

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

JEFFREY KING,
Appellant

v.

G1-05-20

MEDFORD FIRE DEPARTMENT,
Respondent

Appellant's Attorney:

Frank J. McGee, Esq.
1952 Ocean Street
Marshfield, MA 02050-3424
(781) 834-4690
fmcgee77@hotmail.com

Respondent's Attorney:

Mark E. Rumley, Esq.
City Solicitor
City of Medford Law Department
85 George P. Hassett Drive
Medford, MA 02155
(781) 393-2470
mrumley@medford.org

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Jeffrey King (hereafter "King" or Appellant") appealed the decision of the Respondent, the Medford Fire Department (hereafter "Appointing Authority", "City" or "Department"), bypassing him for original appointment to the position of firefighter. The appeal was timely filed. A full hearing was held on August 16, 2006 at the offices of the Civil Service Commission.

At the conclusion of the hearing, the record was left open for HRD to provide additional documents which have now been received by the Commission and both parties.

FINDINGS OF FACT:

Four exhibits were entered into evidence at the hearing. The additional information received by HRD after the hearing has been entered as Exhibit 5. Additional information from the City regarding the driving records of all candidates was provided to both the Commission and counsel for the Appellant after the hearing and has been entered as Exhibit 6. Based on these 6 (six) exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Frank Giliberti, Jr.; Fire Chief;

For the Appellant:

- Jeffrey S. King, Appellant;
- Danielle R. King, Appellant's Wife;

I make the following findings of facts:

1. Jeffrey King is a married, thirty-five year-old male who lives in Medford, Massachusetts. (Testimony of Appellant)
2. He has served in the National Guard for sixteen years and is currently a Staff Sergeant. Among his assignments were a tour of duty in Bosnia in 2001 and a 2003-2004 tour of duty at Guantanamo Bay, Cuba as part of Operation Enduring Freedom. While stationed at Guantanamo Bay in 2003 and 2004, the Appellant provided interior and exterior security for Camp Delta and the surrounding area. Most recently, he was deployed to assist with the aftermath of Hurricane Katrina. (Testimony of Appellant)

3. During his tenure in the National Guard, the Appellant has received a bus license which allows him to drive six different versions of Humvee vehicles, many of which he drove in treacherous conditions while in Bosnia. (Testimony of Appellant)
4. In 2002, Mr. King took the civil service examination for firefighter. (Testimony of Appellant)
5. Medford Fire Chief Giliberti, somewhat dismissive of the civil service rankings, testified that Mr. King's standing on the subsequent civil service certification list has nothing to do with his score, but, rather, his status as a veteran. Chief Giliberti testified that he knew that the highest score received by a veteran on 2004 certification list received by the City of Medford for the position of firefighter was "92". (Testimony of Chief Giliberti)
6. Jeffrey King testified that he received a score of "97" on the civil service exam referenced above and the City did not provide any evidence to dispute this. (Testimony of Appellant)
7. On March 11, 2004, pursuant to a request from the City of Medford, HRD issued Certification 240228 for 7 (seven) permanent full-time firefighters. (Exhibit 5: Cover Letter and Attachment A)
8. The list issued by HRD on March 11, 2004 contained 31 (thirty-one) names, including Appellant Jeffrey King, who, along with two other applicants, was tied for the 3rd ranking. Among the other applicants on that list was Frank A. Giliberti III, the son of Medford Fire Chief Giliberti, who was 28th on the list. (Exhibit 5: Attachment A)

