

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

TIMOTHY O'BRIEN,
Appellant,

v.

G1-08-130

CITY OF WESTFIELD
FIRE COMMISSION,
Respondent.

Appellant's Attorney:

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Hannon Lerner
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Lee, MA 01238

Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Timothy O'Brien, (hereinafter, "O'Brien" or "Appellant") seeks review of the Westfield Fire Commission's decision to accept the reasons of the Westfield Fire Commission (hereinafter "Appointing Authority", "City" or "WFC"), bypassing him for original appointment to the position of full-time firefighter / paramedic. A pre-hearing was held on October 22, 2008 and a full hearing was held on February 25, 2009 at the Springfield State Building in Springfield, MA. One (1) CD was made of the hearing and provided to the parties.

FINDINGS OF FACT:

Thirteen (13) exhibits were entered into evidence at the hearing. The record was left open for the Appointing Authority to submit the notes of the interview panelists. Those notes were submitted and have been entered as Exhibit 14. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- William Phelon, Chief, City of Westfield Fire Department;
- Mary Regan, Deputy Fire Chief, City of Westfield Fire Department;
- Albert Masciadrelli, Chairman of the Westfield Fire Commission.

For the Appellant:

- Timothy O'Brien, Appellant;

I make the following findings of fact:

1. The Appellant is a thirty-three (33) year old male who currently resides in Lanesboro. He graduated from Monument Mountain Regional High School in Great Barrington in 1994, Westfield State College in 1998 (Criminal Justice Major), and Springfield College in 2005 (Paramedic). (Exhibit 3)
2. Certification No. 271241, which was issued on December 17, 2007, and January 4, 2008, cumulatively contained the names of eleven (11) candidates for the position of full-time Firefighter/Paramedic. Three (3) of the eleven (11) candidates indicated a willingness to accept the appointment. (Exhibit 1 and Stipulated Facts).
3. Certification No. 271241 listed the names of the candidates as Thomas L. Edwards, Timothy O'Brien, and Elizabeth Aucoin. (Stipulated Facts)

4. On January 15, 2008, Thomas L. Edwards withdrew his name as a candidate for the position of permanent full time Firefighter/Paramedic. (Exhibit 2)
5. After the withdrawal of Thomas L. Edwards, the only two candidates contained who were willing to accept appointment were the Appellant and Elizabeth A. Aucoin. Elizabeth A. Aucoin was ranked below the Appellant. (Exhibits 1 and 2)
6. The Appointing Authority bypassed the Appellant in favor of Ms. Aucoin and listed both positive reasons associated with Ms. Aucoin and negative reasons associated with the Appellant as justification for the bypass. (Stipulated Facts)
7. The Appointing Authority, in a February 28, 2008 letter to the state's Human Resources Division (hereinafter "HRD") outlined the negative reasons associated with the Appellant as follows:

"With respect to Mr. O'Brien, ...[a] panel of supervisory personnel rated him as a poor candidate on two of...four rated criteria. The Commission gave this determination significant weight. The Commission reviewed the background checks and found that while Mr. O'Brien was employed with American Medical Response in Pittsfield, Mr. O'Brien was issued a no trespass order from Berkshire Medical Center as a result of conduct engaged in while on the job with AMR. AMR was in the position to reassign Mr. O'Brien elsewhere (apparently Northampton). The Westfield Fire Department has no such alternative. If hired by the Westfield Fire Department, Mr. O'Brien would, like Ms. Aucoin, be assigned to staff an ambulance transporting patients to and from local hospitals, primarily Noble Hospital in Westfield. The issuance of a no trespass order would leave the Department with no option but to remove him from employment – there is no alternative site at which to place him.

The background checks reveal that the no trespass order issued after Mr. O'Brien failed to conform his conduct to that which is expected in a mixed gender workplace. The background checks reveal a separate incident in which a female co-employee sought a restraining order¹. The Westfield Fire Department is proud to have a workforce of dedicated men and women working in harmony. The background checks cause the [Fire] Commission to conclude that Mr. O'Brien lacks the required commitment to a workplace in which gender is not a concern or an issue.

