

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

RE:

Tracking Number: I-18-025

Request by: Boston Society of Vulcans, MAMLEO & Ten (10) voters re: how the state's Human Resources Division (HRD) applies the residency preference under G.L. c. 31, § 58 regarding individuals who are on active military duty during the one (1)-year "residency window" referenced in Section 58.

Appearance for Petitioners:

Oren Sellstrom, Esq.
Sophia Hall, Esq.
Lawyers' Committee for Civil Rights
and Economic Justice
61 Batterymarch Street: 5th Floor
Boston, MA 02110

Appearance for Human Resources Division:

Michele Heffernan, Esq.
Deputy General Counsel
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Appearance for Disabled American Veterans:

Daniel P. Stack
Adjutant and CEO
Disabled American Veterans
State House: Room 546
Boston, MA 02133

Commissioner:

Christopher C. Bowman

RESPONSE TO REQUEST FOR INVESTIGATION

1. On February 14, 2018, the Boston Society of Vulcans, the Massachusetts Association of Minority Law Enforcement Officers and ten voters (Petitioners), pursuant to G.L. c. 31, § 2(a), filed a request for investigation with the Civil Service Commission (Commission), asking the Commission to open an investigation regarding how the state's Human Resources Division (HRD) applies the residency preference under G.L. c. 31, § 58 regarding individuals who are on active military duty during the one (1)-year "residency window" referenced in Section 58.

2. On April 10, 2018, I held a show cause conference at the offices of the Commission to provide the Petitioners with the opportunity to show cause why the Commission should open an investigation regarding this matter. The show cause conference was attended by: counsel for the Petitioners, counsel for HRD, counsel for the Boston Fire Department (BFD) and Boston Police Department (BPD), (two (2) appointing authorities referenced in the petition), a representative of the Disabled American Veterans (DAV) (who indicated that the DAV may wish to participate in this matter), an HRD representative, multiple petitioners and other members of the public.
3. As part of the show cause conference, HRD provided an overview of how HRD applies the residency preference in Section 58 to active military duty personnel, including the so-called "Option B" provision which allows Massachusetts residents, who are on active military duty during part or all of the one-year residency preference window to claim a residency preference in a city or town that is their home of record before going on active military duty or a city or town in which they establish residency within ninety (90) days of the date of separation / release / discharge from active military duty. HRD stated that the reason for this provision was to ensure compliance with the Uniformed Services Employment and Re-Employment Act of 1994 (USERRA).
4. The Petitioners provided an overview of the reason for requesting the investigation, which focuses on the latter part of the Option B provision, highlighted above, which they argue is not permitted under Section 58, and, according to the Petitioners, potentially impacts minority applicants (i.e. in Boston) who have residency preference in City or Town "B" (i.e. – a person who never resided in Boston before or during the residency window could potentially appear above that of someone who did.)
5. The BFD and BPD indicated that their practices and procedures, along with all other civil service communities, are dictated by HRD.
6. The DAV stated that they support the current "Option B" provision which they argue protects the rights of persons on active military duty, sometimes for a period of years.
7. Prior to determining whether to open an investigation, the Commission requested and received the following additional information as follows:
 - A. HRD provided the Commission and the Petitioners with a written response regarding why the Commission should not open an investigation. The response included, among other things: an overview of the Option B provision; the reasons behind the Option B provision; data collected by HRD regarding how many active military duty personnel claimed the "Option B / Town B" option in Boston since 2013.
 - B. The Petitioners provided a written response to HRD's submission, including, but not limited to: why the Commission should open an investigation and, as referenced at the show cause hearing, whether the request relates to all individuals claiming the Option B preference, or rather, those individuals who never lived and/or had no connection to "Town B".

- C. The DAV notified the Commission that they sought to participate in the Commission's review of this matter and submitted a position statement why the Commission should not initiate an investigation.

Applicable Civil Service Law and Rules & Final Response

G.L. c. 31, § 2(a) allows the Commission to conduct investigations. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen's Association et al v. Civ. Serv. Comm'n, No. 2006-4617, Suffolk Superior Court (2007). See also Erickson v. Civ. Serv. Comm'n & others, No. 2013-00639-D, Suffolk Superior Court (2014). The Commission exercises this discretion, however, "sparingly", See Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011).

After careful review and consideration of the entire record in this matter, including the submissions of the Petitioners, HRD and the DAV, the Commission has concluded that an investigation is not warranted and has opted not to exercise its discretion to initiate such an investigation under G.L. c. 31, § 2(a).

To ensure transparency, the position statements reviewed by the Commission are attached to this response.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on August 30, 2018.

Notice to:
Sophia Hall, Esq. (for Petitioners)
Oren Sellstrom, Esq. (for Petitioners)
Michele Heffernan, Esq. (for HRD)
Jesse Flynn (Disabled American Veterans)

HRD POSITION STATEMENT

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Request for Investigation by Petitioners:

I-18-025

Boston Society of Vulcans,
MAMELO & 10 individual Massachusetts
Voters

RESPONSE OF THE HUMAN RESOURCES DIVISION

FACTS

Since 1972, the Commonwealth of Massachusetts has provided a residency preference to those applicants for entry level police officer or firefighter positions, who reside a city or town for one year prior to the date of the exam. St. 1972 c. 226 It is a valuable benefit as those who achieve residency preference appear on the eligibility list higher and are considered for employment before non-residents. Specifically, the statute, M.G.L. c. 31 § 58 reads in pertinent part:

If any person who has resided in a city or town for one year immediately prior to the date of examination for original appointment to the police force or fire force of said city or town has the same standing on the eligible list established as the result of such examination as another person who has not so resided in said city or town, the administrator, when certifying names to the appointing authority for the police force or the fire force of said city or town, shall place the name of the person who has so resided ahead of the name of the person who has not so resided; provided, that upon written request of the appointing authority to the administrator, the administrator shall, when certifying names from said eligible list for original appointment to the police force or fire force of a city or town, *place the names of all persons who have resided in said city or town for one year immediately prior to the date of examination ahead of the name of any person who has not so resided (emphasis added).*

Applicants, when applying to take a Civil Service exam, identify the community for which they meet the requirements for residency preference. The Appointing Authority, prior to making an appointment, is responsible for ensuring that candidates claiming a residency preference are deserving of one.¹ To be clear, there is no requirement for long term residency in order to obtain this valuable benefit. The only requirement is that the candidate live in the community the 365 days prior to the exam. A candidate can move outside of the community the day after the exam and still lawfully claim the preference.

Not all were welcoming of the residency preference when this section of the law was enacted. The law was promptly challenged as unconstitutional under the equal protection clause of the Fourteenth Amendment. *Milton v. Civil Service Com.* 365 Mass. 368 (1974). The argument asserted by those challenging the preference was that residency requirement works as a penalty on those otherwise equally qualified applicants who have exercised their constitutionally protected "right to travel." *Id.* at 371. The Supreme Judicial Court noted that the residency preference accords more favorable treatment in the process of selecting police officers to established residence than newcomers, but it recognized that the statute "attaches a cost to the exercise of the right to travel." *Id.* Thus, the Court analyzed whether there was a compelling governmental interest for the preference. The Court noted that in the Commonwealth, preferential hiring of some individual class of people for public employment must be related to some reasonable State objective. *Id.* at 373 citing *Opinion of the Justices*, 303 Mass. 631 (1939). The Court then analyzed the public interest for having a residency preference. The Court noted familiarity with the community, knowledge of local geography, and knowledge of the people

¹ It is not uncommon for HRD to be notified by an appointing authority of a candidate who has incorrectly indicated they are residents. As a result, HRD will remove the designation and the candidate will be placed as a non-resident on the eligible list.

were the basis for finding a reasonable public objective. *Id.* As such, the Court deemed the residency preference constitutional. *Id.* at 375.

The residency preference is not the only preference available to applicants under the Civil Service law. In Massachusetts there is an absolute veteran's preference for original appointments. A veteran's preference is not new or unique. "Our country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages". *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 551 (1983) see *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, n. 25 (1979). In Massachusetts, the veteran's preference first appeared in 1884 to allow a preference in appointments and promotions to honorably discharged veterans who served in the army or navy in time of war. St. 1884, c. 320. Over the next century, the law was amended to provide preference for labor service appointments, (St. 1889, c. 473); disabled veterans (St. 1992, c. 463) and was extended to veterans of the various wars and conflicts that involved the United States. M.G.L. c. 31 §§ 3; 26; M.G.L. c. 4, sec. 7, cl. 43rd. The veteran's preference in hiring is not the only law that provides benefits to veterans; Massachusetts has enacted laws governing the employment and privileges for veterans and those actively serving in the military. *See*: Chapter 708 of the Acts of 1941.

