

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

SEAN O'REGAN,
Appellant

v.

G1-16-182

MEDFORD FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Joseph L. Sulman, Esq.
Law Office of Joseph L. Sulman
391 Totten Pond Road: Suite 402
Waltham, MA 02451

Appearance for Respondent:

Kimberly M. Scanlon, Esq.
City of Medford
85 George P. Hassett Drive
Medford, MA 02155

Commissioner:

Christopher C. Bowman

DECISION

On November 1, 2016, the Appellant, Sean O'Regan (Mr. O'Regan), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the City of Medford's Fire Department (Fire Department) to bypass him for original appointment as a firefighter in the City's Fire Department. A pre-hearing conference was held on November 22, 2016 at the offices of the Commission. A full hearing was held at the same location on February 1, 2017.¹ The full hearing was digitally recorded.²

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

FINDINGS OF FACT:

The Fire Department submitted ten (10) exhibits (Respondent Exhibits 1-10) at the hearing and, per my request, submitted a video recording of Mr. O’Regan’s interview with a background investigator from the City’s Police Department which I have marked as Respondent Exhibit 11. Mr. O’Regan submitted three (3) exhibits (Appellant Exhibits 1-3). Based on those exhibits, the stipulated facts, the testimony of:

Called by the Fire Department:

- Frank A. Giliberti, Jr., Fire Chief, City of Medford;

Called by Mr. O’Regan:

- Sean O’Regan, Appellant;

and taking administrative notice of all matters filed in the case, and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. Mr. O’Regan is thirty-two (32) years old. He is divorced and currently resides in Medford, MA. He graduated from high school and served in the United States Coast Guard for seven (7) years. (Testimony of Mr. O’Regan)
2. Mr. O’Regan was honorably discharged from the Coast Guard in 2014. He was awarded several individual and unit ribbons. (Respondent Exhibit 7, Page 233)
3. Three references provided by Mr. O’Regan, including an Assistant District Attorney, a Medford firefighter, and a State Trooper, all stated that Mr. O’Regan is a loyal, respectful,

² 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 substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

dedicated person who likes to help others and has matured a lot since serving in the Coast Guard. (Respondent Exhibit 7, Page 233)

4. Mr. O'Regan's neighbors describe him as friendly and courteous and as someone who always helps them clear their properties of snow and debris after a storm. (Respondent Exhibit 7, Pages 232-233)

Civil Service Procedural Background

5. In 2014, Mr. O'Regan took the civil service examination for firefighter and received a score of 97. (Stipulated Fact)
6. On October 2, 2015, pursuant to a request from the Fire Department, the state's Human Resources Division (HRD) issued Certification No. 03268, from which the Fire Department ultimately appointed ten (10) firefighters, six of whom (Candidates A through F) were ranked below Mr. O'Regan, who was ranked eleventh (11th) on the Certification, based on his examination score of 97 and his veteran status. (Stipulated Fact)
7. As of the date that Mr. O'Regan filed his appeal with the Commission (November 1, 2016) or the date of the pre-hearing conference before the Commission (November 22, 2016), the Fire Department had failed to notify Mr. O'Regan or any other bypassed candidates of the reasons for their bypass. (Stipulated Facts)
8. At the pre-hearing conference on November 22, 2016, the Fire Department provided Mr. O'Regan with the reasons for bypass and agreed to provide all other bypassed candidates with bypass reasons forthwith.³ (Stipulated Facts)

³ The Fire Department subsequently provided the Commission with verification that all such letters were sent.

