

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

BONNIE VOUSBOUKIS,
Appellant

v.

Docket No. G1-04-319

TOWN OF SWAMPSCOTT FIRE DEPARTMENT,
Respondent

Appellant's Attorney:

Pro se

Respondent's Attorney:

Marc J. Miller, Esq.
Bernstein & Miller, P.A.
220 Broadway, Suite 205
Lynnfield, MA 01940

Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Bonnie Vousboulis (hereinafter "Appellant"), filed a timely appeal, received by the Civil Service Commission (hereinafter "Commission") on June 30, 2004, claiming that the Respondent, Town of Swampscott Fire Department (hereinafter "Town" or "Department") as Appointing Authority, bypassed her for original appointment as a permanent firefighter for the Department on April 29, 2004. The Town was required to rescind its offer of employment based on the Appellant's failure of the pre-employment medical examination due to a Category "A" medical condition, asthma, which is considered an automatic disqualifier of Civil Service employment according to the legislatively

promulgated and binding Commonwealth of Massachusetts Human Resources Division Physician's Guide Initial-Hire Medical Standards (Revised July 2005) (hereinafter "HRD medical standards").¹ A full hearing was held in the Commission's offices on October 30, 2006. One audiotape was made of the hearing. The parties stipulated to decline to submit post-hearing briefs and gave oral closing statements, instead.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1 & 2) and the testimony of the Appellant, I make the following findings of fact:

1. On August 12, 2003, the Appellant received a letter from then-Fire Chief Laurence Gallante informing her of what was needed to make appointments for medical and psychological examinations in connection with her application for original appointment to the Department from Certification List No. 231007. The Chief concluded this letter with the sentence, "Upon completion of these exams I will notify you of the next step in the procedure." (Exhibit 1)
2. The Appellant made an appointment for her medical examination for September 10, 2003. (Id.)
3. In her written submission to the Commission for the hearing of this appeal, the Appellant relates what happened following the examination:

"Once I had completed these exams, I was not contacted by either the Chief or the Dr.'s office regarding the next step or that I had in any way not finished the last step, the exams. I didn't think that there was anything wrong. I simply thought it was a long process. I didn't know that three other people were hired in the meantime.

¹ The General Court of the Commonwealth required the HRD to create binding medical standards and ratified revisions to those standards in March 2003. Further revisions of the standards were ratified in July 2005. These standards are promulgated pursuant to G.L. c. 31, § 61A and c. 32, § 5(3)(e).

In early January 2004, my brother Billy was told that he was being hired. (see William Vousboukis v. Swampscott Fire Department, G1-04-318) We were tied at #2 on the list so I was happy for him, but I did think it was odd, since I had already had all of my tests done, and was pretty sure I had passed. It was then that we heard that three other people had already been hired from lower on the list. I still had not heard anything from either the chief or the Dr.'s office.”
(Id.)

4. The Appellant further describes the events following her examination:

“On Tuesday, January 13, 2004, Chief Gallante told my brother that I had not been medically cleared. I called the chief that day and he told me that although I hadn't failed, I hadn't passed either. He said that he just never got any results or heard from Dr. Miller at all, and that's why I was bypassed. I asked him why I wasn't notified and had to find out from my brother, and he told me to call Dr. Miller.² I feel that he should have called Dr. Miller himself to check on my status as soon as he realized the results weren't in, as I had no way of knowing. I was told prior to the examination that 'all medical examination records are property of the appointing authority . . . The appointing authority will notify the examinee of the results of the exam . . . ' (Exhibit 1, Attachment E, page 1) I believed I signed something specifically giving permission for the results to go Swampscott Fire department. I feel it was definitely the Chief's responsibility to obtain a result either way before moving to the next name on the list. First, what if I had passed and the results were simply 'lost'? It would have been easy enough to duplicate them. Second, if I had in fact failed, I should have been given 'one re-examination under the Initial Medical Standards Program'. (Exhibit 1, Attachment E, page 2) Instead I was stranded. I could not get a second opinion or see a specialist because I had not officially failed.
(Id.)

