

COMMONWEALTH OF MASSACHUSETTS

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

MICHELANGELO RECUPERO,
Appellant

G1-21-152

v.

CITY OF CHELSEA,
Respondent

Appearance for Appellant:

Bryan R. Colella, Esq.
Gens & Stanton, P.C.
12 Ericsson Street
Boston, MA 02052

Appearance for Respondent:

Stephon Treadway, Esq.
City of Chelsea
500 Broadway, Room 307
Chelsea, MA 02150

Commissioner:

Paul M. Stein¹

Summary of Decision

The Commission denied the Appellant's bypass appeal, finding that the City of Chelsea was justified in bypassing him for original appointment as a firefighter based on two positive drug tests indicating recent use of marijuana, which he had not disclosed on his application.

¹ The Commission acknowledges the assistance of Law Fellow Courtney Timmins in the preparation of this decision.

DECISION

On August 26, 2021, the Appellant, Michelangelo Recupero, acting pursuant to G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from the decision of the City of Chelsea (City) to bypass him for appointment to the position of firefighter in the Chelsea Fire Department (CFD).² The Commission held a prehearing conference on January 25, 2022, via remote videoconference (Webex). The Commission subsequently held a full hearing on April 8, 2022 and April 14, 2022. The first day of the hearing was conducted in person at One Ashburton Place, Room 503. The second day of the hearing was conducted remotely, via Webex. The full hearing was recorded on Webex.³ Thirteen joint exhibits and six Respondent exhibits were received in evidence. Each party filed a Proposed Decision on May 31, 2022. For the reasons set forth below, Mr. Recupero's appeal is denied.

FINDINGS OF FACT

Based on the exhibits entered into evidence and the testimony of the following witnesses:

Called by the City:

- Odelisa Macedo, Human Resources Manager, City of Chelsea
- Christopher Lehmann, Captain, Chelsea Fire Department
- Leonard Albanese, Chief, Chelsea Fire Department
- Sarah Nichols, Sample Collector, ARCPoint Labs
- Dr. David Vearrier, Medical Review Officer, Concorde, Inc.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ A link to the recording of the full hearing was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the recording to supply the court with the stenographic or other written transcript of the hearing to the extent they wish to challenge the decision as unsupported by substantial evidence, arbitrary and capricious, or an abuse of discretion.

Called by the Appellant:

- Joshua McLaughlin, friend of Appellant
- Mario Pires, friend of Appellant
- Michelangelo Recupero, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Michelangelo Recupero, lives in Chelsea with his girlfriend and three children. Born in 1987, Mr. Recupero is a lifelong Chelsea resident. He temporarily left Chelsea in 2009-2010, when he lived with his grandparents in East Boston, and in 2011 for a military deployment to Afghanistan. (*Testimony of Appellant; Joint Ex. 6, J0060*)
2. Mr. Recupero is one of thirteen children, with eight sisters and four brothers. He attended Chelsea High School and East Boston High School, but did not graduate. He later earned his GED in 2008. (*Testimony of Appellant; Joint Ex. 3, J0018*)
3. Mr. Recupero enlisted in the military in 2008. He completed a deployment in Afghanistan in 2011 and was honorably discharged in 2016, having achieved the rank of Sergeant. (*Testimony of Appellant*)
4. While in the military, Mr. Recupero began cutting hair in the barracks. He began formal training for hairdressing in 2011 and became a professional barber in 2014. As his primary source of income, Mr. Recupero currently rents a chair in a barber shop in Chelsea. (*Testimony of Appellant*)
5. In 2012, Mr. Recupero applied to be a firefighter in the CFD. In 2013, Mr. Recupero applied to be a police officer in the Chelsea Police Department. On both occasions, the City bypassed Mr. Recupero for reasons unrelated to this appeal. (*Testimony of Appellant; Joint Ex. 3, J0050*)

6. On December 5, 2020, Mr. Recupero took and passed the civil service examination for Firefighter administered by the Massachusetts Human Resources Division (HRD). He received a score of 95 and his name was placed on the eligible list established on March 15, 2021. (*Stipulated Facts; HRD Submission 9/17/21*)
7. On March 24, 2021, HRD issued Certification No. 07670 authorizing the City to appoint six firefighters. Mr. Recupero ranked fifth, tied with two others, among those willing to accept appointment. (*Joint Ex. 1, J0002*)
8. On April 13, 2021, Mr. Recupero signed the Certification as willing to accept appointment. He completed the thirty-three page CFD employment application along with a certification of his responses. (*Testimony of Macedo; Joint Ex. 3, J0008-50*)
9. As part of the CFD hiring process, Capt. Lehmann conducted a background investigation of Mr. Recupero. On June 24, 2021, Mr. Recupero attended an interview with Chief Albanese, Deputy Chief Perisie (now retired), Capt. Lehmann, and Ms. Macedo (the City's Human Resources Manager). (*Testimony of Albanese, Lehmann, Macedo, & Appellant*)
10. After Mr. Recupero left the interview room, the panelists expressed concerns about Mr. Recupero's history and doubts as to whether he was forthcoming in his answers. Chief Albanese made the final decision to move Mr. Recupero forward in the hiring process because of Mr. Recupero's status as a veteran and a lifelong Chelsea resident. However, Chief Albanese gave Mr. Recupero a stern warning that he was under scrutiny and needed to be on his best behavior. (*Testimony of Albanese*)
11. Ms. Macedo then gave Mr. Recupero instructions to go directly to Occupational Health Services for a drug test, which is standard for all candidates. (*Testimony of Macedo*)

12. Question 147 of the CFD application asks: “Do you currently use, or in the last ten (10) years have used, possessed, supplied, or manufactured any illegal drugs?” The questions notes: “Marijuana is illegal under federal law, and is considered an illegal drug for the purposes of this question.” Mr. Recupero checked “No” in response to this question. (*Joint Ex. 3, J0038*) (emphasis in original)

Appellant’s Drug Tests

13. THC metabolite has a very low incorporation rate into hair,⁴ so highly sensitive techniques are used for detection. “The most appropriate strategy to prove cannabis consumption is an immunochemical initial test followed by a GC/MS/MS confirmation of THC-COOH.” This was the method used in both CFD-ordered drug tests Mr. Recupero took on June 24 and July 1, 2021. (*Resp. Ex. 4, R0028; Joint Ex. 8-11*)

14. THC metabolite⁵ is produced in the body once the liver has processed THC. THC metabolite is not present in marijuana plants or smoke, so its presence in a drug test “indicates active consumption” as opposed to “passive exposure from the environment.” (*Testimony of Vearrier; Resp. Ex. 4, R0028-29*⁶)

⁴ The incorporation rate of THC metabolite is 3600 times lower than that of cocaine. (*Resp. Ex. 4, R0028*)

⁵ “THC metabolite” refers to THC-COOH, also known as carboxy-THC. (*Testimony of Vearrier; Resp. Ex. 4, R0028*)

⁶ Dr. Vearrier testified that the article presented in Respondent Exhibit 4 reflects the current scientific understanding of testing hair for THC metabolite.

15. On June 24, 2021, Occupational Health Services collected a urine sample as well as a hair sample from Mr. Recupero's beard.⁷ The samples were sent to Quest Diagnostics for analysis. The urine sample tested negative, and the beard sample tested positive for THC metabolite at 0.2 pg/mg, which is four times greater than the "cut off" value of 0.05 pg/mg used by the laboratory to confirm a positive test for THC metabolite. (*Joint Ex. 11, J0344*)

16. Dr. David Vearrier was the Medical Review Officer for Mr. Recupero's June 24 test. Dr. Vearrier is a licensed medical doctor and professor of emergency medicine at the University of Mississippi Medical Center. He is also a Medical Review Officer for Concorde, Inc. reviewing drug tests results for companies like Quest Diagnostics. Dr. Vearrier specializes in occupational toxicology, specifically drug testing. (*Testimony of Vearrier*)

17. On June 29, 2021, Dr. Vearrier called Mr. Recupero to inform him of the positive result. Dr. Vearrier's notes from the call state that Mr. Recupero admitted to marijuana use and his last use was "a year ago." On July 7, Dr. Vearrier added to his notes:

[Mr. Recupero] called back and was very angry on phone. Telling me I am screwing people over and asking my age. Telling me I did the test incorrectly. I ended the call after asking if he had any questions and he did not after 4 min and 44 seconds of him yelling at me.

(*Testimony of Vearrier; Resp. Ex. 5, R0033*)

⁷ A preponderance of the evidence indicates that the June 24 beard sample was collected using scissors. This is based on the testimony of Dr. Vearrier and the Appellant, particularly the evidence that the Appellant objected to the use of electric clippers only at ARCPoint Labs for the July 1 beard sample.

18. After Mr. Recupero learned of the positive result, he went out and obtained two drug tests independently. Both independent tests analyzed Mr. Recupero's scalp hair only, not his beard. (*Testimony of Appellant; Joint Ex. 12-14*)

- On June 29, 2021, Mr. Recupero went to Fastest Labs. A hair sample was taken from his scalp, sent to Quest Diagnostics for analysis, and came back negative. (*Joint Ex. 14*)
- On June 30, 2021, Mr. Recupero went to Carewell Urgent Care for another drug test. A hair sample was taken from his scalp, sent to Omega Laboratories for analysis, and came back negative. (*Joint Ex. 12*)

19. The negative scalp-hair results from Mr. Recupero's independent tests are consistent with the negative scalp-hair result from the CFD-ordered drug test Mr. Recupero took on July 1 (the first CFD-ordered test on June 24 took a hair sample from the beard only, not the scalp).

20. Negative results from scalp-hair samples are not inconsistent with the positive results of Mr. Recupero's *beard* samples in the two CFD-ordered drug tests. Scalp hair grows faster than beard hair, so it is normal for someone's scalp hair to test negative while their beard hair tests positive. Average hair growth is approximately one centimeter per month, so a three-centimeter sample of scalp hair (taken from as close to the follicle as possible) would reflect, on average, the last three months. A three-centimeter sample of beard hair, which grows slower, would reflect a longer period of time. (*Testimony of Vearrier; Resp. Ex. 4, R0028*)

21. The CFD sent Mr. Recupero for a second (City-ordered) drug test at ARCPoint Labs on July 1, 2021. Samples of Mr. Recupero's scalp and beard hair were collected and sent to

United States Drug Testing Laboratories, Inc. for analysis. The scalp hair tested negative, and the beard hair tested positive for THC metabolite at 0.3 pg/mg. (*Joint Ex. 9-10*)

22. At Mr. Recupero's second CFD-ordered drug test on July 1, Sarah Nichols (a sample collector at ARCPoint Labs) used scissors to collect Mr. Recupero's scalp hair and electric clippers to collect his beard hair. Mr. Recupero did not object to Ms. Nichols' use of clippers when she took the beard sample, but he testified that clippers may lead to contamination. Ms. Nichols uses clippers for beard samples because clippers reach closer to the hair follicles on the neck than scissors. She prevents contamination by taking apart the clippers and thoroughly cleaning them three times between each use. The parts are brushed off, sprayed with Dust-Off aerosol cleaner, and then cleaned with alcohol. However, scissors are standardly used for these tests and scissors carry less risk of contamination than clippers. (*Testimony of Appellant, Nichols, & Vearrier*)
23. With respect to the detection of THC metabolite, inhaling large amounts of secondhand smoke is equivalent to firsthand smoking. However, a person would have to knowingly inhale THC in order to inhale enough secondhand smoke to test positive for THC metabolite. An example of this would be what Dr. Vearrier termed "hotboxing," the practice of smoking THC in an enclosed space, such as a car, and filling it with smoke. (*Testimony of Vearrier*)
24. Mr. Recupero testified that he has never been present for hotboxing in a car, and he has not used marijuana since he enlisted in the military over ten years ago. (*Testimony of Appellant*)
25. Joshua McLaughlin, who has been friends with Mr. Recupero for at least ten years, has never known Mr. Recupero to use marijuana or any other drugs. Mario Pires, a friend of

Mr. Recupero's since kindergarten, has not seen Mr. Recupero use marijuana or other drugs since before Mr. Recupero joined the military. (*Testimony of McLaughlin & Pires*)

26. Mr. Recupero has been in the presence of secondhand smoke, at birthday parties or social events where others smoked marijuana and it was out of his control. Neither Mr. McLaughlin nor Mr. Pires saw Mr. Recupero in the presence of secondhand smoke during the period between the start of the COVID-19 pandemic in winter 2020 and Mr. Recupero's first drug test on June 24, 2021. (*Testimony of McLaughlin & Pires*)

27. "Plenty of people" smelling of THC go into the barbershop where Mr. Recupero works, and some people smoke in the barbershop. (*Testimony of Appellant & Pires*)

28. In a letter dated July 7, 2021, the City Manager approved Chief Albanese's recommendation to bypass Mr. Recupero. The letter states:

Mr. Recupero was given the opportunity to move forward in the process despite multiple questionable incidents and police contact during the past few years. He was sent for the pre conditional offer drug test, which he failed for marijuana. He was then given the opportunity to go to a second facility to dispute the results, and the results were the same. Although state law allows the use of marijuana, candidates are instructed that marijuana is still illegal under federal law, and is considered an illegal drug for the purpose of this process. Additionally, when Mr. Recupero was asked in question 147 if he had ever used drugs including marijuana in the past 10 years, he answered "no." This statement was false. The candidates are informed that any false statement is grounds for disqualification and he signed his acknowledgment of these conditions.

Therefore, based on Mr. Recupero's failure of the drug test and his dishonesty in answering the question related to prior drug use including marijuana, it is my opinion he should be by-passed.

(*Joint Ex. 7, J0099*)

APPLICABLE CIVIL SERVICE LAW

The mission of Massachusetts civil service law is to enforce "basic merit principles," which means, among other things, "recruiting, selecting and advancing of employees on the basis

of their relative ability, knowledge and skills” and “assuring fair treatment of all applicants and employees in all aspects of personnel administration . . .” G. L. c. 31, § 1. The civil service system is meant “to guard against political considerations, favoritism, and bias in governmental hiring and promotion.” *Massachusetts Ass ’n of Minority L. Enf’t Officers v. Abban*, 434 Mass. 256, 259 (2001).

Pursuant to G. L. c. 31, § 2(b), a candidate may appeal from a bypass for de novo review by the Commission. In its review, the Commission’s role is not to determine whether that candidate should have been bypassed. *Police Dep’t of Bos. v. Kavaleski*, 463 Mass. 680, 688 (2012). Rather, the Commission decides “whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the [bypass].” *Id.*; *Boston Police Dep’t v. Civ. Serv. Comm’n*, 483 Mass. 461, 468-69 (2019), quoting *Brackett v. Civ. Serv. Comm’n*, 447 Mass. 233, 241 (2006). In other words, the question for the Commission is not “whether it would have acted as the appointing authority had acted,” but whether reasonable justification existed at the time the appointing authority made its bypass decision. *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003), quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). In this context, “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.” *Boston Police Dep’t*, 483 Mass. at 469, quoting *Brackett*, 446 Mass. at 241.

In its review, the Commission owes substantial deference to the appointing authority’s exercise of judgment. *Malloch v. Hanover*, 472 Mass. 783, 795-96 (2015); *Beverly v. Civ. Serv. Comm’n*, 78 Mass. App. Ct. 182, 188 (2010). “In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion.” *Cambridge v. Civ. Serv.*

Comm'n, 43 Mass. App. Ct. 300, 304-05 (1997); *Malloch*, 472 Mass. at 796. The Commission does not have the authority “to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” *McGuiness v. Dep't of Correction*, 465 Mass. 660, 665 (2013), quoting *Cambridge*, 43 Mass. App. Ct. at 300; see also *Falmouth v. Civ. Serv. Comm'n*, 61 Mass. App. Ct. 796, 800 (2004); *Burlington v. McCarthy*, 60 Mass. App. Ct. 914, 914 (2004).

ANALYSIS

A preponderance of the evidence indicates that the City had reasonable justification to bypass Mr. Recupero for appointment as a firefighter, based on two positive drug tests and concerns about Mr. Recupero’s truthfulness on his application.

The Appellant argues that the mix of positive and negative drug test results point to the unreliability of the testing. However, that is not the case here. None of the results are inconsistent with one another, as explained below:

Collection Date	June 24, 2021		June 29, 2021	June 30, 2021	July 1, 2021	
Collection Facility	Occupational Health Services		Fastest Labs	Carewell Urgent Care	ARCPoint Labs	
Laboratory	Quest Diagnostics		Quest Diagnostics	Omega Labs	United States Drug Testing Laboratories, Inc.	
Sample	Urine	Beard (1)	Hair (1)	Hair (2)	Hair (3)	Beard (2)
Result	Negative	Positive 0.2 pg/mg	Negative	Negative	Negative	Positive 0.3 pg/mg

First, the negative urine test is not inconsistent with any of the five hair tests, because the window of detection in urine tests is much narrower than that of hair tests. Urine may remain positive for THC metabolite between three to ten days after the last use, depending on the frequency of the user. In contrast, hair provides a lookback of up to several months depending on

the length of the hair sample.⁸ Next, none of the five hair tests—three negative scalp-hair samples and two positive beard-hair samples—are inconsistent with one another. Again, there is no inconsistency between a negative scalp-hair test and a positive beard-hair test because beard hair grows slower than scalp hair. Therefore, a three-millimeter sample of beard hair will reflect potential usage over a longer period of time than a three-millimeter sample of scalp hair could.⁹ As such, it is normal that Mr. Recupero's beard samples tested positive, while the other samples from his scalp-hair and urine tested negative. This does not cast doubt on the reliability of the drug tests or their results.

