

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Stephen Hennosy,	:	
Relator,	:	
v.	:	No. 11AP-27
The City of Columbus et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 29, 2012

Thompson Hine LLP, and William C. Moul, for relator.

Richard C. Pfeiffer, Jr., City Attorney, Emily D. Bennett, and Alan Varhus, for respondents.

IN MANDAMUS

BROWN, P.J.

{¶ 1} Relator, Stephen Hennosy, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Municipal Civil Service Commission for the city of Columbus ("commission"), to restore his name to the promotional eligibility list for the position of fire lieutenant with the city of Columbus.

{¶ 2} This matter was referred to a magistrate of this court, pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶ 3} As there have been no objections filed to the magistrate's decision, and it contains no error of law or other defect on its face, based on an independent review of the evidence, this court adopts the magistrate's decision. Relator's request for a writ of mandamus is denied.

Writ denied.

FRENCH and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Stephen Hennosy,	:	
Relator,	:	
v.	:	No. 11AP-27
The City of Columbus et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on March 26, 2012

Thompson Hine LLP, and William C. Moul, for relator.

Richard C. Pfeiffer, Jr., City Attorney, Emily D. Bennett, and Alan Varhus, for respondents.

IN MANDAMUS

{¶ 4} In this original action, relator, Stephen Hennosy ("relator" or "Hennosy") requests a writ of mandamus ordering respondent Municipal Civil Service Commission for the city of Columbus ("commission") to restore his name to the promotional eligibility list for the position of fire lieutenant with the city of Columbus.

Findings of Fact:

{¶ 5} 1. Relator had been a Columbus firefighter for over 19 years when, on April 7, 2009, he participated in a competitive examination for the position of fire lieutenant with the city of Columbus. Of the 123 candidates who took the examination, relator qualified 17th on the eligibility list for the position.

{¶ 6} 2. Candidates for the position of fire lieutenant were required to take an oral examination consisting of two role-play exercises. Candidates were scheduled for their respective role-play exercises during April 6 and 7, 2009. Exercises were scheduled at 15 minute intervals beginning at 8:00 a.m. during both days. Relator was scheduled for a 12:30 p.m. arrival time on April 7, 2009.

{¶ 7} 3. One hour before the role-play exercises begin, the candidate proceeds to the preparation room where the candidate receives written materials including the written stimulus for each of the two role-play exercises. The candidate then has one hour to prepare for the exercises. During preparation, the candidate can write notes to assist him during the exercises. Ten minutes is allowed for each exercise with a five-minute break between.

{¶ 8} 4. On April 7, 2009, in the preparation room, candidate Hennosy was given the written stimulus for the second exercise:

In this exercise, you will assume the role of the fire lieutenant.

You are the lieutenant assigned to Engine 50. At 1508 hours Engine 50 is dispatched to a report of hydrant flowing near the intersection of Brighton Avenue and Carol Street. The current temperature is 95 degrees. Temperatures have remained in the 90's for the past four consecutive days.

This is the third trip to the Brighton Avenue and Carol Street hydrant today. The neighborhood where the illegally opened hydrant is located has no pool or recreation facility available to neighborhood children. Citizens have apparently opened the hydrant so that children can play in the water and to cool off.

When you arrive, there are 10 to 15 children playing in the water coming from the hydrant. In addition to the children, there are several adults watching the children play. As you step out of the Engine, three of the adults approach you and ask you not to close the hydrant.

The following people approach you:

C.J. Collins – father of three of the children

**Refik Mohammed – father of four of the children
Father Ray Hansby – Priest of Good Shepherd
Catholic Church**

Instructions to candidate:

This is a role-play exercise. You are to assume the role of the lieutenant and directly address the situation.

(Emphasis sic.)

{¶ 9} 5. The role-playing exercises for all candidates were recorded on DVDs.

{¶ 10} 6. The DVD for Hennosy's second exercise was transcribed and is contained in the record before this court. The transcript states in part:

MONITOR: This is the second oral exercise for candidate eight-nine-one-two-nine. You'll be playing the role of lieutenant; the raters will assume the roles as assigned in the exercise. You will have a total of ten minutes to complete the exercise. I will let you know when you have two minutes remaining and I will stop the exercise at the ten minute mark. Are you ready to begin?

STEPHEN HENNOSY: Yeah.

MONITOR: You may begin.

RATER #1: Lieutenant, don't you have anything better to do? How can you justify coming out here three times to shut down this hydrant, using all that gas, and driving a fire truck that has seen better days?

