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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
SUCV2012-1752-A

BOSTON FIRE DEPARTMENT

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & another<sup>1</sup>

Memorandum of Decision and Order on  
Plaintiff's Motion for Judgment on the Pleadings

Plaintiff Boston Fire Department ("BFD") filed this action seeking judicial review, pursuant to G. L. c. 31, § 44, and G. L. c. 30A, § 14, of a final decision of the Civil Service Commission ("Commission"), regarding the residency of Daniel Gould ("Gould"), and his eligibility for Residency Preference under G. L. c. 31, § 58. This matter is before the court on the plaintiff's motion for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(C) and Superior Court Standing Order 1-96. For the following reasons, the BFD's motion will be allowed.

Background

The following was taken from the administrative record:

Gould applied to be a firefighter with the BFD by taking the Entry Level Firefighter Examination in June, 2006. In 2008, Gould <sup>was</sup> invited to submit a full application packet to the BFD along with a group of others who had passed the 2006. In his application, Gould included a request for preference based on his residency in Boston. The BFD performed a routine background check, and it concluded that Gould did not in fact reside in Boston at least one year prior to his taking the 2006 exam, as required by G. L. c. 31, § 58. As such, Gould was not given preference based on his residency, his name was not reached on the hiring list, and he was not

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<sup>1</sup>Daniel Gould

hired. In reaching its conclusion, the BFD relied on Gould's ties to the town of Lunenburg. Gould was a part-time firefighter in Lunenburg, his tax returns and forms all listed his father's home in Lunenburg as his own address, and his car was registered and primarily parked in Lunenburg.

After learning of the BFD's decision, Gould appealed to the Commission. The Commission scheduled an evidentiary hearing, but Gould did not appear. The Commission agreed that it would reschedule the hearing so long as Gould submitted all of his evidence in writing. The Commission stated that it would review Gould's evidence, and decide if an evidentiary hearing was necessary. Meanwhile, the parties were free to submit motions for summary decision if they so chose. Shortly after Gould submitted his evidence, the BFD filed a motion for summary decision, to which Gould responded with his own motion for summary decision. The Commission made a final request for supplemental information from the parties before deciding the motions. In sum, the BFD submitted all of the facts noted above, and Gould submitted: affidavits from himself and his aunt, who was also his landlady, stating that he lived in Boston in May, 2005 and commuted to Lunenburg; rent receipts; a copy of his driver's license listing his Boston address issued in May, 2005; jury and census forms; and W-2 forms all listing his Boston address.

The Commission decided the motions without a hearing. It granted Gould's motion for summary decision, and denied that of the BFD. The Commission ordered the BFD to correct its files to reflect Gould's status as a Boston resident for the purposes of preferred hiring, and to hire him as soon as a position opened. The BFD filed a motion to reconsider, which was denied. This appeal followed.

## Discussion

The party appealing an administrative decision bears the burden of demonstrating that the decision is invalid. Fisch v. Board of Registration in Med., 437 Mass. 128, 131 (2002); Bagley v. Contributory Retirement Appeal Bd., 397 Mass. 255, 258 (1986). The court is required to give due weight to the Commission's experience, technical competence, specialized knowledge, and statutorily conferred discretion. G. L. c. 30A, § 14(7); Brackett v. Civil Service Comm'n, 447 Mass. 233, 241-242 (2006). The court may only set aside an agency decision if it is legally erroneous, procedurally defective, unsupported by substantial evidence, or arbitrary and capricious. Id.; G. L. c. 30A, § 14(a)-(g). The court may not substitute its judgment for that of the agency, and "is not empowered to make a *de novo* determination of the facts, to make different credibility choices, or to draw different inferences from the facts found by the [agency]." Hotchkiss v. State Racing Commission, 45 Mass. App. Ct. 684, 651 (1988), quoting Pyramid Co. v. Architectural Barriers Board, 403 Mass. 126, 130 (1988).

The thrust of the BFD's argument is that the Commission failed to properly apply the standard for summary decision. "A motion for summary decision may be made when a party is of the opinion that there is no genuine issue of fact pertaining to all or part of a claim or defense, and he is entitled to prevail as a matter of law..." 801 Code Mass. Regs. 1.01(7)(h). As the language in the regulation mirrors that of Mass. R. Civ. P. 56, cases discussing summary judgment are instructive. In order to properly address the motions, the Commission must first determine if all of the material facts have been established. See Augat, Inc. v. Liberty Mutual Ins. Co., 410 Mass. 117, 120 (1991), and cases cited. the Commission "...should not consider the credibility of the witnesses or the weight of the evidence, nor should the [Commission] make

findings of fact.” Riley v. Presnell, 409 Mass. 239, 244 (1991) citing Attorney Gen. v. Bailey, 386 Mass. 367, 370 (1982).

Here, the question of where Gould physically resided was a material fact that was still in dispute. Gould provided evidence that he resided in Boston. The BFD provided evidence suggesting that Gould’s Boston address was mere pretext, and that he truly resided in Lunenburg. In deciding the motion for summary decision in favor of Gould, the Commissioner acknowledged that the parties disputed the fact of where Gould resided, which should have ended the summary decision question. See Augat, 410 Mass. at 420. The Commission went on however, to find that Gould lived in Boston, because he had provided evidence that was “clear and convincing”, Admin. R. 317, and that was “overwhelming and inherently credible ” Admin. R. 337. The Commission inappropriately weighed the evidence, made credibility determinations and found the ultimate fact in dispute, rather than making a determination based solely on the undisputed facts.<sup>2</sup> See Riley, 409 Mass. at 244; 801 Code Mass. Regs. 1.01(7)(h). By incorrectly applying the summary decision standard, the Commission made a decision based upon an error of law. G. L. c. 30A, § 14(7)(c).

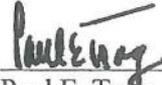
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<sup>2</sup>The court takes no position on the credibility or weight of the evidence in question. Such determinations are within the purview of the Commission.

Order

For the foregoing reasons, the BFD's motion for judgment on the pleadings is **granted**.

The case shall be **remanded** to the Commission for an evidentiary hearing.



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Paul E. Troy  
Justice of the Superior Court

April 25, 2013

notice sent  
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(mdj)