5. The Appellant stated that she attempted to contact Dr. Miller in January regarding her medical examination results:

“I called Dr. Miller's office every day from Tuesday January 13, 2004 through Friday January 16, 2004. I left messaged (sic) everyday with Kathy, his secretary telling her exactly why I was calling and how important it was. When after a week it was clear

² Dr. Steven G. Miller was the examining physician.

he would not be returning my call, I stopped calling him for fear that he would fail my brother who had just been examined.”
(Id.)

6. The Appointing Authority asserted at the Commission hearing that Dr. Miller had requested the Appellant’s previous medical records. The Appellant contends that Dr. Miller didn’t ask for these records. (Opening Statements of both Parties)
7. On April 29, 2004, the Appellant was bypassed for appointment to the position of permanent firefighter with the Department. The Appellant was notified in writing by the HRD of her non-selection from Certification List No. 231007. (Stipulated Fact)
8. The bypass letter from the HRD was based on assertions in a letter from then-Chief Gallante dated March 18, 2004. The Chief’s letter states, in pertinent part:

“Bonnie M. Vousboukis has failed to be cleared by Corporate Services, who is our medical exam service. At this time she has not been rejected but is undergoing further evaluation. Without medical clearance she is unable to take a PAT exam. Corporate Medical Services, Inc. our medical examiners state that Bonnie has not provided all requested documentation for an asthmatic condition.”
(Exhibit 1)
9. The Town asserts that its reason for bypassing the Appellant for the position of permanent firefighter was the Pre-Placement Medical Evaluation Report, dated October 21, 2003, of Steven G. Miller, M.D., Medical Director, Medical Consulting of Greater Boston, Inc. The report determined that the Appellant was medically unfit to perform the duties of a firefighter, including but not limited to the fact that she failed to meet the medical standards under Category A, Section (6) (f) (1) (e). (Exhibit 2)

10. Category “A”, Section (6) (f) (1) (e) is listed as “moderate to severe obstructive pulmonary disease” and is considered an automatic disqualifier of Civil Service employment according to the HRD medical standards. (Administrative Notice)
11. The Appellant was medically examined by Dr. Miller on January 10, 2003 and the Physician’s Certification of Fitness for the Appellant was signed by Dr. Miller on October 21, 2003. Dr. Miller noted that the following specific sections of the HRD medical standards were not met by the Appellant:

Section (6)(f)(1)(e) – Category “A”

(6) = biological systems which are components of the Initial Medical Standards for firefighters

(f) = Respiratory

(1) = Category “A” medical condition

(e) = moderate to severe obstructive pulmonary disease

Section (6)(f)(2)(b) – Category “B”

(6) & (f) = same as above

(2) = Category “B” medical condition (may or may not be a disqualifier for duty as a firefighter)

(b) = obstructive disease not meeting Category “A” criteria

Section (6)(f)(2)(h) – Category “B”

(6), (f) & (2) = same as above

(h) = any other respiratory condition that results in an individual not being able to perform as a firefighter

(Exhibit 2)

12. I find that the reasons for bypass provided to the HRD by the Town on March 18, 2004 are in direct contradiction to the reasons now asserted to this Commission. Further, I find that the Physician’s Certification of Fitness could not have been considered by the Chief when he provided the Town’s written reasons for bypass as he stated therein that the Appellant “has not been rejected but is undergoing further evaluation. Without medical clearance she is unable to take a PAT exam.

Corporate Medical Services, Inc. our medical examiners state that Bonnie has not provided all requested documentation for an asthmatic condition.” If these reasons provided to HRD pursuant to G.L. c. 31, § 27 are accurate, they certainly beg the question as to how Dr. Miller could have – and whether he actually had - made such a definitive conclusion, without the requested documentation, on the Appellant’s medical fitness nearly five (5) months previously and imparted that conclusion to the Department.

13. I find that the Appellant’s written presentation and oral testimony was extremely credible and that the Town’s information was not. The Appellant gave me the distinct impression that she was a reasonable, intelligent and level-headed person caught in what she described as “a very frustrating 3 year long process.” The Appellant clearly did her homework and the Town, by any measure, did not.
(Demeanor of Appellant)

14. The “frustrating 3 year long process” is best illustrated from this passage from the Appellant’s written presentation to the Commission:

“On October 12, 2004, at my pre-trial conference³, the commissioner asked the chief for the forms from Dr. Miller stating that I had failed. They didn’t have them but said they could have them faxed. At his point I explained to the commissioner that I had not actually been failed or passed. Chief Gallant (sic) said that I had, finally been failed. They produced a fax from Dr. Miller to Swampscott Fire Department sent at 0835 that morning. In that letter typed 13 months after my exam, Dr. Miller states he confirmed asthma ‘through a review of relevant medical records’. (Exhibit 1, Attachment D) This is not possible because as I stated earlier, I didn’t give them medical records because they never asked for them. In fact my failure to provide them is used as reason for bypass. (Exhibit 1, Attachment B).”
(Exhibit 1)

³ Said conference being conducted by this Commission.

15. A copy of the fax from Dr. Miller, which the Appellant alleges was sent at 8:35 a.m. on the morning of her pre-hearing at the Commission on October 12, 2004, was provided to the Commission at the Full Hearing in this matter by the Town and it corroborates the Appellant's argument. (Exhibit 2)
16. The Appellant credibly testified that she was never advised by any party that she could seek a re-examination in accordance with § 61A. Administrative notice is taken of the requirement under the HRD medical standards, § 05(1) Medical Standards Examinations and Re-Examinations, that "Medical Standards Examinations and Re-Examinations must be conducted by a physician approved by the standards and wellness community (here, Swampscott) for which the candidate seeks to work." Therefore, the Appellant would have had to be re-examined by a physician selected by the Appointing Authority and not of the Appellant's own choice. (Testimony of Appellant, Administrative Notice)

CONCLUSION:

The Civil Service Commission grants wide latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion. Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987). In a bypass appeal, the CSC must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable

justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and 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). A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988).

The record in this appeal illustrates a medical evaluation process which was improperly handled by the Appointing Authority. Further, the Chief appears to have advised the Appellant to seek her own second medical opinion. While seemingly compassionate and helpful, this advice was, nonetheless, erroneous vis-à-vis the process to be followed pursuant to Civil Service law. Any re-examination or "second opinion" would have had to be conducted by a physician selected by the Appointing Authority.

There is nothing to suggest that the medical conclusions that were issued following the initial medical examination were correct or incorrect. The Commission cannot make that determination. At issue here, is the fact that the reasons provided by the Town for bypass, pursuant to G.L. c. 31, § 27, do not appear to be based on those conclusions and did not comport with the reasons asserted at hearing to the Commission. Based on that, alone, the Appellant prevails in this matter. However, even assuming that this process was conducted appropriately and included the conclusions of Dr. Miller's Certification of Fitness of the Appellant, the law is clear that the Appellant was entitled to a re-examination within sixteen (16) weeks of failure of the initial examination.

The plain language of G.L. c. 31, § 61A is unambiguous in this regard. The section states: "If such person fails to pass an initial medical or physical fitness examination, he shall be eligible to undergo a reexamination within 16 weeks of the date of the failure of the initial examination." The Appellant was never advised of this re-examination opportunity, unwittingly or otherwise, from those upon whom she relied for instruction to comply with this process. Consequently, the Appellant was not able to avail herself of an appropriate re-examination.

Having failed to provide proper reasons for bypass and failing to inform the Appellant of the statutory re-examination opportunity, the Town's bypass of the Appellant was not justified. Chapter 310 of St.1993 of the Acts and Resolves of Massachusetts provides that,

"If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights."

For all of the reasons stated herein, the Appellant's appeal on Docket No. G1-04-318 is hereby ***allowed*** and, pursuant to the powers inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts and Resolves of 1993, the Commission hereby grants equitable relief to the Appellant by ordering the Swampscott Fire Department to provide an opportunity for the Appellant to undergo a medical re-examination, in accordance with the HRD medical standards under c. 31, § 61A, at a time of mutual agreement of the parties but, no later than November 30, 2007. If the Appellant passes her re-examination, the HRD is ordered to place the Appellant's name at the top of the current certification list for the position of Firefighter in the Swampscott Fire Department and each subsequent list, if necessary, until such time as the Appellant has been considered one time for selection to said position. If the Appellant fails the re-examination, her offer of employment will be considered officially rescinded pursuant to G.L. c. 31, § 61A.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Guerin, Marquis and Taylor, Commissioners) on September 13, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice to:

Bonnie Vousboukis
Marc J. Miller, Esq.
John Marra, Esq.