Fire Department's Review Process

9. All firefighter candidates in Medford are required to attend an orientation, complete an application; and meet with a Medford Police Officer, who is responsible for conducting a background investigation. (Testimony of Chief Giliberti)
10. As part of the background investigation, the Medford Police Officer meets with the candidate, asks the candidate dozens of questions and reviews any issues of concern. The meeting is audio and video recorded. (Respondent Exhibit 11)
11. Nobody from the Fire Department, including Chief Giliberti, interviews any of the firefighter candidates. (Testimony of Chief Giliberti)
12. The Fire Department bypassed Mr. O'Regan for the following three (3) reasons: a) poor driving history; b) omissions and errors on the application; and c) the issuance of a restraining order against Mr. O'Regan in 2005. (Respondent Exhibit 2)

Driving History

13. In 2005, Mr. O'Regan was found responsible for failing to stop in Cambridge, MA. (Respondent Exhibit 3, Page 11)
14. In 2006, Mr. O'Regan was found responsible for speeding in Everett, MA. (Exhibit 3, Page 11)
15. Also in 2006, Mr. O'Regan was found responsible for "no transparent window" in Amherst, MA. (Respondent Exhibit 3, Page 11)
16. Also in 2006, Mr. O'Regan's license was suspended for having five (5) surchargeable events. (Respondent Exhibit 3, Page 11)
17. In 2007, Mr. O'Regan's license was suspended for an out-of-state offense regarding a minor in possession of alcohol that occurred in 2006. (Respondent Exhibit 3, Page 11)

18. Also in 2007, Mr. O'Regan was found responsible for a seatbelt violation in Somerville, MA.
(Respondent Exhibit 3, Page 11)

19. In 2015, Mr. O'Regan was involved in a surchargeable accident in Medford, MA.
(Respondent Exhibit 3, Page 11)

Employment Application

20. Under "Marital Status" on Page 1 of the employment application, candidates are asked to provide the date and place of their divorce or legal separation. Mr. O'Regan provided the place, but did not list the date. Mr. O'Regan did provide the date of his divorce in response to another question on Page 12 of the application. (Respondent Exhibit 6) Mr. O'Regan did provide a copy of his divorce decree to the background investigator which provides the date of his divorce. (Appellant Exhibit 1 & Respondent Exhibit 7, Page 230)

21. On Page 2 of the employment application, candidates are asked to provide all residences in the past ten (10) years and to "start with current address and work back." Mr. O'Regan provided the information, but listed his residences in the incorrect order. (Respondent Exhibit 6)

22. On Page 8 of the employment application, candidates are asked to provide a list of employment since age 17 and to "begin with the most recent going backward." Mr. O'Regan provided the information, but listed his employment in the incorrect order. (Respondent Exhibit 6)

23. On Page 12 of the employment application, candidates are asked if they ever had a restraining order issued against them. Mr. O'Regan answered "no" despite the fact that a restraining order was issued against him in 2005. (Respondent Exhibit 6)

24. Other sections of the application were left blank by Mr. O'Regan, but were filled in at the time of his background investigation meeting with a member of the Medford Police Department. (Exhibit 7, Page 236)

Restraining Order

25. In December 2005, a female with whom Mr. O'Regan had a relationship with filed for and received a restraining order against him, referencing an incident that allegedly occurred in August 2005. The order remained in place until 2007. (Respondent Exhibit 7, Page 229; Respondent Exhibit 5, Pages 23-29)

26. Mr. O'Regan answered "no" on his employment application when asked if a restraining order had ever entered against him. (Respondent Exhibit 6, Page 12 of Application)

27. Mr. O'Regan initially answered "no" when asked during the background investigation when asked if a restraining order had ever been entered against him. (Respondent Exhibit 11)

28. Allegations raised by the plaintiff who obtained the restraining order against Mr. O'Regan were investigated but the case was not prosecuted due to insufficient evidence. (Respondent Exhibit 7, Pages 229-230)

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 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) 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, 60 Mass. App. Ct. 914, 915 (2004).

Analysis

The Fire Department has provided reasonable justification for bypassing Mr. O’Regan for appointment. The evidence does not show that the Fire Department’s decision was based on any

political or personal bias against Mr. O'Regan. Rather, the Fire Department put forth three (3) legitimate and reasonable reasons for bypass.