The Massachusetts veteran's preference has not been without legal challenges. In 1896, the Supreme Judicial Court issued an opinion stating that a statutory provision that veterans who pass a civil service exam shall be preferred in appointment to all male persons not veterans was constitutional. *Opinion of the Justices*, 166 Mass. 589 (1896). Later in *Mayor of Lynn v. Commissioner of Civil Serv.* the Court reaffirmed its earlier position that veteran's preference was constitutional. 269 Mass. 410 (1929). Then in 1979, the veteran's preference was challenged as discriminatory against women. The United States Supreme Court found that

although the result of the statute had a disproportionate impact on women, it had not been enacted in order to discriminate against women. *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979). The Court found that the statutory classification was neutral because it was intended to discriminate against non-veterans, not against women, and that the legislative purpose had not been to invidiously discriminate against women. *Id.* Currently, resident disabled veterans are ranked higher on the eligible list than resident veterans, who are ranked higher than resident civilians.

On August 30, 2004, M.G.L. c. 4, sec. 7, cl. 43rd was amended, and the definition of "Veteran" was broadened to allow more individuals with military service to qualify for veteran status for Civil Service purposes.² As a result, greater numbers of applicants meeting the definition of veterans appeared on the eligible lists. To be a "veteran" under Massachusetts law a person is required to have either: 180 days of regular active duty service and a last discharge or release under honorable conditions or 90 days of active duty service, one (1) day of which is during "wartime" per the chart below, and a last discharge or release under honorable conditions.

² M.G.L. c. 31 sec. 1 defines Veteran" as: any person who:

- (1) comes within the definition of a veteran appearing in the forty-third clause of section seven of chapter four; or,
- (2) comes within such definition except that instead of having performed "wartime service" as defined therein, he has been awarded the Congressional Medal of Honor or one of the following campaign badges: Second Nicaraguan Campaign, Yangtze Service, Navy Occupation Service, Army of Occupation or Medal for Humane Action; or,
- (3) is a person eligible to receive the Congressional Medal of Honor or one of the campaign badges enumerated in clause (2) of this paragraph and who presents proof of such eligibility which is satisfactory to the administrator.

A veteran shall not include active duty for training in the army national guard or air national guard or active duty for training as a reservist in the armed forces of the United States.

WAR	"Wartime" DATES
WWI	6-Apr-1917 through 11-Nov-1918
WWII (Merchant Marine: one day between 7-Dec-1941 through 31-Dec-1946)	16-Sep-1940 through 31-Dec-1946
Korea	25-Jun-1950 through 31-Jan-1955
Vietnam	5-Aug-1964 through 7-May-1975
Lebanon Campaign*	25-Aug-1982 through (to be determined later)
Grenada Campaign *	25-Oct-1983 through 15-Dec-1983
Panama Campaign *	20-Dec-1989 through 31-Jan-1990
Persian Gulf	2-Aug-1990 through (to be determined later)

* Naval and Marine DD214 must indicate Expeditionary Medal. All DD214's must specify campaign: Lebanon, Granada, or Panama.

For members of the national guard, to qualify they must have 180 days and have been activated under Title 10 of the U.S. Code or be activated under Title 10 or Title 32 of the U.S. Code or Massachusetts General Laws, chapter 33, sections 38, 40, and 41 must have 90 days, at least one of which was during wartime, per the above chart and the last discharge or release must be under honorable conditions. The Human Resources Division (HRD) began applying the new definition of veteran to eligibility lists issued after August 30, 2004.

In 2005, the application of the residency preference to veterans was brought to the attention of the HRD. It became evident that the law, in its application as written, would eliminate any service member who was on active duty in the year prior to the exam from achieving a residency preference. This was concerning as it was HRD's experience that the majority of communities never reached non-residents on their certification list. This was especially true in the City of Boston. In practice, the application of the residency preference would nullify the veteran's preference for this class of service member. HRD reviewed the issue and believed that not taking into consideration a military member's active duty when

determining a residency preference could run afoul of Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), as the stated purpose of USERRA is to encourage non-military career employment by eliminating or minimizing the disadvantages which can result from military service and prohibit discrimination against such military members. 38 U.S.C. 4301-4335. Therefore, HRD determined that it would be appropriate to develop and institute a solution to address the residency of those military members on active duty during the year preceding the exam.

HRD sought to establish a policy that would recognize that but for the active duty service, the individual would have established residency in a particular community. The thinking behind this rule is that veterans would be put in the same position for residency purposes had they not served. The belief was that this rule served the goal of minimizing disadvantages to active military service, since without a residency preference it would be unlikely that an individual actively serving in the year prior to the exam would have their name high enough on a list to be reached for consideration. HRD then published the "Town A" and "Town B" options for Full-Time Military Active Duty members who were taking the entry level police and fire exams.

In order to claim the Military Residency Preference, the Military Personnel must:

- Served a period of Full-Time Military Active Duty (supported by a DD-214) during any part of the 12 month period prior to the exam.
- Have been a Massachusetts Resident at the time of entry to full-time active duty or the Home of Record on the DD-214 for this period must be a city or town in Massachusetts.

- Return to the Home of Record (Town A) or establish residency in a different Massachusetts municipality (Town B) within 90 days of the date of separation/release/discharge from the period of active duty listed on the DD-214.³ (See Attachment A)

Applicants are expected to maintain their established residency for the duration of their eligibility for that exam, and it is only applicable to the first community they move to following discharge. The 2006 Firefighter exam was the first exam that rules for the Military Residency Preference went into effect and have been applied to every exam since then. For the last 12 years, the “Town A” and “Town B” options have been advertised as options for military members on active duty during the one year prior to the exam and it has been applied without objection.

Military Residency Preference Hires – Police and Fire Eligible Lists: 2012-2016

2016 Firefighter Eligible List Hires – City of Boston (through April 2018)

Total Hires: 59

	Minority	Non-Minority	Did not identify
Disabled Veteran	11	40	2
Veteran	2		
Civilian	4		
Total	17	40	2

³ When the rule was first implemented, residency was to be established within 30 days of discharge. In 2011, in response to the appeal of *Ryan Costa v. City of Brockton*, the Civil Service Commission encouraged HRD to expand the time period for a veteran to establish residency under the Town B scenario. As a result in 2012, HRD established the 90 day time period for the 2012 Firefighter exam. The 90 days were fashioned after the amount of time stated in USERRA for reinstatement.

Town B Residency Preference⁴

Possible Total	Minority	Non-Minority	Did not identify	Possible % of Total Hires
7	1	5	1	11%

2015 Police Office Eligible List Hires – City of Boston

Total Hires: 207

	Minority	Non-Minority	Did not identify
Disabled Veteran	4	11	2
Veteran	10	12	2
Civilian	59	95	12
Total	73	118	16

Town B Residency Preference

Possible Total	Minority	Non-Minority	Did not identify	Possible % of Total Hires
7	2	4	1	3%

2014 Firefighter Eligibility list hires – City of Boston

Total Hires -123

	Minority	Non-Minority	Did not identify
Disabled Veteran	14	94	10
Veteran	1	3	
Civilian		1	
Total	15	98	10

Town B Residency Preference

Possible Total	Minority	Non-Minority	Did not identify	Possible % of Total Hires
24	1	23	0	19%

⁴HRD does not maintain records indicating the residency of an individual prior to active duty. Individuals included within the Town B statistics were identified based upon their active duty dates, and the home of record on their application or DD214. Individuals were included within the statistics if their home of record differed between the DD214 and their application. Please note, if an individual was a Boston resident prior to their active duty but listed another address as their home of record for purposes of receiving correspondence, those applicants would be incorrectly included within Town B Residency Preference statistics above. Appointing Authorities are responsible for validating residency preference.

2013 Police Officer Eligible List Hires – City of Boston

Total Hires -109

	Minority	Non-Minority	Did not identify
Disabled Veteran	0	7	2
Veteran	7	23	3
Civilian	16	41	10
Total	23	71	15

Town B Residency Preference:

Possible Total	Minority	Non-Minority	Did not identify	Possible % of Total Hires
6		6	0	5%

ARGUMENT

I. THE CIVIL SERVICE COMMISSION SHOULD NOT EXERCISE ITS DISCRETION TO INVESTIGATE.

Pursuant to M.G.L. c. 31 § 2(a) the Civil Service Commission has broad discretion to decide when and how to conduct an investigation. *See, e.g., Dennehy v. Civil Service Comm'n*, Suffolk Superior Court, C.A. No. 2013-00540 (2014). However, the Commission has exercised its discretion to conduct an investigation “only ‘sparingly’ and, typically, when there is clear and convincing evidence of an irreparable political or personal bias that can be rectified only by the Commission’s affirmative remedial intervention into the hiring process.” *Damas v. Boston Police Department*, 29 MCSR 550, 554 (2016). In the past, the Commission has investigated when there has been evidence of nepotism in the hiring process. *See, e.g. In Re: 2010/2011 Review and Selection of firefighters in the City of Springfield*, 24 MCSR 627 (2011); and *In Re: 2011 Review and Selection of Permanent Intermittent Police Officers By the town of Oxford*, CSC No. I-11-280 (2011).

