

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

REDOUANE SAMIH,
Appellant

v.

**WALTHAM FIRE
DEPARTMENT,**
Respondent

Case No.: G1-13-160

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. The Appellant submitted written objections to the Tentative Decision and the Respondent submitted a response to the Appellant's objections.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Waltham Fire Department to bypass Mr. Samih for original appointment to the position of firefighter is affirmed and Mr. Samih's appeal under Docket No. G1-13-160 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on June 12, 2014.

A true record. Attest.

Christopher C. Bowman
Chairman

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)(1), 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 to:

Brian Simoneau, Esq. (for Appellant)

Luke Stanton, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk. ss.

Division of Administrative Law Appeals

**Redouane Samih,
Appellant**

v.

Docket Nos. **CS-13-535** (DALA),
G1-13-160 (Civil Service

Commission)

**Waltham - Fire Department,
Respondent/Appointing Authority**

Dated:

Appearance for Appellant:

Brian E. Simoneau, Esq.
161 Worcester Road, Suite 200
Framingham, MA 01701

Appearance for Appointing Authority:

Luke Stanton, Esq.
City of Waltham Law Department
119 School Street
Waltham, MA 02451

Administrative Magistrate:

Sarah H. Luick, Esq.

Summary of Tentative Decision

The Respondent was justified in bypassing the Appellant for an original appointment to Firefighter. There was no pre-textual reason for the Appellant's bypass. The hiring process was the same for all the candidates. The Appellant failed to list his full driving record in his application. The Appellant was not forthcoming when questioned about his interactions with police. The Appellant posed for a photograph in the jacket and hat of a Massachusetts State Trooper while next to the Trooper's cruiser. I recommend that this bypass appeal be dismissed.

TENTATIVE DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Redouane Samih, filed an appeal with the Civil Service Commission on July 19, 2013 to review the merits of the June 28, 2013 decision of the Appointing Authority, the City of Waltham, to bypass him for an original appointment to

the position of Firefighter. G.L. c. 31, § 27. (Exs. 11 & 12.) Pursuant to 801 CMR 1.01(11)(c), a hearing was held on November 1 and December 11, 2013 at the offices of the Division of Administrative Law Appeals (DALA), One Congress Street, 11th Floor, Boston, MA 02114. The hearing was digitally recorded with copies provided to the parties. Various documents are in evidence. (Exs. 1 – 17.) The parties entered into some stipulations and an agreed set of exhibits. (Exs. D & E.) The Commonwealth's Human Resources Divisions did not appear at the hearing, but provided certified list information. (Ex. C.) The Respondent presented the testimony of Deputy Chief Michael J. Quinn, Captain Timothy Pratt and Lieutenant Scott Perry, all of the Waltham Fire Department. The Appellant testified on his own behalf. The parties filed pre- hearing briefs and post-briefs by January 24, 2014 whereupon the administrative record closed. (Exs. A & B.)

FINDINGS OF FACT

Based on the evidence presented and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. Redouone Samih, born in 1985 in Morocco, came to the United States in 2005 with a high school level education. He can speak Arabic and French, and is self-taught in English. He started a business course at Quincy College, attending between January and May 2009, but did not complete the course because he lacked the time and funding to do so. He has never been married. He has a girlfriend of about three years. He has lived in Waltham from 2006. He has been renting the same apartment from 2008. (Exs. 4 & 8. Testimony of Samih.)

2. Mr. Samih began employment in June 2005 with Pro-Tech Automotive in Waltham, and left there in April 2012. He began pumping gas and advanced to work inside the store and to

drive tow trucks. In July 2012 he began his current employment at Mal's Service Center in Lexington as a tow truck driver and a shop assistant. (Exs. 4 & 8. Testimony of Samih.)

3. Mr. Samih has no criminal record and has a satisfactory credit rating. He does not use and has not experimented in the use of illicit drugs, and has no smoking history. Mr. Samih took training and became certified in CPR/AED (expired July 2013). In 2011, he took a Special Police Officer Training Course, and had training at a Waltham Police Citizen's Academy. He has a Statewide Towing Association Light Duty Driver certification that expires in March 2015. He has three handguns and a rifle that are secured and locked in his apartment as required. In terms of hobbies, Mr. Samih raises Canaries, hunts and does target shooting. (Exs. 4, 5, 6 & 8. Testimony of Samih.)

4. Mr. Samih has a current Massachusetts driver's license and has experience driving on the roads of Waltham as part of his tow truck driving experience. He has experience at the scenes of motor vehicle accidents when there has been need to tow vehicles. (Exs. 4, 7 & 8. Testimony of Samih.)

5. Mr. Samih has been seeking public service employment. He applied to take civil service examinations; in 2009 for Police Officer, in 2010 for Firefighter, in 2011 for Police Officer, and in March 2013 for Police Officer and State Trooper. "Mr. Samih had sent a letter to the Mayor [of Waltham] a few years ago inquiring why he was not hired by the Waltham Police." (Ex. 8.) He wanted to talk to the Mayor about this but was not given this opportunity. Mr. Samih took and passed with a score of 99, the April 28, 2012 Civil Service Firefighter Examination that placed him on certified list #00508. (Exs. E, 3, 4 & 8. Testimony of Samih.)

