

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

LOUIS SHELTON,
Appellant,

v.

G1-11-15

SPRINGFIELD FIRE DEPARTMENT,
Respondent.

Appearance for Appellant:

Pro Se

Louis Shelton

Appearance for Respondent:

Jeffrey R. Krok, Esq.¹

City of Springfield

Labor Relations Department

36 Court Street, Room 005

Springfield, MA 01103

Commissioner:

Christopher C. Bowman²

DECISION

On January 15, 2011, the Appellant, Louis Shelton (Mr. Shelton), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD), to accept the reasons offered by the Respondent, Springfield Fire Department (City) as Appointing Authority for bypassing him for original appointment as a permanent, full-time firefighter. A pre-hearing conference was held on February 9, 2011 at the Springfield State Building in Springfield and a full hearing was held at the same location on February 18, 2012. One CD was made of the hearing and copies were

¹ Attorney Krok, subsequent to submitting a post-hearing brief, informed the Commission that he now works for a different municipality. Thus, this decision is being forwarded to City Solicitor Peter Fenton.

² The Commission acknowledges the assistance of Legal Intern Mary B. Flaherty in the preparation of this Decision.

sent to both parties. The parties submitted post-hearing briefs on March 7, 2012 (Appellant) and March 9, 2012 (City).

FINDINGS OF FACT:

Six (6) exhibits were entered into evidence at the hearing. Based on those exhibits, the stipulated facts, all relevant findings, conclusions and documents related to the Commission's Investigation of the 2010 / 2011 Review and Selection of Firefighters in the City of Springfield, 24 MCSR 627 (2011)³, and the testimony of:

Called by the Appointing Authority:

- Joseph Conant, Acting Commissioner, Springfield Fire Department;
- Thomas Belton, Director of Veterans' Services, Springfield Health and Human Service Department;

Called by the Appellant:

- Louis Shelton, Appellant;

I make the following findings of fact:

1. At the time of the hearing, Mr. Shelton was thirty-three (33) years old. He is single, resides in Springfield and has worked for the City of Chicopee's Department of Public Works for the past five (5) years. (Testimony of Appellant; Exhibit 1)
2. Mr. Shelton enlisted in the United States Navy for five (5) years, beginning in March 2001. During most of his enlistment, he served aboard the USS George Washington in Virginia. (Testimony of Mr. Shelton)
3. In the late Summer or early Fall of 2004, Mr. Shelton's mother passed away. He was given bereavement leave and drove home from Virginia to Springfield to attend his mother's funeral services. (Testimony of Mr. Shelton)

³ I took administrative notice of the Commission's investigation at the outset of the hearing.

4. After the funeral services, Mr. Shelton drove back to Virginia and stayed at a hotel near the USS George Washington. He was in regular communication with his father and brother, who were involved in a contentious family dispute. Mr. Shelton was experiencing stress and anxiety as a result of this dispute. While staying at the hotel, Mr. Shelton smoked marijuana twice over a two-day period. Prior to this occasion, Mr. Shelton had only smoked marijuana while in high school. (Testimony of Mr. Shelton)
5. One (1) month after returning to the USS George Washington, Mr. Shelton was subject to a random “Command-wide” urine drug test. He tested positive for marijuana. (Testimony of Mr. Shelton)
6. As a result of testing positive for marijuana, Mr. Shelton was initially demoted in rank and sentenced to fifteen (15) days in the “brig” of the ship. He then received an “Other Than Honorable” discharge from the Navy on February 8, 2005 based on the same reason. (Testimony of Mr. Shelton)
7. In 2008, Mr. Shelton took and passed the civil service examination for firefighter in the City of Springfield. (Stipulated Fact)
8. On April 12, 2010, Mr. Shelton’s name appeared on a Certification that the City requested as part of a 2010 / 2011 review and selection process for permanent full-time fighters. Mr. Shelton signed the Certification indicating his willingness to accept appointment. (Stipulated Fact)
9. On May 20, 2010, Mr. Shelton completed a Recruit Candidate Information Form. As part of this form, he indicated that he had received an “Other Than Honorable” discharge from the Navy. (Exhibit 1)

10. Question D on Page 7 of the Information Form asks: “Have you ever used an illegal drug?”.

Mr. Shelton checked “Yes”. (Exhibit 1)

11. Deputy Fire Chief Jerrold Prendergast, who serves as the Fire Department’s Chief of Administration, conducted the background investigation on all firefighter candidates.

