

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

ISMAEL DOLBRUS,
Appellant

v.

G1-15-79

CITY OF EVERETT,
Respondent

Appearance for Appellant:

James J. Cipoletta, Esq.
Citizens Bank Building
385 Broadway – Suite 307
Revere, MA 02151

Appearance for Respondent:

Albert R. Mason, Esq.
145 Springfield Street
Chicopee, MA 01013

Commissioner:

Cynthia A. Ittleman

DECISION

Ismael Dolbrus (Mr. Dolbrus or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on April 25, 2015, under G.L. c. 31, § 2(b) challenging the decision of the City of Everett (Respondent) to bypass him for appointment to the position of firefighter. A prehearing conference was held in this regard on June 16, 2015 the offices of the Commission. A hearing¹ was held on this appeal on September 28, 2015 at the Commission. At this hearing, the witnesses were sequestered. The Appellant's appearance was waived since he was called to active duty in preparation for his third deployment at or around May 15, 2015.² The hearing was

¹ The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

² The parties attempted to arrange for the Appellant to participate in the hearing by electronic conferencing but they were unsuccessful.

digitally recorded and the parties received a CD of the proceedings.³ A copy of the recording was to be sent by Appellant's counsel to the Appellant in order for him to submit an affidavit to the Commission regarding the testimony given at the hearing. The Respondent submitted a post-hearing brief; the Appellant's affidavit appears to have been the Appellant's post-hearing submission.

FINDINGS OF FACT

Based on the six (6)⁴ exhibits entered into evidence and the testimony of:

Called by Respondent:

- Carlo DeMaria, Mayor
- David T. Butler, then-Fire Chief, City of Everett

Called by the Appellant:

- None

and taking administrative notice of all matters filed in the case; pertinent statutes, stipulations, pertinent regulations, case law and policies; six (6) exhibits; and reasonable inferences from the credible evidence; a preponderance of evidence establishes the following findings of fact:

1. The Appellant is a veteran and a member of the Army Reserves. He is Black and speaks Haitian Creole.⁵ He took and passed the firefighter exam on April 26, 2014. On November 13, 2014, the state's Human Resources Division (HRD) established an eligible list of candidates who passed the exam. Certification 02614 was established on January

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

⁴ Five (5) Exhibits were entered into the record at the hearing and I asked the Respondent to produce another document (the redacted interviewers' notes of their interviews of the other candidates), which the Respondent produced after the hearing and is marked here as Exhibit 6.

⁵ There is no indication that the Respondent requested a list of eligible candidates with foreign language speakers, although the Respondent noted that the Appellant speaks a second language.

14, 2015 to fill seven (7) vacancies. The Appellant was ranked eleventh (11th) on this Certification. (Administrative Notice; Documentation provided by HRD to the Commission and sent to the parties)

2. In 2012, the Appellant previously applied unsuccessfully for the position of police officer in Everett. On January 8, 2013, Everett Police Detective Robert Hall wrote a report to Police Chief Steven Mazzie concerning a recruit investigation that he had conducted in relation to the Appellant's police officer application. The 2013 police candidate investigation report contained positive and negative information. The negative information in Police Det. Hall's written report included,

“ ...Recruit Candidate Dolbrus stated that he had been fired once from a job ... Recruit Dolbrus stated that he had been fired from Home Depot, after what he described as a misunderstanding or missed assignment...
... Boston Police Department investigators were able to speak with Home Depot human resource personnel who contradicted Recruit Candidate Dolbrus' version of his dismissal. Home Depot management alleged that Recruit Candidate Dolbrus had on several occasions, worked 5-6 hours actual time, but submitted an 8 hour pay request, which caused his firing. ...”
(Ex. 5)

3. In 2015, regarding the Appellant's application for firefighter, the Respondent checked the Appellant's residence, criminal record information and driving record information and found no changes of concern since the 2013 police candidate investigation. (Testimony of then-Chief Butler) The only other update to the 2013 police candidate investigation that was made in connection with the Appellant's firefighter application in 2015 is an undated, one (1)-page Fire Candidate Reference Check form (Reference form) from then-Deputy Fire Chief Carli (now Chief Carli). Then-Fire Chief Butler noted in an email message, “Not much there as he was only able to reach one.” (Ex. 6, which I requested at the hearing and was produced after the hearing by the Respondent) The Reference

form lists the names of two (2) job references, one (1) from the Appellant's current employer, who was not available, and another one from a previous job, next to which then-Deputy Chief Carli wrote only "#Bad", apparently indicating that the phone number was inaccurate. Then-Deputy Chief Carli also wrote the names of three (3) personal references, two (2) of whom he wrote were not available; next to the name of the one reference then-Deputy Carli reached was written only "good guy – served together/returned call". (Id.) The reference who served in the military with the Appellant is a member of the Revere Police Department and he has known the Appellant for over a decade. A second reference was a police officer in another municipality. The Appellant's third reference was his current employer. (Ex. 5)