6. In 2013, the City of Waltham sought to appoint twelve Firefighters – original appointments. The City received from the Commonwealth's Human Resources Division a certified list, #00508, of persons ranked highest to lowest based on their scores on the Firefighter examination. The actual scores of each person were not listed. Some ranks

contained a number of persons. The hiring process involves considering those ranked highest on the list first and then reaching lower ranked persons as needed. Mr. Samih ranked sixth along with seven others on this certification. All persons having the same rank receive the same consideration. Four persons ranked fifth, four persons ranked first, second, third and fourth. Mr. Samih signed that he would accept the appointment if offered to him. The Appointing Authority for the City of Waltham is the Mayor but the hiring process is handled by the Fire Chief. The Mayor signs-off on the Fire Chief's recommended candidates. The Waltham Fire Chief had a conflict-of-interest because his son was on this certified list. Therefore, Deputy Chief Michael Quinn was put in charge of the hiring process. Deputy Chief Quinn had prior experience in working on a hiring process for Waltham Firefighter appointments, and had risen through the ranks of the Waltham Fire Department with thirty-five years of experience. Also serving in the hiring process was Captain Timothy Pratt with nineteen years of Waltham Firefighter service, Lieutenant Scott Perry with nineteen years of Waltham Firefighter service, another Waltham Lieutenant Firefighter, and a representative from the Waltham Human Resources Department. (Exs. E, 1, 2, 14, 15 & 16. Testimony of Quinn, Pratt, Perry & Samih.)

7. The announcement for the examination for the position of Firefighter lists the following expectations and duties to do the job:

Firefighters often perform risky and physically demanding duties under emergency conditions ... work under supervision, often as a member of a team, to respond to fires and other emergencies ... [D]uties may include ... connecting, pulling, and operating hose lines; operating a pump; positioning and climbing ladders; emergency rescue and lifesaving; ventilating smoke-filled areas; using and maintaining tools and equipment; training; and fire station activities.

The entrance requirements for the position include being at least nineteen years old, to take and

pass the written examination, to demonstrate physical fitness to accomplish firefighting tasks, and to pass a physical abilities test. There is a smoking prohibition. The candidate must have a valid Massachusetts driver's license to be able to drive the fire engines. A candidate

interview is a required part of the hiring process. (Ex. 17. Testimony of Quinn, Pratt & Perry.)

8. Good character in one's conduct is something expected in a Firefighter, and is a requirement that is part of the information provided to the Firefighter job candidate in the examination announcement.

A candidate may be disqualified for evidence of character clearly unsuited for fire services. Most appointing authorities include a comprehensive background check as part of the selection process.

(Ex. 17. Testimony of Quinn.)

9. All candidates for one of the twelve original appointments to the position of Waltham Firefighter had to go through the same hiring process. This process included a four to six hour orientation session about the hiring process. (Testimony of Quinn, Pratt & Perry.)

10. Mr. Samih was provided with the multi-page application form used in the hiring process that he completed on April 8, 2013. He was aware of the need to make full disclosures in answering the application questions, and not to be at all misleading in his answers. (Ex. 4. Testimony of Quinn, Pratt, Perry & Samih.)

11. When he addressed the application questions about his driving record, there was no information he received that his official record would be viewed by the Police Officer doing a background investigation. Mr. Samih did not attempt to secure his official driving record before answering these application questions, nor did he receive an instruction to secure it. One question asked if his license had ever been suspended or revoked. He answered no. The application asked if he had ever received a traffic citation, he answered yes and listed one offense for "Defective Equipment" with no further explanation. (Ex. 4. Testimony of Samih.)

12. Like other candidates, Mr. Samih's background was investigated by a Waltham Police Officer who checked on the veracity of his application answers, did a criminal

background and driving record investigation, and explored his work, education, and social history. The investigation also included speaking with the candidate. The investigating officer did not participate in the Fire Department hiring interview, but provided an extensive report on the investigation of the candidate to the hiring evaluation group. (Exs. E, 4 & 8. Testimony of Quinn, Pratt & Perry.)

13. Officer Matthew Abbondanzio performed the investigation on Mr. Samih. He submitted his report on May 30, 2013. Officer Abbondanzio found that Mr. Samih has a driving record that includes: speeding in June 2006 and February 2008; a license suspension because of a payment default in October 2008; no inspection sticker in July 2010, and a traffic/safety violation in September 2010. Officer Abbondanzio noted in his report that he asked Mr. Samih why he only listed a 'Defective Equipment' traffic citation in his application, and was told he had forgotten about these other citations. Mr. Samih also added that he had been stopped on May 13, 2013 and given a verbal warning about a lane violation. Officer Abbondanzio considered whether Mr. Samih had just decided these other citations were not "a big deal," but concluded that Mr. Samih had not tried to hide the citations from being discovered. (Exs. 4 & 8. Testimony of Samih.)

14. Officer Abbondanzio found various police reports involving Mr. Samih. On April 4, 2008, Mr. Samih's vehicle was parked across the street from Pro-Tech Automotive where he was employed. Another vehicle struck it causing minor damage. A police report was filed. Officer Abbondanzio asked Mr. Samih at his investigation interview about this incident and Mr. Samih explained what he recalled about it. Officer Abbondanzio noted in his report that Mr. Samih was the "victim in this incident, and not involved any further." (Ex. 8. Testimony of Samih.)

15. On October 8, 2008, Officer Abbondanzio found a police report was made on a

pedestrian at Pro-Tech Automotive having been hit in the back of his legs in the parking lot.

At

the time, Mr. Samih was questioned by an investigating Waltham Police Officer and said he did not know about this incident. The alleged victim had come to the police station using crutches when reporting this, but was seen by the investigating Officer a few days later walking with no limp. No citations were issued. Officer Abbondanzio questioned Mr. Samih about the incident. Mr. Samih said he only vaguely recalled it. After some prompting from Officer Abbondanzio, Mr. Samih explained that preceding the incident, he and a co-worker while at work “had exchanged words,” and that later, a claim was made that Mr. Samih ran over the foot of his co-worker’s brother as Mr. Samih drove his car to the gas pump. Mr. Samih told Officer Abbondanzio that this was a set-up to cause him trouble and gain insurance money. Mr. Samih told Officer Abbondanzio that he never faced any civil lawsuit and was never contacted by any insurance company. Officer Abbondanzio wrote in his investigation report that he was still unsure what had happened, and also that he was not sure why Mr. Samih had initially failed to recall the incident. Officer Abbondanzio investigated further and spoke to the persons involved in the incident. From them he learned that Mr. Samih was joking by driving toward the man, but that he drove over the side of his foot causing some swelling with recovery within a few days. These persons told Officer Abbondanzio that Mr. Samih meant no harm and is a “good guy and the accident was in the past.” Another participant in the event was contacted by Officer Abbondanzio who confirmed the incident was just an accident and that Mr. Samih was never set-up to get his insurer to pay out money damages. (Ex. 8. Testimony of Samih.)

16. Officer Abbondanzio uncovered that on July 15, 2010, Mr. Samih reported to the Waltham Police that two license plates had been taken off his vehicle while it was parked at Pro-

Tech Automotive's parking lot for a few months. There were no known suspects. Officer Abbondanzio spoke to Mr. Samih about this police report, and said the report was true, and also that his car window had been smashed and his car stereo was stolen. He explained that he did not report this additional damage and theft because "he only had basic insurance coverage on the car and the radio would not be covered anyway." Officer Abbondanzio learned the plates were never recovered. (Ex. 8. Testimony of Samih.)

17. Officer Abbondanzio uncovered a Waltham police report that on September 7, 2010,

Mr. Samih reported his vehicle as stolen from his residence with no suspects to report. No issue was included in the police report to point toward this being an insurance scam. He asked Mr. Samih about this. Mr. Samih told Officer Abbondanzio that his insurance company had done an investigation and had issued him a check for \$6,000. (Ex. 8. Testimony of Samih.)

18. Officer Abbondanzio uncovered a Lexington police report that on January 27, 2012,

while Mr. Samih was driving a Pro-Tech tow truck, a motorist reported that she had been hit by him from behind when she stopped to let an oncoming vehicle turn in front of her vehicle. Mr. Samih had not anticipated her stopping and could not stop the tow truck in time. There were no injuries, no vehicle needed towing, and no citations were issued. (Ex. 8.)

19. Officer Abbondanzio uncovered a Belmont police report that on December 13, 2008,

an Officer responded to a supermarket parking lot on a complaint that a couple (Mr. Samih his girlfriend) were in a verbal argument. The Officer separated them, interviewed them, and concluded that no crime had occurred. Officer Abbondanzio spoke to Mr. Samih about this incident. Mr. Samih explained that his girlfriend called him to meet her at this parking lot.

When he arrived, she was in her car and he entered it. They began a verbal argument that someone must have seen or heard, and the police were called. Officer Abbondanzio contacted this former girlfriend who explained that she called him to tell him she wanted to break-up with him. She explained that she had tried to do this before but “he would ‘verbally manipulate’ her into not leaving him.” In terms of the parking lot incident, after again telling him she wanted to break-up with him, he became very angry and “grabbed her by the back of the neck” to force her to look at him while he yelled, ‘look at me’.” She told Officer Abbondanzio she became “extremely nervous,” and that when the Officer approached them, Mr. Samih told her “he ‘would do all the talking’.” She recalled that the Officer spoke to both of them and then left. When Officer Abbondanzio confronted Mr. Samih with this information he said that she had made up the physical touching part of the argument and that she “does not like him.” Mr. Samih’s account of not becoming physical with the woman was believed by Officer Abbondanzio. (Ex. 8. Testimony of Samih.)

20. Mr. Samih listed Massachusetts State Trooper John Arone as a reference on his application. He had texted with Trooper Arone on April 7, 2013 asking him to be a reference for him for the job of Waltham Fire Fighter. Trooper Arone agreed. Officer Abbondanzio spoke with Trooper Arone who reported that he only casually knew Mr. Samih over several years, getting to know him when he began fueling his cruiser at Pro-Tech Automotive. He told Officer Abbondanzio that Mr. Samih was a “good guy, but someone that tries too hard to impress people ... is sometimes arrogant and is too casual in interacting with police on a day to day basis.” Trooper Arone mentioned an incident he recalled occurring about four months prior that had concerned him.

While fueling up his cruiser ... Mr. Samih approached ... [him] and showed him several cell phone pictures which showed Mr. Samih in a Massachusetts State Police rain jacket and hat, posing next to a State Police cruiser.

Mr. Samih acknowledged to Trooper Arone that he had not received permission to pose for a

photograph in the Trooper's uniform, but that "he was only joking and did not see any harm in it." Because this photograph made Trooper Arone upset, he wondered why Mr. Samih would use him as a reference. During his interview with Mr. Samih, Officer Abbondanzio raised this matter and asked to see the photographs. They were still on his cell phone and he showed them. Officer Abbondanzio confirmed they were of Mr. Samih posing in front of the cruiser in a State Police rain jacket and hat.

Mr. Samih told me that his current employer, Mal's Towing, often works on State Police vehicles. He said the Trooper that owned the car had no knowledge that Mr. Samih had entered his cruiser and put on his jacket and hat. Mr. Samih said he only did it as a joke and meant no harm. He admitted that what he did was wrong and deleted the photos in front of me.

(Ex. 8. Testimony of Samih.)

21. Officer Abbondanzio made a surprise visit to Mr. Samih's apartment on May 16, 2013 once he saw Mr. Samih had arrived home from work. Mr. Samih invited him inside.

No

one else was in the apartment. Officer Abbondanzio found "the apartment was extremely messy ... clothing thrown all over the floors and trash around the apartment." Mr. Samih told him to excuse the mess and that most of the clothing and items belonged to his visiting sister.

He also explained that he works so much he has little time to do cleaning. Officer

Abbondanzio found that the apartment "smelled of animals." Mr. Samih showed him "a small room of Canary cages." He saw

about 40 Canaries in various cages. Mr. Samih opened one cage, took hold of a Canary that was dead, and tossed it in a small barrel in the kitchen where another dead Canary had been placed probably days before.

(Ex. 8.)

22. Officer Abbondanzio asked Mr. Samih why he wanted to be a Firefighter.

He told me ever since he was little, that is all he wanted to do. He appreciates what they do for a living, and he wants to help people. Mr. Samih said that he also wants to become a Firefighter because people like Firefighters, and in turn, people would like him. He finally added that he enjoys driving large trucks.

Officer Abbondanzio asked Mr. Samih to explain why he pursued a Police Officer position including doing some police training if he wanted to be a Firefighter, and why he had said during his orientation interview a month ago that “he would take whatever came first, police or fire.” Mr. Samih responded:

[H]e [would] rather be a Firefighter, because the public respects them more than Police ... if he gets hired by the Waltham Fire Department, he would no longer take the Police Civil Service Test.

(Ex. 8.)

23. Officer Abbondanzio spoke to Mr. Samih’s supervisor at Mal’s Service Center who noted how the business “has contracts with several police agencies to do their daily police initiated tows,” and that he “is proud of his employees and the high standards he holds them to.” He told Officer Abbondanzio that “Mr. Samih was a hard worker, and was not afraid to put extra hours in, when needed.” But, he reported having some concerns about his “work performance.” He mentioned that due to “his communications skills on their two-way radio system ... dispatchers could not understand Mr. Samih ... and it was an ‘unwritten rule’ by his dispatchers to give Mr. Samih the longest towing runs to limit the time he would have to be on the radio.” He also told Officer Abbondanzio that Mr. Samih lacks some everyday common sense ... is given one task at a time compared to the 2-3 the other employees get ... Mr. Samih [has] to slow down and listen to instructions that he is giving him ... ‘overdoes’ every task in an effort to impress people ... that because of this, many tasks are done incorrectly.

(Ex. 8.)

24. Officer Abbondanzio spoke to Mr. Samih’s former employer at Pro-Tech Automotive who found Mr. Samih to be “dependable and always willing to help out ... always on time, and never hesitated to take extra shifts.” He noted at first, Mr. Samih did not take criticism well, but he blamed that on being new to the country, and a possible cultural issue ... [and] may have been too friendly to customers ... was

warned that females especially, may take friendliness as something else and to be careful.

He felt Mr. Samih would “be an asset to have on the Waltham Fire Department.” Officer

Abbondanzio also spoke to Mr. Samih’s direct supervisor when he worked at Pro-Tech

Automotive who found Mr. Samih to have been

a dependable, honest, and one of the better employees he has ever had in over 25 years ... always on time for work, and ... never been in any trouble while employed there ... Mr. Samih has come a long way since he first came to the job when he could barely speak English, to the guy he is now.

(Ex. 8.)

25. Officer Abbondanzio spoke to Mr. Samih’s current and prior landlords. None made any negative comments about him, or had any issues regarding his paying rent on time.

Officer Abbondanzio spoke to Mr. Samih’s neighbors. None of them made any negative comments about him. Most of the persons Officer Abbonanzio spoke to noted that Mr. Samih is a friendly person. (Ex. 8.)

26. Officer Abbondanzio ended his investigation report with an assessment.

I do see Mr. Samih as slightly cocky in his demeanor, but not to the point where people may be turned off by him. He appears to have a thing with impressing people, which I feel through the investigation has shown can affect him in his everyday work duties.

At this point, I feel that Mr. Samih would be a good Firefighter, but with close supervision and guidance.

(Ex. 8.)

27. About twenty candidates, including Mr. Samih, were interviewed by the panel set

up

as part of the hiring process. Each candidate was asked the same questions, and candidates could

provide information to the panel members on background information and application

responses they were asked about. The interviews were videotaped and recorded. After the

panel members met with a candidate they conferred about the candidate’s performance and

answers. In regard to the groups of candidates who all had the same ranking on the certified list, the panel members did not compare any of the candidates in the group with candidates who held a different rank or were within another ranked group. Deputy Chief Quinn did not serve on the panel. The panel members had the benefit of the candidate's application and the investigator's report. Neither the panel members nor Deputy Chief Quinn spoke to Officer Abbondanzio about his findings or assessment of Mr. Samih. They relied upon the report and found it to be thorough and useful for their interview and evaluation purposes. (Ex. E. Testimony of Quinn, Pratt, Perry & Samih.)

28. In terms of background information, the key concern of the panel members regarding

Mr. Samih was the donning of the State Trooper jacket and hat and then having photographs taken alongside the State Police cruiser. They found this showed poor judgment and bad character. They were upset that it was done without the State Trooper's permission or knowledge. They were upset that this conduct involved making light of the uniform which is not something to joke about. They were upset that Mr. Samih had kept the photographs until he met with Officer Abbondanzio. Mr. Samih apologized to the panel members for doing this, but emphasized that it was only done as a joke. They were concerned that he would do such a thing. The record does not show the panel members felt Mr. Samih was involved in trying to impersonate a State Trooper for some gain. The panel members asked Mr. Samih why he would list Trooper Arone as a reference because they understood Trooper Arone was not that close a friend and just casually knew him. Mr. Samih responded that Trooper Arone was a closer friend

than he had indicated to the Officer Abbondanzio. The panel members were aware that Trooper

Arone was upset that Mr. Samih posed for the photographs. (Testimony of Pratt, Perry & Samih.)

29. The panel members found Mr. Samih was evasive in his failure to list all his traffic

citations. This was a concern to them because the events had not happened that long ago.

The panel members were not persuaded by Officer Abbondanzio's comment in his report that Mr. Samih seemed genuine in not recalling all his traffic citations. The panel members concluded Mr. Samih was not truthful in claiming he failed to recall anything except the equipment issue he listed in the application. They also concluded he did not feel that his failure to recall his driving record was a big deal. This was a concern to the panel members due to the importance of safe driving in the work of a Firefighter. Also, when Officer Abbondanzio's report revealed to them Mr. Samih's driving record, they decided it was a poor driving record. (Testimony of Pratt, Perry & Samih.)