9. Among the other individuals ranked below Jeffrey King were Dan Shea and Charles Casella, both of whom are sons of senior firefighters of the Medford Fire Department. (Giliberti, Shea and Casella would subsequently be selected for appointment and would be the only three non-veterans selected out of the 10 vacancies that were filled.) (Testimony of Chief Giliberti)
10. The list issued by HRD on March 11, 2004 stated “selection must be of 7 of the first 15 highest who will accept”. (Exhibit 5: Attachment A)
11. On June 2, 2004, HRD received a letter from Medford Mayor Michael McGlynn dated June 1, 2004 requesting that Certification 240228 be used to hire 11 (eleven) permanent firefighters instead of 7 (seven) and also that the certification be extended 90 (ninety) days so that the City had time to complete the hiring process for these additional hires. The request was approved by HRD on June 4, 2004. (Exhibit 5: Cover Letter and Attachment B)
12. HRD did not receive any further information from the City of Medford until August 19, 2004. (Exhibit 5)
13. In the interim, the City of Medford had sent out certification cards to all 31 (thirty-one) individuals on the certification list, including Appellant Jeffrey King, in March 2004 to determine who would be willing to accept a position of firefighter if selected. (Testimony of Chief Giliberti)
14. Danielle King, the Appellant’s wife who had power of attorney for Mr. King, received the above-referenced card that was mailed to Jeffrey King in March 2004. She contacted her husband via email and the Appellant asked her to sign on his behalf

as willing to accept the position of firefighter if selected. (Testimony of Appellant and Danielle King)

15. Shortly after signing on behalf of the Appellant in March 2004, Ms. King had a conversation with Chief Giliberti to inform the Chief that her husband was on active duty in the National Guard. Chief Giliberti told Ms. King that the Appellant, while on active duty, could not be considered for a position as firefighter, but that he could ask HRD to extend the expiration date on the list upon his return. (Testimony of Danielle King)

16. The Medford Fire Department proceeded to conduct a mandatory orientation session for all firefighter candidates either on March 28 or 29, 2004. All applicants who attended were given one week to return an application packet which would trigger a background check, interviews, a psychological examination, a medical examination and a physical abilities test. (Testimony of Chief Giliberti)

17. After her conversation with Chief Giliberti, Ms. King contacted the Appellant via email at Guantanamo Bay and informed him about her above-referenced conversation with Chief Giliberti in which she was told that the Appellant could not be considered for appointment while he was on active duty in the military. The Appellant contacted the United States Department of Labor's Veterans Affairs Division in March 2004 to seek advice and counsel. He was advised to meet with Medford Mayor Michael McGlynn as soon as possible. (Testimony of Appellant)

18. Based on the advice he received from the United States Department of Labor, the Appellant sought leave from his assignment at Guantanamo Bay and flew home to

Massachusetts in May 2004 after purchasing a \$1,000 plane ticket. (Testimony of Appellant)

19. The Appellant met with Mayor McGlynn in May 2004 and was assured by the Mayor that “Medford takes care of its veterans” and the Mayor told the Appellant to see the Fire Chief as soon as his current tour of duty ended. (Testimony of Appellant)

20. The Appellant’s tour of duty ended shortly thereafter and he was back in Medford during the last week in June 2004. He immediately began calling Chief Giliberti “multiple times” over the next two weeks to inquire about his candidacy. The Appellant was eventually told that the Chief was “too busy” with the Democratic National Convention to talk to him. (Testimony of Appellant)

21. Chief Giliberti testified that 8 firefighter candidates were hired in June 2004 and 2 firefighter candidates were hired in July 2004. HRD did not receive notification of these hires (which included Chief Giliberti’s son) and bypass explanations, until August 19, 2004. (Testimony of Chief Giliberti; Exhibit 5: Attachment B)

22. The City submitted the positive reasons for selecting 10 firefighter candidates and the negative reasons for bypassing candidates with a higher rank. The City failed to provide any reason at that time for bypassing Jeffrey King – even though he was listed as an individual who would accept employment if selected. The Chief testified before the Commission that HRD knew at the time that King was in the military service, but was unable to say who conveyed this information to them – or how. (Testimony of Chief Giliberti)

23. G.L. c. 31, § 27 states in part,

“If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name

appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator.” (emphasis added)

24. HRD subsequently approved the reasons for bypass on November 29, 2004. (Exhibit 5: Attachment D)

25. The Appellant waited for the Chief to respond until the last week in July 2004.

Having not heard from Chief Giliberti about his candidacy, the Appellant went to see the Chief in-person at his office during the last week in July 2004. (Testimony of Appellant)

