

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

Robert Walsh,
Appellant

v.

Case No.: G1-12-4

Boston Fire Department,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Boston, MA 02201

Commissioner:

Cynthia A. Ittleman¹

DECISION

Pursuant to the provisions of G.L. c. 31 § 2(b), Appellant Robert Walsh (hereinafter "Appellant" or "Walsh") seeks review of the reasons given by the Boston Fire Department ("Department") used to justify bypassing Walsh for original appointment to the position of fire fighter. The Appellant's appeal was filed timely with the Civil Service Commission (hereinafter "the Commission"), and the parties appeared for a pre-hearing on February 7, 2012, and for a full hearing on April 26, 2012. The witnesses were sequestered, with the exception of the Appellant.

¹ The Commission acknowledges the assistance of Law Clerk Hunter Holman in drafting this decision.

The parties received a copy of the digital recording of the full hearing, and a written transcript became a part of the official record. Both parties submitted post-hearing proposed decisions.

FINDINGS OF FACT

Based on the ten (10) exhibits admitted and the testimony of the following witnesses:

For the Appointing Authority:

- Ryan McLeod, Massachusetts State Police Trooper
- Robert Moran, Director of Human Resources, Boston Fire Department

For the Appellant:

- Robert Walsh, Appellant

a preponderance of the evidence establishes the following:

1. The Appellant graduated from Archbishop Williams High School in Braintree. (Walsh Testimony, p. 94)(“Test.”)
2. Thereafter, the Appellant enlisted in the Marine Corps. (Walsh, Test., p. 94) He went to boot camp in Parris Island in South Carolina but was stationed in North Carolina for four years. (Walsh, Test., p. 94)
3. The Appellant had two tours of duty – each seven months long. (Walsh, Test., p. 95) In his first tour in 2007 and 2008, he was stationed in a city in Iraq doing security patrols and looking for improvised explosive devices (“IEDs”) and high valued individuals (“HVI”), which is a combat assignment. (Id.) A member of the Appellant’s unit was gravely wounded by an IED in the Appellant’s presence. (Walsh, Test., p. 96) The

Appellant's next tour was from 2008 to 2009 and it involved mainly border patrols in northern Iraq setting up listening posts and looking for smuggled weapons. (Id., p. 98) After his second tour, the Appellant was selected out of 200 men to be a machine gun instructor for the division. (Id., p. 99)

4. The Appellant was honorably discharged March 26, 2010. (Walsh, Test., pp. 100-02)
The Appellant has a Cease Service Deployment Ribbon, an Iraqi Campaign Medal with a Bronze Star, a Global War on Terrorism Service Medal, a National Defense Service Medal and a Rifle Qualification Badge. (Id.) The Appellant is a disabled veteran. (Walsh, Test., p. 104)
5. At some point following his military service, the Appellant worked for a moving company. (Walsh Test., p. 131)
6. At the time of the full hearing, the Appellant was twenty-five years old. (Walsh Test., p. 93)
7. On April 24, 2010, the Appellant took an examination for a fire fighter position. (Exhibit #1)
8. On December 1, 2010, the state Human Resources Division ("HRD") established the eligible list for the position of fire fighter in the Department. (Exhibit #1)
9. On March 30, 2011, HRD received a requisition from the Department for a Certification from which to appoint 35 full-time fire fighters. (Exhibit #1)
10. On March 31, 2011, HRD issued Certification number 204795, which contained the Appellant's name on the fifth page, ranked 52nd. (Exhibit #1)²

² There were three certification lists: the so-called regular list on which the Appellant's name appeared (list # 204795), a reemployment certification list, and a special certification list. (Test., p. 51)

