

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

CIVIL SERVICE COMMISSION  
One Ashburton Place, Room 503  
Boston, MA 02108  
(617) 979-1900

ANDREW NARDONE,  
*Appellant*

v.

G1-18-209  
G1-19-070

CITY OF PEABODY,  
*Respondent*

Appearance for the Appellant:

Leah Marie Barrault, Esq.  
Pyle Rome Ehrenber, P.C.  
2 Liberty Square, 10<sup>th</sup> Floor  
Boston, MA 02109

Appearance for the Respondent:

Stephen C. Pfaff, Esq.  
Louison, Costello, Condon & Pfaff  
101 Summer Street  
Boston, MA 02110

Commissioner:

Cynthia Ittleman

DECISION

On October 30, 2018, the Appellant, Andrew Nardone (Appellant), pursuant to G.L. c. 31, s. 2(b) filed the instant appeal, G1-18-209, at the Civil Service Commission (Commission) contesting the decision of the City of Peabody Fire Department (City) to bypass him for appointment to the position of permanent, *full-time* firefighter. On or about March 22, 2019, pursuant to G.L. c. 31, s 2(b), the Appellant filed a separate but timely appeal, G1-09-070, with the Commission contesting the subsequent decision of the City of Peabody Fire Department to bypass him for the appointment to the position of permanent, *reserve* firefighter. A prehearing conference was held in the appeal docketed G1-18-209 on November 27, 2018 and in the appeal

docketed G1-19-070 on April 23, 2018. The parties agreed, on or about June 28, 2019, to consolidate the Appellant's two (2) appeals.

I held a full regarding G1-18-209 on January 24, 2019.<sup>1</sup> The witnesses were sequestered. The hearing was digitally recorded, and the parties were given CDs from the hearing.<sup>2</sup> The parties submitted post-hearing briefs on March 14, 2019. The parties agreed that the second bypass appeal related to the reserve firefighter position (G1-19-070) would proceed *without* a hearing. The parties agreed to file briefs in the second bypass appeal. On September 13, 2019, the parties submitted post-hearing briefs in the form of proposed decisions for G1-19-070. As indicated herein, the appeal docketed G1-18-209 is allowed and the appeal docketed as G1-19-070 is denied as moot.

## **FINDINGS OF FACT**

Seven (7) exhibits were entered into evidence at the hearing of G1-18-209, and one (1) additional exhibit, an Affidavit, was ordered produced by the Respondent at the hearing and was filed post-hearing, totaling eight (8) exhibits. Specifically, the Respondent entered two (2) exhibits plus one post-hearing Affidavit, while the remaining exhibits entered were five (5) joint exhibits. The Appellant sought to enter a 2008 printout of a Facebook page/picture and the comments posted online relative to that 2008 picture.<sup>3</sup> The Commission denied the Appellant's request to admit this printout into evidence. Based on the documents submitted, the testimony of the following witnesses:

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

<sup>3</sup> The Commission denied the Appellant's request to admit the Facebook post into evidence on the basis that social media posts and/or photographs can be interpreted in many different ways and can be misleading if taken out of context.

*For the City of Peabody*

- Beth Brennan O'Donnell, City of Peabody Director of Human Resources
- Chief Thomas Griffin, Peabody Police Department
- Chief Steven Pasdon, Peabody Fire Department

*For Andrew Nardone*

- Andrew Nardone, Appellant

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

1. On or about April 16, 2016, the Appellant took and passed the civil service examination for Permanent Firefighter and received a score of 97. (Stipulated Fact, Jt. Ex. 1)
2. On or about November 4, 2016, the state's Human Resource Division (HRD) established a list of eligible candidates for Peabody Permanent Firefighter. (Stipulated Fact, Jt. Ex. 1)
3. On April 10, 2018, HRD, at the request of the Peabody Fire Department ("PFD"), sent Certification No. 05382 to the PFD. (Stipulated Fact, Jt. Ex. 1)
4. The Appellant was ranked eighth (8<sup>th</sup>) among those willing to accept employment. (Stipulated Fact, Jt. Ex. 1)
5. Of the seven (7) candidates who were selected for appointment by the PFD, two (2) were ranked below the Appellant. (Stipulated Fact, Jt. Ex. 1)
6. By letter dated December 7, 2018, the Mayor of Peabody, Edward Bettencourt, the Appointing Authority, notified the Appellant that the City was bypassing him for appointment. (Stipulated Fact, Jt. Ex. 2)

7. The bypass letter regarding the Appellant stated:

“Bypass due to lengthy history of negative driving incidents as recent as 2015, including multiple instances of speeding in the past five years. Your driving record includes a motor vehicle accident in 2017, six separate incidents of speeding in the past ten years (October 2015, May 2015, April 2014, November 2010, September 2010 July 2008) and other moving violations during that time, as well as two additional speeding violations in December 2006 and March 2007 in which you display a pattern of standards not acceptable in performance of firefighter functions which involve and require substantial regard for driving caution in public safety and emergency response. Bypass also due to results of background investigation, specifically including concerns regarding the nature of a “209A” Restraining Order issued against you in 2007 and other criminal charges brought against you that same year. While these charges were ultimately dismissed or continued without (sic) a required for a responsible public safety position in City government. Moreover, prior civil restraining order was not disclosed on current application packet materials. Questions exist regarding residency in past five years; no Rowley, MA address was listed on current application materials or Verification of Residency Form. However, letters submitted with current application packet dated 2013 and 2014 are addressed to applicant in Rowley, MA. Credit report from February 2016 application material does not indicate Peabody address, while Driver’s License issued in 2015 does. (Jt. Ex. 2, December 7, 2018 Bypass Letter)