RATER #2: Yeah, firefighters should have better things to do.

STEPHEN HENNOSY: Hold on, hold on, gentlemen. Hold on, hold on, hold on. My name's Lieutenant Hennosy, what's your name?

RATER #1: C.J. C[o]llins.

STEPHEN HENNOSY: C.J.? Your name?

RATER #2: Mr. Muhammad.

STEPHEN HENNOSY: Muhammad? Your name?

RATER #3: Ray Hansby[.]

STEPHEN HENNOSY: Mm hmm. Um, I know it's hot out here, it is really hot out here, and it seems that your children are having a good time. But we need to shut down this hydrant, uh, it's, right now, I'm going to have my men shut it down, and it, it's a hazard. Ah, to answer your question, why, why am I wasting my time out here? I'm not really wasting my time. This is part of my job. Um, you know, we need to shut down the hydrant because it's dangerous for the children. The streets, if they're out in the street, running around, and uh, it, it's just not good. And there's things that take place, uh, mechanically with the hydrant, you know, by turning it on and turning it off, you know, there's a thing called water hammer, you know. We can bust pipes, cause damage to the city. Uh, uh, it's a, running like this, it discolors the water, uh. It damages people's laundry and so forth. But um, can I answer any more of your questions? I mean, it's ah, you brought up arson?

RATER #1: I didn't ... bring up arson.

STEPHEN HENNOSY: Ah, I'm sorry, sorry, um. I didn't mean to interrupt you. What were you discussing first?

RATER #1: I was discussing the crack house next door that nobody seems to be paying attention to, and you're worrying about the, the city's worrying about the hydrants.

STEPHEN HENNOSY: We'll, I'll tell you what, ah, that's a police matter and I will, uh, I will get with the police as soon as we're done with this meeting, and uh, I will give you a, uh, a police number that you can call also and keep reference of it? Okay?

RATER #1: Okay.

STEPHEN HENNOSY: Would that be to your satisfaction?

RATER #1: Sure.

STEPHEN HENNOSY: Okay. Mr. Muhammad?

RATER #2: What I want to know is why, why are firefighters out here bothering kids about a hydrant being open, and you

have an arson in the neighborhood who's setting these vacant houses on fire?

STEPHEN HENNOSY: We have somebody setting vacant houses on fire?

RATER #2: Yes sir.

STEPHEN HENNOSY: Okay, well that's something I'm going to need to address with arson. Ah, can I, can I get your, your address? And phone number?

RATER #2: Yes.

STEPHEN HENNOSY: Because I'd like to put them in contact with you. If you have, if you have some information that you can relay to them?

{¶ 11} 7. Elizabeth Reed was a personnel analyst supervisor for the commission during the April 2009 competitive examinations. In that capacity, she was responsible for the promotional testing for all the fire and police classifications. One of the room monitors brought to her attention that it appeared that candidate Hennosy had prior knowledge of the test content. Reed viewed the DVD and then contacted her supervisors.

{¶ 12} 8. On April 16, 2009, Hennosy met with Reed and Mike Eccard, who is the assistant to the commission's executive director. After the meeting, Hennosy provided a written statement which was the subject of the investigative hearing occurring during May 2009:

On [A]pril 16, 2009 I met with Liz and Mike on a concern that I, Steve Hennosy had prior knowledge of part III second scenario prior to taking the test. Your staff explained to me what was taking place and why, and if I would like to see the tape and I agreed. While we were watching the tape we came up to some footage that they thought was evidence that I may have had prior knowledge of the test. This is incorrect, I had no knowledge of the scenario. After they explained to me that I stated to one of the roll players, "tell me about your arson", I turned to the next roll player and he had a fire bomb issue. I could see how this would raise a red flag. I use acronyms to remember key parts of a topic that I need to remember, and as I explained to Liz and Mike my acronym for prevention was P.A.C.F.H.====Prevention,,,Arson,,,community,,,F.F

