

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

JOEL HENDERSON,
Appellant

v.

Case No.: G1-13-1

CITY OF LYNN,
Respondent

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. The Appellant submitted objections and the Respondent was provided with an additional twenty (20) days to file a response to the objections. No response was received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in part.

In bypass cases, the Appointing Authority is not required to prove that all of the reasons proffered are valid reasons to justify the bypass. Rather, if even one of reasons provides reasonable justification for the bypass, then the Commission must affirm the Appointing Authority's decision. See *Arlington v. Cronin*, Middlesex Sup. Crt. No. 09-0476-H (2009).

Here, the Town offered multiple reasons for bypass, including: 1) the Appellant's employment history, which included a termination from Boston EMS for not meeting performance standards; and 2) admitted marijuana use shortly before the commencement of the 2011 hiring cycle. Further, the City put forward numerous positive reasons associated with the appointed candidates. Based on those reasons alone, the City had reasonable justification to bypass the Appellant. For this reason, there is no need to address whether the CORI-related issues, in the context of this case, also provide a valid reason for bypass, or whether we concur with all of the Magistrate's interpretations of the CORI Reform Law.

The decision of the City of Lynn to bypass Mr. Henderson is affirmed and his appeal under Docket No. G1-13-1 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman and Stein, Commissioners [McDowell – not participating]) on July 24, 2014.

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chairman

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)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:
Stephen Churchill, Esq. (for Appellant)
David Grunebaum, Esq. (for Respondent)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Civil Service Commission

Appeal of:

Joel Henderson,

Appellant

v.

Docket No. G1-13-1

DALA No. CS-13-87

Lynn Fire Department,

Appointing Authority

Appearance for Appellant:

Joel Henderson

[REDACTED]

[REDACTED]

Appearance for Appointing Authority:

David F. Grunebaum, Esq.

Todd & Grunebaum

55 William Street, Suite 210

Wellesley, MA 02481

Administrative Magistrate:

James P. Rooney, Esq.

Summary of Decision

Municipal Fire Department's decision to bypass firefighter applicant affirmed based upon an appointing authority's discretion to bypass a candidate who fails to take responsibility for incidents in his criminal history, has recently used drugs, and has an employment history that demonstrates he may be unfit for the position to which he applied. The Department may ask an applicant about incidents in his criminal history and base the decision to bypass him on the answers given. The Department's failure to provide the applicant with a copy of his criminal offense record information before interviewing him may expose it to sanctions by the Criminal Record Review Board, but does not provide an applicant with a claim of unlawful practice or an independent basis for challenging the bypass.

RECOMMENDED DECISION

Joel Henderson timely appeals, under the provisions of M.G.L. c. 32, § 2(b), a decision by the Lynn Fire Department to bypass him for appointment as a Lynn Firefighter based on his past drug use, criminal history, evasiveness during an oral interview, and substandard employment history in a similar position. I held a hearing in this appeal on February 25, 2013 at the Division of Administrative Law Appeals (DALA) under the Standard Adjudicatory Proceeding Rules, 801 C.M.R. 1.00. I recorded the hearing digitally.

I admitted thirty exhibits, nineteen from the Lynn Fire Department and eleven from Mr. Henderson.¹ Deputy Chief William F. Murray, District Chief Stephen P. Archer, and Department Chief James E. McDonald testified for the Lynn Fire Department; Mr. Henderson testified for himself. I gave Mr. Henderson an opportunity, after the hearing, to take steps to correct what he claimed were errors in his criminal history report. He filed an order the Commissioner of Probation entered after the hearing sealing portions of his record. I mark that document and other documents he filed from his application as his twelfth exhibit.

Findings of Fact

Based on the testimony, the exhibits, and reasonable inferences from them, I make the following findings of fact:

1. Mr. Henderson was born in 1971 and took a civil service exam in April 2010 for a firefighter position with the Lynn Fire Department. (L. Exs. 1 and 4.) He has worked on the security staff of Elliott Community Human Services since 2008. He has been assigned both to the company's juvenile justice division with youth held in a maximum security facility and the mental health division at a group home for youths. Prior to this position, Mr. Henderson, who is a basic EMT, accepted a position with Boston EMS in early 2008. He was not allowed to continue his training because his clinical skills were not up to the standards Boston EMS required. (Henderson and Murray Testimony; L. Ex. 16.) In 2003 and 2004, Mr. Henderson worked for Universal Testing, a company that tests concrete

used in construction, but was terminated when he failed to show up for work after his truck broke down. (Henderson Testimony; L.Exs.8 and 16.)