11. In approximately January of 2011, the Appellant signed the certification and submitted an application to the Department. (Walsh Test., p. 104) The Appellant provided three references for his application. (Id., p. 106) The Appellant provided the Department a copy of his DD214 form, which is the Certificate of Release or Discharge From Active Duty form that the Appellant received when he was discharged from the Marine Corps. (Id., p. 102)³
12. The Department did not give the Appellant the U.S. military Form 180 to obtain his military personnel records to submit to the Department at the time he received the fire fighter employment application. (Walsh Test., p. 105) The Appellant did not submit his military personnel record to the Department until 2012, in consideration of his candidacy for the position of fire fighter in the next class. (Walsh Test. pp. 125-29; Moran Test., pp. 57-58) The Department often has trouble acquiring military personnel records from candidates, and in Mr. Moran's words, this is "absolutely not" a reason for a bypass. (Moran Test., p. 75; Walsh Test., pp. 128-29)
13. Mr. Moran has been the Director of Human Resources at the Department since July of 2001. (Moran Test., p. 50) One of Mr. Moran's primary duties is "putting on new classes. Each year [the Department] approximately put[s] on likely, certification that we get from civil service, a hundred to two hundred new members a year." (Moran, Test., p. 50) He also has duties with respect to the notifications that go out to candidates when they are bypassed. (Moran, Test., p. 52)

³ The parties' testimony concerning the date the Appellant gave the Department his DD214 is conflicting and there is no documentation indicating the date it was given to the Department.

14. The Appellant and his family know Mr. Moran and his family personally very well.⁴
(Test., pp. 10-12)
15. Mr. Moran was a member of the roundtable that ultimately recommended bypassing the Appellant, and he spoke with the Appellant a number of times during the application process, and once with the Appellant's father. (Moran Test., p. 55)
16. The roundtable considering candidates in this occasion was comprised of administrators in the Department including Mr. Moran (Director of Human Resources), the Deputy Commissioner of Personnel, the Deputy Chief of Personnel, the Chief of Personnel, and the District Chief of Personnel. (Moran Test., p. 55)
17. The roundtable met with the third party investigators⁵, reviewed the investigators' findings regarding each candidate, and determined which candidates would proceed in the hiring process. (Moran Test., p. 55) Applicants whose background investigation results were satisfactory were interviewed. (Id.) The roundtable did not interview the Appellant because his background investigation results were not satisfactory and because of the open criminal case. (Moran Test., p. 56)
18. On May 23, 2011, the Appellant attended an orientation held for all candidates being considered for the fire fighter positions. (Moran Test., p. 54). During this orientation, Mr. Moran informed the candidates that a third-party investigator hired by the Department would conduct background investigations. (Id.) If the candidates pass the background

⁴ Mr. Moran knows the Appellant "very well" because his family and the Appellant (living with his family) grew up in the same neighborhood and the two families attend the same church. (Moran Test., p. 68) Another of Mr. Moran's children was best friends with the Appellant's sibling until they had a "falling out." (Test., p.12)

⁵ The Department engaged Investigative Services Casework, of New Hampshire, to perform the background investigations. (Moran Test., p. 63)

investigations, they would be interviewed by Mr. Moran and other members of the roundtable. (Id.)

19. At the orientation, it is “drilled” into the candidates that this is a very cumbersome process involving a lot of candidates, that they should be at the appropriate location when the investigators are to meet with them and that the candidates should go to the medical testing and psychological portion of the hiring process as they are told. (Moran Test., p. 54) Mr. Moran also told the candidates that they must remain “squeaky clean” during the application process, or there may be a reason to bypass them. (Moran Test., p. 64)
20. Sometime after the candidate orientation on May 23, 2011, background investigators scheduled a meeting with the Appellant. (Walsh Test., p. 108) The investigators did not tell the Appellant that information was missing from his background or that there were problems with his references. (Walsh Test., p. 110)
21. With respect to the Appellant’s dependability, “The investigators were very unhappy with [the Appellant]. They’ve done a lot of investigations with candidates and they said that you know, it was just very difficult to work with [the Appellant] as far as meeting with him and getting the information that they requested.” (Moran Test., p. 76) “It appeared to the investigators that [the Appellant] was hiding something.” (Moran Test., p. 77)
22. At some point after the applicant orientation but before the bypass, the Appellant’s father called Mr. Moran concerning the “trouble with the investigators getting references for [the Appellant].” (Moran Test., p. 68). Mr. Moran, “... tried to assist him in trying to get better references for [the Appellant].” (Id.) There is no indication in the record whether and how Mr. Moran may have assisted the Appellant with regard to references. (Administrative Notice)