4. On or about February 19, 2015, the Appellant completed an application for employment as an Everett firefighter. The application asked, "[h]ave you ever been dismissed or asked to resign from any employment or position you have held?" The Appellant checked the box "no". Asked on the application to list "all employments", the Appellant did not include Home Depot. (Ex. 4)
5. The application also contained a number of forms for candidates to sign, which the Appellant signed. One, entitled "Authorization for Medical Records, Reports and Bills", states,

"I hereby authorize any physician or other medical provider who has treated me or examined me or who hereafter treats me or examines me or any hospital in which I have been treated or examined or may in the future be treated or examined to furnish to the City of Everett Fire Department, the Fire Chief and the Board of Fire Commissioners or their designated bearer, with a full report regarding any physical condition and treatment and further allow the bearer to examine and obtain copies of all reports and bills that are in your possession relative to treatment rendered to me. All copies of this form shall be treated as an original. ... The authority shall continue for one year unless sooner revoked in writing by the undersigned."

(Ex. 4)

6. Another form in the application signed by the Appellant is entitled, “Authority for the Release of Information”. It states,

“I, (Appellant) ... having filed an application for employment with the Everett Fire Department, consent to have an investigation made as to my moral character, reputation, medical and psychological fitness for the position to which I have applied. ... I agree to give further information, which may be required in reference to my past record.

I also authorize and request every person, firm, company, corporation, governmental agency, court, hospital, clinic, physician, councilor (sic), association or institution having control of any documents ... pertaining to me, to furnish to the Everett Fire Department in such information”

(Ex. 4)⁶⁶

7. On March 18, 2015, the Respondent conducted an interview of the Appellant. The interviewers included Mayor Carlo DeMaria, then-Fire Chief David Butler, then-Deputy Fire Chief Anthony Carli (and present Fire Chief) and Capt. Anthony O’Brien. The interviewers, except Mayor DeMaria, filled out a “Firefighter-Rating Sheet” to complete for each candidate as they responded to a number of questions and an “Interview Impressions of Firefighter Application Qualifications” (Interview Impressions) form. However, the Mayor asked a few questions. The interviewers rated the candidates’ responses from 1 (lowest) to 5 (highest). (Exs. 3 and 6; Testimony of Mayor DeMaria).
8. The Firefighter-Rating Sheet allowed interviewers to rate the candidate’s life/work experience, understanding the firefighting position, presentation of ideas, and similar matters. The Interview Impressions form allowed interviewers to rate the candidates’ physical impressions, quality of responses, readiness and fire potential and to provide

⁶⁶ Other forms in the application erroneously repeat the same authorization to investigate the Appellant’s medical and psychological fitness even where the form otherwise indicates authorization of the Respondent, for example, to obtain the Appellant’s previous employment records.

additional comments. Interview questions asked the candidates about their background, as well as some open-ended questions in order to engage the candidates in conversation, such as “What qualifications do you have that make you think that you will be successful in business and would separate you from the other candidates for the position?”; “[w]hat do you think it takes to be successful in the fire service?” and “[w]hat two or three of your accomplishments have given you the most satisfaction?” (Ex. 3) In response to the last question, the Appellant stated that military experience, success in his current position and raising his siblings are the accomplishments that have given him the most satisfaction. (Ex. 3)

9. The Appellant’s total interview score was 48. The total scores of those eight (8) other candidates for whom the Respondent provided completed interview rating information ranged from thirty-four (34) to sixty-eight (68). (Exs. 3 and 6)
10. Capt. O’Brien wrote in the comments section of his interview rating form “Home Depot – left without ok. Between to (sic) Stores. ...” (Ex. 6) Then-Chief Butler wrote in the comments section of his interview rating form “very relaxed – good interview ... Home Depot – Saugus (Loss Prevention) – dismissed”. (Id.) Then-Deputy Chief Carli did not write any comments on the Appellant’s rating form about the Appellant’s employment at Home Depot. None of the three (3) interviewers who filled out the interview rating forms wrote anything about the Appellant’s Boston Police Department application for employment. (Administrative Notice: Ex. 6)
11. By letter dated April 22, 2015 attached to the instant appeal, the Respondent’s Human Resources Director, Kevin O’Donnell, informed the Appellant, in full,

“This letter is notifying you that you have not been selected to move forward in the hiring process for the position of Firefighter with the Everett Fire Department.