2. Mr. Henderson passed the civil service test and his name was placed on Certification # 203518, a list of prospective hires, in January 2011. By June 8, 2011, the Department reached Mr. Henderson and sent him a card informing him of an orientation in July 2011. (L.Exs. 6, 7, 8, and 17.)

3. As part of the hiring process, all the eligible candidates from Certification #203518 who attended the orientation were sent for drug testing. Drug tests were typically administered by taking samples of each applicant's hair. (L. Ex. 6.) If an applicant had absolutely no hair on his or her body, a urine sample was taken from the applicant to test for the same drugs. Mr. Henderson has a shaved head. Because Mr. Henderson did not have hair follicles on his head, when he was tested on July 2011, samples were taken from hair follicles on his leg instead.² His hair sample tested positive for marijuana. (Murray and Henderson testimony; L. Exs. 4 and 6.) Due to differences in growth patterns, hair samples taken from a person's leg may detect marijuana use for one year prior to the test, while hair samples taken from the head may detect marijuana use for 90 days. (H.Ex. 9.) The Department was unable to make contact with Mr. Henderson regarding his failure to pass the drug test. Consequently, he was not processed further in 2011. (Murray Testimony.)

4. Mr. Henderson's name remained on the list of applicants and, in April 2012, his name again appeared on a list of prospective hires, this time on Certification #202852. (L.Ex.

¹ The Lynn Fire Department's exhibits are cited as "L.Ex." and Mr. Henderson's exhibits are cited as "H.Ex."

² The exact date of the drug test is not clear from the record. The lab report of the drug test states that it was performed on July 8, 2011. (L.Ex. 4.) Other records state that the orientation session at which drug testing was performed occurred on July 18, 2011. (L.Ex. 6.)

10.) Again, the candidates were drug-tested. This time, Mr. Henderson passed his drug test and advanced to the interview. (Murray Testimony.)

5. As part of the hiring process, the Department conducted a background check of Mr. Henderson. The Department received Mr. Henderson's Criminal Offender Record Information (CORI) from the Massachusetts Criminal Justice Information Services (CJIS). (Murray Testimony; L. Ex. 4.)
6. The CJIS printout shows that, as an adult, Mr. Henderson was charged in 1998 with four counts of marijuana possession and possession with intent to distribute. He was placed on probation on one of the marijuana possession counts, while the other charges were continued without a finding. (L.Ex. 4.) These charges stemmed from a drug raid on Mr. Henderson's college dormitory. He was suspended for one semester. (Henderson Testimony; L. Ex. 16.) In 1999, he was charged with marijuana possession; this charge was continued without a finding. In 2001, he was charged with assault and battery; this charge was dismissed. (L. Ex. 4.)
7. [REDACTED] (L. Ex. 4.)
8. Mr. Henderson did not receive a copy of the CJIS printout until the DALA hearing. (Henderson Testimony). In January 2013, he petitioned to have portions of his record sealed. On February 27, 2013, the Commissioner of Probation sealed the 1998 and 1999 drug charges. (H. Ex. 12.)
9. Department personnel contacted two of Mr. Henderson's former employers. A supervisor at Universal Testing confirmed that it was possible that Mr. Henderson was terminated when his truck broke down because employees of the company need to transport equipment to job sites. A captain in the Boston EMS training division stated that a certain number of recruits do not make it out of the academy because Boston EMS has very high standards. (L. Ex. 19.) The Department did not contact either division of Mr. Henderson's current employer. Had it done so, his supervisors in the two divisions of the

Eliot Community Human Services would have stated that Mr. Henderson is punctual, has an excellent attendance record, and has had a strong commitment to the jobs he performed in the two divisions. (H. Exs. 10 and 11.)