23. On June 6, 2011, the Appellant was arrested for assault, and assault with a dangerous weapon, both of which arose out of an interaction between the Appellant and his ex-girlfriend, Ms. A, in the parking area of Pleasure Bay, South Boston. (Exhibit #5)
24. The Appellant and his ex-girlfriend had broken up around the time of the arrest. (Walsh Test., p. 112) The Appellant had asked Ms. A to meet him at the parking area to exchange personal items and she agreed. (Walsh Test., p.133) When the conversation became heated, Ms. A drove out of the parking lot. (Exhibit #5). The Appellant ran to his car and began chasing after Ms. A, driving across the yellow line into on-coming traffic to get around cars slowing in front of him. (Walsh Test., pp. 134-35)
25. Trooper McLeod, the Massachusetts State Trooper who arrested the Appellant regarding this incident, was called to the scene shortly after the Appellant had been pulled over by two Deputy Sheriffs.⁶ (McLeod Test., p. 26)
26. Trooper McLeod has been a State Trooper for more than six years. (McLeod Test., p. 25) He has been stationed in the barracks in South Boston for a little over five years. (Id.) He was very close to the location of the incident leading to the Appellant's arrest when he received a radio call to provide assistance for a possible domestic assault and battery. (Id.) He arrived at the scene within a minute of receiving the radio call. (Id.)
27. Once on the scene, the two Deputy Sheriffs informed Trooper McLeod that they observed a verbal altercation between Ms. A and the Appellant, after which Ms. A drove out of the

⁶ Deputy Sheriff Timothy Flynn was one of the two Deputy Sheriffs who pulled the Appellant over in his vehicle. Deputy Sheriff Flynn was served with a subpoena to testify at the full hearing in this case but he did not appear to testify because he was at "a training." (Test. Page 12). Deputy Sheriff Giorgani, the other Deputy Sheriff involved in pulling the Appellant over in his vehicle, apparently was not subpoenaed to testify at the full hearing at the Commission. (Id., p. 27) The Deputy Sheriffs told Trooper McLeod there was an additional witness but Trooper McLeod did not recall the other witness' name. (Id., p. 28)

parking area. (McLeod Test., p. 28) The Appellant then ran to his vehicle and began driving after Ms. A. (Id.). The Deputy Sheriffs told Trooper McLeod that they pulled over the Appellant after observing him drive "...in an erratic manner, crossing double yellow lines to try to catch up to Ms. [A]." (Id.).

28. When Trooper McLeod spoke with Ms. A, she said the Appellant had been continuously bothering her by phone (including at work), text, email, and Facebook and that because of this she had to change her cell phone number. (McLeod Test., pp. 29-30) Ms. A also stated to Trooper McLeod that she feared the Appellant because he was chasing after her in his vehicle. (Id.) Further, Ms. A told Trooper McLeod that she had wanted to talk to the Appellant that day and end things between them. (Id.)

29. The Appellant also told Trooper McLeod that "he did chase after her in his vehicle." (McLeod Test., p. 27) In addition, the Appellant told Trooper McLeod that he had been in a dating relationship with Ms. A for more than four years and that they decided to meet to exchange personal items. (Id.)