26. The Appellant met with Chief Giliberti for an interview and was given an application package which he returned to the Chief’s office the following Monday (1st week in August 2004). During his interview, the Appellant was asked more than once by Chief Giliberti if it was possible that he would be deployed again on another mission and the Appellant indicated that it was possible. At the conclusion of the interview, the Chief told the Appellant that a background check would be initiated. (Testimony of Appellant)

27. The civil service certification list for firefighter expired on October 31, 2004.

28. During the first week of November 2004, the Appellant called the Chief to find out if he was still under consideration for a position as firefighter. The Appellant needed to know this information as he had been asked to accept a voluntary deployment in Iraq. During his conversation with Chief Giliberti in November 2004, Chief Giliberti told the Appellant that he was still under consideration and there was still a chance the Appellant would be selected. (Testimony of Appellant)

29. After waiting two weeks to hear back from Chief Giliberti, the Appellant went back to see Mayor McGlynn the day after Thanksgiving 2004. Mayor McGlynn called Chief Giliberti to inquire about the status of the Appellant's application. For the first time, the Appellant was informed that he was not being selected because of his driving record. He received written notification of this during the first week of December 2004 and filed an appeal with the Civil Service Commission. (Testimony of Appellant)
30. The Medford Fire Department did not make any appointments other than the 8 new hires in June 2004 and the 2 new hires in July 2004, despite the fact that they successfully amended their request to HRD seeking to hire 11 new firefighters on June 2, 2004. (Testimony of Chief Giliberti)
31. Asked by this Commissioner to explain why the Appellant was interviewed in August 2004 if the Department had already hired the full complement of 10 firefighters that would be hired off that list, Chief Giliberti testified that he had been asked by the Mayor to consider the Appellant and there was one other potential retirement that might result in a vacancy. (Testimony of Chief Giliberti)
32. The City did not provide any credible evidence to show that there was indeed an 11th vacancy to be filled.
33. On November 17, 2004, 17 days after the certification list had expired; three months after the bypass reasons were submitted for all other candidates; and five months after the Medford Fire Department actually began hiring new firefighters, the Medford Fire Department submitted a list of reasons for "bypassing" Mr. King to HRD. (Exhibit 5: Attachment F)

34. The Medford Fire Department included a summary of the Appellant's driving record with its submission to HRD and concluded that, "Mr. King would not be a suitable candidate for a public safety position at the Medford Fire Department. According to these records, Mr. King's past has exhibited immature behavior, lack of responsibility, and disregard for the law." (Exhibit 5: Attachment F)
35. Chief Giliberti testified that he recommended to the Mayor that the Appellant not be selected for appointment. (Testimony of Chief Giliberti)
36. Of the candidates selected for the position of firefighter for the Medford Fire Department, one candidate had a surchargeable accident in 2004; another candidate had a speeding violation in 1999; another candidate had a surchargeable accident in 2002 and an April 5, 2001 warrant from Boston Municipal Court which "expired" shortly thereafter; another candidate had a speeding violation in 2003 and a 1989 violation for improper passing in another state; and another candidate had a "state highway violation in 1997. (Exhibit 6)
37. Jeffrey King's driving record indicates that he had one speeding violation since 1998 and four previous speeding violations between 1994 and 1997. He also had a surchargeable accident in 2002; a seatbelt violation in 1998 and was also cited for "RT OF WAY INTERSECTION" and no registration or license in 1998. Further, his driving record indicates that his registration or license was suspended on at least three occasions between 1994 and 1998 for defaulting on a payment of fines. (Exhibit 6)
38. A March 7, 2003 HRD Memorandum to Appointing Authorities; Mayors; Town Managers and Selectmen in Massachusetts states in part, "Although there is no requirement pursuant to federal or state law that requires a community to select a

military candidate, this same candidate cannot be dismissed without consideration because they have been called to active military duty. (emphasis added) When a community that is in the process of selecting individuals for appointment to the police or fire force, discovers that the top individuals appearing on a certification list are on active military service and are not available to accept an appointment, it may request to establish an intermittent Police or Fire force". (HRD Memorandum Dated March 7, 2003)

CONCLUSION:

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." City of Cambridge v. Civil Service Commission, 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). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, s. 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 the 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 Commission, 31 Mass. App. Ct. 315 (1991).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). However, 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. City of Cambridge, 43 Mass. App. Ct. at 304.