30. The panel members were concerned about the comments Mr. Samih's supervisors at

Mal's Towing had made to Officer Abbondanzio such as; his need to be given close supervision

despite seven years on the job, that he does not listen to instructions well enough, is hard for the dispatchers to understand when he talks over the radio, and that he does not do well trying to do too many tasks. They did not ask Mr. Samih questions about these negative comments at his interview. One concern was that as a Firefighter, Mr. Samih would need to be reliable and perform needed tasks without close supervision at all times during every job performance. (Testimony of Pratt, Perry & Samih.)

31. The panel members asked Mr. Samih about running over his co-worker's foot and his dismissal of the event as not true. They learned from Officer Abbondanzio's report that Mr. Samih said he did not at first recall this event when asked about it by Officer Abbondanzio, but that later he did, and said he was being set-up with this story not true. The panel members also did not find him to be forthcoming about the incident. Being

forthcoming in discussing incidents is a character trait the panel members want to find in the candidate when answering their questions. The panel members found Mr. Samih to be evasive at times in answering their questions and in how he answered Officer Abbondanzio's questions. In terms of his education and useful fire science knowledge, the panel members found he had less than others in his group holding the same rank. (Testimony of Pratt, Perry & Samih.)

32. The panel members decided that Mr. Samih should not be appointed a Waltham Firefighter and informed Deputy Chief Quinn. They did not revisit this decision upon entering

into the next group of candidates who had a rank one level below Mr. Samih's.

[REDACTED] was in this next group and was recommended for hire over Mr. Samih. He was not compared against Mr. Samih by the panel members. (Ex. E. Testimony of Quinn, Pratt & Perry.)

33. [REDACTED], born in 1982, completed his application on April 8, 2013. He lived in Waltham from 2010 and grew up in Salem. He was engaged at the time he completed the application, had never been married, and had no children. He has a B.A. degree in from Lasell College in marketing/communications. At Lasell, he had been class president during each of his four years, captain of the men's lacrosse team, a writer for the student newspaper, on the student athletic advisory council, on the student food council, in the emerging leaders program, and a volunteer for America Reads. He graduated out of the honors program, and had an alumni scholarship. He acknowledged that he had been "written up for being at a campus party in April 2005. He had employment experience as a bouncer and bartender from 2004, and was employed as a sales representative in software sales for Evergate from November 2012. He had prior employment: between September 2011 and July 2012 as a recruitment, advertising and sales manager for New Scientist; between August 2006 and

September 2011 as a regional sales manager and team leader for Buyer Zone; between August 2005 and August 2006 as a delegate recruiter for Tech Target; during the summer 2005 as a groundskeeper at Indian Ridge Country Club; between 2003 and May 2005 as a part-time teacher's assistant working with pre-school children at Lasell College; and, between June 2003 and September 2003 as a park instructor working with children during summers for the Salem Park & Recreation Department. He had never been disciplined, asked to resign, or been fired by his employers. He had been a boy scout through the eighth grade, and had served as an assistant softball coach for the Salem Little League and an assistant football coach for Newton Pop Warner. He had been a volunteer for the Greater Boston Food Bank and received the park instructor of the year award while a park instructor in Salem. He had no military service. He had no criminal conviction record, no illegal drug use besides trying marijuana a few times while in high school and college, and no gambling problems. He is not a smoker. In 2001 at age seventeen or eighteen, he had been charged with disorderly conduct. The charge was dropped by the Salem Police. He had never been the subject of a court order. He had filed his tax returns timely. He had no unsatisfactory credit issues other than "one negative entry in his credit report in which he was past due with a Discover card debt that has since been paid off and closed." He had made no prior efforts to become a Firefighter or Police Officer. (Ex. 9.)

34. On his application, Mr. [REDACTED] provided the following response when asked to list all traffic citations he had received: "Speeding, at-fault, minor accident." He did not further elaborate about the event in his application. (Ex. 9.)

35. Mr. [REDACTED] had a background investigation and interview done by Waltham Police Detective Charles Wentworth. Detective Wentworth's report was submitted on May 16, 2013.

Detective Wentworth explored a Waltham Police record of an assault and battery incident when Mr. [REDACTED] worked as a bouncer on July 7, 2006. There was an intoxicated patron who

either accidentally bumped into or pushed ... [him and] ... had become aggressive ... had been in an altercation with several other patrons in the bar prior to his encounter with Mr. [REDACTED]. No police action was taken against Mr. [REDACTED].

Detective Wentworth explored a Salem Police disorderly conduct/trespassing charge against Mr.

[REDACTED] that had been dismissed in court. This occurred on May 22, 2001. Mr.

[REDACTED] was with

friends drinking beers when one of the friends

threw a beer bottle which broke a windshield of a parked motor vehicle. The police were called and he along with several friends were all charged ... Mr. [REDACTED]'s involvement ... is consistent with his ... statement.

Detective Wentworth found an incident while Mr. [REDACTED] was a student at Lasell College that occurred on October 25, 2003 when the Newton Police responded to

a large fight between several students and visitors ... numerous people were charged with various offenses and one male was serious[ly] injured. Mr. [REDACTED] was not directly involved ... but was present ... observed the altercation ... Mr. [REDACTED]'s name was only added to the report as he was a witness ... and no charges were sought against him.

Mr. [REDACTED] told Detective Wentworth because he was

heavily involved in college activities, he was singled out from the large crowd present to be a witness for this incident ... he is aware that the charges were eventually dropped against all involved parties during the court proceedings.

(Ex. 10.)

36. Detective Wentworth spoke to a number of Waltham Police Officers who had knowledge of Mr. [REDACTED] from his work at the bar which is in Waltham. Officer William Wentworth was assigned to do a detail at the bar/restaurant for the last few years and saw Mr. [REDACTED] at work.

[He] observed Mr. [REDACTED] to be a hard working employee who is always willing to help out his coworkers ... appears to never get upset and when customers

have been belligerent, Mr. [REDACTED] has always remained calm and in control ... a big strong and capable individual who is very likeable and very polite ... has never come to him to ask for any personal favors.