against drugs,,Hydrants. I have others such as P.A.R.A.H==
===== Primary run down,,Accountability,,Ric Team,,
Actions,,Hazard Zone. I have a couple more and also text
book acronyms for the test that the author uses. I wanted to
go into that scenario asking the roll player about his
community, Which is the third word in my acronym and I
couldn't remember it. All I could remember was arson. It did
not come out the way I had intended, so I went to the next
roll player and it was pure coincidence that he had a fire
bomb issue after I spoke of arson. If I would have stated, lets
talk about fire prevention, then the roll player said
something about fire bombs, would I still be in this
situation? Even though arson is in the fire prevention
bureau, I'll bet not. I'm sure that your staff has experienced
many tapes and realizes not everyone can say what they
intend to say, and it comes out wrong. It can be confusing
when The roll players come at you right out of the gate. Why
isn't there any questions about the first scenario. You'll see
where I took my glasses out of my pocket because I couldn't
read my information, but I failed to get them out for the
second one, and why, I don't know. I stated that I took the
test on the second day at noon, so I only had one day to of
testing to find this information out. I work with three people,
a secretary, Bruce Rudman, and Jack Real. The first two have
no interest in civil service and Jack Real would not tolerate
anything of this nature in his office, and I would not
compromise his office or my self respect. I will state again, I
had no prior knowledge of the scenario.

{¶ 13} 9. On May 1 and 6, 2009, Barbara Gates McGrath, the commission's executive director, acting as a commission hearing officer, conducted an investigative hearing to determine whether relator had breached test security. Only Reed and Hennosy testified at the hearing. The proceedings were recorded and transcribed for the record.

{¶ 14} 10. On May 12, 2009, Hearing Officer McGrath issued her written report recommending that Hennosy's name be removed from the eligibility list.

{¶ 15} 11. On May 18, 2009, the commission adopted the recommendation of its hearing officer.

{¶ 16} 12. In her seven-page report, McGrath states in part:

Ms. Reed testified she had no knowledge of anyone having access to scenario #2 providing test information to anyone, other than during the normal course of test preparation and administration. She further testified that her staff takes steps to prevent inappropriate disclosures. For example, security agreements are signed by each subject-matter expert. Candidates also sign confidentiality agreements at each step of the test, agreeing they would not share the content of the exam.

* * *

Following the conclusion of the exam, Ms. Reed took the candidates' notes for the Fire Lieutenant oral exams and provided them to the Hearing Officer. Ms. Reed identified Exhibit 8 as the scenario #2 stimulus. This was the only information given to the candidate, other than general instructions which did not contain test content. She also identified Exhibit 9 as the script the raters who served as role-players used during scenario #2. This script included new information the candidates were given during the oral board exercise.

Ms. Reed testified Exhibit 7, the information given to the candidates in advance, contained no information about arson. Exhibit 8, the role-players' script did contain information about arson. In Exhibit 3, the transcript of the Hennosy DVD for scenario #2, the candidate spoke about arson on page 2, line 2. The role-player provided the information from the script about arson on page 2, line 15.

* * *

Mr. Hennosy identified Exhibit 9 as a copy of the Candidate Certification which he signed. He stated that he signed it the day that he took the oral board test and that at the time he signed it he was telling the truth. Mr. Hennosy testified that prior to the time he appeared to take the oral board exam, he received no information from anyone regarding the content of the test.

Mr. Hennosy testified that in mid-April he met with Commission staff members Mike Eccard and Liz Reed. During that meeting, they watched his scenario #2 DVD to see the footage that led to this investigation. After the meeting, he provided a written statement regarding what had occurred. Mr. Hennosy identified Exhibit 10 as a copy of

the statement he wrote. The statement reads in pertinent part:

***I stated to one of the roll players, "tell me about your arson"... I wanted to go into that scenario asking the roll player about his community, which is the third work in my acronym and I could'nt remember it. All I could remember was arson. It did not come out the way I had intended ... it was pure coincidence that he had a fire bomb issue after I spoke of arson ... It can be confusing when The roll players come at you right out of the gate. Why isn't there any questions about the first scenario. You'll see where I took my glasses out of my pocket because I couldn't read my information, but I failed to get them out for the second one, and why, I don't know. (sic.) ***"

Mr. Hennosy explained that he did not know what kind of community they were in. If the people had air conditioned houses, then they would not need a fan. He tried to rely upon his acronym for the Fire Prevention Bureau – PACFH (which stands for Prevention-Arson-Community-Firefighters against Drugs-Hydrants) but could not remember it. When asked what relationship the PACFH acronym had with the open hydrant scenario, he testified that until a problem arose with hydrants some time ago, he did not realize it but that hydrants were the responsibility of the Fire Prevention Bureau.

After viewing the DVD (Exhibit 2) again, Mr. Hennosy testified that his written statement was incorrect. He did not say "tell me about your arson" as he had indicated; but rather said "you brought up arson." He also testified that he did not hear any rater bring up arson before he did; but a rater did bring up arson after he did. Additionally, Mr. Hennosy testified that his written statement was incorrect in that there had been no mention of a fire bomb.

Mr. Hennosy testified that in scenario #1 he took his glasses out of his pocket and put them on because he could not read his notes. He did not do this for scenario #2. He testified that as a result, he did not say half the things written in his notes. Upon watching the DVD for scenario #1 (without audio), Mr. Hennosy testified that he was not wearing his glasses at the start, that he put the glasses on at 2:04 into the DVD and that he removed them at 2:09.

Mr. Hennosy identified Exhibit 11 as the outline he prepared for scenario #2. The points listed were the things he wanted to cover during the oral board exam. He first testified there were points he did not cover. However, upon further review using Exhibits 12 and 13, which were annotated, Mr. Hennosy testified that there were 24 points identified which he wanted to cover and which he did cover during the exam. He further testified that for the first 9 points he went right down the sheet. This was followed by him responding to role-players injecting new information. After this, he began the section labeled as "Solutions" and went right down the list again for the next 7 points. Mr. Hennosy stated it looked like he went right down what he wanted to say.

When asked if he meant to state "you brought up arson", Mr. Hennosy said he did not. He meant to ask about the community but got "hung up" on the acronym. He said something unrelated to the scenario came out and it was a coincidence it was arson. He stated it was stressful and overwhelming. He said that he scored far from the highest score and should have scored higher had he known the test content.

Looking at Exhibits 6 and 7, Mr. Hennosy testified that he did not talk to any of the candidates listed from the time they took the test to the time he appeared to take the test. He testified that he did not knowingly talk to any of the division personnel involved in the test development about the exam. Mr. Hennosy also testified that to his knowledge he has no close association with any Commission staff, the raters or the outside consultants.

* * *

FINDINGS AND RECOMMENDATION:

The basic facts of this investigation are set forth in the video recording of scenario #2. On its face, it shows: (1) Mr. Hennosy asking for information about an arson during a scenario involving children playing in the street by an illegally opened fire hydrant and (2) a role-player complaining about arsons in the neighborhood *after* the candidate had already tried to address the concern. It is within the realm of possibilities involving scenario #2 that a candidate could use the word "arson" before the role-player

gave the arson stimulus line, consistent with the candidate having no prior knowledge of the test content. The question before the Hearing Officer is whether this is such a case. While certainly the word "arson" raises a red flag, even more troubling is the fact the candidate stated "*you brought up arson.*"

There is no question that promotional testing is a stressful time for candidates. Certainly the stress relating to testing can cause misstatements to occur. The essential question here is whether the stress caused the candidate to reveal he knew test content in advance or whether the stress caused a misstatement that simply gave that appearance. To discern which occurred, the Hearing Officer's only recourse is to analyze the explanation provided by the candidate to ascertain if it is plausible and whether there is any evidence in the record to support it.

The scenario #2 oral board exercise opened with Rater #1 complaining about the time and gasoline being wasted to shut down the hydrant. Rater #2 then started his complaint but Mr. Hennosy interrupted him to allow for introductions. The candidate then began to address Rater #1's concerns. He explained that he was not wasting his time, that this was part of his job. He explained that the open hydrant was dangerous and he outlined reasons the hydrant needed to be shut down. After which he stated:

But, um, can I answer any more of your questions? I mean, it's ah, you brought up arson.

Mr. Hennosy offered the following explanation for this sentence. He testified that the board was overwhelming and confusing at the start because the role-players "came at him right out of the gate." He stated he wanted to establish what type of community the people lived in because he did not want to get "dinged" if he offered them free fans when in fact they lived in air-conditioned houses. He stated unlike scenario #1, in scenario #2, he failed to wear his glasses. He implied because he could not see his notes, he relied on the acronym he uses for the Fire Prevention Bureau which has the responsibility for maintaining hydrants. The acronym is PACFH - meaning Prevention, Arson, Community, Firefighters against Drugs and Hydrants. In thinking of the acronym, he meant to ask about community (the third letter) but instead spoke of arson (the second letter). He attributed

the fact that the role-player would then raise arson as pure coincidence.

Looking to the line in question cited above, on its face, it is clear that the candidate was trying to get information about something already raised so he could finish responding to the role-players' concerns. Immediately after he made the statement, Rater #1 responded by saying "I didn't bring up arson." To which Mr. Hennosy responded, "Ah, I'm sorry, I'm sorry, um I didn't mean to interrupt you. What were you discussing first?" This follow-up statement appears to confirm the fact the candidate was trying to address concerns raised by the role-players rather than transition to an input phase of his response. In fact[,] a review of the role-players' script shows that Rater #1 had completed his first lines and Rater #2 was the one who had been interrupted. Rater #2's first lines were to complain about the firefighters bothering kids when there was an arsonist in the neighborhood. Nothing in the context of the statements immediately before ("Can I answer any more of your questions?") or immediately after ("What were you discussing first?") supports the candidate's explanation he was getting information to formulate his solutions. All the objective indicia of his meaning reflect he was addressing the concerns already raised by the role-players.

In the stressful moment of a promotional oral board it is understandable that a candidate might grasp an incorrect word. With respect to the phrase "you brought up arson," if it were simply the matter of grasping an incorrect word, then that phrase would have been "you brought up community." It is noteworthy that although Mr. Hennosy provided an explanation as to why he said "arson" instead of "community," he offered no explanation for why he said "*you brought up arson*" rather than his articulated intention "*tell me about your community.*" In this regard, his explanation fell short.

Further, even in light of the stressful environment, it is difficult to understand how someone could mistakenly say "you brought up arson" when someone was wanting to learn more about the community. The candidate's explanation is that since he was not wearing his glasses, he could not rely on his notes, and since hydrants are in the Prevention Bureau he relied on his PACFH acronym – all of which led him to talk about arson, the 2nd word rather than

community, the 3rd word. The underlying basis for this misstatement according [to] the candidate was he could not see his notes because he was not wearing glasses. As such, if the record illustrates a problem with the use of his glasses, it would support his explanation.

Looking to this issue, a review of the scenario #1 DVD revealed that Mr. Hennosy wore his glasses for a total of 5 seconds during the ten minute exercise. He did not wear them at all for scenario #2. This leads to the conclusion that (except for the 5 seconds during DVD#1), he either did not rely upon his notes to do the oral exercises or he could read the notes without his glasses. At first Mr. Hennosy testified that there were several points in his scenario #2 notes that he did not make because of the need of his glasses. However upon comparison of his notes to the transcript of the DVD for scenario #2, it was apparent that he covered 24 of 24 points and generally, in order of their presentation on his paper. This leads one to believe that he either knew the notes so well he did not need them or he could in fact read the notes. Having reviewed the videos for both DVD's, watching the candidate's behavior and comparing his oral statements on the DVD's to what appeared in his notes, there is nothing which would lead one to the conclusion that he was unable to read his notes when his glasses were off. To the contrary on Exhibit #1, for example, he continued to look down and seemingly reference his notes after he took his glasses back off and set them on the table. And at the end of his discussion with the first firefighter/role-player in scenario #1, he switched to his second page of notes for his discussion with the second firefighter/role-player. From all appearances, he used his notes and stated phrases listed thereon in both DVD's without the use of his glasses.

Looking to Exhibit 11, the notes themselves, they were well organized. Across the top, the candidate listed his "Intro", which had notes for his introductory statements. Next he listed his "Agenda" which was to shut down the hydrant. Beneath "Agenda", and marked to the side as "Impact," he listed 4 reasons why the hydrant needed to be shut down. Following the "Impact" section, was a section marked "Solutions" at the side. This section included: 1) one line with information pertaining to a locking device placed on the hydrant, 2) the notation "Other areas – notify Parks & Rec", 3) the notation "Numbers for people, Locations" and 4) "Station tours/Fans.[]" Following the "Solutions" section,

were the words "Needs met" and "E-mail – Phone". At the end of the scenario, the candidate stated he was there to "meet their needs" and he talked about his email and phone so they could contact him. Absent from the notes is any reference that he needed any input before identifying ways to solve the issue at hand. So again, the record lacks objective evidence to support the candidate's explanation that he went into the scenario wanting to ask about the community, and that when he could not use his notes, he relied on the PACFH acronym and misspoke.

Finally, Mr. Hennosy has taken the oral board a number of times. He testified he did not score well. He stated he should have done better if he had advance knowledge of the test. However, the records shows he tied for the rank of 17 out of 123 candidates, placing him in the top 15%.

Mr. Hennosy was cooperative with respect to the investigation in general. His explanation for what occurred however is not supported by the record, except for the fact the oral board setting was stressful and overwhelming. His explanation for making the arson statement makes little sense and is inconsistent with facts the Hearing Officer could objectively observe. There is no evidence to show how the candidate acquired information about the test before he took it. Nonetheless, the most plausible conclusion is that the candidate had prior knowledge that arson would be introduced during the scenario and that in the stress of the moment he began to respond to that stimulus before it was introduced.

As such, the Hearing Officer finds that the evidence shows the candidate did have prior knowledge that arson would be discussed during scenario #2. Having reached that conclusion however there is no evidence to ascertain the degree of that knowledge or whether it was incidental or intentional – because the candidate denied it. Had the knowledge of the candidate proved to be unintentional on his part and negligible, this Hearing Officer may have recommended that his name not be removed from the eligibility list. In the absence of those facts, the recommendation is that the candidate's name be removed from the eligibility list.

(Emphasis sic.)

{¶ 17} 13. The Columbus Division of Fire, Professional Standards Unit ("PSU"), pursuant to a directive from Assistant Fire Chief Warren Cox, conducted an investigation from May 23 through September 3, 2009. The purpose of this investigation by the appointing authority was to determine whether disciplinary action was warranted against Hennosy. On September 8, 2009, PSU issued its report which states in part:

[Two] This investigation was conducted to determine the facts and circumstances surrounding the allegation that Firefighter Stephen Hennosy breached the security of the lieutenant's promotional exam by having prior knowledge that arson would be discussed in "scenario 2" of the exam. Civil Service held a hearing on May 1, 2009, Executive Director, Barbara Gates-McGrath recommended that Firefighter Hennosy's name be removed from the eligibility list. Per the directive from Assistant Chief Cox it was decided that the investigation would start with reviewing Civil Service's findings and expand on it in order for the investigation to be as thorough as possible, since Civil Service had already conducted their own.

[Three] On April 7, 2009, Firefighter Hennosy was scheduled to take the oral exam at 12:30 p.m. During scenario #2 Firefighter Hennosy brought up arson by saying "you brought up arson" to one of the role players before it was entered into the scenario. Based on that, Civil Service felt Firefighter Hennosy had prior knowledge of the content's of scenario 2. A decision was made by Civil Service to launch an investigation which resulted in a hearing where the recommendation was made to have his name removed from the eligibility list.

[Four] We began our investigation by first focusing on all fire personnel that Firefighter Hennosy studied with in Battalion 5 that took the lieutenant's test, since he was at Station 26 prior to the test. We included anyone else who we found studied with him. This resulted in a total of 16 interviews of Columbus fire personnel. Of the 16 interviews, nine stated they had no contact with Firefighter Hennosy during the testing process, the other seven had either studied or discussed the exam with him.

[Five] Next we focused on interviewing the people at Civil Service that were involved in either the area of observing the alleged security breach, when it happened, the supervisor

that brought the allegation to [sic] up to the chain of command, including the Executive Director. That resulted in five voluntary interviews.

[Six] We requested that Civil Service contact the evaluators from other fire departments throughout the United States that participated in Firefighter Hennosy's promotional evaluation in scenario #2. Civil Service provided us with the names and number of six evaluators that agreed to be interviewed by us, which we did via telephone.

{¶ 18} 14. On October 20, 2009, Cox directed that additional individuals be interviewed by PSU. On November 18, 2009, PSU issued an addendum report.

{¶ 19} 15. On April 23, 2010, Cox determined that the PSU investigation indicates "[t]he evidence does not support the allegations." Accordingly, no disciplinary action was brought against Hennosy.

{¶ 20} 16. On January 10, 2011, relator, Stephen Hennosy, filed this mandamus action. Respondents answered.

{¶ 21} 17. On April 29, 2011, following completion of the briefing schedule, relator moved to amend paragraph (a) of his prayer for relief to state:

A writ of mandamus ordering that Respondent Commission reinstate Relator to the position he held on May 16, 2009 on the Civil Service eligible list for the position of Fire Lieutenant within the Department of Public Safety, Division of Fire, or, if said eligible list has expired when the Court determines that Relator was improperly removed from said eligible list, that the writ order certification by the Commission of Relator's name to the Appointing Authority at the next occasion of a vacancy within the position of Fire Lieutenant in the Department of Public Safety, Division of Fire.

{¶ 22} 18. On June 3, 2011, the magistrate granted relator's motion to amend his prayer for relief. Also, the magistrate ordered that respondents may file a supplemental brief or amended brief "addressing any issues raised by relator's amended prayer for relief."

{¶ 23} 19. On June 9, 2011, respondents filed a supplemental brief and also moved for leave to file the affidavit of C. Amy DeLong, the current executive director of the commission. Executed June 8, 2011, the DeLong affidavit avers:

[One] I am the Executive Director of the Columbus Civil Service Commission ("Commission"). My responsibilities include overseeing daily operations of the Commission, serving as the custodian of the official City of Columbus employee personnel records and maintaining the City's merit selection system.

[Two] The Columbus City Charter requires the Commission to create rules for the classified service and the Commission is responsible for conducting competitive examinations for positions in the competitive classified service. The Commission is required to create eligible lists upon which the names of successful candidates are placed. In the uniformed promotional ranks of the Fire Division, promotional vacancies are filled from one of the three persons standing highest on the appropriate eligible list.

[Three] Stephen Hennosy is employed by the City of Columbus as a Firefighter. Firefighter Hennosy took the 2009 examination for the Fire Lieutenant classification and as a result of his performance on the examination was ranked based on his final score on the eligibility list for the Fire Lieutenant classification.

[Four] After an investigation into a possible breach of test security was conducted by the Commission, the Commission determined that Firefighter Hennosy had advance knowledge of confidential examination materials. As a result, Firefighter Hennosy's name was removed from the eligible list.

[Five] The 2009 Fire Lieutenant eligible list that Firefighter Hennosy had initially been placed on and ultimately removed from, expired on May 15, 2011. As such, it is no longer in existence.

[Six] Firefighter Hennosy applied for and was approved to take the next promotional examination for the Fire Lieutenant classification in 2011. However, Firefighter Hennosy did not appear to take the examination. Therefore,

Firefighter Hennosy did not meet the requirements for being placed on the current eligible list.

{¶ 24} 20. On June 16, 2011, relator submitted his brief in response to respondents' supplemental brief. Also, relator moved for leave to file the affidavit of Jack Reall executed June 16, 2011. The Reall affidavit avers:

[One] That he is President of Local Union No. 67, International Association of Firefighters, the labor organization which has represented Relator, Steve Hennosy, and all other uniformed members of the Columbus Division of Fire, save the Fire Chief and Executive Officers, during all times material herein;

[Two] That he has held the position of President of Local Union No. 67, International Association of Firefighters, continuously since December 1, 2001;

[Three] That in his capacity as President of Local Union No. 67, he has engaged in and is familiar with the promotional process followed by the Columbus Department of Public Safety, Division of Fire;

[Four] That since May 16, 2009, forty-two (42) Columbus Firefighters have been promoted to the position of Fire Lieutenant by the Appointing Authority (Columbus Director of Public Safety), all of whom were certified to said Appointing Authority by the Municipal Civil Service Commission from the promotional eligible list for Fire Lieutenant created by the Municipal Civil Service Commission in May, 2009 and from which Relator Hennosy's name was removed on May 18, 2009; and

[Five] That each of those Firefighters appointed to the position of Fire Lieutenant, as stated above, was so appointed on the first instance of his/her respective name being certified to the Appointing Authority as then first on the subject eligible list; and,

[Six] That not a single Firefighter certified by the Municipal Civil Service Commission to the Appointing Authority as first on the Fire Lieutenant eligible list created on May 16, 2009 was "passed" by the Appointing Authority in favor of a certified candidate holding a lower position on the subject eligible list.

Conclusions of Law:

{¶ 25} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 26} Hennosy filed this original action following this court's judgment in an appeal that affirmed the judgment of the Franklin County Court of Common Pleas in an action brought by Hennosy for review of the commission's decision at issue here. *Hennosy v. Mun. Civil Serv. Comm.*, 10th Dist. No. 10AP-417, 2010-Ohio-5971 ("*Hennosy I*").

{¶ 27} In *Hennosy I*, this court held that the common pleas court had correctly held that it did not have subject-matter jurisdiction over Hennosy's appeal to the common pleas court. In reaching its decision, this court necessarily determined that the proceedings before McGrath in May 2009 and the commission's adoption of her recommendation were not quasi-judicial in nature.

{¶ 28} Describing the nature of the investigative proceedings, this court, in *Hennosy I* at ¶ 8, states:

Section 154 of the Charter, which provides for investigations and hearings related to the classified service, states that "[i]n any investigation or hearing conducted by the commission it shall have the power to subpoena and require the attendance of witnesses and the production of books and papers pertinent to the investigation and to administer oaths to such witnesses." The Rules and Regulations of the commission also address investigations and hearings, stating the commission "may make investigations, either sitting en banc or through * * * a Hearing Officer, concerning all matters touching the enforcement and effect of the Charter, as it applies to Civil Service and these Rules." Rule XIV(H). According to the rule, the commission or hearing officer in the course of an investigation "may subpoena witnesses and/or require the production of documents and records relevant to the investigation." *Id.* "The Commission's investigation may be public or private and may terminate with such decision or report within the power of the Commission to render or make." *Id.* As pertinent here, the Rules provide an eligible may be removed from an eligibility list if the "individual has practiced or attempted to practice deception or fraud on the application or examination." Rule VI(E)(i).

{¶ 29} In *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, the Supreme Court reviewed in mandamus a decision of the Industrial Commission of Ohio that had awarded additional compensation for the employer's violations of specific safety requirements ("VSSR"). While *Supreme Bumpers* involved VSSR proceedings, the magistrate, nevertheless, finds the following statement of the court to be applicable to a review of McGrath's report and recommendation here:

This court has never required direct evidence of a VSSR. To the contrary, in determining the merits of a VSSR claim, the commission or its SHO, like any factfinder in any administrative, civil, or criminal proceeding, may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence.

Id. at ¶ 69.

{¶ 30} During the second role-play exercise of the oral examination, Hennosy stated to Rater #1: "But um, can I answer any more of your questions? I mean, it's ah, you brought up arson?" Because Hennosy's statement regarding arson came before the subject of arson was actually brought up by a rater, suspicions were aroused that Hennosy had prior knowledge that arson would be discussed during the exercise.

{¶ 31} Upon being confronted with the suspicion that he had breached test security, Hennosy denied that he had prior knowledge that arson would be discussed at the exercise.

{¶ 32} Through his April 16, 2009 written statement, Hennosy endeavored to offer an explanation of how, without prior knowledge that arson would be discussed, he could have brought up the subject of arson before the subject was brought up by a rater.

{¶ 33} During the hearing, McGrath delved into Hennosy's April 16, 2009 statement, but after analysis found that "[h]is explanation for making the arson statement makes little sense and is inconsistent with facts the Hearing Officer could objectively observe."

{¶ 34} Conceding that "[t]here is no evidence to show how the candidate acquired information about the test before he took it," McGrath found that "[n]onetheless, the most plausible conclusion is that the candidate had prior knowledge that arson would be

introduced during the scenario and that in the stress of the moment he began to respond to that stimulus before it was introduced."

{¶ 35} Here, relator, through counsel, characterizes McGrath's report as "disjointed ramblings." (Relator's brief, at 7.) He alleges that the concluding paragraph of her report reflects "her own uncertainty." (Relator's brief, at 7.) He alleges that the evidence before McGrath did not arise above mere suspicion. The investigative hearing itself is described by relator as an "inept and incomplete investigation hearing." (Relator's brief, at 4.) Relator even alleges that he "lost his position on the eligible list because he declined to admit to something he didn't do!" (Relator's brief, at 7.) He offers that McGrath and her staff "are consumed by the matter of test security" which allegedly "drives them to find someone guilty, lest they be criticized for a security lapse." (Emphasis sic.) (Relator's brief, at 8.)

{¶ 36} The magistrate disagrees with relator's characterization of the proceedings and McGrath's report. Contrary to what relator alleges, the magistrate finds that McGrath presents in her report and recommendation a thorough and detailed analysis of the evidence before her and she renders well-reasoned findings and a recommendation. McGrath draws reasonable inferences and relies upon her own common sense in evaluating the evidence. *Supreme Bumpers*. Clearly, the logic in McGrath's findings based upon the evidence before her and available at the time of the hearing is unassailable.

{¶ 37} Here, relator endeavors to introduce the PSU report in this mandamus action to undermine the soundness of McGrath's report.

{¶ 38} The PSU investigation began May 23, 2009 after McGrath had released her report and recommendation that relator's name be removed from the eligibility list. The PSU investigation did not conclude until November 2009, many months after the commission had adopted McGrath's recommendation.

{¶ 39} The PSU investigation, unlike the investigative hearing, consisted of numerous interviews of individuals who might have been in a position to witness a test breach. The PSU investigation, however, found no evidence of a test breach in all of the interviews that were conducted.

{¶ 40} Obviously, McGrath did not have the PSU report to weigh when she rendered her findings and recommendation, nor did the commission have the PSU report when it adopted McGrath's recommendation. But even if McGrath had had the PSU report to weigh, she would not have been compelled to conclude that a security breach had not occurred. If McGrath had had the PSU report to weigh, she could have concluded that one or more of the individuals interviewed were not truthful or that PSU simply failed to find the source of the test security breach.

{¶ 41} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

s/s Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).