30. At the full hearing, the Appellant admitted that he continually bothered Ms. A for weeks prior to the incident on June 6, 2011 by sending her messages over email and Facebook, and that he repeatedly called and texted her throughout the weeks leading up to the incident. (Walsh Test., p.132) Walsh also admitted that he ran to his vehicle after Ms. A left the parking area (Id., p. 135), and that he was driving into oncoming traffic in order to get around cars between himself and Ms. A. (Id., p.136)

31. The Appellant acknowledged at the full hearing that this was very dangerous and that he was "extremely agitated" at the time. (Walsh Test., p. 136)

32. Trooper McLeod advised Ms. A how to obtain a domestic violence restraining order under G.L. c. 209A. (McLeod Test., p. 32) However, Ms. A told Trooper McLeod that she did not want to pursue it at the time and that, if she changed her mind, she would pursue it on her own. (Id.)⁷
33. The Appellant was not arrested at the point where he was pulled over but Trooper McLeod told the Appellant to follow him to the barracks, which the Appellant did. (Walsh Test., p. 116) Thereafter, Trooper McLeod obtained further information relating to the events and placed the Appellant under arrest. (Id.)
34. On June 7, 2011, the Appellant was arraigned and charged in the South Boston District Court with both assault, and assault with a dangerous weapon. (Exhibit #4). He was released from the arraignment without bond. (Walsh Test., p. 117)
35. On June 20, 2011, the Appellant filed a motion to dismiss the criminal charges in the South Boston District Court. (Exhibit #4).
36. On June 23, 2011, one of the criminal charges (assault with a dangerous weapon) was dismissed in court at the request of the Commonwealth, and the other charge (assault) was dismissed on July 22, 2011, for failure to prosecute. (Exhibit #4). Both charges were dismissed because the victim (Ms. A) refused to testify against the Appellant. (McLeod Test., pp. 36-37)
37. At some point between the arraignment and the dismissal of the criminal court charges, the Appellant contacted Mr. Moran to inquire about the status of his application. (Walsh Test., pp. 119 -20; Moran Test., p. 69) During this conversation Mr. Moran informed the Appellant that he had been bypassed. (Id.)

⁷ The Appellant believes that Ms. A did not request and obtain a restraining order against him. Walsh p. 141

38. On the same day that the last criminal court charge was dismissed, July 22, 2011, the Appellant brought a copy of the criminal docket (Exhibit #4) to Mr. Moran to show him that the case was closed. (Walsh Test., p. 121) Mr. Moran sent the criminal docket to the investigators. As a result of the criminal cases, Mr. Moran concluded, “ ... as the Director of HR, [the Appellant] didn’t listen to us in orientation regarding how we wanted him to perform from the May 23rd date to hiring, and that we thought that having an open case for assault was not – was unacceptable to move farther.” (Moran Test., p. 78)
39. The Appellant did not tell the Department about the arrest at first because his attorney told him the case would be dismissed in a couple of weeks. (Walsh Test., p. 117)
40. Mr. Moran told the Appellant that the investigators were unhappy with his background investigation because the Appellant wasn’t at his home address on the day the Appellant was supposed to meet with the investigators and that they had to find the Appellant at a different address. (Moran Test., p. 59)
41. Mr. Moran also told the Appellant that the investigators said they had difficulties finding references for him. (Moran Test., p. 59)
42. Mr. Moran told the Appellant that his application had been stopped because of his open criminal case. (Moran Test., p. 70) Mr. Moran also told the Appellant that the Department could not hire him with an open case. (Id.)
43. When the roundtable made its decision to bypass the Appellant, the investigators had provided the roundtable with “police documents” showing that the Appellant had an open criminal case. (Moran Test., pp. 56, 64-65) Mr. Moran has documents from the investigators about their findings relating to the Appellant’s uncooperativeness (Moran

Test., p. 73) but those documents were not produced at the full hearing (Administrative Notice).