10. On June 19, 2012, Mr. Henderson was interviewed by James McDonald, who is now the Chief, Deputy Chief William Murray, and District Chief William P. Archer, who is in charge of training. (McDonald, Murray and Archer Testimony.) During his interview, Mr. Henderson was asked a set of standard questions and some questions specific to his application, including questions about his employment and criminal histories. (Murray testimony; L. Ex. 17.) One of the standard questions asked was when he had last used marijuana. One of the interviewers wrote down that he replied that that the last time he used marijuana was two days “before he got a card from the city in 2011.” (L. Ex. 17.) Mr. Henderson recalled saying it was two days before the list was established in November 2010. (Henderson Testimony.) Because 70 percent of calls the Department makes are for medical emergencies, Mr. Henderson was also asked about his EMT training. (Murray Testimony.) Mr. Henderson explained that he sought a position with Boston EMS to better qualify him for a position as a Lynn firefighter. (Henderson Testimony.)
11. The interviewers recorded that Mr. Henderson was evasive when answering questions and failed to take responsibility for his past conduct and shifted blame on others. (L.Ex. 18). They were particularly concerned that Mr. Henderson, in his explanation of his 1998 drug arrest, described it as a dorm raid in which others possessed marijuana, but he was arrested with them. (Murray testimony.) They were also concerned that he had been terminated from the Boston EMS academy, as they had no reason to believe Lynn’s standards were any different than Boston’s. (McDonald and Archer Testimony.)
12. On August 1, 2012, Dennis J. Carmody, then Chief of the Department, recommended to the Human Resources Division that Mr. Henderson be bypassed, citing Mr. Henderson's

recent drug use (admitted during the interview and revealed in the 2011 drug test), poor employment history in a similar occupation (his Boston EMS employment), and a poor interview performance. (L.Ex. 4.)

13. In a November 13, 2012 letter, the Department informed Mr. Henderson that he had been bypassed. (L.Ex. 3.) In the letter, the Department stated:

The background investigation has revealed a pattern of conduct which indicates unsuitability for public safety work; irresponsibility, a disregard for the law, and poor judgment, which relates to your suitability to become a Firefighter.

Your CORI showed multiple charges for possession of marijuana. You admitted using, and testing positive for marijuana as recent[ly] as 2011, despite taking the Firefighter exam in April 2010. During the interview you did not take responsibility for past drug use but attempted to minimize involvement and blame incidents on the actions of associates.

Employment history in similar occupation; You stated that you were let go in 2008 by Boston Public Health Commission because your clinical skills were not up to Boston EMS standards.

In your interview you displayed a consistent pattern of evasiveness when confronted with negative aspects of your background. You did not take responsibility for past drug use but attempted to minimize your involvement and blame the incidents on the actions of associates. You demonstrated a consistent pattern of evasiveness when confronted with negative aspects of your background and failed to take responsibility for adverse actions in you past.

(L. Ex. 3.) Of the firefighters hired from Certification #202852, fifteen of the applicants were ranked lower than Mr. Henderson. (L.Ex. 6.) None of them had a similar criminal history.

(Murray testimony; L.Exs. 14 and 15.)

14. Mr. Henderson filed a timely appeal with the Civil Service Commission on January 1, 2013. (L.Ex. 1.)

DISCUSSION

The Civil Service Commission's role in reviewing Mr. Henderson's bypass is not to determine anew whether he should have been bypassed, but, rather, to determine whether the appointing authority—here the Lynn Fire Department—has proven, by a preponderance of the evidence, that there was reasonable justification for bypassing him. M.G.L. c. 31, § 2(b); *Beverly v. Civ. Serv. Comm'n*, 78 Mass. App. Ct. 182, 187, 936 N.E.2d 7, 12 (2010);

Brackett v. Civ. Serv. Comm'n, 447 Mass. 233, 241, 850 N.E.2d 553, 543 (2006). The “reasonable justification” standard that employers are required meet is satisfied if it is shown that the bypass was “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *Brackett*, 477 Mass. at 241, 850 N.E.2d at 553-54, quoting *Selectmen of Wakefield v. Judge of First Dist. Court of E. Middlesex*, 262 Mass. 477, 482, 160 N.E. 427 (1928); see also *Police Department of Boston v. Kavaleski*, 463 Mass. 680, 688, 978 N.E.2d 55, 62-63 (2012).

“In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion.” *Town of Burlington v. McCarthy*, 60 Mass. App. Ct. 914, 914, 805 N.E.2d 88, 88 (2004). The Civil Service Commission may not substitute its opinion about an employment decision for that of the Appointing Authority. Its role is limited to scrutinizing employment decisions for “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, 334, 451 N.E.2d 443, 445 (1983). Absent some proof that the Department acted unreasonably, it may not be forced to take the risk of hiring unsuitable candidates. *Tewksbury v. Massachusetts Civ. Serv. Comm'n*, No. 10-657-G, (Mass. Super. Ct., Suff. Cty., Aug. 30, 2012).