A Commission investigation into the use of the Military Residency Preference is not appropriate. As discussed *infra*, the Human Resources Division established a rule to ensure that those applicants who were on active duty in the year preceding the exam were placed in the same position they would have been in, had they not served. The rule was developed without regard to a specific individual as a beneficiary, and has been applied objectively to those individuals who have applied to receive it and met the stated requirements. In addition, the Appointing Authorities are responsible for ensuring that residency preference is only available to those who qualify for it, thus minimizing the risk of misuse. Therefore, there is no irreparable political or personal bias in the application of the Military Residency Preference.

The Petitioners (10 taxpayers), in their request for an investigation, argue that HRD has violated Section 58 of the Law by offering a Military Residency Preference. Specifically, the Petitioners object to the "Town B" option. They argue that the "Town B" option has no statutory basis and they make an unsubstantiated argument that the option contributes to the lack of diversity in Civil Service hiring. The Petitioners have presented no facts to support their claim and are asking the Commission to investigate based solely on conjecture. It is speculative to suggest that but for the "Town B" option; greater diversity in hiring would have taken place. Those familiar with the process know that there are many hurdles - background check, medical exam, PAT and the successful completion of the academy - between an individual's position on the list and their employment with an appointing authority. In addition, as evidenced by the hiring statistics within in the City of Boston, in most cases only a small percentage of the hires were those individuals who exercised the "Town B" option.

The Petitioners suggest that the Commission can investigate the use of the “Town B” option while allowing “Town A” option to remain in place.⁵ The Petitioners cannot challenge HRD’s rule as violating the statute and then dictate a result that is inconsistent with the statute, especially when their request for relief is compliance with the statute. The Statute requires that an individual reside in a community the year before the exam in order to obtain the preference. Any individual on active military duty during that period of time would be denied a residency preference, which would exclude them from hiring from that eligible list. The Petitioners cannot pick and choose an interpretation they believe to be more palatable. Either HRD can establish a Military Residency Preference that would place a military member in the place they would have been, had they not served, or there is no Military Residency preference available at all.

II. USERRA REQUIRES HRD TO MINIMIZE OR ELIMINATE DISADVANTAGES IN CIVILIAN EMPLOYMENT.

The purposes of Uniform Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*, are: (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian employment which can result from such service; (2) to provide for the prompt reemployment of persons returning to civilian jobs from military service and to minimize the disruption of their lives as well as to those of their employers, fellow employees and communities; and (3) to prohibit discrimination against persons because of their service in the uniformed services. 38 U.S.C. § 4301. USERRA’s anti-discrimination provision prohibits an employer from denying initial employment, reemployment, retention in employment, promotion, or any *benefit* of employment to a person on the basis of membership, application for membership, performance of service, application for

⁵ During the show cause conference held by the Commission on April 10, 2018, the Petitioners appeared to accept some interpretations of Town B scenarios.

service, or obligation of service. 38 U.S.C. § 4311(a) (*emphasis added*). In addition, the plain language of USERRA prohibits discrimination not only on a person's status as a member of the uniformed services, but also on the service member's "obligation to perform service." *McLain v. Somerville*, 424 F. Supp 2d 329, 334 (2006). Congress specifically indicated that it intended USERRA to include the prohibition against discrimination in initial hiring and that an employer may not discriminate in hiring based on a prospective employee's unavailability due to his obligation to perform military service. *Id.* at 335.

It is evident that a residency preference is a great benefit to any individual with a desire to be appointed to a police or firefighter position. There is no question that residents are rewarded with a higher ranking on an eligibility list than non-residents. Therefore, in all cases, a resident will be reached for appointment before a non-resident. A strict interpretation of Section 58 would deny that benefit to military member on active duty the year before the exam. The denial of this benefit would certainly have a negative impact on the ability of that individual's ability to obtain civilian employment and it contrary to the requirements of USERRA.

Offering a Military Residency Preference is lawful as the State may award certain benefits to its bona fide veterans. Resident veterans, as a group, deserve preferential treatment, and such differential treatment related to non-veterans does not offend the Equal Protection Clause. See, e. g., *Personnel Administrator of Mass. v. Feeney*, *supra*; see also *Johnson v. Robison*, 415 U.S. 361 (1974). Various preferences for veterans are grounded in a "[desire] to compensate in some measure for the disruption of a way of life . . . and to express gratitude" *Russell v. Hodges*, 470 F.2d 212, 218 (CA2 1972). The Military Veterans Preference is reasonable in its application. In order to achieve the military residency preference, a veteran must establish residency within 90 days of discharge and remain living in that community.

Therefore, that individual will gain a familiarity with the community, knowledge of local geography, and knowledge of the people – all of the stated reasons relied upon when the Court determined the residency preference to be Constitutional. *Milton v. Civil Service Com.* 365 Mass. 368, 375 (1974). The Military Residency Preference is rational and neutral in application, and as such, should be maintained.

The Petitioners' position that only a "Town A" option is acceptable will not withstand scrutiny. Only allowing a "Town A" option would place HRD in a position of violating USERRA. Again, one of the stated goals of USERRA is to minimize the disruptions of the lives of the military members. Placing the requirement on a military member that they have to return to their original community and live there in order to obtain a residency preference places an unreasonable burden on service members that does not apply to civilians. Service members should be able to move on with their lives following their discharge and execute their life plans after their service to our Country concludes. Service members should be able to reestablish residency without jeopardizing the ability to achieve Civil Service employment. Further, it is nonsensical to argue that "Town B" is offensive to the concept of residency, in light of the fact that a civilian could move to a community one year and one day prior to the exam and move out of the community one day after the exam, and have the benefit of the residency preference.

A possible consequence if the Commission orders strict compliance with Section 58 would be a challenge to the residency preference as unconstitutional to the protected class of active military members. In *Stevens v. Campbell*, 332 F. Supp 102 (1971), veteran plaintiffs were denied a veteran preference based on residency.⁶ The Court in determining the section of

⁶ At that time, M.G.L. c. 31 sec 21(2) required a veteran to have been a resident in Massachusetts more than 6 months prior to wartime service or to have resided in Massachusetts for 5 years prior to the date of claiming the preference.

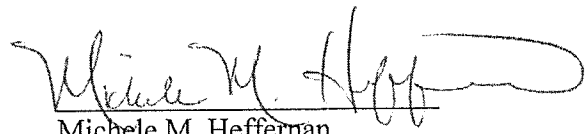
the law unconstitutional, found that the residency requirements for veterans lacked a permissible interest of the civil service system. The Court summarized that the requirement imposed upon admission to the class of persons who are entitled to preference in public employment was a limitation that has no relevance to any legitimate governmental purpose. *Id.* at 105. Thus, the denial of the opportunity for a Military Residency Preference pursuant to this petition could eventually result in no residency preference at all.

In addition to the requirements of USERRA, HRD must be conscious that both active duty military members and veterans are protected classes under M.G.L. c. 151B. The Massachusetts Commission Against Discrimination has applied the adverse impact analysis with regard to veterans as a protected class. *McAuliffe v. Pechilis*, 13 MDLR 1039 (1991). In the employment context, a facially neutral requirement which has an adverse impact on members of a protected class is unlawful, even absent a showing of discriminatory intent, unless it is justified by a business necessity. *Freeman v. World Travelogue Co.*, 6 MDLR 1783 (1984) (citing *Teamsters v. United States*, 431 U.S. 324 (1977)). The Supreme Judicial Court has recognized that M.G.L. c. 151B, like the federal statutes "...proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation". *School Committee of Braintree v. MCAD*, 377 Mass. 424, 428 n. 10 (1979); *O'Neill v. Karahlais*, 10 MDLR 135, 1362 (1988). As such, HRD is required to consider the employment benefits of an active duty service member in a non-discriminatory fashion. Therefore, HRD is obligated to preserve the ability of the active duty service member to achieve a residency preference in such a way that would not discriminate against them for placing their personal lives on hold while on their active duty service to this Country.

CONCLUSION

The Human Resources Division respectfully requests that the Commission decline to open an investigation in this matter.

Respectfully Submitted
The Human Resources Division
By its attorney



Michele M. Heffernan
Deputy General Counsel
Human Resources Division
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Boston, MA 02108
617-878-9779

CERTIFICATE OF SERVICE

The undersigned represents that a copy of the Response of the Human Resources Division has been served upon the counsel for all parties, by email, on May 18, 2018.