44. The Department has bypassed individuals who have closed criminal cases and cases continued without a finding. (Moran Test., p. 60)
45. The Department does not accept candidates with felonies in their background. (Moran Test., p. 61) With regard to other criminal charges, the Department looks at whether they arose when the candidates were in their teens and they look at the whole picture. (Id.)
46. Mr. Moran does not know if there are members of the Department who have felony convictions although he knows that some of them, as candidates, have been arrested. (Moran Test., p. 62)
47. On or about December 23, 2011, the Appellant received a letter dated July 11, 2011 (“bypass letter”), from the Department informing him that he had been bypassed. (Exhibit #2; Moran Test., p. 79)
48. The bypass letter was prepared by an administrative person in the personnel office who was not a member of the roundtable; it was signed by the Department Commissioner and it is based on the information provided by the investigators and the Appellant’s file. (Moran Test., pp. 71-73) The District Chief of Personnel is the person who determines the content of the bypass letter. (Moran Test., p. 85)
49. The bypass letter is addressed to Mr. George Bibilos at HRD. (Exhibit #2) The bypass letter is attached to a letter (“bypass cover letter”) dated November 7, 2011, that is addressed “To Whom It May Concern.” (Exhibit #2). The bypass cover letter states that it encloses the bypass letter. (Id.)

50. The bypass letter states,

Mr. Robert T. Walsh, [social security number redacted], a Candidate for Fire Fighter, is being by-passed for appointment to the Boston Fire Department. Mr. Walsh has applied for an important public safety position and it is necessary that applicant's (sic) background history be investigated as to the legitimacy for employment as a Boston Fire Fighter. It is essential that they follow all instructions specifically as directed.

Mr. Walsh has been uncooperative in his participation in is (sic) background investigation, leaving many aspects of his background file incomplete. Mr. Walsh was informed that because of time restraints failure to cooperate would eliminate him from consideration for the proposed class.

An investigation has revealed that Mr. Walsh has a Criminal History and has failed to follow instructions as directed.

Criminal History

ARRAIGNMENT: (This is a Pending Case)

ARG DATE: 06/07/11 PD:SI6 COURT: SOUTH BOSTON DISTRICT DKT#: 1103CR000602B

Off: assault

Disp: 07/22/11

STATUS: O WPD:
99/99/9999

In addition, Mr. Walsh indicated on his application that while serving in the military he was disciplined by the United States Marine Corps. It is a mandatory requirement that all Military Fire Fighter Candidates request a copy of their Personnel Records to be submitted for review for a background investigation. Mr. Walsh failed to do so as instructed.

A Fire Fighter's responsibilities require that, in addition to their suppression duties, they uphold the Fire Prevention and Arson Laws. They may cite persons and initiate court actions based on the Fire Code and Criminal Violations related to fire and public safety.

A Fire Fighter's duties and responsibilities are many and varied. Among these are that a Fire Fighter must be honest, trustworthy and dependable. These personal qualities are crucial to a public safety position and cannot be compromised. Mr. Walsh has demonstrated anti-social behavior by his record and that he has disregard for the law, therefore, he would be unable to conform to the Rules and Regulations of the Boston Fire Department."

Exhibit 2.

51. The bypass letter was sent months after it was signed because the Department does not send out the bypass letters notifying the candidates that they have been bypassed until all of the fire fighter positions have been filled for that particular class, which in this case,

was “sometime in November, 2011.” (Moran Test., p. 81) Even though the bypass letter is dated July 11, 2011, it includes a reference to the disposition of the criminal charges on July 22, 2011. (Id.)⁸

52. Mr. Moran and Commissioner Fraser reviewed the Appellant’s bypass letter before it was sent to the Appellant. (Moran Test., p. 72)

53. Mr. Moran did not have any conversations with Commissioner Fraser about the Appellant’s application. (Moran Test., p. 81)

54. The investigators provided Mr. Moran with documents stating that they had a hard time obtaining employment and personal reference information from the Appellant. (Moran Test., pp. 59, 73).