8. Beth Brennan O’Donnell has worked as the Director of Human Resources for the City of Peabody (“City”) for three (3) years. As part of her official duties, she is involved in the process of hiring firefighters for the City. (Testimony of O’Donnell)
9. The process for appointing firefighters in Peabody is as follows: Candidates are chosen from the certification and, if they are willing to accept the position, the candidate reports to Peabody Human Resources and signs the Certification. The candidates are given a packet to complete by a date certain and they return the documents to the Peabody Fire Chief’s Office. The Fire Chief reviews the packets for completeness. (Testimony of O’Donnell and Pasdon)
10. The Fire Chief’s office sends all completed applications to the Chief of the Peabody Police to conduct a background check, which includes checking various databases to determine a candidate’s criminal and driver history. This is a paper investigation. No further work is done with regards to the background investigation. The police department does not usually speak

to references listed in a candidate's file. An officer usually looks at the letters of references the candidate has provided. The police department typically does not check with neighbor references, past or current employer references, or long-term acquaintances for fire department candidates. The City usually only checks these types of references for police officer candidates. (Testimony of O'Donnell)

11. The Chief of Police sends the reports generated from the records check back to the Peabody Director of Human Resources. Human Resources then flags those candidates who have a criminal history and/or a driver history within the last ten (10) years. (Testimony of O'Donnell)

12. The next step in the process is to provide the Mayor of Peabody all documents to review. Following the review, the Mayor meets with the Fire Chief and Director of Human Resources to identify those candidates whom the City would like to invite for an interview. Those candidates who do not "pass the background check" do not get an interview. (Testimony of O'Donnell)

13. Ms. O'Donnell, Chief Pasdon, and Mayor Bettencourt met sometime during the summer of 2018 to discuss the applications provided to the City as a result of Certification #05382. They reviewed the criminal history and other database printouts that have been provided to them by the police chief and, based upon these documents, they decide which candidates move forward in the process and receive interviews. (Testimony of O'Donnell)

14. There is no written policy with regards to the interview process. The interview is conducted by the Mayor, the Director of Human Resources and the Fire Chief. They do not have a list of questions, but the interviewers do go over who will ask what. Generally, all candidates are asked the same questions but some questions will be tailored towards the candidate's specific

background. There is no objective rating system utilized for the interview. Answers are not ranked. The Mayor, the HR Director, and the Fire Chief discuss among themselves whether a candidate will move forward and be given a conditional offer of employment. Once a conditional offer is given, the candidates who qualify will undergo a physical, a drug screen, a psychological evaluation, and a Physical Aptitude Test (PAT), in that order. (Testimony of Beth Brennan O'Donnell)

**Background of Appellant, Andrew Nardone**

15. The Appellant, Andrew Nardone, was born in Salem and grew up in Lynn and Rowley, Massachusetts. (Testimony of Appellant and Jt. Ex. 3)
16. The Appellant received a high school equivalency diploma from the Commonwealth of Massachusetts in 2007. (Testimony of Appellant and Jt. Ex. 3)
17. The Appellant has earned college credit through two different associate degree programs but has not finished either program as of the time of the hearing in this appeal. (Testimony of Appellant and Jt. Ex. 3)
18. On or about December 19, 2013, the Appellant graduated from the Massachusetts Firefighting Academy. (Testimony of Appellant and Jt. Ex. 3)
19. On or about April 7, 2014, the Appellant obtained a National EMS Certification at the Emergency Medical Technician level. (Testimony of Appellant and Jt. Ex. 3)
20. The Appellant has obtained multiple certifications from the Massachusetts Fire Training Council including Firefighter I/II; Incident Safety Officer; Public Safety Responses to Bombing Incidents; High Voltage Emergency Awareness; HAZMAT/WMD/CT-Operations Level Responder; NFPA Electric Vehicle Safety; Ethanol for First Responders; Introduction to Incident Command System; Suicide Prevention and Intervention Training Program;

FEMA/An Introduction to the National Incident Management System (NIMS). (Testimony of Appellant and Jt. Ex. 3)

21. The Appellant worked as a paid on-call fire fighter for the Rowley Fire Department (RFD) for five (5) years and, at the time of the hearing in this appeal, had worked as a paid, on-call, per-diem fire fighter in Lynnfield for the past three (3) months. (Testimony of Appellant and Jt. Ex. 3)

22. Since 2012, the Appellant has also owned a demolition business. The Appellant drives a lot of vehicles for this job, including heavy trucks, such as box trucks, econovans, pickup trucks, and dump trucks. He does not have a CDL license as these are non-CDL vehicles. (Testimony of Appellant and Jt. Ex. 3)

23. Prior to 2012, the Appellant worked construction, commuting to towns such as Raynham, Middleton, Saugus and Peabody. However, he drives more for his own company than he did before. (Testimony of Appellant)

24. In an undated letter of recommendation authored by Mr. G, a Firefighter/EMT of the RFD, Mr. G has known the Appellant for almost four years, since the Appellant joined the RFD in 2012. Mr. G has worked beside the Appellant and attended the Fire Academy with him. He notes that the Appellant's "competency and strong work ethic... and his eagerness to help co-workers, including myself, and his willingness to learn from experienced superiors." Mr. G notes the Appellant seemed eager to take any opportunity to work at the station, including participating in cleaning details and public service events. Mr. G believes Peabody "would gain a dependable and enthusiastic individual who takes pride in his work. Andrew is highly motivated and ...has always been committed to preserving the standard of excellence necessary for a high-stress job working for the public." (Jt. Ex. 3)

