

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

RYAN TURNER,

*Appellant*

v.

G1-16-081

CITY OF HAVERHILL,

*Respondent*

Appearance for Appellant:

Scott F. Gleason, Esq.

Gleason Law Offices

163 Merrimack Street

Haverhill, MA 01832

Appearance for Respondent:

David F. Grunebaum, Esq.

Tobin and Grunebaum

60 Dedham Avenue, Suite 204

Needham, MA 02492

Commissioner:

Cynthia A. Ittleman

**DECISION**

The Appellant, Ryan Turner, (Mr. Turner or Appellant), acting pursuant to G.L. c. 31, § 2(b), filed a timely appeal with the Civil Service Commission (Commission or CSC) on April 26, 2016 contesting the decision of the City of Haverhill (Haverhill or Respondent) to bypass him for appointment to the position of permanent reserve firefighter. A pre-hearing conference was held on May 23, 2016 at the Mercier Housing Center in Lowell. The full hearing was held on

July 25, also at the Mercier Housing Center.<sup>1</sup> The witnesses were not sequestered as the only witnesses were the Appellant and Retired Fire Chief John Parow (Chief Parow) and Chief Parow testified first, remaining in the hearing room following his testimony in order to assist counsel for the Respondent. The full hearing was digitally recorded. The Commission sent copies of the digital recording to the parties.<sup>2</sup> The Respondent submitted a post-hearing brief on August 31, 2016 and the Appellant submitted a post-hearing brief on August 27, 2016.

**FINDINGS OF FACT:**

Nine (9) exhibits were entered into evidence by the Respondent (Exs. 1 – 9) without objection. The Appellant offered no additional exhibits. Based on these exhibits, the testimony of the following witnesses:

*Called by the Respondent:*

- John Parow, Chief (ret.), Haverhill Fire Department (HFD)

*Called by the Appellant:*

- Ryan Turner, Appellant

and taking administrative notice of all matters filed in the case; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

1. The Appellant has lived his whole life in Haverhill. At the time of the Commission hearing, the Appellant was engaged to be married to a woman with whom he has been in a relationship for six (6) years. They have a young child together. A number of the

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudicatory hearings before the Commission with G.L. c. 31 or any Commission rules taking precedence.

<sup>2</sup> 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.

members of the Appellant's family have been firefighters in different Fire Departments.  
(Testimony of Appellant)

2. In 2000, after high school, the Appellant served in the U.S. Army National Guard for approximately six (6) years. During his service, shortly after 9/11, the Appellant was assigned as a military police officer to Logan Airport for nearly one (1) year. Thereafter, he served in Uzbekistan for nearly another year in active combat where he disarmed improvised explosive devices. During his service, the Appellant received a number of commendations and awards and he was honorably discharged after his service. He was also a combat lifesaver, has Fire I and Fire II certifications, and he was trained in first aid, CPR, and AED/Defibrillator usage. (Testimony of Appellant)
3. At first, the Appellant experienced difficulty adjusting to civilian life when he returned from service abroad, where he and his fellow soldiers experienced ongoing threats to their safety. (Testimony of Appellant)
4. In early July 2004, the Respondent hired the Appellant as a police officer in Haverhill. Later in July 2004, the Appellant resigned from HPD, writing to the then-Chief of the HPD that he wanted to resign "due to personal reasons." (Ex. 8) He added, "I feel that I cannot complete the academy at this time." (Id.)
5. In September 2004, the Respondent hired the Appellant as a firefighter<sup>3</sup>. (Ex. 8)
6. In June 2005, the Appellant was arrested and charged with assault with a dangerous weapon – a hand-gun – a felony. In September 2005, the Appellant was convicted of assault with a dangerous weapon. The Appellant served a nine (9) month sentence in the house of correction with the remainder of the sentence suspended for two (2) years

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<sup>3</sup> It is unclear if the Appellant was hired as a fulltime permanent firefighter in 2004 or if he was hired as a permanent reserve firefighter.

(ending in 2007). (Ex. 8) Also in September 2005, following his conviction, the Appellant resigned from the Fire Department rather than be terminated. (Testimony of Parow; Exs. 1, 2 and 8)

7. In 2008, the Appellant admitted to driving while intoxicated in New Hampshire. His license was suspended beginning in 2008. (Ex. 3) His license remained suspended until 2014, at least in part, because he could not afford the fines and penalties he was assessed and the cost of the program he was required to attend. (Testimony of Appellant) Prior to his suspension, the Appellant was charged with speeding in 1999 and 2003 but he was found not responsible for those charges. (Ex. 9)
8. The Appellant worked for a construction company from 2006 to 2015, after which he started his own construction business. (Testimony of Appellant; Ex. 9)
9. The Appellant took the April 26, 2016 firefighter exam. He passed the exam with a score of 96. (Stipulation)
10. On November 1, 2014, the state's Human Resources Division (HRD) created an eligible list, ranking the examinees according to their exam scores and any applicable statutory preferences. (Stipulation; *see* G.L. c. 31, ss. 26 and 58)
11. The Respondent asked HRD for a Certification from which to select six (6) candidates for the position of permanent reserve firefighter. On July 22, 2015, HRD sent the Respondent Certification 03056. (Stipulation)
12. The Appellant's name ranked fifth (5<sup>th</sup>) from among the candidates who signed Certification 03056 to indicate their interest in the available position. (Stipulation)
13. The Appellant filled out an application for the firefighter position on July 23, 2015. (Ex. 9)

14. HFD Chief Parow was appointed interim Fire Chief on June 14, 2015 and served in that position until July 1, 2016. As interim Fire Chief, Chief Parow was involved in the hiring process at issue here. Chief Parow did not know the Appellant prior to this hiring cycle but the Appellant's 2005 felony conviction was widely known. (Testimony of Parow)

15. The Haverhill Police Department conducted background investigations of the candidates, including the Appellant. This included checking the candidates' criminal records after the candidates signed forms authorizing the Respondent to do so. Chief Parow noticed the Appellant's accomplishments during his military service and that the Appellant had completed a fire academy previously but he also noticed that the Appellant had resigned to avoid termination and that the positive information about the Appellant was outweighed by the Appellant's felony conviction. (Testimony of Parow)

16. After the background investigations were completed, Chief Parow and Capt. Robinson interviewed the candidates, including the Appellant. At the Appellant's interview, the Chief and/or Captain asked the Appellant if anything had changed in connection with his criminal record, such as whether the Appellant's conviction had been overturned on appeal, and the Appellant told them that there had been no such change. (Testimony of Parow)

17. The Respondent hired six (6) candidates from Certification 03056, four (4) of whom were ranked below the Appellant. (Stipulation) The Appellant was the only candidate in this hiring process that had a felony conviction. Some candidates had a misdemeanor conviction and they were not hired. (Testimony of Parow)

18. By letter dated February 29, 2016, the Respondent informed the Appellant that he had been bypassed, attaching a copy of Chief Parow's October 29, 2015 letter<sup>4</sup> from Chief Parow to the Respondent's HR Director, which states the negative reasons for the Appellant's bypass, as well as attaching copies of letters sent to HRD explaining the positive military and professional experiences of each of the four (4) candidates ranked below the Appellant who were hired, in addition to the college education of three (3) of the four (4) ranked below the Appellant who were hired. (Ex. 2)
19. The negative reasons given for the Appellant's bypass in Chief Parow's letter were the Appellant's 2005 felony conviction, incarceration and suspended sentence; the suspension of the Appellant's driver's license from 2008 through 2013; and the Appellant's "multiple license suspensions"<sup>5</sup>. The bypass letter informed the Appellant of his right to appeal the bypass to the Commission. (Ex. 2)
20. The Appellant timely filed the instant appeal on April 26, 2016. (Stipulation; Administrative Notice)

### *Relevant Authorities*

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, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304 (1997). "Basic merit principles" means, among

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<sup>4</sup> Chief Parow's letter requests that the Appellant's name be "removed from consideration for employment as a firefighter". However, the parties concur that the Respondent sought to bypass the Appellant, not to have his name removed from the eligible list pursuant to Personnel Administrator Rules (PAR).09.

<sup>5</sup> Chief Parow testified at the Commission hearing that he apparently erred in his bypass letter by referring to "multiple license suspensions". The Appellant's driver history includes a number of entries related to the 2008 suspension of his license; but they do not appear to be separate, multiple suspensions.

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.

Pursuant to G.L. c. 31, § 27, a bypass occurs,

... [i]f 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....

(Id.)

Upon an appeal of a bypass by a candidate for employment, 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)).

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See City of Beverly v. Civil Serv. Comm'n, 78 Mass.App.Ct. 182, 189 (2010). In its review, the commission is to "find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority." Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct.

726, 728, *rev. den.*, 440 Mass. 1108 (2003)). However, the commission's work "is not to be accomplished on a wholly blank slate." Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). Further, the commission does not ignore the previous decision of the appointing authority, but rather "decides whether 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." Id. at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev.den.*, 390 Mass. 1102 (1983)).

In deciding an appeal, the commission "owes substantial deference to the appointing authority's exercise of judgment in determining whether there was reasonable justification" for the bypass. Beverly, 78 Mass.App.Ct. at 188. The Commission should not substitute its own judgment for that of an appointing authority. Id. (citing Sch. Comm'n of Salem v. Civil Serv. Comm'n, 348 Mass. 696, 698-99 (1965)); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm'r of Health & Hosps. of Boston v. Civil Serv. Comm'n, 23 Mass.App.Ct. 410, 413 (1987)).

Pursuant to G.L. c. 151B, s. 4(9 1/2) employers may not discriminate against job applicants with regard to certain criminal records. *See also* 804 CMR 03.00. However, the Massachusetts Commission Against Discrimination's (MCAD) website provides that, "[a]n employer may ask: [h]ave you ever been convicted of a felony ...."

<http://www.mass.gov/mcad/resources/employers-businesses/emp-fact-sheet-discrim-criminal-record-gen.html> (emphasis added).

Under G.L. c. 6, s. 172(a)(1), criminal justice agencies may obtain all criminal offender record information (CORI), including sealed records "for the actual performance of their criminal justice duties". Id. Further, section 172(a)(3) adds that certain authorities may request



the CORI “to evaluate current and prospective employees ....” (Id.) Section 172(a)(3) adds, however, in part, that,

Criminal offender record information made available under this section shall be limited to the following: (i) felony convictions for 10 years following the disposition thereof, including termination of any period of incarceration or custody, (ii) misdemeanor convictions for 5 years following the disposition thereof, including termination of any period of incarceration or custody ....

Id. (emphasis added)

### *Analysis*

The Respondent has established, by a preponderance of the evidence, that it had reasonable justification to bypass the Appellant. There is no dispute that the Appellant was convicted in September 2005 of felony assault with a dangerous weapon (a hand-gun), for which he was incarcerated for nine (9) months and given a two (2)-year suspended sentence ending in 2007. The Respondent required candidates completing the application to sign a form authorizing the Respondent to check their criminal records. However, as Chief Parow credibly testified, the Appellant’s felony conviction was well known. It was likely well known, at least in part, because it occurred when the Appellant worked in the Fire Department previously and he had resigned rather than be terminated. At the Appellant’s interview, Chief Parow or Capt. Robinson asked the Appellant if the conviction had been overturned on appeal. The Appellant answered that there had been no change in his conviction.

There is also no dispute that in 2008 the Appellant admitted to driving while intoxicated in New Hampshire, resulting in the suspension of his license through 2013. Although the Appellant represents that an OUI in New Hampshire is a civil matter and not a criminal matter, the Respondent can, nonetheless, consider the resulting license suspension in making its hiring decision. Moreover, there were aggravating factors for the Respondent to consider. First, the Appellant’s license remained suspended for approximately five (5) years. Although the

Appellant asserts that this extensive suspension was due, at least in part, to his inability to pay the requisite fines, fees and for his participation in a required program, the fact remains that he did not have a valid driver's license up until two (2) years before he applied to the HFD.

Secondly, the proximity in time between the Appellant's felony conviction and admission to an OUI is troubling. Specifically, the Appellant's two (2)-year suspended sentence from the 2005 felony conviction ended in 2007 and his admission to the OUI offense occurred the following year. Combined, the Appellant's felony conviction and OUI provide reasonable justification for bypassing him.

The HFD is not a criminal justice agency under G.L. c. 6, s. 172. In addition, it was the Haverhill Police Department, not the HFD, who requested the Appellant's CORI for the purpose of assisting the HFD in hiring firefighters. However, even if G.L. c. 6, s. 172 was applicable here, the statute authorizes employers to inquire about criminal record information related to "felony convictions for 10 years following the disposition thereof, including termination of any period of incarceration", and misdemeanor convictions for 5 years following disposition thereof, including termination of incarceration, and pending criminal charges. Id. The Appellant was convicted of a felony in September 2005 and was sentenced to serve nine (9) months and given a two (2)-year suspended sentence (ending in 2007) and resigned from the HFD to avoid being terminated. The Appellant's nine (9) month incarceration in September 2005 would end in or around June 2006. After taking the 2015 firefighter exam, the Appellant applied to the HFD again, signing his application on July 23, 2015. The ten (10)-year period in which the Respondent may inquire of a felony conviction did not lapse until 2016 at the earliest. Therefore, the Respondent would have been permitted to consider the Appellant's 2005 felony conviction and bypass him therefor in this case.

Conclusion

For all of the above-stated reasons, Appellant's appeal under Docket No. G1-16-081 is ***denied.***

/s/ Cynthia A. Ittleman  
Cynthia A. Ittleman  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan Commissioners) on July 19, 2018.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. 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.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 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. 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:  
Scott F. Gleason, Esq. (for Appellant)  
David F. Grunebaum, Esq. (for Respondent)  
Patrick Butler, Esq. (for HRD)  
John Marra, Esq. (HRD)