

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place – Room 503
Boston, MA 02108
(617)727-2293

MIHAI TUTILA,
Appellant

v.

G1-15-197

TOWN OF SAUGUS,
Respondent

Appearance for Appellant:

Marc Osborne, Esq.
Chambers Law Office
220 Broadway, Suite 404
Lynnfield, MA 01940

Appearance for Respondent:

Eugene J. Sullivan, III, Esq.
Matthew S. Wahrer, Esq.
Holtz & Reed, LLP
225 Friend Street, Suite 201
Boston, MA 02114

Commissioner:

Cynthia A. Ittleman

DECISION

Mihai Tutila (Mr. Tutila or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on October 21, 2015, under G.L. c. 31, s. 2(b) challenging the decision of the Town of Saugus (Town or Respondent) to bypass him for appointment to the full-time position of firefighter. A prehearing conference was held in this regard on November 3, 2015. A hearing¹ was held on this appeal on December 18, 2015 at the Commission. At this hearing, the witnesses were sequestered, except the Appellant. The hearing was digitally

¹ The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

recorded and the parties received a CD of the proceedings.² The parties submitted post-hearing briefs in the form of proposed decisions. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Based on the seven (7)³ exhibits entered into evidence and the testimony of:

Called by Respondent:

- Michael Newbury, Chief, Saugus Fire Department (SFD)
- Michael Ricciardelli, Lieutenant, Saugus Police Department (SPD)

Called by the Appellant:

- Mihai Tutila, Appellant

and taking administrative notice of all matters filed in the case; pertinent statutes, including, without limitation, stipulations, pertinent regulations, case law and policies; and reasonable inferences from the credible evidence; a preponderance of evidence establishes the following findings of fact:

1. At the time of the hearing in this appeal, the Appellant was twenty-eight (28) years old and single, residing in Saugus. (Ex. 2C⁴)
2. The Appellant was born in Romania and lived there with his mother until he was eight (8) years old. The Appellant has difficult relationships with his parents and has minimal contact with them. (Testimony of Appellant)
3. The Appellant attended Saugus High School and Beverly High School but did not graduate from either school. He obtained a GED in 2006. (Exs. 2A and 2C)

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

³ The Exhibits are numbered 1, 2A, 2B, 2C, 2D, 3 and 4.

⁴ Ex. 2C contains the Appellant's application and documents he produced in relation to his documents. However, it also includes documents that the Respondent produced in relation to the Appellant's application.

4. At the time he was interviewed for the firefighter position, the Appellant was taking courses at North Shore Community College. (Ex. 2A)
5. The Appellant served in the U.S. Army from 2006 to 2012 and received a number of awards. During his military service, the Appellant served in Korea from 2006 to 2008 and from 2011 to 2012. From 2008 to 2011, the Appellant lived in or near a military base in Lawton, Oklahoma. He was married in 2009 to another soldier and divorced in 2013. (Exs. 2A, 2B, 2C and 2D)
6. On April 26, 2014, the Appellant took and passed the civil service exam for fire fighters. (Ex. 2A)
7. On June 5, 2015, the state's Human Resources Division (HRD) issued certification 02916 to the Town in order for the Town Manager, who is the Appointing Authority, to hire two (2) firefighters. Subsequently, the certification was amended so that the Town could hire an additional two (2) firefighters for a total of four (4) new firefighters. The Appellant's name appeared second on the certification among those who signed the certification indicating their willingness to accept employment. (Ex. 2A; Testimony of Newbury)
8. Fire Chief Newbury has been at the SFD for many years. At the time of the hiring process at issue in this appeal, Chief Newbury was then-Deputy Chief and, thus, he did not make the hiring recommendations to the Town Manager. Rather, then-Chief McQuaid made the recommendations. As Deputy Fire Chief, Newbury joined then-Chief McQuaid and Town Manager Scott Crabtree in interviewing the Appellant. Over the years, current-Chief Newbury was involved in the hiring process for more than twenty (20) candidates. The SFD has approximately fifty-two (52) firefighters. (Testimony of Newbury)