In view of the considerable discretion accorded the Department in making hiring decisions, I conclude that the Lynn Fire Department had reasonable justification for bypassing Mr. Henderson. The Department’s determination that Mr. Henderson would be a poor risk based on evidence of recent marijuana use, his failure to accept sufficient responsibility for an old marijuana conviction, and his failure to complete the training for a similar position with Boston EMS merits deference.

I. *Alleged Discrimination in Drug Testing*

Mr. Henderson objects to any reliance by the Department on the drug test he failed in 2011, alleging that the method used to test for the presence of drugs constituted discrimination against bald men and African Americans. Before addressing his argument, I note that Mr. Henderson is appealing his bypass in 2012, not the failure of the Department to process him further in 2011 after he failed the drug test. In 2012, he passed the drug test that relied on a testing method to which he now objects. The Department used the 2011 test only as some evidence that Mr. Henderson had recently used marijuana, which he confirmed was true in response to the standard questions asked of all applicants.

Mr. Henderson points out that other applicants were typically tested by analyzing a hair sample taken from the head. Mr. Henderson's hair sample was taken from his legs because there was no hair on his shaved head sufficiently long enough to provide accurate results. The Department did not dispute evidence Mr. Henderson introduced to demonstrate that hair samples taken from the leg may detect marijuana use for up to one year, while hair samples taken from the head detect marijuana use only for the preceding 90 days, due to differences in growth patterns. (Finding of Fact 4). Mr. Henderson urges that the Department should have relied on urine tests instead to avoid the difference in the effective time period tested when hair is taken from different parts of the body.

The Lynn Fire Department, as a public safety agency, had an interest in hiring individuals who do not abuse drugs. *See Boston Police Dept. v. Campbell*, 7 Mass.L.Rptr. 236, *3 (1997) ("Marijuana abuse is a legitimate and nondiscriminatory reason to reject an applicant for employment"). This interest is significant enough that the Civil Service Commission has affirmed the bypass of a candidate by public safety agency that has a policy of rejecting any applicant who tests positive for an illegal substance. *See Pinckney v. Boston Police Dept.*, 23 MCSR 147 (Feb. 26, 2010) (rejection of a candidate who tested positive for steroids). Mr. Henderson does not dispute that the Department had a legitimate reason to drug test applicants who sought to become firefighters. He also does not claim that the 2011 test he

failed was inaccurate, only that it discovered drug use that a test of head hair (or urine) would not have detected.

I find no error in the manner in the Department's choice of drug use test. The exhibit Mr.

Henderson uses to show that body hair tests for a longer timeframe than head hair also states:

Hair can be collected from several head locations and combined to obtain the required amount of hair. In addition, body hair may be used as a substitute for head hair. In the rare case where no hair is collectible, complete urine/adulteration testing may be utilized.

(H.Ex. 9). This exhibit also explains that many drugs are rapidly excreted from the body, and thus urine tests detect use only within a few days before a test is administered. Because hair testing detects usage over a longer period, it tends to detect four to eight times as much drug use as do urine tests. *Id.* In view of the Departments' legitimate interest in hiring individuals who do not abuse drugs, its decision to use a test that detects prior drug use over a longer period of time than could be detected in a urine test was permissible.

Although a test of hair taken from the head looks back only 90 days while a test of hair taken from the body looks back for up to one year, Mr. Henderson is in no position to claim that as a bald man, he was discriminated against, because he conceded that the test accurately detected his use of marijuana. There is some dispute in the record as to what he told the interviewers about when this use occurred. He recalled answering that it occurred two days after he learned that his name was on the eligibility list that was established in November 2010. (Finding of Fact 10.) He evidently did not say it this way, however. Rather he appears to have said he last smoked marijuana two days before he received a card from the City. One of the interviewers, possibly aware that the Department had sent him a card in June 2011 inviting him to the interview, wrote down that the use was in 2011. *Id.* Whenever the use actually occurred does not matter in resolving his claim. If it occurred in June 2011, one month before he was tested, then testing by any method that would have detected drug use within the preceding 90 days would have picked up his use of marijuana the previous

month. But even if Mr. Henderson last used marijuana eight months before the interview, the test result was corroborated by his admission to drug use after he had taken the civil service test.