Detective Wentworth spoke to Officer Paul Hanley who knew Mr. [REDACTED] from the bar/restaurant when he worked a detail there.

[H]e has always observed Mr. [REDACTED] to be a nice person who is always helpful when Officer Hanley has dealt with the more difficult of patrons ... never observed Mr. [REDACTED] take anything personal[ly] and does not seem to get mad ... has a good working relationship with both his supervisors and coworkers and that a lot of trust has been placed in Mr. [REDACTED] at the restaurant ... a big, strong, level headed individual with a good disposition.

Detective Wentworth spoke to Officer John Longmoore who knew Mr. [REDACTED] from doing details at the bar/restaurant.

[H]e does not know Mr. [REDACTED] well ... has observed him to be [a] careful bartender who does not over serve his customers and ... appears to get along well with everyone ... has never heard any of the other restaurant employees say anything bad about Mr. [REDACTED] ... has not observed Mr. [REDACTED] do anything to cause him any concerns.

Detective Wentworth spoke to Mr. [REDACTED]'s supervisor at the bar/restaurant who noted that

Mr. [REDACTED] is a long time employee because he is trustworthy, problem free and easy to work with ... does his job, does not complain and treats the customers well ... works well with his coworkers ... has never had a discipline problem ... is able to handle others well and is a sociable person.

Detective Wentworth learned from Mr. [REDACTED]'s current employer that he has no attendance issues,

works very hard and works a full day ... has multiple responsibilities ... which includes sales and ... deals with existing customers to solve any problems they have ... [is] extremely smart, trustworthy, authentic ... liked by everyone he works with ... is the type of employee that would eventually advance within the company.

Detective Wentworth did not find any issues of concern and found only praise for Mr.

[REDACTED]'s working abilities and personality from his other past employers. (Ex. 10.)

37. Detective Wentworth spoke to Mr. [REDACTED]'s previous girlfriends and his fiancé who

was living with him. There were no negative comments received. Detective Wentworth spoke to Mr. [REDACTED]'s listed references and there were no negative comments received. Detective Wentworth spoke to other persons such as a former roommate and friend, his future father-in-law, his lacrosse team coach, and others. None of them made any negative comments about Mr. [REDACTED]. Detective Wentworth spoke to Mr. [REDACTED]'s current landlord who raised no concerns and made no negative comments about Mr. [REDACTED]. Detective Wentworth spoke to neighbors who also made no negative comments about Mr. [REDACTED]. Detective Wentworth made a surprise home visit to Mr. [REDACTED] and was welcomed inside. He observed a tidy home. (Ex. 10.)

38. Detective Wentworth reviewed Mr. [REDACTED]'s driving record. It included:

“Speeding”

in July 2005, March 2006 and March 2008; “Failure To Use Safety” in December 2006; “Unregistered/Improper Equipment” in August 2007; “Inspection Sticker” in February 2009. The record also showed: “Suspension/Payment Default in August 2005 and “Expiration Payment Default” in September 2005; “Suspension/Payment Default in April 2006 and Expiration Payment Default in May 2006; “Surchargeable Accident” in March 2007, Suspension/Payment Default in October 2007; “Suspension 5 Surcharge Events” in October 2007; and “Reinstated 5 Surchargeable Events” in December 2007. No further exploration of this driving record or about the answer Mr. [REDACTED]'s made in his application about traffic citations was made by Detective Wentworth in his report other than noting there were no outstanding parking tickets. (Ex. 10.)

39. Mr. [REDACTED] told Detective Wentworth that he had “wanted to become a

Firefighter ...

while growing up in Salem.” He lived next door to a Firefighter and “looked up to him as a good role model ... began to view firemen to have a vital role in their communities and was

always impressed by the way in which [they] give to their respective communities.”

Detective

Wentworth concluded his investigation report on Mr. [REDACTED] by finding him

an excellent candidate ... for the position of firefighter.” He found “Mr. [REDACTED] to be one of the most responsive of the candidates ... [he] ever investigated for any position ... [W]henver any request was made ... Mr. [REDACTED] would respond ... go[ing] well beyond whatever was asked of him ... responses ... were almost always instant and without complaint.

Detective Wentworth “was impressed by not only [his] work history, [his] academic history, but also the manner in which Mr. [REDACTED] presents himself to others.” (Ex. 10.)

40. Mr. [REDACTED] went through the interview process before the panel members.

No

particular concerns were found about his candidacy by the panel members, including nothing regarding his driving record. He was recommended to be a candidate for hire. (Testimony of Pratt & Perry.)

41. After the interview process was completed, the panel members presented Deputy Chief Quinn with their concerns regarding the candidacy of Mr. Samih that included his failure to list all his motor vehicle citations and a poor driving record, his current employer’s finding some concerns about his working abilities, his explanations showing a lack of recall of certain police incidents that seemed to them to be evasive and not forthcoming, and his photographs in a State Trooper’s uniform that he kept and considered to be a joking matter. In addition to the information received from the panel members, Deputy Chief Quinn reviewed Mr. Samih’s application, Officer Abbondanzio’s investigation report, and the videotape and recording of Mr. Samih’s interview before the panel members. Deputy Chief Quinn found fault in Mr. Samih’s failure to address his driving record sufficiently despite the clear instruction he had received to do so. This seemed to confirm what his employer noted of a problem following and listening to instructions. Deputy Chief Quinn concluded that this issue would not make him a suitable Waltham Firefighter. Deputy Chief Quinn agreed with

the panel members that the photographs and Mr. Samih's discussion of them as just a joke, along with the fact that he kept them as long as he did, were very troubling reactions to being asked about why he engaged in this conduct in the first place, and supported a determination that he is not ready to undertake the serious public safety role of a Firefighter. Deputy Chief Quinn concluded this despite knowing that to Officer Abbondanzio and to the panel members, Mr. Samih apologized for this conduct, and that he did not widely show the photographs. Deputy Chief Quinn found this conduct to be a serious character flaw and to show poor judgment. Deputy Chief Quinn also agreed with the panel members that in answering the questions posed to him by Officer Abbondanzio and by the panel members, Mr. Samih was at times evasive and less than forthcoming as he should have been. This was viewed as a character flaw and to show poor judgment. (Testimony of Quinn, Pratt & Perry.)