Jeffrey King received a score of 97 on a civil service examination for the position of firefighter. That score, along with his status as a veteran, tied him for third with two other candidates on a certification list requested by the Medford Fire Department when it sought to fill eight (subsequently ten) vacancies within the Department. The City argues that King was bypassed for appointment by nine other individuals who ranked below him due to his lengthy driving record which includes speeding violations, a surchargeable accident, a seatbelt violation and license suspensions related to late payment of fines. This lengthy driving record distinguishes him (negatively) from the nine candidates ranked below him who were selected for appointment. While some of those candidates had motor vehicle violations, none compared with King's lengthy record. Mr. King's motor vehicle record is fair game for the City to consider and it is solely within their

discretion – not the Commission’s – to determine how much weight that record should be given in the selection process.

In this case, however, the City did not submit these reasons for bypass to HRD until months after its original submission to HRD in which they listed both the negative reasons for not selecting some candidates and the positive reasons for candidates that were selected. That initial submission by the City to HRD was done on August 19, 2004, three months prior to submitting the bypass reasons for Jeffrey King. In fact, Medford Fire Chief Giliberti testified that 8 firefighters were actually hired in June 2004 and another 2 firefighters were hired in July 2004. The testimony of Jeffrey King and the evidence presented clearly show the reason for this discrepancy: the City of Medford never considered Jeffrey King for one of the ten available firefighter positions --solely because he was on active duty in the National Guard. (The City provided no credible evidence that an 11th vacancy was ever a serious possibility.)

In March 2004, Chief Giliberti, whose own son was on the list of potential candidates that would eventually bypass Mr. King, told the Appellant’s wife that Mr. King could not be considered for appointment at that time because his service in Guantanamo Bay, Cuba prevented him from attending a mandatory orientation session. That decision by the Chief is troublesome on two fronts. First, it contradicts the plain language of a 2003 HRD directive which states in part, “Although there is no requirement pursuant to federal or state law that requires a community to select a military candidate, this same candidate cannot be dismissed without consideration because they have been called to active military duty.” (emphasis added) The Commission takes note that the U.S. District Court of Massachusetts recently applied the Uniformed Services

Employment and Reemployment Rights Act of 1994 (38 U.S.C.S. § 4311, et seq.) to a case involving an active duty applicant for the position of Somerville police officer. McLain v. Somerville, 424 F. Supp. 2d 329 (D. Mass. 2006). In McLain, the federal court found that the plain meaning of the federal statute bars discrimination against an applicant for employment who is in the uniformed services. Although the Respondent in Mr. King's case has asserted that it bypassed him because of his driving record, the record clearly shows that Chief Giliberti treated his application in contravention of the law because of his military status.

Second, state ethics laws prohibit public employees from taking any type of official action which will affect the financial interests of their immediate family. (See G.L. c. 268A, § 6) By removing King, who was ranked third on the list, from consideration, Chief Giliberti was undoubtedly boosting the chances of his son, who was tied for last on the same list.