Michele M. Heffernan



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 > 2017 Police Officer Military Residency Preference

2017 Police Officer Military Residency Preference

Information for Military Personnel Claiming Residency Preference

For the 2017 Police Officer Entry Level Exam:

Pursuant to MGL Ch. 31, Section 58, an applicant is eligible to claim residency preference for the 2017 Police Officer Entry Level Exam if he or she has lived in the same civil service city or town from March 25, 2016 to March 25, 2017.

For military personnel who were on full-time active duty during any part of or the entire 12-month period of March 25, 2016 to March 25, 2017, you may still be eligible to claim residency preference if you meet the following conditions*:

<p>You must have served a period of Full-Time Military Active Duty (for which you received or will receive a DD214) during any part of the 12 month period of March 25, 2016 to March 25, 2017.</p> <p>You must have been a Massachusetts Resident at the time of entry to full-time active duty or your Home of Record on your DD214 for this period of active duty must be a city or town in Massachusetts.</p> <p>You must return to your Home of Record (Town A) or establish residency in a different Massachusetts municipality (Town B) within 90 days of the date of separation/release/discharge from this period of active duty as listed on your DD214.</p>	Massachusetts City/Town of your residence at time of entry:	Massachusetts City/Town of your residence upon separation/release/discharge from active duty:	You may claim Residency Preference in:
	Town A	Town A	Town A
	Town A	Town B	Town A or Town B

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☐ Yes☐ No



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2016 Firefighter Military Residency Preference

Information for Military Personnel Claiming Residency Preference

For the 2016 Firefighter Entry Level Exam

Pursuant to MGL Ch. 31, Section 58, an applicant is eligible to claim residency preference for the 2016 Firefighter Entry Level Exam if he or she has lived in the same civil service city or town from April 16, 2015 to April 16, 2016.

For military personnel who were on full-time active duty during any part of or the entire 12-month period of April 16, 2015 to April 16, 2016, you may still be eligible to claim residency preference if you meet the following conditions*:

<ul style="list-style-type: none">You must have served a period of Full-Time Military Active Duty (for which you received or will receive a DD214) during any part of the 12 month period of April 16, 2015 to April 16, 2016.You must have been a Massachusetts Resident at the time of entry to full-time active duty or your Home of Record on your DD214 for this period of active duty must be a city or town in Massachusetts.You must return to your Home of Record (Town A) or establish residency in a different Massachusetts municipality (Town B) within 90 days of the date of separation/release/discharge from this period of active duty as listed on your DD214.	Massachusetts City/Town of your residence at time of entry:	Massachusetts City/Town of your residence upon separation/release/discharge from active duty:	You may claim Residency Preference in:
	Town A	Town A	Town A
	Town A	Town B	Town A or Town B

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PETITIONERS' POSITION STATEMENT

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Request for Investigation by)
Petitioners:)
)
Boston Society of Vulcans, MAMLEO,)
& 10 Massachusetts Voters)
)
)
)

Tracking No.: I-18-025

PETITIONERS' REPLY

INTRODUCTION

The response of the Human Resources Department (HRD) to Petitioners' Request for an Investigation is most notable for what it does **not** say: namely, that its policies regarding Military Residency Preference comport with G.L. c. 31, § 58. Clearly, they do not. HRD's "Town B option" simply cannot be squared with the plain language of Massachusetts' residency preference law. Accordingly, the Civil Service Commission should formally open an investigation into this matter and require that HRD, the Boston Fire Department (BFD), and the Boston Police Department (BPD) bring their practices into compliance with the law.

Such a result is particularly necessary here, given the immense impact that the Town B option is having on diversity within BFD and BPD. As HRD concedes, the Town B residency preference provides a "great benefit" to applicants. *See* HRD Response at 12. Yet it is a benefit that in Boston goes overwhelmingly to White applicants. This is not "speculation," as HRD contends. *Id.* at 10. According to the statistics that HRD itself submits in its Response, **upwards of 85%** of all individuals who have made use of the unauthorized Town B exception in Boston over the past five years have been White. *See infra* at 7-9. In a City that is majority-minority – and that repeatedly states that it wishes it could do more to increase diversity in its

public safety agencies – it is highly problematic to allow an unauthorized policy that has such a negative effect on diversity to continue.

HRD's chief argument in its Response – that re-writing the statute to insert a Town B option is necessary in light of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) – is based on a fundamental misunderstanding of that law. As this Commission and numerous courts have recognized, USERRA prohibits discrimination against veterans, but it is not intended to re-write existing laws nor to grant preferential treatment; that is “precisely what USERRA does not require.” *Nicholas v. Human Resources Division*, CSC No. B2-14-266 (2016) at 9; *see infra* at 8-10. Reliance on USERRA is especially inappropriate here, given that the individuals who are losing out because of the unauthorized use of the Town B option are veterans themselves – the true Boston veterans, many of color, who are unfairly denied job opportunities when non-residents are allowed to displace them.

Petitioners therefore respectfully request that the Commission open an investigation into the use of the Town B option and, if violations of G.L. c. 31, § 58 are found, order HRD, BFD, and BPD to bring their practices and procedures into compliance with the law.

ARGUMENT

I. THE CIVIL SERVICE COMMISSION SHOULD FORMALLY OPEN AN INVESTIGATION.

A. The Commission Has Broad Discretionary Authority To Investigate Any Practices That Are Inconsistent With Governing Civil Service Laws.

Pursuant to G.L. c. 31, § 2, the Civil Service Commission has the power “[t]o conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth.” *Id.* The Commission has “broad discretionary

authority” with regard to investigations. *See Erickson v. Civil Service Commission and Town of Rockland*, 2014 WL 11498124 at *4 (Sup. Ct. 2014). Contrary to HRD’s suggestion, these broad investigatory powers are not limited to issues of nepotism and political bias. *See, e.g., Investigation Re: Boston Police Department & Due Process of Non-Selected Candidates*, Tracking No. I-16-106 (2016). Rather, it is well within the Commission’s discretionary purview to investigate any matters in which agencies are not complying with civil service law. *See id.*; *see also Investigation Re: City of Northampton Labor Service Appointments*, CSC Tracking No. I-18-029 (2018); *Investigation Re: City Of Boston Labor Service Appointments*, CSC Tracking No. I-11-267 (2011).

By their own admission, HRD, BPD, and BFD are not following G.L. c. 31, § 58. Non-profit civil rights groups whose objective is to further racial diversity in BPD and BFD, together with ten registered voters, have sought the Commission’s assistance in rectifying this unauthorized practice. That is a quintessential matter that the Commission can and should investigate.

B. The Town B Option Does Not Comply With The Residency Statute.

As HRD recognizes, the plain language of G.L. c. 31, § 58 grants a preference for entry level police or firefighter positions to those applicants who “have resided in [a] city or town for one year immediately prior to the date of examination.” *See* HRD Response at 1 (citing G.L. c. 31, § 58). There is no question that individuals who are allowed to exercise the Town B option do not meet this criterion. Indeed, by its very terms, the Town B option is granted to individuals who “establish residency in a different Massachusetts municipality (Town B) within 90 days of the date of separation/release/discharge” from the military. *See* HRD Response, Ex. A. That is flatly inconsistent with the statutory language at issue.

It is a fundamental canon of statutory construction that statutory language should be given effect consistent with its plain meaning. *See Sullivan v. Town of Brookline*, 435 Mass. 353, 360 (2001). The statutory language here is clear and unambiguous. However, HRD, BPD, and BFD deviate from this rule by allowing veterans who have not resided in a municipality for one year immediately prior to the date of examination to nonetheless claim the residence preference. HRD's argument that the Town B option is "reasonable in its application," HRD Response at 12, is therefore beside the point; if a rule is not statutorily authorized in the first place, it may not be lawfully applied. While an administrative agency may interpret the statutory provisions that it implements, it is not empowered to re-write laws. *Massachusetts Hosp. Ass'n v. Department of Med. Sec.*, 412 Mass. 340, 345–346 (1992).

Moreover, as HRD's own citations make clear, the Town B option is inconsistent with the legislative purpose that the Supreme Judicial Court has held underlies the residency preference. In rebuffing a constitutional challenge to the residency preference, the SJC found a number of factors that contribute to the governmental interest in allowing the preference:

such residents would be more likely to be immediately familiar with the community. Knowledge of the local geography would allow quicker response, and knowledge of the people could lead to a greater interest and more conscientious effort in the performance of duty. A further advantage consist[s] of the likelihood that members of the community would be better acquainted with its police officers and, hence, more likely to trust and cooperate with them.