42. In determining who to hire within this process, Deputy Chief Quinn was cognizant that the candidate's ranking on the certified list is an important factor in support of hire but not the only factor to consider. He was aware that for an original appointment to the position of Firefighter there are minimum entry requirements. In determining whether Deputy Chief Quinn was going to agree with the panel members about bypassing Mr. Samih, he did no direct comparison of his candidacy versus Mr. [REDACTED]'s candidacy, although he examined Mr. [REDACTED]'s application and background investigation report. As to why Mr. [REDACTED]'s driving record was not something to prevent his hire, Deputy Chief Quinn relied on the fact that Detective Wentworth did not address this as a cause of concern in his investigation report, nor did the panel members, and that Mr. [REDACTED] was forthcoming and took full ownership of his driving record before Detective Wentworth and before the panel committee. (Testimony of Quinn.)

43. Deputy Chief Quinn recommended to the Mayor, the bypass of Mr. Samih. The Mayor agreed. As required, a letter was composed containing reasons for his bypass. The letter was worked on by Lieutenant Perry with Deputy Chief Quinn reviewing it and then signing it. The bypass letter was dated June 18, 2013 and was sent to the Commonwealth's Human Resources Division. This is the bypass letter Mr. Samih received with a June 28, 2013 cover letter from Deputy Chief Quinn containing his right to appeal the bypass to the Civil Service Commission. (Exs. E & 11. Testimony of Quinn & Perry.)

44. The reasons set forth in the bypass letter were highlighted as covering the areas of "Morality and Poor Judgment Issues," "Failure to Achieve a Satisfactory Background Investigation," and within this latter category, "Unacceptable Driving Record, Evasive or Incomplete Application." Under the first category the letter concluded that the background investigation

revealed that Mr. Samih illustrated a substantial lack of judgment and moral character and demonstrated disrespect of authority by entered (sic) a State Police vehicle ... invaded the personal space of the Trooper and proceeded to don the Trooper's uniform items (Trooper hat and coat). Mr. Samih then proceeded to take pictures on his cell phone of himself in the Massachusetts State Trooper uniform seated in the fully marked State Police cruiser. He then showed these photos to another State Trooper thinking it was funny. The Trooper was alarmed enough to revealed (sic) Mr. Samih's actions to the background Investigating Officer assigned to investigate the candidate. Mr. Samih had to be instructed to delete the photos. When questioned about the incident, Mr. Samih made light of the situation and said it was a joke.

Mr. Samih's lackadaisical attitude toward an event boarding on impersonating an Officer along with his callous response regarding such an incident leads this board to believe he possesses less than acceptable morality and the good judgment required for the position of Firefighter for the City of Waltham.

(Ex. 11.)

45. The bypass reasons letter described another ground for the bypass.

During the background investigation, Mr. Samih was asked a number of questions pertaining to various facets of his background ... [which] needed clarification. It appeared Mr. Samih was conveniently unable to recall certain events pertaining to incomplete application materials, specific events, as well as portions of his less than desirable driving record.

The inadequate or deficient background investigation report ... reveals specific issues and instances which, at this time, deem Mr. Samih to be an insufficient candidate for employment ...

The letter goes on to set forth what is meant by deficiencies:

When asked why he [Mr. Samih] did not list all by (sic) one of his multiple driving infractions ... he did not recall them. Mr. Samih then recalled that he was recently pulled over on May 13, 2013.

The letter explained that the investigating officer had uncovered about ten driving connected events from speeding to a license suspension back in time to June 2006 and continuing to the May 13, 2013 event. (Ex. 11.)

46. The reasons letter summed up the decision to bypass Mr. Samih.

[L]ooking at the totality of circumstances, it appears that Mr. Samih has demonstrated a substantial lack of good judgment ... substantial and lengthy driving history with very recent events ... may not be the best candidate to safely operate extremely large and heavy emergency fire apparatus ... [C]oncerning is Mr. Samih's inability to recall events when it appeared to suit him during the hiring process. This lack of recollection presents an air of untrustworthiness ... Truthfulness and strong veracity is a trait that must be present to be employed as a member of the Waltham Fire Department to protect and serve those vulnerable residents in need of assistance.

[A]fter a comparison, Mr. Samih does not possess the satisfactory background, positive veracity, education, experience, local knowledge, Fire Science background, skills and sound judgment/morality as compared to ... most of the current candidate pool.

(Ex. 11.)

47. Mr. Samih timely appealed the bypass decision. (Exs. E & 12.)

Conclusion and Recommendation

I conclude that not all but a sufficient number of reasons reached by the Appointing Authority justify its decision to bypass Mr. Samih for an original appointment to the position of

Waltham Firefighter. The Appointing Authority has shown justifiable concern over Mr. Samih's conduct in regard to the photographs in some of a State Trooper's uniform against the backdrop of the State Trooper's cruiser, done without the Trooper's knowledge or permission, and keeping the photographs because they were taken only as a joke. The

Appointing Authority has shown justifiable concern over Mr. Samih's failure to appreciate the importance of all the information the application sought; in particular, that his failure to recognize that all of his driving record was an important matter necessary to fully reveal as part of the hiring process. The Appointing Authority has shown that Mr. Samih was initially evasive or not sufficiently forthcoming in discussing police incidents that Officer Abbondanzio and then the panel members brought up.