¹ As part of the full hearing, the City stipulated that they are not relying on the temporary restraining order, which was subsequently dismissed, as grounds for the bypass.

Equally troubling, Mr. O'Brien failed in the course of his interview before the Commission to disclose to the Commission those incidents concerning on-the-job behavior and relationships. This omission has forced the [Fire] Commission to conclude that, at a minimum, Mr. O'Brien lacks the candor and judgment necessary as a firefighter paramedic who serves as part of a trained team of emergency response professionals." (Exhibit 10)

8. The Appellant's background check was completed by Fire Chief William Phelon, who was then serving as Deputy Chief. Chief Phelon spoke with eight (8) individuals, including Raymond Webb, Emergency Room Charge Nurse and Mark Chretien, EMS Director, both of whom are employed by Berkshire Medical Center aka Berkshire Health Systems. (Exhibit 5 and Testimony of Phelon)
9. Chief Phelon spoke with Mr. Webb and Mr. Chretien on January 25, 2008 because the Regional Director for American Medical Response (AMR), one of the Appellant's former employers, indicated that there were some issues between the Appellant and Berkshire Medical Center, a facility that the Appellant visited in his capacity as an employee with AMR. (Testimony of Phelon and Exhibit 5)
10. Mr. Webb, the Emergency Room Charge Nurse, told Chief Phelon that there was a problem between the Appellant and a female employee at Berkshire Medical Center. As a result, Mr. Webb met with the Appellant and told him that he "needed to learn how to take no for an answer." Mr. Chretien told Chief Phelon that the problem with the Appellant persisted, that the Appellant's movement at the facility was restricted and the Appellant was subsequently prohibited from bringing patients to Berkshire Medical Center in his capacity as a paramedic for a six-month period. Chief Phelon testified that he (Phelon) construed this to be a "no trespass order". (Testimony of Phelon)

11. On November 2, 2006, AMR issued the Appellant a written warning which stated in relevant part:

“This will serve as a **Written Warning** for disorderly conduct and breach of employee conduct at the facility of our customer, Berkshire Medical Center. You violated these policies when you disregarded the rules of Berkshire Medical Center’s facility by drinking coffee and sitting in prohibited areas and having an inappropriate outburst in the ER Tech Room.

In addition to this warning, you are being re-assigned to another Western Mass. AMR division effective immediately. The reassignment is in response to Berkshire Medical Center’s action of banning you from their facility as a representative of AMR. You will also be required to attend a remediation session with Human Resources re-addressing the AMR’s Policies and Procedures...” (**emphasis in original**) (Exhibit 13)

12. The Appellant testified before the Commission that AMR told him that Berkshire Medical Center did not want him on their property and that AMR gave him the option of quitting or transferring to Northampton. The Appellant chose to transfer to Northampton. (Testimony of Appellant)

13. According to the Appellant, he began transporting patients to Berkshire Medical Center after a six-month period subject to the following conditions: no food or drink in the emergency room; no hanging of pictures; no socializing; and he was not to be out of the sight of his partner. (Testimony of Appellant)

14. Mr. Chretien told Chief Phelon that the Appellant, upon his return, continued to have problems with at least one female employee, including questioning orders that he was receiving from a female employee. (Testimony of Chief Phelon)

15. According to the Appellant, AMR subsequently informed him that Berkshire Medical Center had again requested that he be prohibited from transporting patients to their facility. The Appellant testified that AMR gave him the option of transferring to Pittsfield or

Holyoke or be fired. The Appellant testified that the final resolution of this matter was that he agreed to be laid off by AMR. (Testimony of Appellant)