Milton v. Civil Service Com., 365 Mass. 368, 371 (1974); *see also* HRD Response at 2-3 (noting benefits to residency preference include "familiarity with the community, knowledge of local geography, and knowledge of the people...."). The Town B option, under which individuals need only state that they plan to establish residency in a new municipality in the future, clearly advances none of the governmental interests cited by the SJC.

In short, HRD's Town B option cannot be squared with the law as written. The Commission should therefore formally open an investigation into this practice, and require that HRD, BFD, and BPD come into compliance with the law.

II. THE TOWN B OPTION HAS A SHARPLY NEGATIVE IMPACT ON BOSTON PUBLIC SAFETY AGENCIES' DIVERSITY, AT A TIME WHEN THOSE AGENCIES ARE WIDELY RECOGNIZED AS NEEDING MORE DIVERSITY.

While the Town B option would be unauthorized regardless of its impact on diversity, it is particularly problematic for HRD to be maintaining it in light of its real-world consequences. HRD claims that the Town B option's impact on diversity is "unsubstantiated" and "based solely on conjecture," *see* HRD Response at 10, yet at the same time, they put forth statistics that demonstrate that in fact the impact is enormous – much greater than Petitioners even imagined when they filed this Request for Investigation. **Upwards of 85%** of all applicants who have made use of the unauthorized Town B exception in Boston over the past five years have been White. What HRD correctly terms "a great benefit" disproportionately goes to White applicants at the expense of applicants of color:

BFD and BPD Hires Claiming Town B Preference Status
2013-April 2018

Total	Minority Applicants	White Applicants	Did Not Identify	Percent Minority	Percent White
44	4	38	2	9.09%	86.3%

See HRD Response at 7-9 (totaling numbers from Town B Residency Preference charts). These percentages are grossly disproportionate to the percentages of total hires during the years in question: 25.7% Minority, 65.6% White, and 8.6% Did Not Identify. *See id.* (totaling numbers from Eligibility List Hires charts). In some years, particularly for BFD, the statistics are even

worse. For example, for the 2014 Firefighter Eligibility list, nearly 96% all of the applicants claiming the Town B option were White applicants. *See id.* at 8.

Government officials, community members, and experts alike recognize the many benefits that accrue when public safety agencies reflect the communities that they serve. *See, e.g., Boston Fire Department Slides Backwards On Diversity*, BOSTON GLOBE (Oct. 29, 2017), available at <https://www.bostonglobe.com/opinion/editorials/2017/10/28/boston-fire-department-slides-backward-diversity/ORDg06WRcUBMl6PJlOM4zM/story.html>; Final Report Of The President's Task Force On 21st Century Policing, U.S. DEPARTMENT OF JUSTICE, at 16-17 (May 2015), available at <https://ric-zai-inc.com/Publications/cops-p311-pub.pdf>. Yet as Boston is becoming more racially diverse, its public safety agencies are failing to keep pace. *See Equity, Access, and Opportunity Report Card: The Walsh Administration's Efforts and Results*, NAACP-Boston Branch, at 8 (Oct. 2017), available at <http://bostonnaacp.org/wp-content/uploads/2017/10/2017-BosNAACP-Report-Card.pdf>. Since 2010, people of color have constituted 50% or more of the Boston population, yet not even a fraction of that representation is reflected back in these agencies. *See* U.S. CENSUS BUREAU, Boston Census Population (2010).

City officials regularly state that they wish they could do more to increase diversity. *See, e.g., NAACP To Release Harsh Report On Walsh's Promises To Communities Of Color*, BOSTON GLOBE (Oct. 22, 2017) available at <https://www.bostonglobe.com/metro/2017/10/21/naacp-releasing-scathing-report-walsh-promises-communities-color/EcbWMN7EAC7ttwigQCuTCN/story.html>. Here, simply following the residency law as written would represent a big step forward. Although the Town B option would be improper regardless, the fact that it is contributing to the underrepresentation of

employees of color in Boston's public safety agencies makes it even more imperative that the Commission act to correct these unauthorized practices.

III. HRD'S RATIONALE FOR NOT COMPLYING WITH THE LAW IS UNAVAILING.

HRD puts forth several arguments for why it should not have to comply with G.L. c. 31, § 58 as written, but none of those arguments has merit.

A. The Town A Option Is Materially Different Than The Town B Option.

First, HRD argues that eliminating the Town B option would necessarily entail eliminating the Town A option as well. Petitioners have not challenged the Town A option, so this is not an issue that the Commission needs to address. Regardless, it is clear that the Town A option, which allows veterans to claim residency preference in their Home of Record (*i.e.*, where they lived when they entered the military), stands on very different footing from the Town B option. The Town A option simply follows the well-established rule, applied over many years in numerous different contexts, that servicemembers do not lose their legal residence by being temporarily absent for military service. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788 (1992) (for Census purposes, military personnel stationed overseas are properly counted as Massachusetts residents); 50 USCA App. § 4001(a)(1) (for tax purposes, members of the military do not lose residence by virtue of temporary absence for military service); *Melendez-Garcia v. Sanchez*, 629 F.3d 25, 41 (1st Cir. 2010) (noting, for diversity jurisdiction purposes, that "[s]ervice personnel are presumed not to acquire a new domicile when they are stationed in a place pursuant to orders; they retain the domicile they had at the time of entry into the services."); *Woodroffe v. Village of Park Forest*, 107 F. Supp. 906 (E.D. Ill. 1952) ("[a] person is not to be considered as having lost residence when the sole reason for his absence is compliance with military or naval orders....").

It is certainly a valid interpretation of G.L. c. 31, § 58 to follow this long and venerable line of authorities and recognize that military personnel maintain their legal residence in their Home of Record while they are temporarily absent for military service. Moreover, the Town A option is fully consistent with the SJC's holding in the *Milton* case as to the compelling governmental interest in a residency preference. Individuals who reside in a municipality, though they may be temporarily stationed elsewhere during military service, have the type of familiarity with the municipality, its geography, and its residents that the Court found to create a sufficiently compelling governmental interest to survive an Equal Protection challenge. As such, the Town A option stands in stark contrast to the Town B option, which has no basis in law in any context.

B. The Residency Preference Statute Can Easily Be Enforced As Written Without Running Afoul Of USERRA Or Other Anti-Discrimination Laws.

Next, HRD argues that re-writing the statute to insert the Town B option is necessary to avoid running afoul of USERRA. This argument is based on a fundamental misunderstanding of USERRA, however. Moreover, it ignores the fact that application of the Town B option **harms** veterans: namely, those who are true Boston residents, many of whom are from communities of color.

USERRA's anti-discrimination provision states that an employer may not discriminate against a veteran by denying "initial employment, reemployment, retention in employment, promotion, or any benefit of employment" 38 U.S.C. § 4311(a). It requires that a veteran prove that his or her service in the military is "a motivating factor in the employer's action...." *Id.* § 4311(b). As an initial matter, it is questionable whether USERRA applies to the residency preference at all. HRD argues that the residency preference is a "benefit of employment," but the term "benefit of employment" is specifically defined by USERRA to mean a benefit that

accrues “by reason of an employment contract or agreement” (e.g., wages, pension, health plan, etc....). *Id.* § 4303(2). Given that application of the residency preference precedes actual employment, it therefore would appear to fall outside USERRA’s scope.¹

More to the point, however, decisions from this Commission as well as from multiple courts throughout the country make clear that USERRA’s goal is to provide equal, not preferential, treatment to veterans. The *Nicholas* case is instructive. In that matter, a veteran wanted to take the promotional examination for Boston Fire Lieutenant, an examination that by state law is only open to those who have been employed on the force for three years. *See Nicholas*, CSC No. B2-14-266 at 4. The date of Mr. Nicholas’ appointment as a BFD firefighter was less than three years prior, but he argued that USERRA required that HRD consider him “employed” as of the date of his retroactive seniority date, which would have brought him within the three-year window. The Commission rejected this contention:

Mr. Nicholas appears to claim that, although he was not (and could not be) actually appointed until he finished active duty, an exception should be made for him because of his military service so that he is deemed, in effect, ““constructively appointed” sooner than he was, in fact, appointed and actually able to serve. This argument clearly cannot be credited as it is plainly a demand that he be given “preferential”, not “equal” treatment in “initial employment”, which is precisely what USERRA does not require.

Id. at 9 (citing cases).