55. Another reason the investigators told the roundtable the Appellant was uncooperative was that the Appellant failed to inform the Department that his address had changed, and, as a result, the investigators initially went to the wrong house to meet with the Appellant. (Moran Test., p. 59) However, the investigators called the Appellant, who gave them his new address just down the street and the investigators arrived within a “couple of minutes.” (Walsh Test., p.109)

56. The Appellant had orally informed Mr. Moran of his new address at or near the time of the applicant orientation. (Walsh Test., pp. 107-08) Mr. Moran recalled this conversation. (Moran Test., p. 81) Specifically, the Appellant moved from 132 Minot Street in Dorchester, Mass., where he had lived with his family, to 635 Gallivan Boulevard, Dorchester. (Walsh Test., p. 107)

⁸ Mr. Moran acknowledged that the July 11, 2011 date on the bypass letter was probably incorrect and that it was sent after July 22, 2011. (Moran Test., p. 79)

57. On the same day that the Appellant received his bypass letter, December 23, 2011, he also received a notification that he could be considered for the next class of fire fighter candidates. (Walsh Test., p. 124)
58. The Appellant signed the certification for the subsequent class and has been considered and bypassed for the same reasons provided by the Department previously. (Moran Test., pp. 83-84) The Appellant has not appealed the subsequent bypass. (Administrative Notice)
59. The Appellant filed an appeal at the Commission regarding the first bypass on January 5, 2012. (Administrative Notice)

DISCUSSION

Applicable Law

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). See Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it,

the Appointing Authority has established that the reasons assigned for the bypass of an appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

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); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). 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, 43 Mass. App. Ct. at 304.

“It is permissible for the [Appointing Authority] to review a CORI and make a determination based on the record as to whether the applicant should be denied.” Dept. of Corrections v. Anderson and Civil Service Commission, No. 09-0290, Suffolk Sup. Ct. (2010); *see also* City of Beverly v. Civil Service Commission, 78 Mass. App. Ct. 182, 188 (2010); Acosta v. Dept. of Corrections, 23 MCSR 605 (2010); Campbell v. Boston Fire Dept., G1-08-46 (2009); and Preece v. Dept. of Corrections, 20 MCSR 152, 153 (2007). It has also been established that an Appointing Authority may rely on a CORI report for a bypass even when the charges are ultimately dismissed. Anderson, No. 09-0290, Suffolk Super. Ct. (2010); Acosta, 14 MCSR at 607; Thames v. Boston Police Dept., 17 MCSR 125, 127 (2004); Soares v. Brockton Police Dept., 14 MCSR 109, 110 (2001); Lavaud v. Boston Police Dept., 12 MCSR 236 (1999); Brooks v. Boston Police Dep’t, 12 MCSR 19, 20 (1999); Frangie v. Boston Police Dept., 7

MCSR 252, 253 (1994); and Campbell, No. G1-08-46 (2009). An appointing authority may reasonably conclude from criminal charges, even if they are ultimately dismissed, that the applicant does not possess characteristics, such as good judgment, respect for others, and respect for the law, which are central for a public safety position. See Acosta, MCSR at 607; Fay v. Boston Police Department, 21 MCSR 344 (2008); Roach v. Brockton Police Department, 11 MCSR 48, 50 (1998); and Preece v Department of Correction, 20 MCSR 152 (2007).

Analysis

Mr. Moran testified credibly when confirming certain reasons for the Department's bypass of the Appellant. Specifically, Mr. Moran's testimony clearly confirmed the Department's reliance on the criminal charges as a reason for the Appellant's bypass. To this end, Mr. Moran stated that investigators provided the roundtable with police documents indicating that the Appellant had been charged with two serious crimes during the application process and the crimes were committed against Ms. A, whom the Appellant had repeatedly contacted by various means in the weeks prior to the incident resulting in his arrest. In fact, Ms. A found it necessary to change her phone number. The charges arose while the Appellant was being considered for the position of fire fighter at the Department, at which time the Appellant was either twenty-four or twenty-five and after he had been honorably discharged from military service. Mr. Moran testified that when the Appellant brought him a document stating that the criminal charges had been dismissed, Mr. Moran transmitted it to the roundtable. The bypass letter confirms that the Department was aware that the criminal charges had been disposed of July 22, 2011 but that the Department concluded the charges warranted the Appellant's bypass nonetheless. Trooper