16. After the background investigations were completed, a preliminary interview was conducted on January 31, 2008 with Deputy Chiefs Mary Regan, Andrew Roy, Pat Kane, and Joseph Pac. The preliminary interview panel had not seen the background investigations prior to the interview. (Testimony of Regan) There were ten (10) questions asked at the interview that were asked of the candidates and comments were prepared to be presented to the Fire Commission. (Testimony of Regan Exhibits 9 and 10)
17. One of the preliminary interview panelists, Deputy Chief Mary Regan, testified before the Commission. Deputy Chief Regan testified that she was “very concerned” about issues that arose during the Appellant’s interview and the manner in which he responded to certain questions. (Testimony of Regan)
18. Question #4 , asked of all candidates by the preliminary interview panel states, “As part of the hiring process we will be doing an extensive background investigation. Is there anything in your past that you would like to discuss or explain to this panel?” Deputy Chief Regan testified that when the Appellant was asked this question, the Appellant’s demeanor changed, he sat back in his chair, he looked around the room at the deputies and then said, “why don’t you tell me what you know and I can respond.” (Testimony of Regan)
19. According to Ms. Regan, the Appellant then stated during the interview that:
 - he had difficulty working with a girlfriend at a prior job;
 - a female nurse at Berkshire Medical Center wouldn’t date him because a doctor also wanted to date her;

- a nurse felt threatened by him and that he suspected that she felt this way because he smiled too much, was too friendly, and brought coffee into the Emergency Room;
- an employee's tires were slashed, but that he didn't do it and the employer couldn't prove that he did it;
- a female employee from a former employer (not AMR) filed a complaint after she slipped and fell as a result of the Appellant putting peanut butter on the door handle of an ambulance as a practical joke.

(Testimony of Regan)

20. During his testimony before the Commission, the Appellant acknowledged putting peanut butter on the handle of an ambulance as a practical joke, but questioned the motivation of the female employee who filed the complaint regarding the incident. (Testimony of Appellant)

21. The Appellant's answers led Deputy Chief Regan to conclude that the Appellant had encountered difficulty working with co-workers at multiple work locations and that he had poor teamwork skills. Deputy Chief Regan was also concerned about whether the Appellant could work effectively with the eight female members of the Westfield Fire Department and the employees of the local hospital. (Testimony of Regan)

22. In consultation with the other members of the preliminary interview panel, and after reviewing the information from the background investigation, Deputy Chief Regan prepared a written summary of the interviews of both candidates and forwarded them to the Final Interview Panel, which consisted of Albert Masciadrelli, Chairman of the Fire Commission, and the two other Commissioners. (Testimony of Regan and Exhibits 8 and 9)

23. The summary of the Appellant's preliminary interview regarding teamwork stated in part, "we have some reservations about the number of incidents that were revealed in the interview and background checks with stakeholders and coworkers specifically at BMC but also Becket Ambulance." In regard to "honesty", the preliminary panel stated, "Tim did reveal some problems that came up in his background checks as well as some we didn't hear about. His impression of what happened was very vague and not always consistent with what was reported. He put blame for these problems with everyone around him and did not take responsibility for the situations." As part of their final recommendation regarding the Appellant, the panel stated, "It was the consensus of the group that there are a number of unresolved issues from his past that make his employment questionable at this time for Westfield Fire. The background checks along with the information in the interview make it appear that there may be some interpersonal problems that keep coming up in his history which make him a weak candidate." (Exhibit 8)
24. Fire Commission Chairman Masciadrelli testified before the Commission. According to Chairman Masciadrelli, the final review panel gave great weight to the preliminary review panel's concerns regarding the Appellant's teamwork and honesty. Based on those concerns, they considered it a risk to hire the Appellant. (Testimony of Masciadrelli)
25. In contrast to the Appellant, the selected candidate had "demonstrated good relations with coworkers and the hospitals she currently has contact with in her present position" and her background checks "did not reveal anything from the past that may be reason for concern." (Exhibit 9)
26. Given that the final interview was conducted in public, the final interview panel did not specifically ask the Appellant to address the concerns raised by the preliminary panel.

Rather, the panel gave the Appellant and the selected candidate the option of discussing any issues in executive session and they both declined. (Testimony of Masciadrelli)

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, § 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 Commission, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

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, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86

(1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). 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.

The Appellant is a 33-year old resident of Lanesboro who has worked as a paramedic since at least 1999. Although I don't doubt his sincere desire to serve as a Firefighter / Paramedic for the City of Westfield, the City has provided reasonable justification for bypassing him for appointment.

A preliminary interview panel, chaired by Deputy Fire Chief Mary Regan, rated the Appellant as poor in two categories: teamwork and honesty. In regard to honesty, the panel considered the Appellant's responses during the interview to be "vague and not consistent with what was reported." When first asked during the interview to discuss any issues that may have arisen during his background check, the Appellant challenged the panel to "tell me what you know and I can respond."

In regard to teamwork, the interview panel was concerned about numerous incidents discussed by the Appellant during the interview that led them to conclude that he had poor teamwork skills and may have difficulty working with others, including the eight female members of the Westfield Fire Department. Specifically, the panel was concerned about two instances in which the Appellant, who was then serving as an EMT for AMR, was prohibited by Berkshire Medical Center from transporting patients to their facility. The reason for the hospital's decision was related to the Appellant's interactions with at least one female employee of the hospital. Further, the Appellant acknowledges that while he was working as an EMT for another employer, a female employee filed a complaint after she slipped and fell as a result of the

Appellant putting peanut butter on the handle of an ambulance door. During his testimony before the Commission, the Appellant chalked this up as a practical joke and then questioned the motivation of the female employee who lodged the complaint.

An applicant's poor performance during the interview process is a relevant factor an appointing authority can use to judge an applicant. See Frost v. Town of Amesbury, 7 MCSR 137 (1994) (Commission upholds bypass where applicant's answers to situational questions were unsatisfactory); LaRoche v. Department of Correction, 13 MCSR 159 (2000) (Commission upholds bypass where applicant's answers to situational scenarios did not comply with department policies and procedures and failed to demonstrate an ability to lead); McMahon v. Town of Brookline, 20 MCSR 24 (2007) (poor interview performance can stand alone as the sole basis for bypass where there is no evidence of any inappropriate motivations on the part of the Appointing Authority).

Here, there was no evidence of any inappropriate motivations on the part of the City. All of the City witnesses were highly credible and showed a sincere commitment to selecting the best candidate for the City's fire department. It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Prior to being selected as Fire Chief, Chief Phelon had served as the City's Deputy Fire Chief for 22 years and Deputy Chief Regan has served the Department for 22 years. The selection process established by Fire Commission Chairman Masciadrelli was fair; all candidates underwent the same background investigation and each was asked the same questions by a preliminary interview panel and then ultimately interviewed by a final review panel.

Through this process, the City concluded that the Appellant's poor teamwork skills and questions about his honesty made him a poor candidate for original appointment as a Firefighter / Paramedic. Further, the underlying issues that led them to this conclusion are directly related to the core functions of a firefighter / paramedic including the ability to work effectively with hospital and other medical personnel in a mature, professional manner. Here, it is undisputed that a local hospital twice prohibited the Appellant from transporting patients to their facility because of his interactions with female employees and that his immature practical joke while employed with another ambulance company resulted in another female employee filing a complaint. In comparison, the City had no such concerns with the selected candidate.

For these reasons, the City has shown through a preponderance of the evidence that it had reasonable justification to bypass the Appellant for appointment as a Firefighter / Paramedic. The Appellant's appeal under Docket No. G1-08-130 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor) on April 29, 2009.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. The motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 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 to:

Jeremia A. Pollard, Esq. (for Appellant)

Kathleen E. Degnan, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)