Similarly here, the Town B option is an exception to the law as written, one that “give[s] ‘preferential’, not ‘equal’ treatment” *Id.* The Town B option allows veterans to do something that no other applicant can do: claim residency preference in a municipality where

¹ Nor does the preference constitute a “denial of initial employment.” The SJC’s decision in the *Milton* case in fact explicitly distinguishes the residency preference from a denial of employment. *See Milton*, 365 Mass. at 373-74 (noting that residency preference “does not require ... that State employment be foreclosed to any person. Rather it makes the status of certain applicants subordinate to others who possess the requisite length of residence....[T]hey may be placed at a relative disadvantage to one-year residents in the competition for a job to which they have no vested right.”); *see also Nicholas*, *supra*, at *7 (reviewing USERRA’s anti-discrimination provisions and finding that claim related to eligibility for promotional exam “does not fit any of these categories of discriminatory treatment.”).

they have never resided. That type of preferential treatment is “precisely what USERRA does not require.” *Id.* Numerous courts have reached the same conclusion in similar cases. *See Crews v. City of Mt. Vernon*, 567 F.3d 860, 865-66 (7th Cir. 2009) (no USERRA violation where City rescinded policy allowing military reservists to make up weekend shifts lost to attend drill, because servicemembers are “not entitled to preferential policies”); *Sandoval v City of Chicago*, 560 F.3d 703, 704-05 (7th Cir. 2009) (no USERRA violation where City administered civil service test to plaintiffs serving overseas, but not in as convenient a location as plaintiffs desired, because “[w]hat [plaintiffs] want is not the same treatment as everyone else (an anti-discrimination norm), but *better* treatment....”) (emphasis in original); *Jolley v Department of Housing and Urban Development*, 299 Fed Appx. 966, 968 (Fed. Cir. 2008) (no USERRA violation where HUD hired through internal recruitment process blind to veteran preference because “[t]he fact that [veterans] were not treated better than non-veterans does not show discrimination.”) (citation omitted); *Violetto v Village of Tinley Park*, 130 F. Supp. 3d 1179, 1184 (N.D. Ill. 2015) (no USERRA violation where municipality changed weighting system for military preference); *Spadoni v Easton Area School District*, 2009 WL 449108, at *4 (E.D. Pa. 2009) (no USERRA violation where plaintiff seeks “an enhanced privilege not available to any other district employee”). To the extent that USERRA was found to apply at all, the Town A option – which Petitioners do not challenge and which does not run afoul of G.L. c. 31, § 58 -- already puts veteran applicants on equal footing with other applicants, by not penalizing them for their service. Returning veterans may claim residency preference in their Home of Record.²

For similar reasons, HRD’s final argument – that the Town B option could violate G.L. c. 151B – also fails. Although veterans are a protected class under G.L. c. 151B, that law as well is

² Of course, veterans may also establish residency in a different municipality and claim a residency preference there after a year. As the Commission noted in *Nicholas*, numerous courts have held that a reasonable delay does not implicate USERRA. *Nicholas*, *supra*, at 10.

one that seeks equality of treatment, not preferential treatment. *See, e.g., Picot v. New England Telephone & Telegraph Co.*, 1994 WL 878936 at *4 & n.10 (1994); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (same under Title VII, federal cognate to 151B). Moreover, as noted above, application of the Town B option harms true Boston veterans, many of whom are also from another protected class under 151B as well (*i.e.*, communities of color).

RELIEF REQUESTED

For the reasons stated above, Petitioners respectfully request that an investigation be formally opened, and that HRD, BPD, and BFD be ordered to comply with the law as written. The Commission should request such further documentation and information as may be necessary to ensure compliance.³

At the Show Cause hearing, and in the April 20, 2018 Procedural Order, the Commissioner asked whether the Request for Investigation “relates to all individuals claiming the Option B preference, or rather, those individuals who never lived and/or had no connection to ‘Town B’.” It is Petitioners’ contention that the Town B option, as currently written and implemented, must be abandoned. It has no basis in law, has a detrimental impact on diversity efforts in Boston, and runs contrary to the compelling state interest in residency preferences. Although the most glaring examples of how the Town B option is inconsistent with governing law are those in which individuals have had absolutely no connection to the new municipality, even individuals who have some connection to the town in question cannot legally be afforded residency preference, unless they have actually been legal residents at least one year prior to the

³ HRD continues to resist providing information that Petitioners request. Following the Show Cause hearing, Petitioners asked HRD for raw data used in compiling their Response, as well as for records that might indicate whether BFD and BPD have been allowing out-of-state residents to claim the Town B preference. HRD has refused to provide the information. *See* Exs. A, B.

examination. *See Hussey v. City of Somerville*, CSC No. G1-16-215 (2016) (“strong ties” to community do not establish residency) (citing cases).

Petitioners, however, are not asking the Commission to take any action vis a vis individuals who may have in the past availed themselves of the Town B option under HRD’s policies. Rather, Petitioners are asking that these policies be fixed going forward. In light of the arguments presented above, such a forward-looking remedy is critically needed.

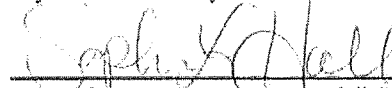
CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that the Civil Service Commission open an investigation into the practice of HRD, BFD, and BPD of allowing a Residence Preference even for individuals who have not resided in a city or town for one year prior to the applicable civil service examination. Petitioners also request that the Commission order the agencies to come into compliance with the law forthwith if it finds that the agencies’ practices are contrary to law.

Respectfully Submitted,

BOSTON SOCIETY OF VULCANS,
MASSACHUSETTS ASSOCIATION OF
MINORITY LAW ENFORCEMENT
OFFICERS, and TEN INDIVIDUALS
REGISTERED TO VOTE IN THE
COMMONWEALTH,

By their attorneys,


Oren Sellstrom, Esq. (BBO# 569045)
Sophia Hall, Esq. (BBO# 684541)
Lawyers’ Committee for Civil Rights and
Economic Justice
61 Batterymarch Street, 5th Floor
Boston, MA 02110
(617) 984-0274
shall@lawyerscom.org

Dated: June 22, 2018

Exhibit A:

The Lawyers' Committee's Public Record Request to Human Resources Division
Dated May 25, 2018



LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND
ECONOMIC JUSTICE
Serving Greater Boston Since 1968

May 25, 2018

Delivered by First Class Mail & Email

Michele Heffernan
Deputy General Counsel
One Ashburton Place, Room 211
Boston, Massachusetts 02108

Dear Ms. Heffernan:

This letter constitutes a public record request pursuant to the Public Records Law, G.L. c. 66 § 10, for records in the custody of the Office of the Human Resources Division ("HRD"). As used in this request, "Military Residence Preference" refers to the application of any residency preference for current or former military personnel under Massachusetts' civil service merit system; and the "Town B option" refers to the ability of certain military personnel to claim a residency preference if they establish residency in a town different from their home of record within 90 days of separation/release/discharge, as referenced on HRD's website (<https://www.mass.gov/service-details/residency-preference>).

I hereby request copies of the following documents:

1. All records used or referenced to create the Response of the Human Resource Division in the matter: *Request for Investigation by Petitioners: Boston Society of Vulcans, MAMLEO & 10 Individual Massachusetts Voters*, Civil Service Commission, I-18-025, dated May 18, 2018.
2. All records indicating or reflecting any Boston Police Department applicant or Boston Fire Department applicant for the Military Residence Preference Town B option, whose home of record is not a city or town of Massachusetts from January 1, 2012, to present day, including, but not limited to, discharge records such as the form DD-214.

As this request involves a matter of public concern, we ask that all fees associated with this request be waived pursuant to 950 C.M.R. 32.06(5). The purpose of this request is to gain information about the Military Residence Preference. The information will not be used for any commercial purpose. If the waiver is denied and you expect the fee to exceed \$10.00, please provide a detailed fee estimate.

Further, as our inquiry concerns residency issues, we believe that full applicant addresses should be provided in responsive documents, and that only names should be redacted, if necessary (anecdotal evidence suggests that in the past, multiple applicants have claimed the

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same street address as their residence and/or come from out of state). To the extent that you redact any address information, we ask that you provide your reasoning for doing so and redact as minimally as possible consistent with your stated reason (e.g., street number only).

The Public Records Law requires that you comply with this request within 10 days following receipt. If your response to any portion of this request is that said request or portion of said request is not public, please set forth in writing the specific reasons for such denial, including which specific exemption you believe applies. To the extent that you determine that records need to be redacted in order to be produced, please do so rather than withholding them in their entirety

If you have any questions about this request, please contact me by phone at (617) 984-0274, or by email at shall@lawyerscom.org. Thank you in advance for your prompt attention to this request.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sophia L. Hall".