McLeod, who arrested the Appellant, testified in a straight-forward manner, confirming the details of the arrest, his report of the arrest, and the serious danger to Ms. A and the public of the Appellant's behavior that day. In addition, the Appellant, to his credit, admitted the conduct that led to his arrest and the dangerousness of his conduct. The law cited herein permits an appointing authority to consider criminal charges when deciding whom to hire as public safety employees, even when the charges were subsequently dismissed since it can indicate whether candidates lack good judgment, respect for others, and respect for the law, which are important factors for public safety personnel. Therefore, a preponderance of the evidence indicates that the Department had sound and sufficient reasons to bypass the Appellant based upon the criminal charges against him.

The evidence concerning the Department's bypass of the Appellant for uncooperativeness is troublesome. Mr. Moran confirmed that investigators reported that the Appellant was uncooperative with regard to providing his correct home address and providing references. However, any documents or other information explaining how the investigators and/or the roundtable came to the conclusion that the Appellant was uncooperative were not produced at the full hearing. Therefore, we do not know the bases of the investigators' report in this regards. In addition, the Appellant stated, and Mr. Moran confirmed, that he orally gave his change of address information to Mr. Moran. However, when the investigators went to meet with the Appellant as part of the background investigation, they drove to his previous (family) address and the Appellant was not there. It is reasonable to assume that if the Appellant submitted written notice of his address change, the information would have been given to the investigators, who would have found the Appellant at his new address in the first instance, instead of having to go to his previous address, call the Appellant to locate him, and drive to his new address.

However, the Appellant did not submit his address change in writing to the Department, relying instead inappropriately upon his family friendship with Mr. Moran to orally advise him of his address change. In any event, the Appellant testified that the investigators called him when they did not find him at his previous address, the Appellant directed them to his new address, and they arrived at his new address only minutes later. Therefore, the Department has not provided sound and sufficient reason to bypass the Appellant in this regard.

The Appellant testified that he provided three references to the Department. The Appellant further testified that when the investigators arrived at his new address, they met with him and they did not indicate that the Appellant needed to provide any additional information, such as further references, relating to his candidacy. However, Mr. Moran testified that the Appellant's father called him (Mr. Moran) to ask about obtaining references for his son (the Appellant), suggesting that there were, indeed, shortcomings in the Appellant's references. Mr. Moran testified that he agreed to assist the Appellant's father in this regard but he did not indicate whether and how he assisted him. It would have been inappropriate for Mr. Moran to assist the Appellant in this regard. In fact, in light of the long-standing relationship between Mr. Moran and his family and the Appellant and his family, to avoid even the appearance of impropriety, Mr. Moran should have removed himself from involvement in consideration of the Appellant's application throughout the process. The bypass letter does not indicate the reasons the Department concluded the Appellant was uncooperative in this regard. Further, the Department did not produce any documents that the roundtable may have received from the investigators indicating the bases of their finding that the Appellant's uncooperativeness with regard to references. For the foregoing reasons, there is insufficient evidence to support the Department's bypass of the Appellant based upon his uncooperativeness.