25. A second letter of recommendation was provided in the Appellant's 2018 application packet provided to the PFD. In an undated letter, Mr. D, a Firefighter/EMT with the RFD, indicates that, in his time working with the Appellant, he has been a valuable asset and a team-player who is capable of leading a team. Mr. D further opines that if a "situation at-hand requires the efforts of an individual then Andrew Nardone will be that focused and target-oriented individual that will get the job done." (Jt. Ex. 3)
26. No one from the PFD, the City's Human Resources Department, or the Mayor's Office contacted either Mr. D or Mr. G, the two firefighters who wrote the letters of recommendations. (Testimony of O'Donnell and Pasdon)
27. Included within his application packet for the PFD, the Appellant listed Mr. D of the RFD, Mr. M, Chief of the Lynn Fire Department, and Mr. F, the owner of a construction company where the Appellant had worked, as the Appellant's personal references. (Jt. Ex. 3)
28. No one from the PFD, the City of Peabody Human Resources Department, or the Peabody Mayor's Office contacted either Mr. D, Mr. M or Mr. F to check the Appellant's references. (Testimony of O'Donnell, Griffin and Pasdon)

*Appellant's Driving Record*

29. Peabody Police Chief Griffin testified on behalf of the City. He has been the Chief of the PPD for four and half (4.5) years and was previously in the Investigations Unit, rising to the rank of Captain, with the Salem Police Department for twenty-seven (27) years prior to working for Peabody. (Testimony of Griffin)
30. Chief Griffin assigned Officer Taryn Brotherton to conduct a background investigation of the Appellant, including the acquisition of a driving history from the Massachusetts Registry of Motor Vehicles (RMV). (Testimony of Griffin and Jt. Ex. 4)

31. Chief Griffin assigned Officer Brotherton to check a number of other databases for information regarding the Appellant’s criminal offender record, his interstate criminal record, COP Link to check municipal police reports and an in-house database system to determine if the Appellant had been involved with the PPD. (Testimony of Griffin and Jt. Ex. 4)
32. Chief Griffin personally reviewed the documents obtained by Officer Brotherton and the Appellant’s driving history was of concern to him. The license query returned a number of speeding violations. The Appellant was found responsible for some speeding violations and not others. (Testimony of Griffin and Jt. Ex. 4)

33. The Appellant’s RMV driving record acquired by the PPD shows:

December 26, 2006	Speeding in Violation of Special Regulation, NR
March 7, 2007	Speeding in Violation of Special Regulation, R
March 2, 2007	Municipal Motor Vehicle Ordinance Violation , CW
July 14, 2008	Speeding in Violation of Special Regulation, R
September 23, 2010	Speeding, NR Failure to Drive in Right Lane, NA
November 26, 2010	Speeding, R
April 17, 2014	Speeding, R
May 5, 2015	Speeding, NR
October 22, 2015	Speeding, R
(Respondent Ex. 1)	

34. Chief Griffin indicated that the City will look at ten (10) years or so into the candidate’s driving history. He indicated that even if the candidate is found *Not Responsible*, the City is looking to see if there is a pattern of misconduct. The most relevant findings to the Chief when looking at someone’s driver history are moving violations, especially speeding violations, because the City firefighters are entrusted with driving a large vehicle when responding to emergencies for the City. (Testimony of Griffin and Jt. Ex. 4)

35. There is no written policy as to how candidate's driver histories are reviewed. The police chief does not draft a report for a fire candidate relative to his findings about a driver history. The City considers the history "stale" beyond ten (10) years. (Testimony of O'Donnell)
36. Officer Brotherton also provided Chief Griffin with a printout from the in-house system for the PPD, indicating whether or not the Appellant's name has appeared in a records check. This printout indicates that the Appellant was listed as the "Operator" in an "Accident" on August 10, 2017. (Respondent Exhibit 1)
37. The City never spoke to the Appellant about this accident referred to in his records. Ms. O'Donnell cannot tell if the Appellant was at fault in this accident or not. (Testimony of O'Donnell)
38. Ms. O'Donnell was concerned with the Appellant's driving history because there are six (6) incidents of speeding in the past ten (10) years and an additional two (2) speeding incidents on his record that fall beyond the ten (10) year lookback. The City looked at the 2006 and 2007 speeding incidents as part of a pattern of conduct. The City looks at the totality of the record. (Testimony of O'Donnell)
39. Peabody Fire Chief Pasdon has been the Chief of the PFD for eighteen (18) years. Chief Pasdon is familiar with Certification #05382 and is familiar with the hiring process undertaken to fill the positions of permanent firefighter relative to that certification. (Testimony of Pasdon)
40. Chief Pasdon also reviewed the Appellant's driver history and he was "very much concerned" with the Appellant's driving record. Chief Pasdon concurred with Ms. O'Donnell that there is no written policy for evaluating a candidate's driver history but the past practice is to look at a ten year window, and more specifically focussing on the past five (5) years.

Firefighters for the City are expected to drive a 60-100,000 pound fire apparatus, which is more difficult to handle and stop than a regular vehicle. (Testimony of Pasdon)

41. Neither Chief Pasdon, Ms. O'Donnell, nor Police Chief Griffin discussed the Appellant's driving history with him at any time during his candidacy, nor did they discuss with him his criminal history or his involvement in a 2017 motor vehicle accident. They did not ascertain whether the Appellant was at-fault in the 2017 motor vehicle accident. The City officials did not write a report regarding their findings. (Testimony of Pasdon, O'Donnell and Griffin)

42. Police Chief Griffin did not speak to Mayor Edward Bettencourt, the Appointing Authority, about the reports his department generated relative to the Appellant's background nor did he give his opinion about the content of those reports to the Mayor. (Testimony of Griffin)

43. The Appellant was rear-ended on Rt. 128 in the 2017 motor vehicle accident that appears in his records. An insurance company report, produced by the Appellant and marked for Identification (Id. A), indicates that the Appellant was found not at fault in that accident. (Testimony of Appellant and Identification A)

44. The Appellant never spoke to either the Mayor, Fire Chief Pasdon, Police Chief Griffin, Officer Brotherton, or Ms. O'Donnell about his driver history.<sup>4</sup> (Testimony of Appellant)

#### *Appellant's Criminal History*

45. The Appellant's record indicates that a 209A civil restraining order was issued against him beginning on January 11, 2007 and expired on September 10, 2007. (Respondent Ex. 1)

46. The Appellant's criminal history indicates that he was charged with assault and battery with a dangerous weapon and procuring alcohol for a minor in September 2007. The first case was

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<sup>4</sup> The 2017 motor vehicle accident does not appear as an entry in Joint Exhibit 4, the Appellant's RMV Driver History, rather, this entry appears in Respondent's Exhibit 1, in a printout from the PPD's in-house system which identifies whether the Appellant's name, address, or vehicle appears in any reports.

dismissal by the court and the second was disposition of the Procuring Alcohol count was continued without a finding (CWOFF). (Respondent Ex. 1)

47. The Appellant did not mention in his application that he was the subject of a civil restraining order in 2007. (Jt. Ex. 3 and Testimony of Griffin)

48. A 209A restraining order is a civil matter in the Commonwealth of Massachusetts, unless the restraining order is violated, at which point it becomes a criminal violation. (Testimony of Griffin)

49. The Appellant mistakenly considered the 209A restraining order which appears in his criminal history to be a criminal matter and not a civil matter. The Appellant did not list this matter in his application because there was nowhere to specifically note it. (Testimony of Appellant)

50. On page 9 of the application, question 8A asks the Appellant if had “ever been convicted of a criminal offense?” The Appellant marked the box to indicate “no”. On page 9, question 8D asks if he had “ever been a plaintiff or a defendant in a civil court action?” The Appellant did not include the 2007 restraining order in this section either because he mistakenly thought the restraining order was a criminal matter (of which he was not convicted), not a civil matter. (Jt. Ex. 3 and Testimony of Appellant)

51. There is no separate, specific question in the Appellant’s PFD application packet that asks solely about prior restraining orders. (Jt. Ex. 3)

52. Neither Mayor Bettencourt, Chief Pasdon, Chief Griffin, Officer Brotherton, nor Ms. O’Donnell ever spoke with the Appellant regarding his criminal history. The City of Peabody did not obtain the police reports relative to the entries on the Appellant’s criminal history or relative to the restraining order issued against the Appellant in 2007. The City did not

question the Appellant about the restraining order. (Testimony of Griffin, Pasdon, O'Donnell and Appellant)

Residency Preference

53. The Appellant signed a Verification of Residency Form, attesting that he maintained a residence in Peabody for one full year prior to taking the exam from which certification #05382 was created. The time frame for residency preference was from 2015-2016. (Jt. Ex. 3 and Testimony of O'Donnell)
54. The Verification of Residency Form requires candidates to "list places(s) of residence for the past 24 months." The Appellant wrote that he lives in Peabody and has been a resident in the City since 2013. (Jt. Ex. 3)
55. As part of his application, the Appellant gave the City a letter from the Mass. Fire Training Council regarding his Firefighter I/II certifications. The letter was dated December 18, 2013 and contained his address parents' address in Rowley, MA. (Jt. Ex. 3 and Testimony of Appellant)
56. As part of his application, the Appellant gave the City a letter from National Registry of Emergency Medical Technicians regarding his EMT Certification. The letter was dated April 14, 2014 and contained his parents' address in Rowley, MA. (Jt. Ex. 3 and Testimony of Appellant)
57. These letters sent to his parents' address were from agencies that he does not interact with on a daily basis so he never bothered to correct his address to reflect the Peabody address. These documents were part of the Appellant's application with the PFD to show evidence of his education/certifications, not to prove or disprove his residency in 2013 or 2014. (Testimony of Appellant)

58. The City never questioned the Appellant relative to the listing of his address as a Rowley address in 2013 and 2014. (Testimony of Donnell and Appellant)
59. The Appellant's credit report provided to the City with his application materials contains the Appellant's Peabody address at the pertinent point in time. (Jt. Ex. 3)
60. The City did not investigate the Appellant's residency. The City did not send out investigators to check on the Appellant's residence nor did they speak to the Appellant regarding any questions the City may have had about his residency. (Testimony of O'Donnell and Appellant)
61. On occasion for other past candidates, the City has investigated their residency. (Testimony of O'Donnell)
62. The Appellant gave the City the contact information of his landlords in Peabody but the City never contacted them. (Testimony of Appellant and Jt. Ex. 3)

*Relationship of the Mayor and Candidate - Mr. P*

63. The City bypassed the Appellant and hired Mr. P.<sup>5</sup> (Jt. Ex. 2)
64. Mr. P grew up in the City of Peabody and is a graduate of Peabody Veterans Memorial High School. He has been employed by the PFD as a Signal Maintainer since March 2013. (Jt. Ex. 2)
65. Mr. P is "in the process of becoming EMT certified." (Jt. Ex. 2)
66. Mr. P grew up with Mayor Bettencourt and HR Director O'Donnell. (Testimony of O'Donnell)
67. Ms. O'Donnell and Mr. P went to high school together, although they do not currently "run in the same circles." (Testimony of O'Donnell)

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<sup>5</sup> For purposes of confidentiality, this candidate will be referred to by the first letter of his last name. Every candidate will be referred to in this manner, hereafter.

68. Mr. P and Mayor Bettencourt are friends and are contemporaries. They grew up in Peabody and went to high school together. (Testimony of O'Donnell)
69. The Mayor did not recuse himself from involvement in this hiring process with respect to his friend, Mr. P. (Respondent Exhibit 3, Affidavit of O'Donnell dated January 31, 2019 and email exchange between this Commissioner and the Respondent's counsel dated January 31, 2019)
70. Multiple members of the PPD and PFD with first-hand knowledge told the Appellant that they joked that there is a "P Line" on the certification and that the Mayor would do anything he needed to get down to his friend's name (Mr. P) on the certification because Mr. P had not taken the civil service examination again and would not be eligible on the next certification. (Testimony of Appellant)
71. Chief Pasdon has supervised Mr. P during his employment with the City as a Signal Maintainer. (Testimony of Pasdon)
72. Mayor Bettencourt, Ms. O'Donnell, and Chief Pasdon conducted the interviews of those applicants selected from certification #05382, including Mr. P, and made final hiring decisions, including the decision to hire Mr. P. (Testimony of O'Donnell and Pasdon)
73. Mr. P's driver history was ascertained by the Peabody Police in the course of his records check. Mr. P was cited for speeding on five (5) occasions between 1990 and 1995. He was cited in 1998 for unsafe operation of a motor vehicle and failure to stop/yield. He has had no speeding citations within the last ten (10) years and the only infraction within the past ten (10) years on his driving history is an improper turn in 2010 and an unpaid parking ticket in 2013. (Testimony of O'Donnell and Jt. Ex. 5)

74. Mr. P's criminal history report states that he had two criminal charges: one in 1994 for disorderly person and one in 2004 for compulsory insurance violation, both of which were dismissed by the court. (Jt. Ex. 5)
75. Mr. P's driver history was not of concern to Police Chief Griffin since Mr. P's speeding citations occurred well outside of the ten (10) year window and he was not concerned with the one 2010 citation for an improper turn. Chief Griffin never contacted Mr. P to discuss his driving record. He noted that, although Mr. P had some entries on his driver history in the 1990's, he figured that perhaps it is due to maturity, a lifestyle change, or the choice to abide by the regulations which caused Mr. P not to have any future speeding violations on his record. (Testimony of Griffin)
76. Fire Chief Pasdon testified that there was nothing of concern in Mr. P's driver history. (Testimony of Pasdon)

*Relationship with the Mayor and Candidate - Mr. O*

77. The City bypassed the Appellant and hired Mr. O. (Jt. Ex. 2)
78. Mr. O grew up in the City of Peabody and is a graduate of Peabody Veterans Memorial High School. (Jt. Ex. 2)
79. Mr. O lacks fire department experience. (Jt. Ex. 2)
80. Mr. O and Mayor Bettencourt are friends. (Affidavit of O'Donnell, dated January 31, 2019, Respondent Exhibit 3, and email exchange between this Commissioner and the Respondent's Counsel dated January 31, 2019)
81. The Mayor did not recuse himself from involvement in this hiring process with respect to Mr. O. (Affidavit of O'Donnell, dated January 31, 2019, Respondent Exhibit 3, and email exchange between this Commissioner and the Respondent's Counsel dated January 31, 2019)

### *Applicable Law*

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L.c.31, §1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); *MacHenry v. Civil Serv. Comm'n*, 40 Mass.App.Ct. 632, 635 (1995), *rev.den.*, 423 Mass.1106 (1996). Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons – positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L. c.31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it had “reasonable justification” for the bypass. *Boston Police Dep’t v. Civil Service Comm’n*, 483 Mass. 474-78 (2019); *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Service Comm'n*, 78 Mass.App.Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass.App.Ct. 726, 727-28 (2003). “Reasonable

justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law’”. Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. *See also* Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991)(bypass reasons “more probably than not sound and sufficient”).

The Commission’s role, while important, is relatively narrow in scope: to review the legitimacy and reasonableness of the appointing authority’s actions. *See* Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 824-26 (2006). In doing so, the Commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182,188 (2010). The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the acts 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).; Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

### *Analysis*

Of the reasons the City has given for bypassing the Appellant, the only one about which the City has raised legitimate concerns is the Appellant’s driver history. However, the bias that permeated the City’s hiring process violates the tenets of civil service basic merit principles,

requiring the Commission to allow the bypass appeal docketed as G1-18-209. I address the City's bypass reasons below.

The Mayor of Peabody was involved in significant parts of the hiring process at issue in the appeal docketed G1-18-209. The Mayor is a longtime, personal friend of two selected candidates (Mr. P and Mr. O), whose names appeared below the Appellant's on the certification. For these reasons, the Mayor should have insulated himself from his involvement in the hiring process until he received the ultimate recommendations from those to whom he should have delegated the hiring process. The Appellant was in direct competition for the same position being sought by Mr. P and Mr. O. The Mayor should not have been involved in reviewing the purported background investigations of Mr. P or Mr. O. He should not have determined who would receive an interview. He should not have participated in the initial interviews themselves nor should he have subjectively determined, based on those who were interviewed, who was ultimately given a conditional offer of employment.

The lack of a level playing field makes it difficult, at best, to determine whether the City would have viewed the Appellant's background through a different lens if he, like other lower-ranked candidates, was a longtime, personal friend of the Mayor. Would the City have considered more fully the Appellant's candidacy learning, for example, that he was so dedicated to becoming a fulltime, permanent firefighter that he earned many certificates in the field of fire safety and firefighting on his own volition? Would the City have called and spoken to the Appellant's firefighter-references to gain insight into the Appellant's experience as a working firefighter in another community? Would the City have actually investigated the Appellant's residence? Would the City have given the Appellant the opportunity to address his dated criminal record? The Appellant deserved, but was denied, the opportunity to be evaluated as part

of a process that, at a minimum, has not been compromised by patronage involving long-lasting, personal relationships between the Appointing Authority and other candidates.

Supporting the Appellant's testimony about the favoritism he heard from members of the PFD and/or the PPD, Ms. O'Donnell testified and confirmed in an Affidavit that the Mayor is a personal friend of both Mr. P and Mr. O , whose names were ranked below the Appellant on the certification, yet were chosen over the Appellant. Any decision to bypass candidates ranked above the Mayor's friends benefitted Mr. P and Mr. O. The Mayor actively participated in the decision-making process, benefitting Mr. P and Mr. O. Specifically, the Mayor reviewed all documents provided by the Chief of Police relative to the background investigations of all candidates. The Mayor was then involved in discussions about the background investigations and in the determination of who, and who would not be given the opportunity for an interview, the next step in the hiring process. The Mayor took part in the interviews of all who were given an interview. There appears to be minimal uniformity of questions the candidates were asked in their interviews. The Mayor made the determination, along with Ms. O'Donnell (who has also known Mr. P and O since high school) and Chief Pasdon, about who would be given a conditional offer of employment. The Appellant was not chosen by the Mayor for an interview yet two candidates with whom the Mayor was personal friends, and whose names were ranked below the Appellant on the certification, were given interviews.

The hiring processes used in this case were based on unduly subjective methods of assessing the candidates, in addition to processes that are inconsistent with basic merit principals of the civil service hiring process. 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. Due to the clear bias and/or favoritism of the Mayor, the City's bypass reasons are fatally flawed.

Driver History

The City's bypass letter states, in part, that it bypassed the Appellant,

“due to the lengthy history of negative driving incidents, as recent as 2015, including multiple instances of speeding in the past five years. [His] driving record includes motor vehicle accidents in 2017, six separate incidents of speeding in the past ten years (October 2015, May 2015, April 2014, November 2010, September 2010, July 2008) and other moving violations during that time, as well as two additional speeding violations in December 2006 and March 2007 in which you display a pattern of standards not acceptable in performance of firefighter functions which involve and require substantial regard for driving caution in public safety and emergency response.” Jt. Ex. 2.

When an appointing authority's hiring process comports with civil service basic merit principles, the Commission owes the appointing authority substantial deference in determining whether a firefighter candidate's driving record results in his non-selection. The appointing authority, however, “must show that the reason is valid, and reasonable, and not arbitrary and capricious.”

Stylien v. Boston Police Dept., G1-17-194 (April 12, 2018). In reviewing such cases, the Commission places an emphasis on the more recent driving infractions as opposed to stale or non-moving violations that are not necessarily reflective of a candidate's ability to effectively drive a fire truck. Stylien v. Boston Police Dept., G1-17-194 (April 12, 2018). Moreover, a candidate's driving history must be evaluated in the proper context, including consideration of the number of driving hours logged by a candidate and where the driving occurred. Failure to do so runs the risk of favoring candidates who have a “good driving history simply because they drive less and/or whose driving history occurs in areas less challenging....” Stylien v. Boston Police Dept., G1-17-194 (June 21, 2018).

The City's witnesses all testified that they relied on the Appellant's driver history printout as their source of evidence relative to his driving history. At the hearing for the 2018 appeal, the Appellant testified that since 2012, he has owned a demolition company and that he drives five to six (5-6) hours per day for this company, using different types of heavy trucks, although he does not have a CDL license. The Appellant asserted the driving he does for his demolition company is similar to truck hauling or a delivery driver, to some extent. I did not credit the Appellant's testimony as evidence of the type of extensive driving which would warrant a closer look, or mitigation for the driving citations on the Appellant's driver history. The Appellant was involved in one motor vehicle accident in 2017 for which he was found to be not at fault. His driver history has no entries relative to speeding offenses for 2016, 2017, and 2018. *See e.g. Pacini v. Medford Fire Dept*, 18 MCSR 351, 353 (2005)(Commission did not consider infractions for which applicant was found not responsible). His last speeding citation was in 2015 and he was found not responsible, three years prior to this application to the PFD.

The Appellant claims his driver history is comparable to that of Mr. P, who was selected over of the Appellant. I do not find Mr. P's driver history comparable to the Appellant, mostly because of the timeframe of Mr. P's speeding infractions, which were in the 1990's, and the time frame of the Appellant's record, 2008-2015 (and 2006, 2007 to show a pattern of similar citations). Mr. P had numerous entries on his driver history, including four (4) speeding violations (May 1990, January 1991, July 1992, and July 1995 – although he was found responsible for only one of them) and failure to stop/yield in 1992 and unsafe operation (1998). Any other entry on Mr. P's driver history was not a moving violation. The City's witnesses testified that Mr. P's driver history was of no concern. I find the entries on Mr. P's driver history

from 1990 to 1998 to be stale, since they occurred between 20-28 years before this 2018 bypass appeal.

The Appellant's driving infractions are much more recent than those of Mr. P. The Appellant was cited for six (6) speeding violations in the past ten (10) years and was found responsible for four (4) of them between 2008 and 2015. The City also cited to two other speeding violations on the Appellant's driver history that fall outside of the ten (10) year lookback window, one in 2006 (not responsible) and the other in 2007 (responsible) to show a pattern of behavior. On the other hand, the only entries on Mr. P's driving history that fall within the ten-year lookback window are: in 2004, unregistered motor vehicle (not responsible), uninsured motor vehicle (dismissed), and no inspection sticker (responsible); in 2010, improper turn (responsible); and in 2013, an unpaid parking ticket. I do not find these entries on Mr. P's driver history to be comparable to the Appellant's driver history during the noted ten-year period. As a result, the Appellant's driver record at the time he applied to the PFD in 2018 raised concerns.

### *Criminal History*

The City failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant based on his criminal record. In its December 7, 2018 bypass letter, the City wrote that the Appellant was bypassed for, among other reasons,

“...results of a background investigation, specifically including concerns regarding the nature of a ‘209A’ Restraining Order issued against [him] in 2007 and other criminal charges brought against [him] that same year. While these charges were ultimately dismissed or continued with a [sic]<sup>6</sup> required for a responsible public safety position in City government. Moreover, prior civil restraining order was not disclosed in current application packet materials.” Jt. Ex. 2.

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<sup>6</sup> In the hearing of this matter, the Director of Human Resources, Beth Brennan O'Donnell, admitted that there was a clerical error in this bypass letter. The letter did not sufficiently indicate that the Appellant's case was Continued Without a Finding, which finding led the Respondent to bypass the Appellant. The Commission found that this was a clerical error or no legal significance.

The PPD was asked to obtain background information about the candidates, including the Appellant. The PPD obtained the Appellant's criminal record information and produced a computer printout of a Peabody Police Department in-house database. The record indicates that the Appellant had a 209A civil restraining order issued against him at the request of a family member on January 11, 2007 and that order was continued in effect until September 10, 2007. Additionally, the record indicates that the Appellant was charged with both assault and battery with a dangerous weapon (A&B DW) and with procuring alcohol for a minor on March 26, 2007. The Commission takes the issuance of a restraining order against a candidate very seriously and considers a variety of factors in assessing any such order, including whether an emergency restraining order has been extended to one year. In this case, the order was in effect for less than one year but the record lacks any other information. There is no indication in the record that the Appellant has been the subject of any other restraining orders since 2007. With regard to the criminal charge in the Appellant's record, the first criminal charge against was dismissed and the latter was continued without a finding and ultimately dismissed (both on September 14, 2007).

One of the City's arguments in favor of bypassing the Appellant is that he had not disclosed the restraining order on his application. However, the Appellant credibly explained in his testimony before the Commission that he was under the mistaken belief that the restraining order was a criminal matter, not civil.<sup>7</sup> The Appellant also testified that he did not mention the 2007 restraining order in the section of the application requesting criminal information because it only requested information pertaining to convictions. There is no

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<sup>7</sup> Indeed, it is not unusual for laypersons and others to believe that a restraining order is a criminal, not civil matter. In fact, restraining order information appears on criminal offender record information even though it is a civil matter.

indication in the record that the Appellant was charged with violating the restraining order and convicted of a crime. The Appellant further credibly testified that he did not disclose the 2007 restraining order in the section of the application that asks whether he had been involved in civil litigation because he thought it was a criminal matter. Nowhere in the application is there a separate question asking if a restraining order has been issued against the applicant. It is understandable that an applicant may be confused about whether a restraining order is a criminal or civil matter.<sup>8</sup>

The use of a criminal record, without the appropriate review of the circumstances behind a criminal record, particularly a stale offense that does not suggest a pattern of misconduct, is a problematic reason to bypass an otherwise qualified candidate. Finklea v. Boston Police Dep't., G-1-01-5-070, *aff'd in rel. part*, Finklea v. Civil Service Comm'n., 34 Mass.L.Rptr. 657, \*6 (2018); Stylien v. Boston Police Dept., G1-17-194, 12-13 (April 12, 2018). In the present case, the City admits that it did not obtain information about the underlying facts associated with the two 2007 charges in the Appellant's record or the 2007 restraining order prior to bypassing him. Neither Officer Brotherton nor Chief Griffin, who conducted the background checks, contacted the Appellant to discuss their findings or otherwise provide the Appellant with an opportunity to explain the incidents. Nor did the Director of HR, the Fire Chief, or the Mayor speak to the Appellant about his record or otherwise offer him the opportunity to address it.

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<sup>8</sup>At the hearing of this matter, the Respondent attempted to add a reason for bypass in G1-18-209, specifically "untruthfulness." There is no mention of untruthfulness in the 2018 bypass letter. The Commission barred the Respondent from adding this to its argument for bypass, pursuant to G.L. c. 31, s. 27 and HRD Personnel Administrator Rules PAR.08(4), which explicitly bars appointing authorities from adding any reasons not included in the bypass letter.

In its recent decision in Boston Police v. Civ. Serv. Comm'n and Gannon, the SJC confirmed that an Appointing Authority must prove, by a preponderance of the evidence, that the Appellant actually engaged in the alleged misconduct used as a reason for bypass. However, the Court also *reaffirmed* that, once that burden of proof regarding the prior misconduct has been satisfied, it is for the appointing authority, not the commission, to determine whether the appointing authority is willing to risk hiring the applicant. The City has not proved by a preponderance of the evidence standard that the alleged criminal conduct actually occurred.

That turns to whether the Appellant's criminal conduct, if it actually occurred, is a valid reason for bypass. The City failed to establish by a preponderance of the evidence that the stale isolated events from 2007 provide a valid ground for bypass. The City acknowledges that the charges stem from an incident that occurred eleven (11) years prior to the Appellant's application to the PFD. The Appellant was not convicted of the two criminal charges. The City argues that this notation on the Appellant's criminal record alone is reason enough to bypass the Appellant yet the Commission knows nothing more than the entry on the record. The Commission does not know any of the underlying facts relative to the charges or what the Appellant, witnesses or victims recall since there is no indication in the record that the City discussed the matter with the Appellant or otherwise investigated it beyond the mere entry of the charges on the Appellant's record.

In Stylien v. Boston Police Department, the Commission concluded that a stale felony CWOFF from 16 years ago, and the Appellant's driver history, when viewed in the proper context, did not provide a reasonable justification to bypass the Appellant in that case. Stylien v. Boston Police Department, G1-17-194 (2017). The Commission in Stylien found that the appointing

authority was entitled to give some weight to an applicant's criminal record but they may not automatically disqualify a candidate because he has a felony CWOFF on the record, particularly when the CWOFF is stale and is not accompanied by any evidence showing a pattern of criminal behavior. As in Stylien, the City of Peabody has failed to articulate an argument supported by sufficient credible evidence, the reason that a stale, isolated incident provides a valid reason for bypass. Further, leaders on both sides of the political spectrum in the Commonwealth have advocated looking beyond a snapshot of who a candidate was many years ago to look at who that candidate is today, as defined by the intervening years since the misconduct occurred. The Appellant provided two positive letters of recommendation from two local fire departments with which he has been associated as an on-call firefighter. He has completed many firefighting certification courses upon his own initiative. He has successfully begun and operated his own business. Because the City failed to obtain and consider such information, it did not establish by a preponderance of the evidence that the Appellant's criminal record provided reasonable justification for his bypass.

### Residency

The City also failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant based on his lack of residency in Peabody. Specifically, the City's bypass letter states that "[Q]uestions exist regarding residency in the past five years; no Rowley, MA address was listed on current application materials or Verification of Residency Form. However, letters submitted with current application materials does not indicate Peabody address, while Driver's License issued in 2015 does." Jt.Ex. 2. Pursuant to G.L. c. 31, s 58, the City is authorized to give preference to candidates for civil service who have maintained a Peabody residence for one year immediately prior to the date of the relevant civil service

examination. The timeframe that the City of Peabody would look to in this particular instance for the Appellant's residency status would be from 2015-2016.

The Appellant provided the City with numerous documents in his application that indicate that he lived in Peabody during the required time period. This included a 2016 credit report and a driver's license. The Appellant also signed a Verification of Residency Form on page 13 of Joint Exhibit 3, where the Appellant listed two different Peabody addresses from 2013-2018. At no point during the Appellant's candidacy did the City reach out to the Appellant to inquire about his residency. The City did not undertake its own further investigation into questions it had regarding the Appellant's residency. In addition to consulting the Appellant, the City could have checked official sources such as voting records, bank records and car insurance records or check the Appellant's landlords and neighbors but the City failed to do so.

The City simply points to two letters in the Appellant's application which have a Rowley address. One letter is a 2013 letter is from the Massachusetts Fire Training Council and the 2014 letter is from the National Registry of Emergency Technicians. These letters, however, are from 2013 and 2014, not the 2015-2016 residency period at issue here. The Appellant testified that the letters were sent to his parents' address and the two institutions that sent the letters are not places that he deals with on a daily basis so he never bothered to update his address and correct them. Moreover, the Appellant gave those letters to the City with his application to bolster his educational credentials for the position of permanent firefighter, not to prove residency for the timeframe of 2015-2016. If the City had asked the Appellant about the two letters, he could have easily explained them but the City failed to do so. Therefore, the City failed to establish that the Appellant was not a Peabody resident in the year prior to the civil service exam that the Appellant took and passed.

*Conclusion*

For all of the foregoing reasons, the Appellant's appeal under Docket G1-18-209 is hereby **allowed**.

Under the appeal G1-18-209, pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

- 1) The state's Human Resource Division shall place the name of Andrew Nardone at the top of the current or next Certification for the position of permanent, full-time firefighter in the City of Peabody until he has been appointed or bypassed.
- 2) If Mr. Nardone is appointed, he shall receive the same civil service seniority date as those candidates appointed from Certification 03582.

Since the Appellant is being awarded relief through the appeal docketed under G1-18-209, his subsequent appeal under Docket No. G1-19-070, is ***dismissed*** as moot.

Civil Service Commission

/s/Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 25, 2021.

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:

Leah Marie Barrault, Esq. (for Appellant)  
Stephen Pfaff, Esq. (for Respondent)  
Michele Heffernan, Esq. (HRD)