(Exhibit 1 and Investigation Findings)

12. Deputy Prendergast’s son, Zachary Prendergast, was also a candidate for permanent, full-time firefighter. Zachary Prendergast was ranked lower than Mr. Shelton on the Certification. (Exhibit 4 and Investigation Findings)

13. As part of another bypass appeal regarding this same hiring cycle, another candidate questioned why Deputy Prendergast was involved with the review and selection process if his son was among the candidates being considered for appointment. (Investigation Findings)

14. The Commission subsequently placed all of the bypass appeals related to this hiring cycle in abeyance and opened an investigation under G.L. c. 31, § 2(a). (Investigation Findings)

15. On December 15, 2011, the Commission issued Findings, Conclusions and Orders related to that investigation. Among the findings and conclusions were that:

- Deputy Chief Prendergast’s direct involvement in the review and selection process compromised the Fire Department’s ability to ensure open consideration of all candidates for the position of firefighter.
- Deputy Chief Prendergast inappropriately conducted the background investigations on all candidates, including that of his son.
- There is strong circumstantial evidence to suggest [that] improprieties in the process tipped the scales in favor of appointing Deputy Chief Prendergast’s son over other candidates. (Investigation Conclusions)

16. Zachary Prendergast was required to fill out the same Recruit Candidate Information Form as Mr. Shelton and all other candidates. (Investigation Documents)

17. As referenced above, Question D on Page 7 of the Information Form asks: “Have you ever used an illegal drug?” Zachary Prendergast is the only candidate who did not answer this question. There is no documentation to show that Deputy Prendergast, who conducted his son’s background investigation, followed up on this question and/or reported his son’s failure to answer this question to the Fire Commissioner before Zachary Prendergast was appointed. (Investigation Documents)⁴
18. All candidates should have been required to answer the question related to drug use as part of the background investigation. (Testimony of Acting Commissioner Conant)
19. On September 1, 2010, then-Fire Commissioner Gary Cassanelli forwarded correspondence to HRD requesting that Mr. Shelton, whose name was ranked above Zachary Prendergast, be bypassed for appointment. As part of the reasons to justify the bypass of Mr. Shelton, Commissioner Cassanelli wrote:
- “It is my opinion that the public expects firefighters to be held to a higher standard of conduct than the general public and that they will exercise good judgment in order to perform their duties and responsibilities properly. These responsibilities include but are not limited to ensuring that the public is safe and enforcing the Commonwealth’s fire prevention and arson laws, and, when encountering violations of these fire prevention and arson laws, including those that may be criminal, to issue citations as well as initiate court actions. His unacceptable conduct and judgment regarding the laws governing the use of marijuana may affect his credibility in court and may impact the trust and feeling of safety within the City.” (Exhibit 2)
20. HRD approved the reasons for bypass and this appeal ensued. (Stipulated Facts)

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is

⁴ Acting Commissioner Conant, who was not involved in this hiring process, testified as a witness for the City. During his testimony, I showed him a copy of Zachary Prendergast’s application and asked him to confirm that Mr. Prendergast failed to answer this question. He reviewed the application and confirmed that this question was not answered.

charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. at 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 1. 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. Cambridge at 304.

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 at 304. 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).

Bypass cases are decided based on 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, section 43.

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).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 824-826 (2006). The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Beverly citing Cambridge at 305, and cases cited.

ANALYSIS

The Commission’s 2011 investigation regarding this hiring process showed that Deputy Chief Prendergast’s participation compromised the Fire Department’s ability to ensure open consideration of all candidates for the position of firefighter. In summary, his actions tipped the scales in favor of appointing his son.

The events regarding the instant appeal provide a stark example of how Deputy Prendergast’s involvement tainted the process. Mr. Shelton, who was ranked above Deputy Prendergast’s son on the civil service Certification, was bypassed for appointment for reasons related to his use of marijuana, which resulted in him receiving an “Other Than Honorable” discharge from the United States Navy. Then-Commissioner Cassanelli was unequivocal in his reasons for bypass, writing that Mr. Shelton’s “unacceptable conduct and judgment regarding the laws governing the use of marijuana may affect his credibility in court and may impact the trust and feeling of safety within the City.”

Those words would carry more weight and may show that the City acted reasonably in bypassing Mr. Shelton had the same standard been applied to Deputy Prendergast's son. As noted in the findings, Zachary Prendergast failed to answer the question on the application related to drug use. He then submitted his application to his father, Deputy Prendergast, who was responsible for reviewing the application and conducting the background investigation. There is no documentation to show that Deputy Prendergast ever followed-up on this non-response or that he informed Commissioner Cassanelli of his son's failure to answer this question. There is no evidence to suggest – and I make no such inference – that Zachary Prendergast has ever used illegal drugs. That is not the issue here. Rather, the issue is whether the City can justify bypassing other, higher-ranked candidates for reasons related to illegal drug use, when it failed to even require a response to this question from Deputy Prendergast's son.

The inherent problems with these troubling events is self-evident and reinforces the findings and conclusions from the Commission's investigation that other candidates, including Mr. Shelton, did not receive the fair consideration that *any* credible, merit-based system requires.

CONCLUSION

For all of the reasons cited above, Mr. Shelton's appeal under Docket No. G1-11-15 is hereby *allowed*.

Pursuant to the Commission's authority under Chapter 310 of the Acts of 1993 and consistent with the orders from the 2011 Investigation, the Commission orders the following:

- The state's Human Resources Division (HRD), shall place the name of Louis Shelton at the top of any future certifications for the position of permanent full-time firefighter in the City of Springfield until such time as he is appointed or bypassed.
- Deputy Prendergast shall play no role in the background check and/or interview of Mr. Shelton and, in regard to the next hiring cycle, any candidates for original appointment to position of firefighter.

- In regard to the next hiring cycle in which Mr. Shelton is considered for appointment, (a) candidate interviews must be conducted by a panel to be selected and arranged by an independent outside individual or firm that has experience in the review and selection of public safety personnel in Massachusetts; (b) neither the outside individual or firm, nor any member of the interview panel shall have any present or prior contractual, employment or familial relationship to employees of the Springfield Fire Department or to any of the candidates; (c) the candidates will be provided, also reasonably in advance of the interview, a description of the criteria by which their credentials and their interview performance will be evaluated; (d) the evaluation criteria shall be established by the independent individual or firm selected to arrange the interviews, and shall contain such procedures and criteria that the outside individual or firm deems appropriate in consideration of a candidate for firefighter, provided that the Fire Commissioner may contribute his input to the independent individual or firm as to any aspect of the interview process, including evaluation criteria, as he deems appropriate; (e) the interview panel shall render a written report of the interviews to the Fire Commissioner; and (f) the written report shall include a specific rating of each candidate's performance in each component or question during the interview, an overall ranking of the candidates, and a description of any unique positive and/or negative qualities or experience noted about any of the candidates.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on September 20, 2012.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten 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-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:

Louis Shelton (Appellant)

Peter Fenton, Esq. (for Springfield Fire Department)

John Marra, Esq. (HRD)

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SPRINGFIELD FIRE DEPARTMENT,
Respondent

OPINION OF COMMISSIONER STEIN CONCURRING IN RESULT

I concur in the conclusion but write to express my view that, on the record presented, I have grave concern that, on the merits, the reasons given for bypassing Mr. Shelton for appointment as a firefighter can be shown to pass muster under basic merit principles. Essentially, he was bypassed for a single episode of self-admitted marijuana use, while on leave from military duty to attend to the death of his mother in 2004, approximately six years before his bypass. There is no evidence of subsequent substance abuse, and, presumably, all candidates for appointment to the Springfield firefighter force are required to pass a drug test to verify their current drug-free status. While I do not have the benefit of the full evidentiary record and credibility assessments available to the Commissioner hearing the appeal, and while the fact that this episode resulted in a “Less Than Honorable” discharge from the Navy, without more in the military record or in the evidence, I would find it improbable that I would be inclined to uphold a bypass of Mr. Shelton, solely for having used marihuana, off-duty, to relieve the stress of the death of a parent (and, in circumstances that, today, in Massachusetts, would not appear to have been criminal),

Paul M. Stein
Commissioner