Mr. Moran contradicted the Department's other reasons for bypassing the Appellant, undermining his own credibility somewhat and the Department's other reasons for bypassing the Appellant. For example, the bypass letter suggests that the Appellant was not trustworthy, honest, or dependable, all characteristics crucial to a public safety position. Mr. Moran, however, testified that he did not feel that the Appellant was not trustworthy and dishonest. However, Mr. Moran testified that, with regard to dependability, the experienced investigators found it very difficult to work with the Appellant in regard to his references. The bypass letter also stated that one of the reasons the Department bypassed the Appellant was that he failed to provide the Department with his military personnel records. Mr. Moran testified that it is not necessarily grounds for bypass if a candidate's military personnel record is absent, stating that applicants sometimes have difficulties obtaining their military personnel records. Further, the bypass letter notes that the Appellant's application indicated that he had been disciplined in the military. Mr. Moran testified that he thought, although he was not certain, that the Appellant's military discipline was based on allegations of under-age drinking, which would not necessarily preclude the Appellant from being considered for the fire fighter position. (Moran Test. Page 74) There was no documentation in this regard. As Mr. Moran has negated the Department findings that the Appellant lacked dependability, he failed to provide his military personnel records, and he was disciplined during his military service, there is insufficient evidence to support those reasons for the Department's bypass of the Appellant.

The Appellant was also an appellant in another case before the Commission, Gaynor v. Boston Fire Department (Case Nos. I-11-103 – 110 and I-12-101 – 104, June 2011), which has been resolved in favor of the Department. The Appellant argues that the Department was motivated to bypass him because of his involvement in the Gaynor case. The issues in Gaynor

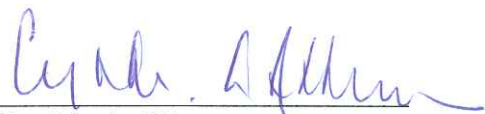
have no connection to the issues in the instant case. Further, the allegation that the Department's bypass of the Appellant in this case was retaliation for the Appellant's involvement in the Gaynor case is without evidentiary basis and, as such, does not affect the Commission's determination in this case.

Conclusion

The Department has shown, by a preponderance of the evidence, that the criminal charges against the Appellant provided a sound and sufficient reason to bypass the Appellant for the fire fighter position. There was abundant reliable evidence of the Appellant's conduct leading to his arrest for two serious criminal charges, which conduct posed a serious danger not only to his ex-girlfriend but also to the public at large, as the Appellant drove over the roadway dividing lines, facing oncoming traffic, as he attempted to reach his ex-girlfriend, who was driving her car away. This followed weeks of the Appellant's repeated efforts to contact his ex-girlfriend through various means. The Appellant admitted to the charges and the dangerousness of his behavior, although he argued the criminal charges had little relevance since they were later dismissed. It is particularly troublesome that the Appellant engaged in the cited behavior after he and other applicants for the fire fighter position were specifically instructed at a recent orientation session that they should remain "squeaky clean" while they were being considered for the job. In addition, at the time of the criminal charges, the Appellant was either twenty-four or twenty-five years old, indicating that the conduct cannot be dismissed as youthful indiscretion. There was no bias against the Appellant; if anything, the Appellant was the beneficiary of inappropriate conversation with the Appellant's father in which Mr. Moran agreed to help the

Appellant obtain references because of his personal and family relationship with Mr. Moran and his family. In fact, given the relationship between the Appellant's family and Mr. Moran's family, Mr. Moran should have recused himself from any involvement in the Appellant's candidacy. However, the beneficial relationship could not, and did not extend to the Appellant's criminal charges, which provided more than sufficient basis for the Department's decision to bypass the Appellant. The Department did not establish, by a preponderance of the evidence, sound and sufficient reasons for bypassing the Appellant on other grounds identified herein. However, in relying on the criminal charges against the Appellant, the Department established, by a preponderance of the evidence, sound and sufficient reason to bypass the Appellant. Therefore, the appeal is hereby *dismissed*.

Civil Service Commission


Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; McDowell, Marquis and Stein, [Ittleman - absent] Commissioners on July 12, 2012.

A True Record. Attest:

Commissioner

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 as stated below.

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 from the effective date specified in 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.

Notice to:

Joseph Sulman Esq. (for Appellant)
Robert Boyle Jr. Esq. (for Respondent)
John Marra Esq. (HRD)