This decision was made as a result of your lack of candor with the application process.

You have the right to appeal this determination by filing an appeal, in writing, within sixty (60) calendar days of receipt of this notice, with the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108. You can visit the commission's website at www.mass.gov/csc, to download an appeal form and receive information regarding filing fees. Please file a copy of this correspondence and all enclosures with your appeal to the Commission.”

(Administrative Notice)

12. The Appellant filed the instant appeal on April 25, 2015. (Administrative Notice)

13. As of May 12, 2015, the Respondent had issued conditional offers of employment to nine (9) candidates⁷, not including the Appellant. Four (4) of the candidates who received conditional offers of employment were ranked below the Appellant on the Certification. By the date of the Commission hearing, the Respondent had hired the nine (9) candidates to whom it had extended conditional offers of employment, including four (4) candidates ranked below the Appellant on the Certification. (Testimony of Butler; Ex. 2)

14. In response to a Procedural Order issued by the Commission, by email message dated July 13, 2015 the Respondent produced an email message from then-Fire Chief Butler stating that he had written the following to HRD as the reasons to bypass the Appellant,

“A background check of the candidate revealed that he failed to provide accurate information on his notarized application for employment. He stated that he had never been dismissed from any employment. His background checked (sic) revealed he had been fired from Home Depot for falsifying payroll (sic) time cards. He also failed to disclose on his application that he had applied and was not selected for employment by the Boston Police Department for failure to report for drug testing.”

⁷ There is no indication how the number of vacancies was increased from seven (7), as noted in the HRD documentation, to nine (9).

(July 13, 2015 email message from Respondent to Commission and Appellant⁸)

15. The Appellant states, in full,

“Under the pains and penalties of perjury, I did take a drug test for the BPD and that was around 2005 or 2006. I never got the result. Also, I did not lie on my time sheet, I simply completed my task but went home at the end of my shift from a different Home Depot. Neither of those allegations is true.”

(Appellant’s Post-Hearing Submission and Affidavit, October 23, 2015)

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. 256, 259 (2001), citing Cambridge v. Civil Serv. Comm’n., 43 Mass.App.Ct. 300, 304 (1997). “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, § 1. It also means, “... assuring that all employees are protected against coercion for political purposes” Id. 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.

Pursuant to G.L. c. 31, § 2(b), the Commission has the powers and duties, among other matters, “to hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator ...” Id. The Commission has the same powers and duties with respect to

⁸ The text of the Respondent’s letter sent to HRD was inserted into this email message; the letter was not attached to the email message and there is no indication of the date it was sent. The documentation sent to the Commission and provided to the parties did not include such a letter from the Respondent.

persons aggrieved by the action, or failure to act, by municipalities through G.L. c. 31, § 2(c), and via delegation from HRD to the municipality under G.L. c. 31, § 5(e).

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Comm'rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971) (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

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, 189-191 (2010) citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. 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. “It is not

for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree.” Town of Burlington v. McCarthy, 60 Mass.App.Ct. 914, 915 (2004).

The deference that the Commission owes to the appointing authority is “especially appropriate” in respect to the hiring of police officers. Beverly, 78 Mass.App.Ct. at 188. The Commission is mindful of the standard of conduct expected of officers of the law. *See* Dumeus v. Boston Police Dep’t, 24 MCSR 124 (2014)(finding that a police officer must be a model of good citizenship). An officer of the law “carries the burden of being expected to comport himself or herself in an exemplary fashion.” Mclsaac v. Civil Serv. Comm’n, 38 Mass. App. Ct. 473, 474 (1995). Police officers “voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

The essential issue being evaluated in a bypass appeal to the Commission remains whether or not the appointing authority has reasonable justification, under basic merit principles, to select a candidate whose performance on the civil service qualifying examination placed him lower than the bypassed candidate, thus skipping over a higher ranked candidate for a valid reason. Section 27 of G.L. c. 31, specifically provides, in part,

“If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator. The administrator shall make such statement available for public inspection at the office of the department.”

Id.

In this regard, Personnel Administrator Rules (PAR).08(4) adds, in part,

“(4) Upon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule .02, an appointing authority shall, immediately upon

making such determination, send to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked, or of the reason or reasons for selecting another person or persons, lower in score or preference category. Such statement shall indicate all positive reasons for selection and/or negative reasons for bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass or selection of a candidate or candidates. No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. ... The certification process will not proceed, and no appointments or promotions will be approved, unless and until the Personnel Administrator approves reasons for selection or bypass.”

Id.

Since the Personnel Administrator delegated much of the law enforcement appointment process to municipalities in 2009, the municipality is obliged to inform a bypassed candidate accordingly. Administrative Notice.

With regard to pre-employment physical or psychological examinations, G.L. c. 151B, section 4(16) provides, in part,

“An employer may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts.”

Id.

The Parties' Arguments

The Appellant argues that he is a valuable candidate, being a veteran and currently serving in the Army Reserves, and he is bilingual. In addition, the Appellant avers that the Respondent has not proved that the candidates who bypassed him were more qualified than him. With regard to verification of the Appellant's prior employment at Home Depot, the Respondent's 2013 investigation report does not identify with whom the police investigator spoke to obtain information about the Appellant and, as a result, its validity is in question.

Further, the Appellant alleges that the Respondent did not ask the Appellant about events at Home Depot. Similarly, the Appellant alleges that the Respondent failed to ask him about the drug test that he had taken when being considered for employment at the Boston Police Department, that he actually took the drug test at BPD but never heard anything further from BPD about his application. Finally, the Appellant asserts that the Respondent made its bypass decision based on incomplete information about the Appellant.

The Respondent asserts that it is not making a value judgement about the Appellant. Rather, it argues, the issue in this case is that the Appellant was not candid in his application and other candidates did not have the problems presented by the Appellant's application. Further, the Respondent asserts, the Appellant failed to disclose that he had been dismissed from Home Depot and that he failed to report for a drug test when he applied for employment at the Boston Police Department.

Analysis

The Respondent established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. In considering the Appellant's 2015 application for employment as a firefighter, the Respondent relied on the investigation report prepared by the Everett Police Department in 2013 when the Appellant submitted an application for the position of police officer, with limited updates in 2015. The 2013 investigation report indicated that the Appellant admitted that he had been fired from Home Depot and that information was confirmed by the Boston Police Department, whom the Respondent contacted because the Appellant had applied for employment there and was not selected. However, in the Appellant's 2015 firefighter application, he denied that he had been fired by any employer and he did not include Home Depot on the list of his previous employers. Thus, the Appellant "lacked candor" with respect to

his employment history and the Respondent had reasonable justification to bypass the Appellant based on his failure to disclose his employment and termination at Home Depot.

The Respondent did not establish by preponderance that it had reasonable justification to bypass the Appellant for allegedly failing to report for a drug test when he applied for the position of police officer at the Boston Police Department. First, the Appellant's affidavit plainly asserts that he took the drug test but that he never heard back from the Boston Police Department. Secondly, the Appellant applied to the Boston Police Department eight (8) years prior to his application for the position of firefighter in Everett, suggesting that this information has limited relevance to the Appellant's firefighter application in Everett. Third, there is no indication that the Respondent discussed this matter with the Appellant and there are no notations on the interviewers' forms indicating that it was something that they considered.

Although the Respondent has established a reasonable justification for bypassing the Appellant, the process is not without its flaws. All of the reasons on which the Respondent intends to rely to bypass a candidate should be discussed with the candidate in an interview. Secondly, the Respondent's application form required the Appellant (and other candidates, presumably) to authorize it to obtain medical information about him without first extending a conditional offer of employment to the Appellant. The law in this regard is clear; an employer may not seek medical information of a candidate for employment prior to the issuance of a conditional offer of employment pursuant to G.L. c. 151B, § 16. Third, the Respondent sent a letter or email message to HRD asserting the reasons for bypassing the Appellant without disclosing that its reasoning was based on a two (2)-year old investigation report that was conducted by the Everett Police Department when the Appellant applied to be an Everett police officer.

Conclusion

For these reasons, Mr. Dolbrus's appeal under Docket No. G1-15-25 is hereby *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman, Esq.
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 16, 2017.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

James J. Cipoletta, Esq. (for Appellant)
Albert R. Mason, Esq. (for Respondent)
Mark Detwiler, Esq. (HRD)
John Marra, Esq. (HRD)