

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

MARK GILBODY,
Appellant

v.

G1-12-288

CITY OF QUINCY,
Respondent

Appearance for Appellant:

Joseph G. Donnellan, Esq.
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Appearance for Respondent:

Janet Petkun, Esq.
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Commissioner:

Cynthia Ittleman¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Mark Gilbody (hereinafter “Appellant”), filed an appeal on October 19, 2012, with the Civil Service Commission (“Commission”) alleging that the City of Quincy, the Appointing Authority (hereinafter “City” or “Respondent”), bypassed him for appointment to the position of Firefighter because the, “City refuses to recongnize (sic) my status as a veteran on civil list 00037”. (Administrative Notice) A pre-hearing conference was held on November 6, 2012 at the offices of the Civil Service Commission (“Commission”).

¹ The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

The Respondent filed a Motion to Dismiss (“Motion”) on November 6, 2012, and the Appellant filed an Opposition to the Motion to Dismiss (“Opposition”) on November 16, 2012. The Motion was denied on November 21, 2013. On January 2, 2013, the City filed a Motion for Transfer to the Division of Administrative Law Appeals (“Transfer Motion”). The Transfer Motion was denied on January 7, 2013. A full hearing was held on January 24, 2013 at the Commission. The hearing was digitally recorded. Copies of the recording were sent to the parties. Both parties submitted post-hearing briefs in the form of Proposed Decisions on: March 7, 2013 by the City, and March 11, 2013 by the Appellant. For the reasons stated herein, the Appellant’s appeal is denied.

FINDINGS OF FACT:

Three (3) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the City:

- Stephen J. McGrath, Quincy Director of Human Resources²;

For the Appellant:

- Robert Gilbody (father of Appellant Mark Gilbody)

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, a preponderance of the credible evidence, and reasonable inferences therefrom, establishes the following findings of fact:

1. At the pertinent time, Mark Gilbody was an applicant for the position of firefighter with the City. He was oversees on active duty with the U.S. military at the time of the Commission hearing.³ The Appellant joined the Army National Guard in 2009 and began

² Mr. McGrath is now deceased.

³ The commission may draw an adverse inference when an Appellant fails to appear but does not do so here because the Appellant was on active military duty.

serving in Qatar in June, 2012. His discharge was anticipated in September, 2013. His father, Robert Gilbody (“Mr. Gilbody”), represented the Appellant’s interests through power of attorney.⁴ Mr. Gilbody himself is a long serving and active member of the Quincy Fire Department. The Appellant took an open examination for the position of firefighter with the City in April, 2010, scoring a 98. (*Testimony of Gilbody*)

2. On August 7, 2012 the City filed a requisition with the State Human Resources Division (“HRD”), seeking a certification from an existing eligible list for the position of firefighter to fill twenty (20) vacancies. (*Exhibit 1, Testimony of McGrath*)
3. In response to this, HRD generated certification 00037 on August 16, 2012, and provided it to the City. The Appellant’s name appeared on this certification. Mr. Gilbody, with power of attorney to represent the Appellant, signed the Appellant’s name on the certification. The Appellant was ranked twenty-second (22nd) of those who signed the certification. (*Exhibit 2, Testimony of Gilbody*)
4. Soon thereafter, all candidates who were willing to accept appointment signed the certification, and received and returned their applications. Applicants had ten (10) days in which to fill out applications and return them. The City made conditional offers of employment to certain candidates, who took part in physical aptitude tests, physical examinations, and psychological examinations. Around this time, the City began conducting background checks of certain candidates. HRD informed the City the hiring process needed to be completed by November 30, 2012 since the list would expire on that date. (*Testimony of McGrath*)
5. The Appellant was called for active military duty in June, 2012. In September, 2012, the Appellant applied to HRD for veteran status. On September 28, 2012, HRD sent the

⁴ The Appellant was scheduled to return home in May, 2013.

Robert Gilbody a letter stating, “Per your request to be notified in writing, Mark Gilbody (ss#[redacted]) has been granted Veteran’s Status/Preference on the 2010 Firefighter exam eligible list as of 9/26/12. ...” (*Exhibit 3; Testimony of Gilbody*)

6. The Appellant is listed as a civilian on the certification issued on August 16, 2012. (*Exhibit 2*)
7. The City was notified of the Appellant’s status change from civilian to veteran in September, 2012. (*Testimony of McGrath and Gilbody*)
8. Shortly after the Appellant received notice from HRD that his status was changed to that of a veteran, Mr. Gilbody asked the City to ask HRD to issue a new certification to reflect the Appellant’s status as a veteran. The City did not request a new certification. (*Testimony of Gilbody and McGrath*)
9. The City had not appointed any candidates by October 19, 2012 when the Appellant filed this bypass appeal. (*Testimony of McGrath*)
10. In November, 2012, the City appointed nine (9) candidates from the certification. The nine (9) were listed as veterans on the certification. The lowest rank of the nine (9) candidates who were appointed was sixteenth (16th). Two (2) of the appointed candidates were on active military duty; both of those candidates appeared on the certification as veterans and, therefore, were higher ranked than the Appellant on the certification since he was listed on the certification as a civilian. (*Testimony of McGrath, Exhibit 2*)
11. Pursuant to the 2n+1 formula prescribed in PAR.09(1), as only nine (9) candidates were appointed, the City only needed to consider the first nineteen (19) candidates on the certification willing to accept appointment. The City did not consider the Appellant since he was twenty-second (22nd) on the certification as a civilian. (*PAR.09, Exhibit 2*)

12. The Appellant filed the instant appeal on October 19, 2012. (*Administrative Notice*)

Discussion

Applicable Law

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.” Cambridge v. Civil Service Comm’n, 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 Comm’n, 31 Mass.App.Ct. 315 (1991). G.L. c. 31, § 43.

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. *See* City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 189 (2010). “In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” *Id.* at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass.

814, 823 (2006). Further, “[t]he commission does not act without regard to the previous decision of the appointing authority, but rather decides whether 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.” *Id.* at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. Beverly at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone ... than in disciplining an existing tenured one.” *See* City of Attleboro v. Mass. Civil Serv. Comm’n, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly at 191. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” *Id.* (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)).

In order to be considered for appointment to the position of firefighter, individuals must first pass a civil service examination. Upon doing so their names are placed on an eligible list. G.L. c. 31, § 6. An appointing authority that wants to make appointments to the official service, is required to submit a requisition to HRD in this regard in a timely manner, whereupon HRD is required to certify from the eligible list “sufficient names of persons for consideration ... by the appointing authority,” pursuant to G.L. c. 31, § 25 and the PARs. *Id.*; *see* G.L. c. 31, § 25,

regarding eligible lists and certification. Upon certification by HRD of a list of eligible persons, the appointing authority “... may appoint only from the first $2n+1$ persons named in the certification willing to accept appointment ...,” with “n” being the total number of appointments to be made. PAR.09(1); see PAR.08(1). Pursuant to G.L. c. 31, §26, “the names of persons who pass examinations for original appointment to any position in the official service shall be placed on eligible lists in the following order: (1) disabled veterans...; (2) veterans ...; (3) widows or widowed mothers of veterans who were killed in action or died from a service connected disability incurred in wartime service; (4) all others, in the order of their respective standings.”

Analysis

A review of the pertinent documents filed in this case indicates that the City did not bypass the Appellant. Overshadowed by the averments is the fact that the Appellant was not reachable on the certification. Although the City requested a certification to fill twenty (20) vacancies, it only appointed nine (9) firefighters before the list from which the certification was generated.⁵ Pursuant to PAR.09(1)’s $2n+1$ formula, the City only needed to consider the first nineteen (19) individuals who signed the certification and were willing to accept appointment in order to appoint nine (9) individuals. Since the Appellant ranked twenty-second (22d) on the certification as a civilian, he was not reached for consideration. The lowest ranked person on the certification to be selected was ranked sixteenth (16th). Consequently, the Appellant was not reached and was not bypassed.

⁵ HR Director McGrath’s affidavit, dated November 1, 2012, submitted in support of the City’s Motion to Dismiss, states that, “There are seven vacancies and more are expected in the near future. ... Thirteen people are being processed and have already undergone background checks and psychological examinations. They are awaiting the last step, which is the physical ability test. ... The appellant is twenty-second on the list and was not processed....” Motion to Dismiss, Affidavit of HR Director McGrath. There is no indication that the City appointed other individuals from the certification before the eligible list from which the certification was generated expired at the end of November, 2012.

The Appellant asserts that he should have been considered as a veteran, not a civilian, since HRD sent his father a letter stating that he was a veteran and, pursuant to the federal Uniformed Services Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C. §§ 4301-4333, the City should have considered him because he was on active military duty when the City was processing the candidates. The argument that the Appellant should have been considered by the City as a veteran, not a civilian, asserts that the City was obliged to ask HRD to request a new certification on which, presumably, the Appellant’s name would appear at a higher rank as a veteran and he would have had a better chance of being selected. However, there appears to be no legal authority requiring the Appointing Authority to request the issuance of another certification under these circumstances. Further, as the City averred, it did not learn that HRD indicated that the Appellant was a veteran in late September until thereafter, by which time it was mid-way in processing candidates on the certification provided by HRD in August. In addition, as the City asserted, with the eligible list about to expire in November, there was insufficient time to begin the process anew and it would be unfair to candidates on the existing certification to do so. The argument that the City violated USERRA because it failed to consider the Appellant for appointment because he was on active military duty also fails because he did not fall within the 2n+1 (or the first 19 candidates who signed the certification) and he was not reached.⁶

⁶ In its Motion to Dismiss, the City asserted, “It is unknown if the appellant would have been appointed. Because he is on active duty, he is unavailable for the process. He cannot be interviewed or subject to psychological examination and the physical ability test.” Motion, p. 3. The City did not make this argument in its recommended decision. The Commission has noted that under USERRA such reasons may not be applied to candidates who are on active military duty, pursuant to McLain v. Somerville, 424 F.Supp.2d 329 (D. Mass. 2006).

CONCLUSION

For the above reasons, the Appellant’s appeal under Docket No. G1-12-288 is hereby

denied.

Civil Service Commission

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on May 29, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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)(l), 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 (30) 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:
Joseph G. Donnellan, Esq. (for Appellant)
Janet Petkun, Esq. (for Respondent)
John Marra, Esq. (HRD)