9. The SFD gave the Appellant and other candidates an application form for employment to complete. The Appellant returned the application form to the SFD on or about June 8, 2015.⁵ (Ex. 2C)
10. The employment application form indicates that people who smoke tobacco are not eligible for appointment. (Ex. 2C)
11. The application also contains a memo to applicants stating that truthfulness is one of the most important issues to the SFD. (Ex. 2C)
12. The application contains at least three (3) notices to applicants indicating that any misrepresentation or omission on the application will result in the candidate being rejected. Ex. 2C)
13. An “Authorization for Release of Information” in the application to be signed by the applicants, states, in pertinent part,

“I authorize all individuals and organizations ... to release any and all information that they may have concerning me, my work, record, my reputation, my financial status, and my medical records and condition”
(Ex. 2C)(emphasis added)

14. On his application, the Appellant failed to provide the following information required by the application:

- the address, phone number and date of birth of his ex-wife
- the address, phone number and date of birth of both of his parents
- a list of all persons currently residing with him, although he listed his brother as a reference and indicated that his brother lives at the same address that the Appellant wrote for his home address (although he did not provide his brother’s date of birth, as required)
- the dates that he visited the half-dozen or so states he listed as having visited
- the name/s of the high school/s he attended
- that he was attending North Shore Community College

⁵ It appears that the Appellant also applied to the SFD for employment in January 2014 but there is no additional evidence in the record in this regard. (Ex. 2C)

- a list of all loans exceeding \$1,000 although his credit report indicates he has a number of such loans (including education loans - payment of which is deferred, and a car loan)
- the name and phone number of his supervisor at Guardsmark, a prior employer, and that he had been fired from Guardsmark
- the name and contact information of the Appellant's landlord
- that he was sued by a prior landlord
(Exs. 2A and 2C)

15. The Appellant provided the following objectionable responses to questions on his application and/or failed to provide information as required:

- he disclosed that he had been forced to surrender a security deposit on a rental property and he failed to describe the incident that led to the surrender of his security deposit, as required by the application
- he wrote on his application that he was unemployed from 2013 until the date he submitted his job application to the Respondent but in fact he had been working months prior to submitting his application
- he indicated that he was honorably discharged from the Army and disclosed that he was disciplined in the Army for being in a female barracks
- he wrote that he left employment at Guardsmark because of "bad hours [and] too far" when in fact he had been fired
- he listed his brother as one of his personal references although the instructions for personal references state that personal references cannot include relatives
- for professional references, the names that the Appellant provided were of people with whom he has not worked and, therefore, who were not qualified to provide "professional" references
(Ex. 2C)

16. In his application, the Appellant:

- denied having been sued or that there are civil actions pending against him when, in fact, he had been sued by a prior landlord
- admitted that he was rejected for a civil service position previously but failed to provide, as required, a detailed explanation thereof⁶
- denied that there was a domestic abuse prevention order issued against him under pertinent provisions of Massachusetts General Laws although a restraining order was issued to the Appellant in response to the request of his then-wife when they were in the military in 2010 in Lawton, Oklahoma.
(Exs. 2C and 2D)

17. The Appellant applied for and obtained a firearms license from the SPD in or about 2014.

The firearms license application asked, among other things, "Are you now or have you

⁶ This appears to be a reference to the Appellant's 2014 application to the SFD.

ever been the subject of a M.G.L. C209A restraining order or involved in a domestic violence charge?” (Ex. 2C)(emphasis added) The Appellant answered “no”. (Ex. 2C)

18. At the pertinent time, Lt. Ricciardelli, a long-term member of the Saugus Police Department (SPD), was in charge of the SPD training division and oversaw background investigations for candidates for employment at the SPD and SFD. He had been conducting hiring investigations for three (3) years at the pertinent time and had conducted or overseen nearly seventy (70) background investigations. Lt. Ricciardelli conducted the Appellant’s background investigation. He also conducted a background interview of the Appellant on July 23, 2015 with then-Deputy Chief Newbury. Lt. Ricciardelli submitted a written report of his background investigation and interview of the Appellant to then-fire Chief McQuaid sometime later in July 2015. (Ex. 2A)
19. SPD Lt. Ricciardelli’s report stated that he found, in pertinent part, that the Appellant had not completed many parts of the application and that some of the information the Appellant said was unavailable was available (such as family, post-high school education and employment information); a domestic abuse prevention restraining order was issued against the Appellant in Oklahoma by his then-wife when they were in military service there; there were criminal charges against the Appellant when he lived in Oklahoma⁷; the Appellant received an honorable discharge from the military but his discharge document (the DD214) states that it was for “unsatisfactory performance”; the Appellant’s neighbors reported that he smokes cigarettes although the Appellant said in the interview that he quit smoking six (6) months earlier; the Appellant did not disclose on his firearms license application that he had been the subject of a domestic violence restraining order;

⁷ The criminal charges against the Appellant during his military service appear to have involved allegations by his then-wife, who apparently declined to pursue the allegations when they reached a divorce agreement.

the Appellant reported that he left his employment at Guardsmark Security when, in fact, documents show that he was fired by that company; the Appellant did not work with any of the personal references whose names and contact information he provided in his application, and he did not list his current employer, another security company, on the application and stated that he had just begun the job at the time of the interview when a document from the employer shows he began employment there months earlier. (Exs. 2A and 2C)

20. On August 13, 2015, then-Chief McQuaid, then-Deputy Chief Newbury and Town Manager Crabtree conducted an interview of the Appellant. (Ex. 2A; Testimony of Newbury)

21. On August 21, 2015, Chief McQuaid wrote a memo to Town Manager Crabtree recommending that he bypass the Appellant based on the Appellant's failure to accurately respond to many parts of his application, the domestic violence restraining order issued against the Appellant, his military record and for being untruthful on his recent firearms license application. (Ex. 2C)

22. By a letter dated August 28, 2015, Town Manager Crabtree informed the Appellant that he was being bypassed, enclosing a copy of then-Chief McQuaid's August 21, 2015 memo explaining the reasons therefor. (Ex. 1)

23. The Town Manager appointed one (1) candidate ranked above the Appellant and three (3) candidates ranked below the Appellant on certification 02916. (Ex. 2A)

24. On August 29, 2015, SPD Police Chief DiMella wrote to the Appellant stating that his firearms license was suspended for being untruthful on his firearms license application. (Ex. 2C)

25. The Appellant filed the instant appeal on October 21, 2015. (Administrative Notice)

Applicable Law

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The Commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001), citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1. It also means, "... assuring that all employees are protected against coercion for political purposes" Id. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

Pursuant to G.L. c. 31, § 2(b), the Commission has the powers and duties, among other matters, "to hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator ..." Id. The Commission has the same powers and duties with respect to persons aggrieved by the action, or failure to act, by municipalities through G.L. c. 31, § 2(c), and via delegation from HRD to the municipality under G.L. c. 31, § 5(e).

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm'n., 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law." Comm'rs

of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971) (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Beverly citing Cambridge at 305, and cases cited. “It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree.” Town of Burlington v. McCarthy, 60 Mass.App.Ct. 914, 915 (2004).

The essential issue being evaluated in a bypass appeal to the Commission remains whether or not the appointing authority has reasonable justification, under basic merit principles, to select a candidate whose performance on the civil service qualifying examination placed him

lower than the bypassed candidate, thus skipping over a higher ranked candidate for a valid reason. Section 27 of G.L. c. 31, specifically provides, in part,

“If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator. The administrator shall make such statement available for public inspection at the office of the department.”

Id.

In this regard, Personnel Administrator Rules (PAR).08(4) adds, in part,

“(4) Upon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule .02, an appointing authority shall, immediately upon making such determination, send ... , in writing, a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked, or of the reason or reasons for selecting another person or persons, lower in score or preference category. Such statement shall indicate all positive reasons for selection and/or negative reasons for bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass or selection of a candidate or candidates. No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed ... shall later be admissible as reasons for selection or bypass in any proceeding before the ... Civil Service Commission. ...”

Id.

Since the Personnel Administrator delegated much of the law enforcement appointment process to municipalities in 2009, the municipality is obliged to inform a bypassed candidate accordingly. Administrative Notice.

G.L. c. 41, s. 101A, provides, in pertinent part,

“Subsequent to January first, nineteen hundred and eighty-eight, no person who smokes any tobacco product shall be eligible for appointment as a police officer or firefighter in a city or town and no person so appointed after said date shall continue in such office or position if such person thereafter smokes any tobacco products. ...”

Id.

Analysis

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. Contrary to the specific requirements and instructions of the application form to be truthful and complete, the Appellant failed to respond to many questions and/or gave responses that were untrue in part or in whole. For example, during the investigation for the firefighter position, the Respondent learned that the Appellant untruthfully reported on his Massachusetts firearms application to the Saugus Police Department that no restraining orders had been issued against him. It is deeply troubling that such a restraining order was issued against the Appellant; having been untruthful about it makes the Appellant's candidacy even more troublesome. Having learning of this information, the SPD Police Chief suspended the Appellant's firearm license. I note that, unlike the firefighter application form that only inquires about restraining orders issued under specific Massachusetts statutes, the firearms license application is broader, making it clear that the firearm license application asks about restraining orders issued elsewhere, not just in Massachusetts. In addition, although the Appellant received an honorable discharge from the military, his discharge document (DD214) indicates that he was discharged for "unsatisfactory performance". Further, the Appellant's references indicated that he smokes tobacco. Under G.L. c. 41, s. 101A, firefighters (and police officers) may not do so.

The Appellant also failed to provide the following information required by the firefighter application: the names of the high schools he attended, the contact information for his ex-wife that he could have obtained, the number of loans he had that each exceeded \$1,000, his parents' contact information, the dates he visited the states he listed on his application, that he was attending North Shore Community College, the contact information for his supervisor at

Guardsmark, the contact information for the Appellant's landlord, that he was sued by a prior landlord, and that he was currently employed at another security company although he represented that he was then unemployed. In addition, the Appellant stated on his application that the reason he left Guardsmark's employ was that the hours were bad and the job was far away when the investigation produced a Guardsmark document indicating that he had been fired. Further, the Appellant provided professional references of people with whom he has not worked, and he listed his brother as a personal reference despite the application's explicit instruction not to include family members as personal references. Having established by a preponderance of the evidence that the Appellant made a number of false and/or incomplete statements, despite the multiple reminders in the application that applicants were to provide truthful and complete answers, the Respondent has provided reasonable justification for the Appellant's bypass.

Although the Respondent has established reasonable justification for bypassing the Appellant, the process it used in reaching its decision is not without flaw. The Respondent's application form required the Appellant to authorize it to obtain medical information about him and yet the Respondent had not extended a conditional offer of employment to the Appellant. The law in this regard is clear; an employer may not seek medical information of a candidate for employment prior to the issuance of a conditional offer of employment pursuant to G.L. c. 151B, § 16. Since the Appellant was not given a conditional offer of employment and was bypassed, the Respondent should not have required him to authorize access to his medical information. Notwithstanding this shortcoming, a preponderance of the sufficiently objective information supports the Appellant's bypass and I find no evidence of bias that negates it.

Conclusion

For all of the above stated reasons, the appeal of Mr. Tutila, under Docket No. G1-15-197 is *denied*.

Civil Service Commission
/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Tivnan, and Stein) on May 25, 2017.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Marc Osborne, Esq. (for Appellant)
Eugene J. Sullivan, III, Esq. (for Respondent)
John Marra, Esq. (HRD)