The Appellant also argues that the beard sample from July 1 was collected with electric clippers, which carry a greater risk of contamination than scissors. Although this is true, the use of electric clippers does not undermine the reliability of the positive results in this circumstance. Importantly, the positive result from the July 1 test does not stand alone. The June 24 beard sample, which was collected with scissors and therefore had the least risk of contamination, also tested positive. This argument fails to address the fact, moreover, that the Appellant tested positive twice, once where scissors were used. On top of that, the risk of contamination seems negligible following the thorough cleaning process used for the clippers. Ms. Nichols, who collected the July 1 sample, testified that she obviates the risk of contamination by cleaning the clippers three times between each use. She disassembles the clippers, brushes off the parts, sprays them with Dust-Off aerosol cleaner, and finally cleans the clippers with alcohol. At bottom, this argument fails because the positive result was duplicated in a test where scissors were used to collect the sample.

⁸ (*Resp. Ex. 4, R0025-27*)

⁹ (*Testimony of Vearrier; Resp. Ex. 4, R0028*)

Second, the Appellant argues that the positive results could be the result of inhaling large amounts of secondhand smoke or unknowingly consuming an edible. With regard to the possibility of secondhand smoke, neither Mr. Recupero nor his friends testified to any occasion in the last ten years where he would have inhaled enough smoke to cause a positive result. Both the scientific literature and Dr. Vearrier indicated that a person would have to knowingly inhale significant amounts of secondhand smoke to test positive for THC metabolite. THC metabolite results from active consumption, such as smoking firsthand or hotboxing, and not mere passive exposure from the environment. Mr. Recupero testified that he has never been present for hotboxing or any type of deliberate smoke inhalation. He and his friends testified that they have been at parties where other people were smoking, and some people smoke in the barbershop where Mr. Recupero works. However, according to the information before us, neither of those scenarios explain the presence of THC metabolite in the Appellant's beard hair. As for the idea that Mr. Recupero may have consumed an edible, even unknowingly, this argument does not hold weight. First, Mr. Recupero did not testify to any occasion where he consumed an edible or could have done so unknowingly. Second, even if Mr. Recupero had claimed to ingest marijuana without knowing it, the Commission has previously established that a hypothetical "brownie defense" will not negate an adequately supported positive hair drug test result." *Lecorps v. Department of Correction*, 26 MCSR 519, 521 (2013); see also *Gannon v. Boston Police Dep't*, 28 MSCR 543, 552-53 (2015).

Third, as the City points out, there are substantial differences between the instant matter and the Commission's decision in *Gannon v. Boston Police Dep't*, 28 MSCR 543 (2015), aff'd sub nom., *Boston Police Dep't v. Civ. Serv. Comm'n*, 483 Mass. 461 (2019). In *Gannon*, the Commission rejected the Boston Police Department's reliance on a single positive test for

cocaine to bypass a candidate. This was partly based on the fact that hair testing for cocaine has not been proven scientifically reliable, so one positive test for cocaine, by itself, was not sufficient reason to bypass a candidate. *Gannon* is not dispositive here because the facts are much different. First, the City relied on positive results from two separate drug tests, not one, to bypass Mr. Recupero. Second, unlike the state of the science on cocaine testing, the City offered unrebutted expert testimony and scientific literature supporting the reliability of hair testing for THC metabolite. Under these circumstances, the City was justified in relying on the results of two positive drug tests, in addition to concerns about Mr. Recupero's truthfulness on his application.

Finally, the City's decision to bypass Mr. Recupero is reasonably justified based on the two positive tests for THC metabolite that were proved in this appeal. Thus, I do not need to specifically determine whether Mr. Recupero was untruthful when he stated on his application that he had not used marijuana in the past ten years (i.e., not since he enlisted in the military in 2008). I note, however, that the evidence offered by the City (since the beard sample is taken as close to the skin as possible) does seem consistent with a conclusion that the levels of THC metabolite found in such a sample would be attributable to ingestion much more recently than 2008, contrary to what Mr. Recupero claimed.

I have not overlooked the fact that the law governing marijuana and public acceptance of its use is evolving and future consideration of candidates for public safety positions who acknowledge recent recreational or medicinal use may be viewed differently by appointing authorities (similar to how candidates who quit smoking prior to seeking appointment). That does not change the decision in this appeal, however, that, at the time of this bypass, the City was

reasonably justified in declining to appoint Mr. Recupero based on a reasonably thorough review of his suitability that turned up reliable evidence of recent marijuana use.

CONCLUSION

For the reasons stated above, the appeal of Michelangelo Recupero, CSC Docket No. G1-21-152, is ***denied***.

Civil Service Commission
/s/ Paul M. Stein
Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on November 17, 2022.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Bryan R. Colella, Esq. (for Appellant)
Stephon Treadway, Esq. (for Respondent)