

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

GELSON LAGUERRE,
Appellant,

v.

G1-11-153

SPRINGFIELD FIRE DEPARTMENT,
Respondent.

Appearance for Appellant:

Mark E. Draper, Esq.
Annino, Draper & Moore, P.C.
1500 Main Street: Suite 2504
P.O. Box 15428
Springfield, MA 0115-5428

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. Bowman

DECISION

On February 15, 2011, the Appellant, Gelson D. Laguerre (Mr. Laguerre), 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 (Fire Department or City) as Appointing Authority for bypassing him for original appointment as a permanent, full-time firefighter. A pre-hearing

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.

conference was held on October 26, 2011² at the Springfield State Building in Springfield and a full hearing was held at the same location on March 14, 2012. One CD was made of the hearing and copies were sent to both parties. The parties submitted post-hearing briefs on April 11, 2012 (City) and April 13, 2012 (Mr. Laguerre).

FINDINGS OF FACT:

Eleven (11) 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:

- Jerrold E. Prendergast, Deputy Fire Chief, Springfield Fire Department;

Called by the Appellant:

- Richard A. Flach, Staff Sergeant, United States Army;
- Gelson D. Laguerre, Appellant;

I make the following findings of fact:

1. Mr. Laguerre is thirty-four (34) years old. He was born in Puerto Rico and currently lives in Springfield with his girlfriend and their six (6)-year old son. (Testimony of Mr. Laguerre)
2. In April 1996, while he was a senior at Chicopee High School, Mr. Laguerre was driving his father's car to his brother's wedding in Westfield. There was a traffic tie-up involving a truck. Mr. Laguerre got into a dispute with the driver of the truck. Both Mr. Laguerre and the driver of the truck exited their vehicles. Mr. Laguerre struck the driver of the truck with a car-locking device known as a "club". (Testimony of Mr. Laguerre)

² The pre-hearing conference was delayed as Mr. Laguerre was on active military duty in Iraq when he filed his appeal with the Commission.

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

3. The driver of the truck filed a complaint and Mr. Laguerre was charged with assault and battery with a dangerous weapon, a felony. Mr. Laguerre pled “no contest” to the charge and was found guilty. He received a six (6)-month suspended sentence, served probation and paid restitution. (Testimony of Mr. Laguerre and Exhibit 2)
4. In June 1996, Mr. Laguerre graduated from Chicopee High School. (Testimony of Mr. Laguerre and Exhibit 1)
5. From 1996 to 1998, Mr. Laguerre attended Springfield Technical Community College on a part-time basis. He had various part-time jobs during this time period. (Testimony of Mr. Laguerre)
6. From 2000 to 2005, Mr. Laguerre worked for Titeflex in Springfield as an inspector. When the Titeflex plant was sold in 2005, Mr. Laguerre went to work for Teleflex as a group leader in the manufacturing division. (Testimony of Mr. Laguerre and Exhibit 1)
7. In March 2000, Mr. Laguerre enlisted in the Army National Guard. He completed two months of basic training at Fort Benning, followed by three (3) months of aviation school at Fort Rucker. He was trained at Fort Rucker to maintain Huey helicopters. He currently has a rank of Sergeant (E-5) in the Army National Guard. (Testimony of Mr. Laguerre and Exhibit 1)
8. From November 2005 to November 2006, Mr. Laguerre completed a tour of duty in Iraq. He was responsible for the air evacuation of wounded soldiers, civilians and enemy combatants. His duties included the maintenance of the helicopter both before and during the flight, perimeter security for the flight team while on the ground and assisting the medics when necessary. After transporting the wounded to the hospital, Mr. Laguerre and his crew were

responsible for cleaning blood from the helicopter and preparing it for its next mission.

(Testimony of Mr. Laguerre and Staff Sergeant Flach)

9. Staff Sergeant Richard Flach was Mr. Laguerre's immediate supervisor. He described Mr. Laguerre as his "go-to guy" and someone he could always trust to get the job done.