I find the Appointing Authority's reason that Mr. Samih's driving record is poor and extensive not to be justified by the evidence presented so that it should not be considered a reason to support the bypass. The information revealed during the hearing showed that the Appointing Authority felt Mr. Samih would likely need much direct supervision as a Firefighter based on the information provided by his current employer about not always listening sufficiently to instructions even after working in his current job over seven years. Nothing in the bypass letter directly addresses this point and this is not a reason to support the bypass.

I found an overstatement in the bypass letter of what Mr. Samih lacks in terms of his abilities to serve as a Waltham Firefighter. It is understandable why he appealed the bypass decision. There was much in his record that was positive and not fully acknowledged in the bypass letter. His profile may not have been as glowing as Mr. [REDACTED]'s, and that seemed to show itself in the reasons letter somewhat too much. The record shows he was very serious and sincere in wanting to work as a Waltham Firefighter.

Mr. [REDACTED] had a worse driving record than Mr. Samih, but he was found to have taken ownership over that driving record and did not make light of it, a good character and good judgment trait looked for in a Firefighter candidate. If having a poor driving record was a reason to bypass Mr. Samih it should also have been considered a reason against selecting Mr. [REDACTED]. Like Mr. Samih, he had no criminal record of any significance. The fact of

his arrest as a youth was followed by the charges being dropped, and involved being in a group of friends when one of the friends did property damage. The fact that Mr. [REDACTED] was named in a police report about a disturbance on his college campus was only because he was going to be a possible witness to testify about the disturbance if charges were pursued against others. Like Mr. Samih, Mr. [REDACTED] has no illicit drug use problem, has no gambling problem, and has no significant financial debt issues. The one small debt issue Mr. [REDACTED] had about his Discovery card payment was not significant. He only tried marijuana in high school and college.

Perhaps Mr. [REDACTED] demonstrated a much more compelling profile in terms of his social relations, community volunteer work, and education over what Mr. Samih's profile revealed, but that is not a valid reason for bypassing Mr. Samih for an original appointment to the position of Firefighter and was properly not included as a reason by the Appointing Authority. Both candidates showed their interest of working in public service. Neither candidate had any job discipline in their employment records. Maybe Mr. [REDACTED]'s record with his employers was more glowing than Mr. Samih's record, but nothing in the reasons letter addresses this area as a reason why Mr. Samih was bypassed. The record does not show that the Appointing Authority invented a pre-textual reason to bypass Mr. Samih because Mr. [REDACTED], other than being one rank below Mr. Samih on the certified list, had a profile that seemed overall more favorable. The record shows the decision to bypass Mr. Samih for substantial reasons was determined before Mr. [REDACTED]'s candidacy was considered.

All the Appointing Authority witnesses who were directly involved in the hiring process had prior experience with this hiring process. All are long-time Waltham Firefighters and Officers. Their understanding of what is needed to be a productive Waltham Firefighter was made clear from their testimony. The hiring process was shown to be a process that had

worked well for the Fire Department in the past and was carried out fairly among all the candidates, including for Mr. Samih. The persons involved in the hiring process relied heavily on the background investigation reports of the Waltham Police Officers, and no persuasive evidence was shown to put any doubts about the thoroughness or fairness of the investigation done on Mr. Samih or on Mr. [REDACTED]. No sufficient proof was presented that this heavy reliance on the background investigation results was misplaced. On the other hand, no sufficient proof showed the hiring group deferred in all respects to every recommendation of the investigating Officers.

So much of why Mr. Samih was bypassed by the Appointing Authority had to do with his judgment concerning the taking, keeping and showing of the photographs of himself looking like

a State Trooper. I conclude this lack of judgment is also a character issue and was sufficiently proven at the hearing to support the bypass determination. Poor judgment and bad character conduct come within the scope of requirements for an original appointment to the position of Firefighter. The evidence fails to prove this conduct was simply used as a pre-textual reason to bypass Mr. Samih.

When an Appointing Authority bypasses an otherwise eligible candidate it must provide both a reasonable justification for doing so, as well as proof that such a justification could be applied fairly to all potential candidates. *Brackett v. Civil Service Commission*, 447 Mass. 233, 241 (2001); *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997).

In hearing bypass appeals, the Civil Service Commission must determine whether the Appointing Authority has “sustained its burden of proof that there was reasonable justification for the action taken.” *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 304.

Reasonable justification requires that the Appointing Authority base its actions on adequate reasons, supported by credible evidence, guided by common sense, and weighed by an unprejudiced

mind. See *Wakefield v. First District Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928); *Civil Service Commission v. Municipal Court of Boston*, 359 Mass. 214 (1971). In sustaining its burden of proof, the Appointing Authority must prove its justification by a preponderance of the evidence. G.L. c. 31, § 2(b). I conclude the Appointing Authority's proof satisfies these standards for its bypass determination for Mr. Samih other than the issue of a poor driving record.

When applying reasonable criteria, Appointing Authorities are granted wide discretion when choosing individuals from a certified list of eligible candidates. The Civil Service Commission cannot substitute its views and preferences for those of the Appointing Authority.

Burlington v. McCarthy, 60 Mass. App. Ct. 914 (2004). Rather, the Civil Service Commission's role is to "protect against overtones of political control, objectives unrelated to merit standards, and assure neutrally applied public policy." *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 304; *Revere v. Civil Service Commission*, 31 Mass. App. Ct. 315, 321 (1991); *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). The Civil Service Commission reviews the legitimacy and reasonableness of the Appointing Authority's grounds for bypassing an Appellant. *Beverly v. Civil Service Commission*, 8 Mass. App. Ct. 182, 187 (2010). So long as the Appointing Authority provides sound and sufficient reasons for the bypass and applies its policies equally, the Civil Service Commission should not intervene. This is what the record shows occurred with Mr. Samih's bypass other than relying on a poor driving record.

For these reasons, I recommend that the Civil Service Commission affirm the action taken by the Appointing Authority and dismiss Mr. Samih's bypass appeal.

**DIVISION OF ADMINISTRATIVE
LAW APPEALS**

Sarah H. Luick
Administrative Magistrate
Dated: