

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

PAUL BARLOW,
Appellant

v.

G2-13-52

TOWN OF FRAMINGHAM,
Respondent

Appearance for Appellant

Andrew J. Gambaccini, Esq.
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4 Lancaster Terrace
Worcester, MA 01609

Appearance for Respondent:

Christopher L. Brown, Esq.
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Commissioner:

Cynthia A. Ittleman¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Paul Barlow (hereinafter “Mr. Barlow” or “the Appellant”), filed an appeal on February 22, 2013, regarding the Town of Framingham’s (hereinafter “Town” or “Appointing Authority”) decision to bypass him for promotion to the position of Temporary Deputy Chief of the Town Fire Department. A pre-hearing conference was held on March 26, 2013 and a full hearing was held on June 4, 2013 at the offices of the Civil Service Commission (hereinafter “Commission”). All witnesses, except the Appellant, were sequestered. The hearing was digitally recorded and a copy of the CD was provided to the parties. The parties submitted post-hearing briefs, as well as a post-hearing stipulation. Also, at the full hearing, the Appellant asserted that the candidate who ultimately was appointed to

¹ The Commission acknowledges the assistance of Law Clerk Jared Varo in preparing this decision.

the position of Temporary Deputy Fire Chief lived outside the 10 mile radius required by of G.L. c. 31, § 58. The parties submitted memoranda after the hearing, wherein the Town asserted that residency was controlled by the 15 mile radius set out in G.L. c. 41, § 99A. However, G.L. c. 31, § 58 controls. See *Mulrain v. Bd. of Selectmen of Leicester*, 13 Mass. App. Ct. 48, 50, 430 N.E.2d 831, 833 (1982). The Commission declines to further address this issue.²

FINDINGS OF FACT

Fifteen (15) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Gary T. Daugherty, Chief, Framingham Fire Department;

For the Appellant:

- Paul Barlow, Appellant;
- William T. Norton, Captain, Framingham Fire Department;

and taking administrative notice of all matters filed in the case; as well as pertinent statutes, case law, regulations and policies; and drawing reasonable inferences from the credible evidence; a preponderance of the credible evidence establishes as follows:

The Bypass

1. The Appellant is a 58 year old male and a native of Framingham. The Appellant applied for a promotion to Temporary Deputy Chief. He has worked for the Framingham Fire Department since 1979 and has previously served as a Temporary Deputy Fire Chief in the Framingham Fire Department. (Testimony of the Appellant)

² Issues of this type are more properly addressed as an investigation, not as a bypass appeal. The Commission acknowledges that St. 2013, c. 38, sec. 50, which amends G.L. c. 31, § 58, may affect such matters going forward.

2. In the fall of 2012, a Temporary Deputy Chief position opened up at the Framingham Fire Department, with a second Temporary Deputy Chief position opening shortly thereafter. (Testimony of Chief Daugherty)
3. The Town filed a requisition with the State Human Resources Division (“HRD”) on September 5, 2012. Using the required 2n+1 formula, a five name list was generated to fill the two vacancies. The Appellant was ranked second. The first-place candidate was selected to fill the first opening, and the third-place candidate was selected to fill the second opening. (Testimony of Chief Daugherty, Ex. 12)
4. The Appellant received a bypass letter on February 26, 2013. The letter was dated November 14, 2012. There is no explanation for the three month delay between the generation of the bypass letter and its delivery. Although the Appellant was on sick leave³ on November 14, 2012 he was at home, and able to receive mail. (Testimony of Appellant, Ex. 1)
5. The bypass letter explained that the third-place candidate was chosen because he had a better work history than the Appellant, contributed substantial time upgrading a Fire Department truck, was certified as a Training Instructor, and had held the position of Temporary Deputy Fire Chief before. The letter noted that the Appellant had also held the position of Temporary Deputy Fire Chief before. (Ex. 1)
6. The reasons the letter stated for the bypass were that the Appellant had three⁴disciplinary suspensions on his record and that he had been involved in a

³ The Appellant was on sick leave from a non-work related injury for over one month.

⁴ Although the Town claimed that the Appellant had three suspensions, the evidence before this Commission indicates that he was only suspended on two occasions. The third suspension was grieved, and the Town agreed that it would not be considered in future proceedings. As such, it will not be considered in this appeal.

confrontation with a civilian while in uniform.⁵ The letter concluded that the Appellant lacked the ability to make sound decisions. (Ex. 1)

7. Chief Daugherty did not read the candidates' files before deciding whom to appoint to the position of Temporary Deputy Chief of the Department. (Testimony of Chief Daugherty)

The Appellant's Record

8. On November 15, 2006, the Appellant received a letter of reprimand for speaking disrespectfully to a superior. The reprimand was later increased to a 48-hour suspension.⁶ The Appellant believes that the incident was the result of a misunderstanding but did not appeal the discipline because he did not believe it was worthwhile and because the union would not provide assistance to him in this regard. (Testimony of the Appellant, Ex. 15)
9. On April 14, 2006, while doing part-time work with an electrician, the Appellant was asked by the electrician about a new Chief at the Fire Department. The Appellant replied, "He sucks." The Appellant believed that that new chief to whom the electrician referred was William Norton. Mr. Norton had worked with the Appellant as a part-time roofer and was a close friend. As a roofer, Mr. Norton would write "Barlow sucks" in the substructure of buildings they were working on, as a joke. The electrician believed that the Appellant was referring to a different chief, who was the

⁵ Although the Town claimed that the Appellant had three suspensions, the evidence before this Commission indicates that he was only suspended on two occasions. The third suspension was grieved, and the Town agreed that it would not be considered in future proceedings. As such, it will not be considered in this appeal.

⁶ Firefighters work in shifts which include periods of 24 hours on-duty, then 48 hours off duty, then 24 hours on duty, and 96 hours off duty. As such, a 48-hour suspension roughly equates to a one week suspension in a traditional-five-day work week.

electrician's brother. The Appellant was suspended for 24 hours⁷ for this infraction. The matter was submitted to arbitration. The arbitrator found the suspension to be too severe and reduced the suspension to 8 hours.⁸ (Testimony of the Appellant, Mr. Norton, Ex. 15)

10. In 2008, the Appellant's elderly mother was engaged in a zoning dispute with her neighbor. The Appellant's mother contacted him while he was on duty. She was in a panicked state as crews had begun construction on the neighbor's lot before a variance had been granted. The Appellant notified his superior officer that he was going to speak to his mother in person to calm her down. The Appellant arrived at her home in uniform. Subsequent to this incident, the neighbor claimed that the Appellant had used his position to intimidate her and that he had engaged in a variety of forms of misconduct. Several local agencies conducted investigations of the incident but none found that the Appellant had acted improperly. The Appellant received no discipline for this conduct. Chief Daugherty was aware of the event and felt that the Appellant's conduct in this incident was improper. (Testimony of the Appellant, Chief Daugherty)

11. Prior to the current promotion, the Appellant met with Chief Daugherty to discuss filling the position of a superior officer who was on sick leave. It is not certain what was actually said in this meeting although Chief Daugherty took offense that the Appellant wished to fill the position quickly before the existing Civil Service list expired. (Testimony of the Appellant, Chief Daugherty)

⁷ A 24 hour suspension roughly equates to a half-week suspension.

⁸ An 8-hour suspension for a firefighter is equivalent to a one-day suspension for a worker with a traditional schedule.

12. On another occasion, the Appellant filed a complaint with the union, after Chief Daugherty had filled a different position immediately before a Civil Service list expired. Chief Daugherty became aware of this and resented it. (Testimony of the Appellant, Chief Daugherty)
13. Chief Daugherty does not appreciate the Appellant as a Firefighter and merely “tolerates” him. (Testimony of Chief Daugherty)
14. The Appellant has served as Temporary Deputy Fire Chief before. He is a nurse and is an experienced EMT. He currently serves on the Fire Department Dive Team and served on the Tunnel Team until it was disbanded in 2003. He has served in the position of Training Captain sometime around 2001. (Testimony of the Appellant)

The Third-Place Candidate’s Record

15. The third-place candidate was issued a written reprimand for failure to complete a report on March 16, 1999; he was issued a verbal warning for productivity on July 25, 2001; he was spoken to on August 2, 2001 about slow response time; he wrote an apology for a misplaced motorcycle on May 20, 2004; he was issued a verbal reprimand for failure to clear snow on December 24, 2004; and he wrote an apology for failure to wash a car on March 14, 2005. (Ex. 8)
16. The third-place candidate is a Certified Training Instructor and, like the Appellant, has served as a Training Captain.⁹ He has put in significant extra time, some of it his own time, working on upgrading a Fire Department truck with new rescue tools. This opportunity to work on the truck was given to him by Chief Daugherty. On occasion, Chief Daugherty drove to New Jersey with the third-place candidate, and perhaps

⁹ Training Captain is a position within the Framingham Fire Department. Training Instructor is a position within the Massachusetts Fire Academy. Training Instructors require certification, while Training Captains do not.

another person, in order to assess equipment for the truck. (Testimony of Mr. Chief Daugherty, Ex. 1, Stipulation dated July 17, 2013)

DISCUSSION

Applicable Civil Service Statutes and Rules

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, § 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. 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).

G.L. c. 31, § 2(b) requires that bypass cases be determined by 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, § 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. Such deference is especially appropriate with respect to the appointment of law enforcement personnel. In light of the high standards to which law enforcement personnel appropriately are held, appointing authorities are given significant latitude in screening candidates. Beverly citing Cambridge at 305, and cases cited.

The Respondent's Argument

The Town argues that its selection of the third-place candidate and bypass of the Appellant was reasonably justified because he is a Certified Training Instructor, he has recently put in significant effort towards updating a fire truck and has had very little discipline. Furthermore, the Town argues that the Appellant has had several disciplines, including the incident at his mother's house, is not a training instructor and has not put in recent efforts comparable to the third-place candidate.

The Appellant's Argument

The Appellant argues that the decision was not based upon the merits of the candidates but rather upon Chief Daugherty's favoritism of the third-place candidate. He further argues that he was cleared of all wrongdoing in the zoning dispute involving his mother, and avers that his suspensions were the result of misunderstandings. In addition, he notes that he has given extra effort as a member of the Dive Team and the Tunnel Team.

Analysis

The Town has shown by a preponderance of the credible evidence that it had reasonable justification to bypass the Appellant for promotion to Temporary Deputy Fire Chief. While the Appellant is clearly well qualified, his discipline record provides reasonable grounds for bypass. That said, it is obvious that Chief Daugherty does not like the Appellant, though the reason for the depth of his dislike are unclear. Specifically, Chief Daugherty stated that he does not appreciate the Appellant as a Firefighter but merely "tolerates" him. Chief Daugherty and the Appellant have been of different minds at least twice in the past. Specifically, Chief Daugherty expressed his distaste for the

Appellant's decision to meet with him concerning a possible job opening when another officer was on sick leave. The Appellant wished to be considered for the position before the then-current Civil Service list expired, a request which incensed Chief Daugherty. On a second occasion, Chief Daugherty filled a different position shortly before a list expired by upgrading the rank previously assigned to a lesser position. The Appellant felt that this was unfair and filed a complaint about it to the union.

Chief Daugherty's negative view of the Appellant was palpable in his tone, demeanor and body language. The two events described above do not completely explain Chief Daugherty's negative view of the Appellant. When asked, he failed to explain the basis of these feelings; he cryptically stated that explaining it would "change the dynamics of everything." Finally, Chief Daugherty admitted that he did not read the candidates' files before selecting a new Temporary Deputy Chief, relying instead on reputation. The failure to notify the Appellant of the bypass in a timely manner also raises some suspicion, as Chief Daugherty was unable to explain why the notice was not mailed until months after it was dated. This undermines Chief Daugherty's objectivity in deciding who to appoint, as well as his credibility, but it does not delegitimize the Chief's reliance on the Appellant's disciplinary history as a reason for bypass, nor does it rise to the level of bias.

Confrontation While in Uniform

The bypass letter devoted significant space to noting that the Appellant had had a confrontation with a civilian while in uniform. However, testimony at the hearing revealed a different story. The Appellant testified in greater detail about the incident, explaining that incident occurred when workmen had come to install a driveway at the

home of his mother's neighbor, despite the fact that the work required a zoning variance which had not yet been approved. The Appellant credibly testified that, although he did go to the scene of the incident in uniform, he did so without speaking to, or interacting with, any person but his mother. The incident was investigated by several independent agencies and the Appellant was cleared of all wrongdoing.

Chief Daugherty failed to explain why the incident should be counted against the Appellant. While Chief Daugherty may have felt that a more cautious person would have avoided it, this seems unreasonable. Had there been any misconduct, it would have come out through investigation. As there was no misconduct found, this is not a reasonable justification for bypass.

Time Contributions

It is uncontroverted that the third-place candidate spent a significant amount of time, some of it his own, working on upgrading a Fire Department truck with new rescue tools. There was testimony that his involved a great deal of communication with manufacturers, testing, and even out-of-state trips with Chief Daugherty to review the upgrades. While this is certainly a significant contribution, I am not convinced it was fairly weighted. The Appellant testified that he also given significant time to the department as a current member of the Dive Team and a former member of the now defunct Tunnel Team.¹⁰ He also pointed out that he was not given the opportunity to take on a project like the one entrusted to the third-place candidate. Indeed, Chief Daugherty testified that he gave the task of upgrading the truck specifically to the third-place candidate and it would appear that they did work together on it.

¹⁰ The Tunnel Team was created to service the MetroWest Water Supply Tunnel construction project. The Team was disbanded after the project was completed in 2003.

Given that Chief Daugherty did not read the Appellant's file (or any candidate's file) to determine what contributions he had made, the conclusion that the third-place candidate's contribution was superior seems somewhat questionable. While I have no doubt that the third-place candidate did recently contribute a great deal of hard work to update a fire truck, it is also clear that the Appellant was not fairly credited with his extra work. Furthermore, the third-place candidate did not initiate the fire truck upgrade. Rather, it was given to the third-place candidate by Chief Daugherty.

*Certification as an Instructor*¹¹

The bypass specifically noted that the third-place candidate is a Certified Fire Training Instructor. To obtain this certification, a firefighter must take and pass an instructor training class at the Fire Academy. This certification allows an individual to serve as a Massachusetts Fire Academy Training Instructor or to teach at other institutions on fire related matters. In contrast, a Training Captain is a position at the Framingham Fire Department, and requires no certification. The Training Captain conducts training only at the Framingham Fire Department, and is additionally responsible for filling in for other positions as needed.

The third-place candidate is a Certified Fire Training Instructor and has taught at the Massachusetts Fire Academy. Furthermore, he has served as Training Captain at the Framingham Fire Department. In contrast, the Appellant has only served as Training Captain. Though he took the course to obtain certification as a Fire Training Instructor, he did not complete it due to a scheduling conflict with the final exam. As such, the third-place candidate's qualifications are superior in this regard.

¹¹ After the hearing, the parties submitted a stipulation to supplement the hearing testimony regarding the respective duties and qualifications of Training Captains and Training Instructors.

Discipline History

Although the bypass letter discussed only the Appellant's discipline record and not the third-place candidate's, both candidates have been disciplined. However, the third-place candidate's discipline record is minimal and the most recent event was in 2005. The third-place candidate was issued a written reprimand for failure to complete a report on March 16, 1999. He was issued a verbal warning for productivity on July 25, 2001. He was spoken to on August 2, 2001 about slow response time. He wrote an apology for parking his personal motorcycle in the Fire Department bay on May 20, 2004. He was issued a verbal reprimand for failure to clear snow on December 24, 2004. He wrote an apology for failure to wash a chief's car on March 14, 2005.

The Appellant, on the other hand, has been suspended on two occasions. The Appellant received a letter of reprimand for speaking disrespectfully to a superior on November 15, 2006, which was later increased to a 48-hour suspension.¹² The Appellant received a 24 hour suspension¹³ on May 12, 2006, which was later reduced to an eight hour suspension.¹⁴

Even taking into account Chief Daugherty's questionable attitude towards the Appellant, the Appellant's discipline is more recent and consists of two suspensions, whereas the third-place candidate's discipline record consists of two verbal reprimands and one written reprimand. While the Appellant contends that his discipline incidents were the result of misunderstandings, both incidents did result in suspensions, only one of which was appealed. The appeal that was granted resulted in a reduced suspension, but this is a suspension nonetheless. It is reasonable to conclude from this that he was a

¹² This is equivalent to a one-week suspension.

¹³ This is equivalent to a half-week suspension.

¹⁴ This is equivalent to a one-day suspension.

less suitable candidate. The third-place candidate's record is clearly better than the Appellant's in this regard. Therefore, a preponderance of the credible evidence establishes that the Town had just cause to bypass the Appellant.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. G1-13-52 is hereby *dismissed*.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, Marquis and Stein, Commissioners) on September 8, 2013.

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 the 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 a Civil Service Commission's final decision.

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.

Notice:

Andrew J. Gambaccini, Esq. (for Appellant)
Christopher L. Brown, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)