Sophia L. Hall, Esq.
Staff Attorney

Exhibit B:

The Human Resources Division's Response to the
Lawyers' Committee's Public Record Request



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE
HUMAN RESOURCES DIVISION
ONE ASHBURTON PLACE, BOSTON, MA 02108

CHARLES D. BAKER
Governor

KARYN E. POLITO
Lieutenant Governor

MICHAEL J. HEFFERNAN
Secretary

RONALD J. ARIGO
Chief Human Resources Officer

June 11, 2018

Sophia Hall
Staff Attorney
Lawyers' Committee for Civil Rights
61 Batterymarch Street 5th Floor
Boston, MA 02110

RE: Public Records Request

Dear Attorney Hall:

This responds to your public records request dated May 25, 2018. Your request seeks the following records:

1. All records used or referenced to create the Response of the Human Resource Division in the matter: *Request for Investigation by Petitioners: Boston Society of Vulcans, MAMLEO & 10 Individual Massachusetts Voters*, Civil Service Commission, I-18-025, dated May 18, 2018.
2. All records indicating or reflecting any Boston Police Department applicant or Boston Fire Department applicant for the Military Residence Preference Town B option, whose home of record is not a city or town of Massachusetts from January 1, 2012, to present day, including, but not limited to, discharge records such as the form DD-214.

Request #1: Records used or referenced to create the Response of the Human Resources Division in the matter: *Request for Investigation by Petitioners: Boston Society of Vulcans, MAMLEO & 10 Individual Massachusetts Voters*, Civil Service Commission, I-18-025, dated May 18, 2018.

As stated at both the investigation conference at the Civil Service Commission on April 10, 2108 and in the Response of the Human Resources Division in *Request for Investigation by Petitioners: Boston Society of Vulcans, MAMLEO & 10 Individual Massachusetts Voters*, I-18-025 (2018), the Human Resources Division does not maintain records indicating the residency of an individual prior to active duty in the military. In anticipation of litigation and at the direction of counsel, the Human Resources Division prepared an analysis of those employees of Boston Police or Fire who may have been considered a "Town B" candidate for purpose of Military Residency Preference. These records were prepared solely for the purpose of the Human Resources Division's defense during ongoing litigation.

Attorney Work Product is not public record pursuant to M.G.L. c. 4, § 7, cl. 26 (d) as inter-agency and intra-agency deliberations regarding government decisions. *DaRosa v. New Bedford*, 471 Mass. 446 (2015). When an agency is engaged in litigation, "decisions regarding litigation strategy and case preparation fall within the rubric of "policy deliberation,"" *Id.* at 458.

The Human Resources Division is withholding the records used or referenced to create the Response of the Human Resource Division in the pending litigation before the Civil Service Commission, as they are records containing communications and documents exempt from disclosure under the attorney-client privilege and/or work product doctrine.

Request #2: The DD-214 for Applicants/Employees of the Boston Fire Department:

The DD-214 is a form issued by the United States Government through the Defense Department to every service member identifying the condition of discharge. Veterans submit a DD-214 to establish their veteran's preferences pursuant to MGL c. 31. The DD-214 contains the following information:


- Date and place of entry into active duty
- Home address at time of entry
- Date and place of release from active duty
- Home address after separation
- Last duty assignment and rank
- Military job specialty
- Military education
- Decorations, medals, badges, citations, and campaign awards
- Total creditable service
- Foreign service credited
- Separation information (type of separation, character of service, authority and reason for separation, separation and reenlistment eligibility codes)

The DD-214 is not a public record as it contains private information pursuant to M.G.L. c. 4, § 7, cl. 26(c) including home addresses and service assignments. In addition, the DD-214 contains personnel information such as evaluative information and separation information. Therefore, the DD-214 may be withheld under M.G.L. c. 4, § 7, cl. 26(c). In addition, the addresses of public employees are not public record pursuant to M.G.L. c. 4, § 7, cl. 26(o) and may not be disclosed.

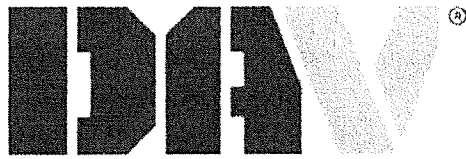
The Human Resources Division is unable to identify any other state or municipal agency that may have possession, custody or control of the requested records.

If you wish to challenge any aspect of this response, you may appeal to the Supervisor of Public Records following the procedure set forth in 950 C.M.R. 32.08, a copy of which is available at <http://www.mass.gov/courts/case-legal-res/law-lib/laws-by-source/cmr/>. You may also file a civil action in accordance with M.G.L. c. 66, § 10 A.

Very truly yours,


Michele M. Heffernan
Deputy General Counsel

DAV'S POSITION STATEMENT



FULFILLING OUR PROMISES
TO THE MEN AND WOMEN WHO SERVED

June 22, 2018

RESPONSE TO THE CIVIL SERVICE COMMISSION, HUMAN RESOURCES DIVISION AND PETITIONERS

The Commonwealth of Massachusetts has long been considered the gold standard for Veterans benefits and protections by Veterans advocates nationwide. Our civil service laws have a history of providing fair and equal treatment throughout the hiring and employment process. Civil Service is especially important to Veterans of the Commonwealth.

Veterans' preference has afforded returning Veterans the opportunity for gainful employment and further service to their community since 1884. The Civil Service Commission has been a vital independent arbiter of this preference. Returning Veterans face many challenges when seeking employment after returning home from service. Both the State Legislature and the Human Resources Division have made every effort to ensure the Civil Service system is free from discriminatory policies and practices that would effectively penalize a Veteran for his or her service. These efforts are clearly aimed at protecting Veterans of all ethnic classes, races and genders and ensuring fair treatment during the hiring process. One important aspect of those protections is the Military Residency Preference.

This preference protects Veteran candidates from being disqualified from consideration for employment in Civil Service municipalities due to active duty military service during the one-year period leading up to the civil service exam. Without this policy recently discharged

Veterans would be put at an extreme disadvantage, as they are typically stationed outside the city or town where they now seek to apply.

The Military Residency Preference Policy allows Veterans to return from active duty and establish residency in a city or town without the requirement to establish continuous residency for one year. This is an important protection. For example, without the Military Residency Preference an applicant that resided out of state but attends college here for a year would have a higher ranking on a Boston Civil Service list than a Massachusetts Veteran returning home from military service. This would put the veteran at an obvious disadvantage stemming from his or her military service.

Many Veterans enlist in the Armed Forces at the age of 18 or 19 years old either while in High School or very soon after graduation while still living with their parents. These men and women ship off for basic training and enter military service. Upon discharge from active duty these Veterans should have the right to start their new civilian life in any city or town in the Commonwealth. They should not be put at a disadvantage for serving their nation in a place of duty not in that community and being unable to meet the residency requirement. These Veterans would be utilizing the Town B option. This option is vital to ensuring Veterans transition to civilian life without preconditions based on their military service.

The revocation of Military Veteran Preference would have unintended effects on Veteran employment opportunities. Without special consideration a Veteran deployed to Afghanistan for a one year deployment could be considered as having no permanent residency due to not meeting the complete requirement as defined by Human Resources Division (HRD). The requirement states, "Your residence, for the purposes of civil service law, is the place

where you actually lived and intended as your permanent home.”¹ In the case of the deployed soldier, sailor, airman or marine he or she would only meet one half of that requirement as he or she did not intend to make their duty station their permanent home. Additionally cities and towns, which hold responsibility to conduct the residency compliance investigations, have differing definitions of residency. For example the city of Boston defines residency in its Residency Certification as, “the actual principle residence of the individual, where he or she normally eats and sleeps and maintains his or her normal personal and household effects”². The applicant is required to sign this residency compliance document during the application process. This is especially troublesome for a recently deployed service member. Without Military Residency Preference the city of Boston or the petitioners may argue that a deployed service member ate, slept, and maintained all of their possessions at their deployed duty station and therefore did not have residency at their home of record nor in the city of Boston. These unintended consequences must be fully weighed before any changes to the Military Residency Preference are considered.

Last year the City of Boston passed a Home Rule Petition to increase the residency requirement to continuous residency for three years prior to the Civil Service Exam for positions with the Boston Police and Boston Fire Departments³. This is a three-fold increase in the residency requirement aimed at returning Veterans. No other positions in the state, including other municipal and city government positions in the City of Boston, have a residency requirement of over one year prior to the civil service exam. This Home Rule Petition only

¹ Civil Service Residency Preference, Mass.gov

² City of Boston Residency Certification

³ House Bill 3537, an act to increase residency for appointment to Boston Police Department and Boston Fire Department to three years

affects Boston Police and Boston Fire positions, which Veterans overwhelmingly seek. The Home Rule Petition to increase residency was championed by the petitioners in an effort to decrease the ability of returning Veterans to be considered for employment with the Boston Police Department (BPD) or Boston Fire Department (BFD). This is a clear effort to circumvent Veterans Preference, MGL Chapter 31, Section 26 and the Military Veteran Residency Preference.

This increase in residency requirement must be addressed in the Military Residency Preference. Veterans that seek Civil Service positions with BPD or BFD must be allowed to claim residency if he or she served on full-time military active duty during any part of the three year period leading up to the Civil Service exam. This change must be made by HRD to keep the city of Boston compliant with Military Veteran Residency Preference and Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

HRD is correct in its assertion that without a Military Residency Preference there can be no residency preference at all. Veterans must given every benefit, including residency preference, regardless of the terms of their military service. If there was not a Military Residency Preference Veterans would be penalized for military service and be subjected to unfair requirements. This would be a clear violation of the USERRA as addressed in the HRD response.

The petitioners have offered no evidence that the Military Residency Preference has been a barrier to diversity. The petitioners have not offered evidence showing how this policy has caused them harm in becoming employed. The petitioners offer only anecdotal evidence consisting of alleged private conversations and phone calls with unnamed applicants. The

petitioners also fail to address how the Veteran Residency Preference affects all of the other Civil Service municipalities in the state. This must be taken into consideration, as the Military Residency Preference is not only applied in the city of Boston but in dozens of other communities as well. Veterans across the entire state would lose an important protection if the Military Residency Preference were rescinded. The petitioners have failed to show cause as to why such drastic measures are warranted.

The petitioners have not presented any appeals to the Civil Service Commission that claimed the Military Residency Preference Policy as the reason for bypass. Prior to this request for investigation the petitioners had no mechanism for measuring the number of applicants that used either the Town A or Town B option of the Military Residence Preference. The HRD response correctly described their request for investigation request as speculative. HRD acknowledges it is difficult to accurately measure which applicants used the Town B option. Short of a complete accurate and unabridged history of the applicants living arrangements prior to entering the military neither HRD or the hiring authority would be able to ascertain whether the applicant used the Town A or Town B option.

In the case of Town B the petitioners testified that these applicants have no connection to the city of Boston. But there is no way to accurately estimate how many of the applicants that use the Town B option have no previous connection to the city. The applicant may have moved to or from the city of Boston just prior to enlistment in the Armed Forces and HRD would have no way of knowing. HRD can only compare the addresses listed as their home of record on their DD214 and their employment application. In many cases Veterans list their home of record address on their DD214 as their most reliable address to receive mail in case of

official correspondence from the Government. There is no way for HRD to know where that applicant lived prior to military service or immediately following discharge. HRD is correct and must allow a 90-day window for the Veteran to establish a residence, a new home of record.

Arguments made by the Lawyers Committee for Civil Rights and Economic Justice (LCCREJ) that the Veteran Residency Preference harms diversity is flawed. Only Massachusetts Veterans may utilize the Military Residency Preference. Therefore, any comparison of racial demographics of the City of Boston should only be compared to Veteran demographics and not overall racial demographics of the Commonwealth as a whole. The comparison must be made using available Veteran population demographics. The comparison should only consider the age demographic of 18-36, as that is the eligible age for applicants.

Though the City of Boston is more diverse than the entire population of Massachusetts the City of Boston is not drastically more diverse than the Veteran population. Minority Veterans made up about 22% of the total Veteran population in 2014. The diversity of the Veteran population increases sharply within the Post-9/11 and Pre-9/11 eras. These eras are important because the Veterans from these eras are within the 18-36 year old demographic necessary to be considered for employment. Post-9/11 Veterans are 34.5% minority. Pre-9/11 Veterans are 30.5% minority.⁴ This data was compiled using nationwide census data but there is no evidence to imply the Massachusetts Veteran population is outside of this national norm.

Females make up approximately 8% of Veterans but almost 20% of new military recruits. Almost 280,000 women have served post 9/11 in Iraq and Afghanistan. While the number of male Veterans is expected to decrease dramatically by 2020 the number of female

⁴ 2014 Minority Veterans Report, National Center for Veterans and Statistics, April 2016.

Veterans is expected to grow dramatically, to 11% of the veteran population. 33% of female Veterans are minorities.⁵

Utilizing Veteran minority demographics the Military Veteran Residency Preference almost certainly helps to increase diversity in the vast majority of Civil Service municipalities that have substantially lower minority populations than the 30-34.5% of the Veteran population. This data on the diversity of the Veteran population directly contradicts the testimony of the LCCREJ. The Military Residency Preference does not adversely affect diversity in hiring for the BFD or BPD. The population of Boston across the 18-34 year old age groups is 45.5%.⁶ The Veteran population is within 11% of that number sitting at approximately 34.5%. But of that 45.5% of potential minority candidates many of these individuals may not actually be eligible for employment within Civil Service. When this ineligible population is accounted for the diversity percentages of eligible Boston minority candidates falls even closer in line with the percentage of minorities represented within the Veteran population.⁷

The hiring process for the BFD and BPD is a rigorous one. There are many factors when considering a population eligible for employment as Boston Police Officers and Boston Firefighters. Applicants must meet basic standards, which include being between 18 and 36 years old, being a US citizen and proficiency in English. When these standards are applied to the population it restricts the eligible hiring pool. In the case of the city of Boston these restrictions

⁵ Women Veterans: The Long Journey Home, Disabled American Veterans, 2018, <https://www.dav.org/wp-content/uploads/women-veterans-study.pdf>

⁶ Boston's Racial Groups, Boston redevelopment Authority, research Division, August 2014

⁷ Boston's Racial Groups, Boston redevelopment Authority, research Division, August 2014

would disqualify many minority candidates from being considered part of the qualified applicant pool.⁸

The information provided in the HRD response is important. It shows that the Military Veteran Preference accounts for a small percentage of each BFD and BPD academy class even with the admission that these numbers are most likely overestimated. There is also more recent and compelling data that shows that the Military Residency Preference and Veterans as a whole are having little adverse impact on diversity of the BPD and BFD.

The most recent Boston Police Recruit Class, sworn in on April 2, 2018, had just 3 Military Veteran Recruits graduate out of a class of 97 total graduates. The Military Residency Preference had no effect on the hiring of this recruit class.⁹ The Veteran list was exhausted before 91 lower ranked civilian candidates were offered employment. Our public records requests detailing BPD hiring as far back as 2005 show that the Boston Police Department has never had an all Veteran academy class. In fact between October 2005 and December 2016 Veterans made up only 21% of total new hires with lower ranked civilian candidates making up 79% of new hires. The military residency preference has had no impact on Boston Police hiring.

The Boston Fire Department seldom exhausts the DAV and Veteran hiring lists. There is no evidence that the Military Veteran Preference has prevented the BFD from exhausting the DAV and Veteran lists and allowing them to consider candidates off of the civilian list. BFD would have not exhausted any DAV or Veteran list had the Military Veteran Preference Policy not been in effect. It seems more likely, that without the Military Residency Preference, those DAV and Veterans that did not have residency due to military service would have been

⁸ Boston's Racial Groups, Boston redevelopment Authority, research Division, August 2014

⁹ Boston Police Demographics, Boston Police Department Recruit Class 51-17

bypassed and lower ranked DAVs or Veterans would have been selected. The Town B option has had very little influence on the hiring demographics of BFD. It has not been proven and no solid evidence has been presented to show that the Military Residency Preference has had any impact on BFD hiring whatsoever.

The Civil Service Commission should not use its limited resources to investigate the unproven allegations from the petitioners. This is especially true in the current climate of budgetary restrictions placed on Civil Service by the Legislature. The evidence presented in the HRD response shows the Military Veteran Preference has very limited impact on the hiring of Boston Police Officers and Boston Firefighters. There has been no evidence presented showing a link between a lack of diversity in the Boston Police Department or Boston Fire Department and the Military Veteran Preference. The Commission must also consider that this is a statewide policy that affects Veterans in dozens of Civil Service municipalities including those currently serving on active duty and deployed around the world in defense of our country. The Commission should not use its resources to launch a costly and time consuming investigation based solely on the unproven complaints stemming from one city.

The Disabled American Veterans is not disputing or downplaying the importance of police officers and firefighters reflecting the communities in which they serve. We do not believe that Veterans are a barrier to achieving a diverse and qualified Police or Fire Department. Veterans are a valuable resource for diversity. With proper outreach and education the current Veterans' Preference laws including the Military Veteran Residency Preference can be used as a valuable tool to further diversify civil service departments throughout the state. The DAV has offered to meet with the petitioners to try to develop

beneficial policies to help strengthen diversity and increase Veteran employment. These goals are not mutually exclusive. Our offer still stands and we look forward to working with the petitioners, the Human Resources Division and Civil Service in the future.

Respectfully Submitted,

A handwritten signature in black ink that reads "Daniel P. Stack". The signature is written in a cursive style with a large, stylized 'D' and 'S'.

Daniel P. Stack
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