

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108

ROBERT M. McMASTER,
Appellant

v.

G1-07-216

CITY OF BOSTON,
Respondent

Appellant's Attorney:

Pro Se
Robert McMaster
19 Bexley Road
Roslindale, MA 02313

Respondent's Attorney:

Jordan N. Ablon, Esq.
City of Boston
Office of Labor Relations
Boston City Hall, Room 624
Boston, MA 02201

Commissioner:

John E. Taylor

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Robert McMaster (hereinafter "McMaster" or "Appellant") is appealing his bypass for original appointment to the position of permanent full-time firefighter with the City of Boston (hereinafter "Appointing Authority", or "City"). The appeal was timely filed and a full hearing was held on January 15, 2008 at the office of the Civil Service Commission (hereinafter "Commission"). One (1) tape was made of the hearing and is held by the Commission.

The respondent submitted a proposed decision to the Commission. The Appellant did not submit a proposed decision to the Commission.

FINDINGS OF FACT:

Six (6) Exhibits were entered into evidence at the hearing. Based on the documents submitted into evidence, and the testimony of:

For the Appointing Authority:

- Robert Moran, Director of Human Resources, Boston Fire Department

For the Appellant:

- Geraldine Sainato, Appellant's aunt
- Robert McMaster, Appellant

I make the following findings of fact:

1. In November 2006, the City requested a certification list of candidates to fill fifty (50) positions of permanent full-time firefighters from the state's Human Resources Division (hereinafter "HRD"). (Testimony of Robert Moran)
2. On or about December 14, 2006, in response to the City's request, HRD sent Certification No. 261149 to the City. The list contained the names of approximately 101 candidates who had applied for the position of firefighter. Each of these candidates had also completed the Civil Service Exam, which is a requirement for the position. (Exhibit 1)
3. The Appellant's name appeared in the upper portion of those candidates willing to accept appointment to the position of firefighter. (Testimony of Robert Moran)

4. On or about December 23, 2006, the Appellant signed and submitted to the City a release form, authorizing the City to conduct an investigation as to the Appellant's moral character and fitness for the position of firefighter. (Exhibit 1)
5. Along with the release form, the Appellant submitted an information form which required him to provide his court record, personal history, residences, education, parking violations, employment history and military record. (Exhibit 1)
6. The Appellant indicated on his application that he was a Disabled Veteran who had served in the United States Marines Corps from July 2000 to July 2004. (Exhibit 1)
7. The Appellant attained the rank of Corporal and served in Iraq and Afghanistan. He was honorably discharged in 2004.
8. In April 2007, the Boston Fire Department (hereinafter "BFD") hired approximately fifty (50) firefighters from Certification No. 261149. (Testimony of Robert Moran)
9. On April 6, 2007, Fire Commissioner Roderick Fraser (hereinafter "Fire Commissioner") sent a letter to HRD stating that the Appellant was being bypassed for appointment to the BFD. The following reasons were given for bypassing the Appellant: (1) an open criminal record, (2) a poor driving record, and (3) that he was not a resident of Boston.
10. The Appellant's open criminal matter referred to a matter in South Boston Division of the Boston Municipal Court for operation after suspension of his driver's license. The matter was closed on December 21, 2006. (Exhibits 5 and 6)
11. The Appellant's Registry of Motor Vehicles record shows that he was cited for speeding on May 5, 1999 and on February 27, 2006, and was cited for failure to stop

on September 27, 2006. The Appellant was also involved in two (2) surchargeable traffic accidents, one on November 1, 2004, and one on October 4, 2005. (Exhibit 3)

12. The Appellant's license was suspended numerous times for failure to pay fines.

(Exhibit 3)

13. The Appellant's application listed his permanent residence as Dorchester,

Massachusetts. (Exhibit 1)

14. According to his Safety Insurance Company policy, from August 2004 to August 2006, the Appellant's car was registered to an address in Hanson, Massachusetts.

(Exhibit 4)

15. The Appellant did not list a Hanson, Massachusetts address on his application,

although he was asked to list "all residences in the past seven years including addresses while attending school, away from home, and all military addresses."

(Exhibit 1)

16. The Appellant, however, did list that he graduated from Whitman Hanson Regional High School on the application.

17. The Appellant did list four (4) previous residences on his application, the two (2) most recent locations being in Boston. (Exhibit 1)

18. On May 4, 2007, the City sent the Appellant a letter notifying him that he had been bypassed. (Testimony of Appellant)

19. On May 25, 2007, HRD sent the Appellant a letter which stated that he would be reported among the non-resident candidates on the Boston eligible list. (Testimony of Appellant)

20. The Appellant was also given a copy of the April 6, 2007 letter sent by the Fire Commissioner to HRD, which stated the reasons for his bypass. (Testimony of Appellant)
21. On June 15, 2007 the Appellant filed a timely appeal with the Commission.
22. On January 15, 2008 a full hearing was held at the Commission office.
23. At the hearing, BFD Human Resources Director Robert Moran testified that firefighters must live in the City in order to be hired, and that the Appellant did not indicate that he lived in the City. (Testimony of Robert Moran)
24. The Appellant and his aunt, Geraldine Sainato, both testified that they had lived together in Charlestown, Massachusetts for a period of time after the Appellant was discharged from the Marines in 2004. (Testimony of the Appellant, Testimony of Geraldine Sainato)
25. The Appellant testified that after living with his Aunt, in 2005 he moved to 289 West Fifth Street in South Boston, Massachusetts, where he lived for over a year. He then moved to 98 Boston Street in Dorchester, Massachusetts, where he resided at the time he applied for the firefighter position with the City. (Testimony of Appellant)
26. The 289 West Fifth Street in South Boston, Massachusetts and the 98 Boston Street in Dorchester, Massachusetts were listed on the Appellant's application. (Exhibit 1)
27. When the 98 Boston Street landlord was contacted by HRD as part of the Appellant's background investigation, he confirmed that the Appellant was his tenant. (Testimony of Appellant)

28. The Appellant further testified that his license and insurance were registered at his parent's address in Hanson, Massachusetts. He recently changed these registrations to his new address in Boston. (Testimony of Appellant)

CONCLUSION

The role of the 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 Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997). 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). 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 Civ. Serv. v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

It is a fundamental purpose of the civil service law to protect employees from arbitrary and capricious actions. Callanan v. Personnel Adm'r for the Comm., 400 Mass. 597, 601 (1987). 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 Commission to act. Cambridge at 304. All candidates must be adequately and fairly considered. The Commission will not uphold the bypass for an Appellant where it finds that “the reasons offered by the Appointing Authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.” Borelli v. MBTA, 1 MCSR 6 (1988). 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 probable than not sound and sufficient." Mayor of Revere v. Civil Serv. Comm’n, 31 Mass. App. Ct. 315 (1991); G.L. c. 31, § 43.

In the present case, the City has shown by a preponderance of evidence that the reasons for bypassing the Appellant to the position of full-time permanent firefighter were justified in regards to his poor driving record only. The City decided to bypass the Appellant for three reasons: (1) the Appellant had an open criminal record at the time he filed his application, (2) the Appellant has a poor driving record, and (3) the Appellant did not reside in Boston at the time he filed his application. Due to these reasons, the City determined that the Appellant is irresponsible and has poor judgment, making him ineligible to be a firefighter.

According to G.L. c. 31 §50, no person shall “be appointed to or employed in any such position within one year after his conviction of any crime except that the appointing authority may, in its discretion, appoint or employ within such one-year period a person convicted of ... a violation of any provision of chapter ninety relating to motor vehicles

which constitutes a misdemeanor.” Although the Appellant was involved in a pending criminal case at the time he applied to the City, it was a case of operating with a suspended license, a G.L. c. 90 offense. Therefore, as stated in c. 31 §50, a single traffic violation does not make the Appellant ineligible to be appointed as a firefighter.

The Appellant listed three addresses on his application which indicated he resided in Boston since September of 2004. He lived with his aunt, Geraldine Sainato, at 27 Tibbettsten Way, Charlestown, MA for three months after his discharge from the Marine Corp. He also listed two other addresses, in Boston. The only evidence contrary to the Appellant’s residency in Boston was an insurance policy that listed his parent’s address in Hanson, Massachusetts. Given that the Appellant was a Marine on active duty for four years, it is reasonable to infer that he was only recently able to change his insurance policy over to his new address.

The Appellant’s poor driving record is problematic. The Appellant has had numerous traffic violations for speeding and failure to stop. The Appellant was also involved in two surchargeable traffic accidents and his license was suspended numerous times for failure to pay fines. He also listed on his application that he had five hundred dollars worth of unpaid parking tickets.

. After considering all of the testimony and evidence in the record, I conclude that the City did establish just cause by a preponderance of the evidence for bypassing the Appellant to the position of full-time permanent firefighter.

For all of the above reasons, the appeal filed under Docket No. G1-07-216 is hereby *dismissed.*

Civil Service Commission

John E. Taylor
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Stein, Marquis and Taylor, Commissioners) on January 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. 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 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:
Robert McMaster (Appellant)
Jordan N. Ablon, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)