Mr. Henderson's claim that hair testing discriminates against African Americans is essentially a variation on his claim that such testing discriminates against bald men. He asserts that African American men tend to wear their hair short, and thus are more likely to have head hair that is too short to be used to test for drugs. This claim fares no better. There is no evidence in the record that African American candidates for Lynn firefighter positions are more likely to be tested using body hair or, as a consequence, are more likely to fail drug tests. There is also no evidence that Mr. Henderson was harmed by the test method chosen, given his conceded use of marijuana before he was tested.

I note that a group of Boston Police officers has sued in federal district court asserting that the Police Department's use of hair testing for cocaine use resulted in disproportionately positive results for black officers. The First Circuit has vacated a district court decision granting summary judgment for the City and remanded the matter to the district court, having found that, although very few black or white officers failed the drug test, there was a statistically significant difference in their failure rates, and as a result the plaintiffs had established a prima facie case of disparate impact. *Jones v. City of Boston*, ___ F.3d ___, No. 12-2280, <http://media.ca1.uscourts.gov/pdf.opinions/12-2280P-01A.pdf> (1st. Cir., May 7, 2014.) The First Circuit left it up to the district court to consider the City's defense that it had legitimate reasons to rely on a hair test and that urine tests, which the plaintiffs did not dispute, also show a difference in the failure rate between black and white officers. *Id.* Because the federal litigation remains pending, it offers no assistance in resolving Mr. Henderson's appeal.

Some of the same officers in *Jones* also challenged their discharge by the Boston Police Department before the Civil Service Commission. Although these appeals do not raise discrimination claims based on race or baldness, they offer some assistance in addressing Mr. Henderson's appeal. The appeals challenged the reliability of hair testing for cocaine use. *Boston Police Department Drug Testing Appeals ("D" Cases)*, 26 MCSR 73 (Mar. 1, 2013). Commissioner Stein ruled that hair testing for cocaine was not sufficiently reliable to be used as the sole basis to terminate tenured civil service employees, but could be considered with other probative information to determine whether termination was justified. *Id.* at 107-109. The other participating Commissioners thought that a positive test result created a rebuttable presumption that an officer had ingested cocaine. *Id.* at 114. If either of these approaches applied to hair testing for marijuana,³ there would be sufficient evidence that Mr. Henderson had used marijuana after taking the Civil Service exam, particularly his admission that he did so. Furthermore, an applicant's situation may be treated differently than a tenured civil servant's, as Commissioner Stein's decision suggested. It noted that hair testing is potentially useful in making pre-employment hiring decisions. *Id.* at 107. Thus, the standards that apply to evaluation of drug testing of tenured civil servants probably do not necessarily apply to the evaluation of candidates for employment, like Mr. Henderson. And even if they did, he would not be able to benefit from them.

In sum, Mr. Henderson's application was not rejected solely because of the 2011 hair test that he questions. He was processed further in 2012, given another drug test that he passed (and because it was a test of his body hair, it showed that he had not used marijuana for up to one year), and was given an opportunity to interview for the position. The test had

³ The decision focuses solely on the reliability of hair testing for detecting cocaine use. One of the issues was whether the tests used were sophisticated enough to distinguish cocaine found in the hair from sources other than ingestion -- for example, from cocaine powder particles floating in the air. 26 MCSR at 88-89. Whether there are similar issues with hair tests for marijuana is not in the record.

accurately detected recent marijuana use by Mr. Henderson, something he confirmed at his interview. Under these circumstances, I find no error in the Department's consideration of evidence that Mr. Henderson had used marijuana more than one year after he took the civil service test as one of several factors it considered in evaluating whether he might be at risk of abusing drugs if he were hired as a firefighter.

II. *Lack of Due Diligence in Evaluating Candidate*

Mr. Henderson alleges that the Department did not perform a sufficient check of his employment history before bypassing him. He offered evidence that the Department did not contact his current employer, Elliott Community Human Services, where Mr. Henderson has worked in two separate divisions. He maintained that the Department should have noted that he had become an EMT to bolster his chances for employment as a Lynn firefighter, that he was honest about his drug use, that he coaches Pop-Warner football teams in his community, and that his record over the past 10 years indicates self-reform. He also argued that the Department did not check his employment with Boston EMS sufficiently.