(Testimony of Staff Sergeant Flach)

10. Mr. Laguerre was awarded the Army Air Medal for his service in Iraq. The citation states in relevant part that Mr. Laguerre's "professionalism and commitment to aviation were instrumental to the brigade's mission ... he distinguished himself by exceptionally meritorious conduct ... and performance of outstanding service to the United States as a crew chief in C Company, Third Battalion, 126th Aviation Regiment ... during Operation Iraqi Freedom ... During this time, he flew over 100 combat missions in the ... black hawk helicopter ... His extensive aviation knowledge and attention to detail ensured the professional completion of each mission ..." (Testimony of Mr. Laguerre and Staff Sergeant Flach and Exhibit 6)

11. In 2005, Mr. Laguerre was hired as a full-time civilian employee for the Department of Defense. He has worked for the Department of Defense as an aircraft mechanic at Barnes Air Force Base since this time. He has an exemplary performance record. (Testimony of Mr. Laguerre and Staff Sergeant Flach and Exhibit 1)

12. In 2008, Mr. Laguerre took the civil service examination for firefighter in the City of Springfield and received a score of 98. (Stipulated Fact)

13. On April 12, 2010, Mr. Laguerre's name appeared first on a Certification that the City requested as part of a 2010 / 2011 review and selection process for permanent full-time

fighters. Mr. Laguerre signed the Certification indicating his willingness to accept appointment. (Stipulated Fact)

14. On May 27, 2010, Mr. Laguerre completed a Recruit Candidate Information Form. As part of this form, he indicated that he had been found guilty of a felony (assault and battery with a dangerous weapon) in 1996. (Exhibit 1)
15. 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)
16. Deputy Chief Prendergast reviewed Mr. Laguerre's CORI report and confirmed what Mr. Laguerre had reported regarding the felony conviction. He did not take any further steps to investigate the incident and he did not meet with or interview Mr. Laguerre. (Testimony of Deputy Prendergast)
17. When making appointments to firefighter, the City relies on HRD's "Certification Handbook" which states in relevant part, "Because persons convicted of felonies cannot obtain gun permits in Massachusetts, conviction of a felony is always grounds for removal for the position of Police Officer. Conviction of a felony will in most cases be grounds for removal for the position of Firefighter, as well as a reason for bypass." (Testimony of Deputy Prendergast and Exhibit 9)
18. The Fire Department has a longstanding policy not to hire applicants who have a felony conviction. The purpose of the "no felony policy" arose from a concern for appearing partial to some felonies and not others. Rather than risk mistakes in the hiring process of an individual convicted of a felony, the Fire Department put an internal ban on hiring anyone with a felony. (Testimony of Deputy Chief Prendergast)

19. Deputy Prendergast's son, Zachary Prendergast, was also a candidate for permanent, full-time firefighter. Zachary Prendergast was ranked lower than Mr. Laguerre on the Certification. (Investigation Findings)
20. 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)
21. 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)
22. The Commission ultimately found 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)
23. In the summer of 2010, Mr. Laguerre received his orders for a second combat tour in Iraq. He delivered a copy of his orders to the Fire Department. (Testimony of Mr. Laguerre)
24. On August 3, 2010, then-Fire Commissioner Gary Cassanelli sent a request to HRD asking that Mr. Laguerre's name be removed⁴ from the Certification. HRD never approved the City's request to remove Mr. Laguerre's name from the Certification. (Exhibit 2 and Investigation Findings)

⁴ "Removal" from the Certification is distinguishable from a "bypass". By removing an individual's name, an Appointing Authority may consider additional individuals as part of the statutory "2n + 1" formula and the candidate will not be considered for future employment during the 2-year life of the eligible list from which the Certification was created.

25. In September 2010, Mr. Laguerre was deployed to Iraq for his second combat tour from September 2010 to September 2011 as part of Operation New Dawn. (Testimony of Mr. Laguerre)
26. Mr. Laguerre's unit, C Company, 3rd Battalion, again performed air evacuation in Black Hawk helicopters of wounded soldiers, civilians and enemy combatants. In addition to his duties as crew chief, he was again responsible for providing perimeter security for flight team, maintaining the helicopter and preparing it for its next mission. (Testimony of Laguerre)
27. Staff Sergeant Flach was again Mr. Laguerre's immediate supervisor during this second combat tour. He described Mr. Laguerre as the person he most trusted during this second combat tour to get the job done. (Testimony of Staff Sergeant Flach)
28. Mr. Laguerre was awarded a second Army Air Medal for his service in Operation New Dawn. The citation stated in relevant part that Mr. Laguerre "has proven through his actions and performance that his steadfast leadership and knowledge is that of a true warrior and lifesaver." (Exhibit 7)
29. Mr. Laguerre has received a total of seventeen (17) awards and decorations from the United States Army. (Exhibit 5)
30. On September 1, 2010, then-Fire Commissioner Cassanelli forwarded correspondence to HRD requesting that Mr. Laguerre, whose name was ranked above Zachary Prendergast, be bypassed for appointment. As part of the reasons to justify the bypass of Mr. Laguerre, Commissioner Cassanelli wrote:

"It is the opinion of the Springfield Fire Department that the unacceptable conduct and judgment that resulted in a felony conviction of assault and battery with a dangerous weapon in 1996 for Gelson Laguerre makes him unqualified for a position as a firefighter for the City of Springfield. This information was provided by the Massachusetts Criminal Offender

Record Information (CORI). I have personal knowledge that, in the past 20 years the Springfield Fire Department has not appointed any firefighter candidate who has been convicted of a felony.

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. Gelson Laguerre's disregard for the laws of the Commonwealth may affect his credibility in court and may impact the trust and feeling of safety within the City. Another consequence of Gelson Laguerre's (sic) may also affect his ability to conform to the rules and regulations of the Springfield Fire Department."

31. On December 22, 2010, while Mr. Laguerre was serving his second combat tour in Iraq, Deputy Chief Prendergast penned a letter to Mr. Laguerre informing him of the above-referenced bypass reasons that had been sent to HRD and his right to appeal. (Exhibit 3)
32. HRD approved the reasons for bypass and this appeal followed. (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 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. That standard gives the commission some scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground. Id. 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.

Here, the City argues that the decision to bypass Mr. Laguerre was based solely on a longstanding policy not to appoint any individual with a felony conviction. Based on a review of all the evidence, including the findings and conclusions of the investigations, which were penned by this Commissioner, I conclude that Mr. Laguerre would have been bypassed for appointment even if Deputy Prendergast had not been involved in the hiring process. The Fire Department presented credible evidence that it makes no exceptions regarding its “no felony conviction” policy and that is the sole reason for bypassing Mr. Laguerre.

That raises the more difficult question of whether the Fire Department’s sole reliance on a “no felony conviction” policy justifies the decision to bypass Mr. Laguerre. It does not.

G.L. c. 41, § 96A states that, “[n]o person who has been convicted of any felony shall be appointed as a police officer of a city, town or district.” (emphasis added) HRD’s “Certification Handbook” has incorporated this statutory prohibition, stating that “Because persons convicted of felonies cannot obtain gun permits in Massachusetts, conviction of a felony is always grounds for removal for the position of Police Officer.” There is no such statutory prohibition relating to felonies regarding firefighter candidates -- and the City has erred by effectively creating one.

G.L. c. 31, § 58 does establish some prohibitions related to the hiring of firefighters including a minimum age requirement (19 at the time of the examination) and a maximum age restriction (32) for certain civil service communities. Further, G.L. c. 31, § 50 states in relevant part that,

“No person ... shall be appointed to or employed or retained in any civil service position, nor shall any person be appointed to or employed in any such position within one year after his conviction of any crime except that the appointing authority may, in its discretion, appoint or employ within such one-year period a person convicted of any of the following offenses: a violation of any provision of chapter ninety relating to motor vehicles which constitutes a misdemeanor or, any other offense for which the sole punishment imposed was (a) a fine of not more than one hundred dollars, (b) a sentence of imprisonment in a jail or house of correction for less than six months, with or without such fine, or (c) a sentence to any other penal institution under which the actual time served was less than six months, with or without such fine.” (emphasis added)

Had the legislature intended to prohibit any individual ever convicted of a felony from being appointed as a firefighter, they could have done so. They did not.

While there is no statutory prohibition against appointing individuals with a felony conviction as a firefighter, the Commission owes “substantial deference” to the City’s exercise of judgment regarding such appointments. That deference, however, is not without limitations. The Commission must still “review[] the legitimacy and reasonableness of the appointing authority’s actions.” Beverly.

The Springfield Fire Department’s sole reliance on a permanent prohibition against appointing any individual who has ever been convicted of a felony to the position of firefighter is not reasonable and it is not consistent with basic merit principles.

As years of precedent-setting judicial decisions have made clear, the appointing authority, not the Commission, decides how much weight to give to various factors as part of the review and selection process regarding public employees. Here, however, the review and selection process ended with the Fire Department’s unauthorized prohibition against appointing any individual

convicted of a felony. That impermissible prohibition prevented the Fire Department from conducting any type of reasonably thorough review of Mr. Laguerre's suitability for appointment, including but not limited to: the time period that has elapsed since the incident occurred (fifteen (15) years); the age of the applicant at the time of the incident (eighteen (18) years old while a senior in high school); any further criminal history since that time (none); the career and life path of the applicant since the incident (two (2) tours of combat duty in Iraq where he performed the most dangerous of duties in an exemplary manner; a stellar performance record of employment with the Department of Defense; raising a child, etc.).

This matter is distinguishable from other Commission and judicial decisions in which criminal charges and convictions formed the basis of bypassing a candidate for a public safety position.

In Suppa v. Boston Police Dep't, 21 MCSR 614 and 685 (2008), a majority of the Commission determined that the candidate's admission to sufficient facts to assault and battery (a misdemeanor) was not a valid reason for bypass. The Superior Court, in a decision affirmed by the Appeals Court, vacated the Commission's decision. The Court's decision, however, rested largely on issues related to the employment of police officers, G.L. c. 41, § 96A and whether the admission to sufficient facts was equivalent to a guilty finding. Further, in Suppa, the record shows that the Boston Police Department conducted a reasonably thorough review of the applicant, reviewing his entire employment record, the police incident report(s); providing the applicant with the opportunity to address his criminal history and determining, how much weight, if any, to give to other positive factors including the applicant's military history. Here, the Fire Department did not conduct any such review, beyond the automatic disqualification based solely on the felony conviction.

In Beverly, the Court reversed a majority decision of the Commission, stating that the City was not required to prove that the allegations against the applicant (related to his prior employment), were true. In Beverly, however, the Court noted that the City had completed a reasonably thorough review of the applicant and, based in part on the applicant's responses during an interview, was reasonably justified in bypassing the applicant for the position of police officer. This, again, is distinguishable from the instant appeal as the Fire Department here ended any consideration of Mr. Laguerre based on their determination that a prior felony conviction was a bar to ever being employed by the Fire Department.

A series of other Commission decisions are also distinguishable as they either involved the appointment of police officers and/or the applicant's criminal history did not serve as an automatic disqualifier, but, rather, was given the weight that the appointing authority chose to give it after a reasonably thorough review of the incident and the applicant. See Preece v. Department of Correction, 20 MCSR 152 (2007); Lavaud v. Boston Police Department, 17 MCSR 125 (2004); Brooks v. Boston Police Department, 14 MCSR 109 (2001); Gallo v. City of Lynn, 23 MCSR 348 (2010); Cruz v. City of Lowell, 25 MCSR 255 (2012).

One decision that is less distinguishable, however, is Benevento v. Springfield Fire Department, 14 MCSR 123 (2001).⁵ In Benevento, the Board of Fire Commissioners, *after interviewing the applicant*, opted to bypass Mr. Benevento for the position of firefighter based on two (2) felony convictions in 1983 (breaking and entering in the nighttime with the intent to commit a felony and receiving stolen property over \$100.) In its 2001 decision, the Civil Service Commission stated in part that, "Crimes of theft would render a candidate ineligible to be a firefighter because the public must be able to trust firefighters to enter its homes unsupervised or

⁵ Ironically, Mr. Benevento was also bypassed for appointment (again) during this current hiring cycle. He filed a bypass appeal with the Commission and a decision regarding that matter is being issued the same day as this decision.

to guard keys to their homes and businesses”, citing Dowd v. Lowell Fire Department, 14 MCSR 31 (2001). Even in the 2001 Benevento decision, however, the Fire Department first interviewed the applicant. Further, in its decision upholding the bypass, the Commission reviewed the nature of the crimes committed and determined that committing a crime of breaking and entering in the night time with the intent to commit a felony was particularly problematic given that firefighters are called upon to enter citizens’ homes. Finally, to the extent that the Commission’s decision upheld the Department’s decision to bypass Mr. Benevento because of his felony conviction, it may have been justified in that it was much closer in time to the conviction.

CONCLUSION

For all of the reasons cited above, Mr. Laguerre’s appeal under Docket No. G1-11-53 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 Gelson Laguerre 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. Laguerre 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. Laguerre 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 November 15, 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:

Mike Draper, Esq. (for Appellant)
Peter Fenton, Esq. (for Springfield Fire Department)
John Marra, Esq. (HRD)