In June 2004, several weeks prior to the City's submission of bypass reasons to HRD, in August 2004, the Appellant had returned home from duty and made several attempts to contact the Chief to be considered for appointment as a firefighter. Even Chief Giliberti acknowledges that two of the ten firefighters selected were not hired until July 2004. The Appellant was told that the Chief was too busy with duties related to logistics of the Democratic National Convention, which was taking place in Boston. Again, what is most troubling in this regard is that Chief Giliberti had any role in choosing firefighter candidates from a pool that included his son, let alone being the point person. The Commission also finds it troubling that, in Pacini v. Medford, Docket No. G1-04-275 (October 20, 2005), a previous case at the Commission involving the same eligibility list,

the Respondent led the Commission to believe that Chief Giliberti played no substantive role in the hiring process for the list when we have learned in this case that the Chief interviewed Mr. King. Regardless, Chief Giliberti did not interview Jeffrey King until King literally knocked on the Chief's door during the last week of July 2004. HRD had yet to receive and/or review the reasons for bypass from the City regarding the ten candidates selected and those bypassed. G.L. c. 31, § 27 states in part, "appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator." Put simply, the selection process, for which Chief Giliberti's son was an applicant, was still on-going.

During the same time King's background check was finally being completed, the City submitted the positive reasons for selecting 10 firefighter candidates and the negative reasons for bypassing candidates with a higher rank. The City failed to provide any reason at that time for bypassing Jeffrey King – even though he was listed as an individual who would accept employment if selected. The Chief testified before the Commission that HRD knew at the time that King was in the military service, but was unable to say who conveyed this information to HRD – or how.

Several weeks after the initial August 2004 submission to HRD, and well after all ten of the candidates that would be selected were hired, the City submitted the negative reasons for bypassing the Appellant, listing his lengthy driving record.

The selection process in this case was fatally flawed. First, Jeffrey King was never appropriately considered by the Medford Fire Department for one of the ten vacant positions that would eventually be filled --solely because he was on active duty in the military. His interview and background check were not initiated until after the City had

already decided who it wanted to fill the ten vacancies. Second, the Chief, whose son was eventually chosen for the position of firefighter, failed to recuse himself and played an inappropriate role in the non-selection of Jeffrey King.

For all of the above stated reasons, the City of Medford failed to appropriately justify its bypass of the Appellant by a preponderance of the evidence. While Appointing Authorities are granted wide discretion in the hiring process, the selection process in this case was fatally flawed and inconsistent with the basic merit principles required by civil service laws. Moreover, the Commission has no confidence that the selection process going forward is likely to adhere to basic merit principles. The appeal is hereby *allowed*.

Pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts of 1993, the Commission orders the following:

1. HRD is to place the name of Jeffrey King at the top of the eligibility list for original appointment to the position of firefighter so that his name appears at the top of the existing certification list, or the next certification list if the current one has expired, requested by the City of Medford from HRD and from which the next original appointment to the position of firefighter in the Medford Fire Department shall be made by the City of Medford.

In order to prevent a reoccurrence of a flawed selection process in the future, in Medford or any other city and town, the Commission feels strongly that the following additional intervention is warranted and orders the following:

2. Until such time as Mr. King is selected or appropriately bypassed for the position of firefighter in the City of Medford, the Commission maintains jurisdiction over the hiring of any firefighters by the City of Medford. During this time, all bypass reasons submitted to HRD for the position of firefighter must be sent to HRD prior to hiring the selected candidates and the bypass reasons must be simultaneously sent to the Commission.
3. Executive Order No. 444 (03-2) issued on January 9, 2003, requires each person applying for employment within the State's Executive Branch to disclose in writing, upon such application, the names of all immediate family as well as persons related to the immediate family by marriage who serve as employees or elected officials of the Commonwealth. The Commission hereby directs HRD to implement a similar requirement for all individuals applying for permanent civil service positions in cities

and towns, requiring applicants for original or promotional permanent civil service positions to disclose in writing, upon application, the names of all immediate family as well as persons related to the immediate family by marriage who serve as employees or elected officials of the city or town for which they are seeking to be employed. All such disclosures shall be made available for public inspection to the extent permissible by law by the official with whom such disclosure has been filed.

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman, Guerin, Bowman, Marquis and Taylor, Commissioners) on September 28, 2006.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice:

Frank McGee, Esq.

Mark Rumley, Esq.

Patrick Mulroney, Esq.

John Marra, Esq.