The Lynn Fire Department bypassed Mr. Henderson, in part, because of its concerns with deficiencies in his recent employment history -- his termination by Boston EMS because his clinical skills were not up Boston EMS standards. The Department made an adequate attempt to investigate this aspect of Mr. Henderson's employment history. It contacted a captain in the Boston EMS training division and was told that a certain percentage of trainees do not make it through the training academy because of Boston EMS's high standards.⁴ It was in the Department's purview to think that it had high standards as well and to consider Mr. Henderson's failure to make it through the Boston EMS academy as a negative factor in evaluating his candidacy.

⁴ Mr. Henderson testified that he was terminated from the Boston EMS academy because of a lack of experience and was told that, if he turned in all his equipment, he could be rehired after one year. It is not clear that he told this to the interviewers. In any event, the Department was still entitled to take into account that he had been terminated.

Mr. Henderson's job performance thereafter and his community service may tend to demonstrate that he would be a good firefighter, but it is not the Commission's role to question what aspect of an applicant's work history the Department should have emphasized, as long as the reasons for its bypass decision are legitimate. The Department is permitted to look to past acts of an applicant as a basis for bypassing him. *See Alband v. Dept. of Correction*, 24 MCSR 56 (Feb. 11, 2011) (bypass of correction officer applicant affirmed based in part on negative evaluations by her former supervisors in the military, despite her more recent success working for a security firm) and *Wojtczak v. Town of South Hadley*, Decision on Respondent's Motion to Dismiss, 19 MCSR 418 (Dec. 1, 2006) (police officer applicant, who had been bypassed in 2001 because he had been terminated by another police department during his probationary period that same year, could be bypassed again in 2006 for the same reason, particularly when the applicant continued to deny responsibility for his actions). Mr. Henderson's employment with Boston EMS was especially important to the Department's hiring decision because, given the frequency with which the Department responds to medical emergencies, the skills required to be a successful EMT are also required to be a successful firefighter. Based on this history, the Department had reason to believe that Mr. Henderson would not meet its standards.

II.

CORI Information

Before turning to Mr. Henderson's specific objections to considering his criminal history, I note that he has only one adult conviction, and that was in 1998 for marijuana possession, 14 years before he was interviewed for a firefighter position. The conviction alone was much too stale to be given great weight on it in evaluating his candidacy. The Department did not do that, however. Instead, it looked to it as some evidence relating to its concern that Mr. Henderson might be prone to abuse marijuana, and it questioned him about it to determine whether he accepted responsibility for his actions. In its view, he did not show such

responsibility, and it was this opinion that weighed heavily against Mr. Henderson's candidacy, rather than the 1998 conviction.

A. *Questioning an Applicant About CORI Information*

Mr. Henderson alleges that the Department acted improperly when it asked him about incidents on his criminal record that did not result in convictions. He cites M.G.L. c. 151B, § 4(9), which states, in relevant part, that it is unlawful:

For an employer . . . in connection with an application for employment . . . to request any information . . . or otherwise discriminate against any person by reason of his failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no convicted resulted . . .

Mr. Henderson contends that this statute prohibits employers from asking at all about arrests that did not lead to convictions. This is a misreading of Section 4(9). The statute merely bars employers from requesting this information from prospective employee; it does not bar requests made to an authorized distributor of CORI information. *Bynes v. School Committee of Boston*, 411 Mass. 264, 581 N.E.2d 1019 (1991). The Department properly received Mr. Henderson's CORI information from the Massachusetts Criminal Justice Information Services. The use by an appointing authority of "an individual's arrest record, not directly obtained from that individual, in making employment decisions does not violate § 4(9)." *Id.* at 269, 581 N.E.2d at 1022.

An applicant's complete criminal history, not simply any prior convictions, can be a proper basis for bypass. See *Preece v. Dep't of Correction*, 20 MCSR 152 (2007). In *Preece*, for example, an applicant had been acquitted of second degree murder, but his bypass was justified based on a police report showing that he had a propensity for violence and for using racial epithets.