Although the restraining order was issued twelve (12) years ago, the Fire Department was entitled to consider the fact that the order stayed in place for over a year as well as the serious nature of the allegations contained in the plaintiff's sworn affidavit when seeking the order. I listened carefully to Mr. O'Regan's testimony, including his statement that he didn't object to the order being entered at the time because he didn't wish to see the plaintiff any longer and, therefore, didn't see any reason to contest it. Even if true, that does not diminish the seriousness of a Court's decision to enter the order for over a year and the Fire Department was justified in considering that when deciding to bypass him for appointment. Further, as part of this current hiring process, Mr. O'Regan twice incorrectly stated that a restraining order had never been issued against him, once in the application and once when initially asked by a Medford police officer conducting his background investigation. When the Medford police officer questioned Mr. O'Regan about this discrepancy, Mr. O'Regan stated that he misunderstood the question and appeared to casually discount the seriousness of the restraining order and the underlying allegations.

While the Fire Department appeared to somewhat overreach regarding some of the alleged errors and omissions on the application, there was enough evidence to show that the Fire Department had legitimate concerns about Mr. O'Regan's ability to follow instructions and provide candid, forthright answers to all questions asked.

Finally, while most of the negative entries on Mr. O'Regan's driving history appear somewhat stale, his license was suspended at one point for five surchargeable events and Mr. O'Regan did have a surchargeable accident as recently as 2015. When taken together with the

other reasons cited above, Mr. O'Regan's driving history provided the Fire Department with another legitimate and reasonable reason to bypass him for appointment as a firefighter who would be charged with driving large pieces of fire apparatus around the City of Medford.

In reaching my conclusion, I did consider that the Fire Department appears to have engaged in multiple missteps here. First, as noted above, the Fire Department failed to provide Mr. O'Regan, or any other bypassed candidates, with bypass reasons until Mr. O'Regan filed an appeal with the Commission. That is a violation of the civil service law and rules and calls into question whether bypassed candidates in Medford are being provided with their right to contest their non-selection to the Civil Service Commission. Here, however, Mr. O'Regan, albeit through his own initiative, was able to contest his non-selection and receive a de novo hearing before the Commission. Further, the City's Fire Department did move quickly to rectify this procedural misstep after the pre-hearing and I am confident that further violations of the civil service law and rules in this regard will not take place going forward.

Second, many of the questions posed to Mr. O'Regan as part of his written application and background interview appear to run afoul of the state's employment discrimination law and guidelines, including those related to what employers may ask about an applicant's criminal record.⁴ For example, asking a candidate on the employment application if he has ever been

⁴ G.L. c. 151B, §4(9) provides that it is unlawful: "For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.

arrested and asking a candidate during a background interview if he was ever convicted or adjudicated as a youthful offender would appear to go far beyond the limited questions permitted under state law. Here, however, I have based my conclusions solely on the reasons cited above, which do not raise issues related to potentially impermissible questions. Had that not been the case, the outcome of this appeal may have been different. The City would be well advised to ensure, forthwith, that its hiring practices are consistent with the state's employment discrimination law.

Finally, I considered Mr. O'Regan's argument that other candidates ranked below him showed concerns similar to those raised of Mr. O'Regan (i.e. – driving history, omissions on application). I carefully reviewed the applications and background investigations of each of those candidates. While some of these appointed candidates did have negative issues, I did not find any that contained all of the reasons of concern related to Mr. O'Regan, including a poor driving history, omissions and errors on the application and the issuance of a restraining order against him, which he denied ever existed – twice.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.” (emphasis added)

Conclusion

For all of the above reasons, Mr. O'Regan's bypass appeal under Docket No. G1-16-182 is hereby *denied*.

Civil Service Commission

/s/ Christopher C. Bowman

Christopher C. Bowman

Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Stein and Tivnan, Commissioners [Camuso – Not Participating; Ittleman - Absent]) on December 21, 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:

Joseph Sulman, Esq. (for Appellant)

Kimberly Scanlon, Esq. (for Respondent)