Because the Department properly obtained Mr. Henderson's CORI information before it interviewed him, it was within its discretion to ask about incidents on the lawfully acquired

CORI form and base its employment decision on this information and on Mr. Henderson's responses to interview questions about it. The Department could consider that Mr. Henderson was arrested twice on marijuana-related charges as an adult as part of its effort to evaluate whether Mr. Henderson might be prone to abuse marijuana. But, as pointed out above, the board that conducted the interview was most concerned with his response to questions about the 1998 marijuana-related arrest that resulted in his being placed on probation. They concluded that his answers to questions about this arrest were evasive and shifted responsibility for what happened onto others. This use of Mr. Henderson's CORI information to assess his application was lawful under M.G.L. c. 151B, § 4(9).

B. *CORI Information Errors*

Mr. Henderson contends that the decision to bypass him was also improper because there were -- in his view -- errors in his CORI information. The errors he asserted are in his juvenile record. He maintained that the 1986 drug possession charge belonged to another individual with the same name. He was attempting at the time of the hearing to have these alleged errors corrected, but asserted that any reliance on an erroneous CORI to make hiring decisions is itself erroneous.

However, "[i]t is the [disseminating authority], and not the recipient, which has the duty to assure the accuracy and completeness of CORI, as well as to prevent its unauthorized disclosure." *Bynes*, 411 Mass. at 270, 581 N.E.2d at 1022-23, quoting *Police Comm'r of Boston v. Municipal Court of the Dorchester Dist.*, 374 Mass. 640, 648, 374 N.E.2d 272 (1978). The Department thus bears no responsibility for relying on what may have been an erroneous CORI history. The Department, moreover, did not take Mr. Henderson's juvenile record into consideration other than the drug charge. On that charge, it considered it only in the context of Mr. Henderson's drug use overall. It was concerned not with information

suggesting Mr. Henderson used drugs as a teenager, but rather with information demonstrating overall he was still using drugs while attempting to become a firefighter.⁵

C. Failure to Furnish Applicant with CORI Information Prior to Questioning

Finally, Mr. Henderson alleges that his bypass was improper because the Department did not give him a copy of his CORI report before asking him about it, as is required by M.G.L. c. 6, § 171A. Section 171A amended existing CORI law in April 2012, almost two months before Mr. Henderson interviewed with the Department. The amended statute now requires that an employer provide an applicant with a copy of his CORI report *before* questioning him about information and incidents contained in the report. If an employer does *not* ask any questions to the applicant about information in the applicant's CORI report, but still bases its decision not to hire the applicant on information in the report, the employer must then provide a copy of the report to the applicant. M.G.L. c. 6, § 171A.

Mr. Henderson did not receive a copy of his CORI report until the DALA hearing. (Finding of Fact 8). Although questioning Mr. Henderson about information contained in his CORI was lawful, the Department appears to have violated Section 171A by failing to provide Mr. Henderson with his CORI before such questioning or after a decision based on CORI information was made on his application.

The statute provides that in the event an employer violates § 171A, the Criminal Record Review Board will conduct an investigation to determine if hearings or sanctions are warranted in view of the violation. This is typically the sole remedy for a violation. The statute does not “permit a claim of an unlawful practice under chapter 151B or an independent cause of action in a court of civil jurisdiction except as otherwise provided under chapter 151B.” M.G.L. c. 6, § 171A. Mr. Henderson has not asserted that in some manner the

⁵ Sealed adult or juvenile criminal records may not be used to disqualify a person from public service. M.G.L. c. 276, §§ 100A and 100B. Some of Mr. Henderson's criminal record is now sealed, including the two adult marijuana charges, but that has no impact here because it was not sealed until after the Department bypassed him.

Department's failure to provide him with his CORI report until the DALA hearing
violated the discrimination provisions of M.G.L. c. 151B.

Section 171A further states that even if an employer neglects to furnish a copy of the applicant's CORI report to the applicant, it is not precluded from basing its employment decision on the applicant's CORI information. M.G.L. c. 6 § 171A. The Department, while perhaps careless in not abiding by recent changes in the law, still had the right to base its decision on Mr. Henderson's CORI information, which it did, among other factors, such as his poor interview and a tenuous employment history in a related position.

CONCLUSION

The Department acted with reasonable justification when it bypassed Joel Henderson for employment as a Lynn firefighter, based on his criminal history, a history of drug use combined with recent drug use, his employment history, and his interview performance. I recommend that the Civil Service Commission affirm the Lynn Fire Department's decision to bypass Mr. Henderson for the position of firefighter.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
First Administrative Magistrate

Dated: