

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 10-00657-G

TOWN OF TEWKSBURY & another¹

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & another²

Notice sent
8/31/2012
M. J. L.
L. & D.
J. R. C.
C., L. & P.
R. L. Q., JR.
J. P. R.
R. & A.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR
JUDGMENT ON THE PLEADINGS

(sc)

The plaintiffs, the Town of Tewksbury (the "Town") and the Tewksbury Police Department ("Police Department"), seek judicial review pursuant to G. L. c. 30A, §14 and G. L. c. 31, §44 of a Massachusetts Civil Service Commission ("Commission") decision. Specifically, the Commission reversed a decision by the Division of Administrative Law Appeals ("DALA") to uphold the Town's bypass of Peter Cyrus ("Cyrus") for appointment as a permanent intermittent police officer. The plaintiffs have filed a Motion for Judgment on the Pleadings. For the reasons discussed below, the plaintiffs' Motion for Judgment on the Pleadings is **ALLOWED.**

BACKGROUND

The following facts are taken from the administrative record.

I. Certification List #271101

David Cressman ("Cressman"), the Town Manager, makes hiring decisions for Tewksbury police officer positions. On November 21, 2007, the Commission issued

¹ Tewksbury Police Department

² Peter Cyrus

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Certification List #271101, containing the names of twenty-seven applicants for eight permanent intermittent police officer positions, to the Town (Exhibit 3). The Certification List states that the selection of the eight permanent intermittent police officers "must be of 8 of the first 17 highest who will accept."³ The first seventeen candidates were ranked as follows: Michael Pacini ("Pacini"), Thomas Butler ("Butler"), Michael Bain ("Bain") tied with Robert Conley ("Conley"), Ryan Hickey ("Hickey"), Cyrus tied with Paul Nicosia ("Nicosia"), Michael Donovan ("Donovan") tied with Dimitrois Kalogeropoulos, David Miano ("Miano"), Alex Paltrineri ("Paltrineri"), James Ryser ("Ryser"), Michael Sitar ("Sitar"), and Brad Zarba ("Zarba"), and Brian Barbato tied with Benjamin Mahan and Harmony Driscoll.⁴ The Commission notified the candidates on the Certification List that they should go to Tewksbury Town Hall to sign the list if they would accept appointment as a permanent intermittent police officer. All but one of the first seventeen signed the list. The candidates were also asked to fill out an employment application.

As Police Chief Alfred Donovan's son, Michael Donovan, was one of the candidates for the police officer positions, Police Chief Donovan agreed that he would play no part in the hiring decisions for Certification List #271101; instead Deputy Chief Timothy Sheehan ("Deputy Sheehan") took over the role the Police Chief usually played (i.e., supervising the background checks, interviewing the candidates with Cressman, and making hiring recommendations).

³ Cressman is aware that he is supposed to select individuals in the manner in which they appear on the Certification List unless he has a justifiable reason for bypassing them (Volume IV, page 5-6).

⁴ Pacini, Butler, Bain, Conley, Hickey, Cyrus, and Nicosia are all veterans. Pursuant to G. L. c. 31, § 26, veterans, "in the order of their respective standings," are placed before non-veterans on certification lists.

II. Interviews

On January 4, 2008, Cressman and Deputy Sheehan interviewed the first thirteen candidates from Certification List #271101 who had indicated that they would accept assignment (Exhibit 64). Each candidate was allotted twenty minutes for the interview. Cressman asked each candidate eleven questions that he had handwritten on a piece of paper (Exhibit 65).⁵ Cressman has developed these open-ended questions over his twenty years as the appointing authority. Cressman took handwritten notes regarding the candidates' responses to his questions (Exhibit 66). In addition, Deputy Sheehan asked three questions from a typed document entitled "Tewksbury Police Department Interview Questions," containing twenty questions that he had created (Exhibit 67).⁶ Deputy Sheehan compared the candidates' answers to a "guide" of model answers that he had prepared and scored the answers using a scale of one to six (one and two being a "Poor Response," three and four being an "Adequate Response," and five and six being a "Good Response") (Exhibit 67). As most of the questions asked by Cressman were similar to a question on Deputy Sheehan's form, Deputy Sheehan took notes regarding a candidate's answer to a Cressman question under the relevant question on his form and ranked the answer using the

⁵ Specifically, (1) "Why are you interested in this position?"; (2) "In terms of education and experience, why do you believe you're qualified for this position?"; (3) "Please describe your lost time record?"; (4) "If you're involved in a foot chase and a suspect was caught and cuffed and then an officer came over and hit the suspect, what would you do?"; (5) "Please describe your understanding of community policing?"; (6) "Do you view a police officer as a crime fighter or a social worker and why?"; (7) "If you saw several juveniles drinking in a yard, you stopped, and they ran into the house, what would you do?"; (8) "Please describe your involvement in the community?"; (9) "Please describe your interpersonal skills?"; (10) "If you become a police officer what weakness would you have to address?"; and (11) "What are your three strengths that you will bring to the job?"

⁶ Specifically, Deputy asked questions regarding narcotics use, see question 14, integrity, see question 15, and racial profiling, see question 17 (Exhibit 67).

same scale. Deputy Sheehan also had the candidates take a timed writing sample test that he had created and compared the candidates' writing samples to a "guide" he had prepared (Exhibit 68).

None of the questions addressed information contained in the candidate's employment application, but the candidates were allowed to discuss any issues they wanted to raise, including those relating to their employment applications. In addition, none of the questions specifically addressed any information determined by the background checks (e.g., driving, criminal, and employment history) because the background checks had not yet been completed. Cyrus's interview took twelve minutes, while the selected candidates' interviews lasted between eighteen and twenty-three minutes.⁷ Both Cressman and Deputy Sheehan took notes on each candidate's answers and Cressman had Deputy Sheehan's notes when making his recommendations.

After the interviews, Deputy Sheehan created a "Candidate Interview and Writing Sample Assessment," ranking the interviewees (Exhibit 70). The rankings of the candidates from Certification List #271101 were as follows: (2) Donovan (62 points); (3) Sitar (60.5 points); (4) Miano (57.5 points); (5) Paltrineri (55.5 points); (6) Zarba (54.5 points); (7) Nicosia (51.5 points); (7) Pacini (51.5 points); (8) Ryser (49.5 points); (9) Conley (48 points); (10) Cyrus (42.5 points); (11) Butler (42 points); (12) Hickey (40 points); and (14) Bain (35 points).⁸ Cressman and Deputy Sheehan also discussed the interviews.

When asked how much weight he gave to the interview process, Cressman testified:

I generally tend to give the interview process a significant amount of weight. I tend to make decisions based on the interview process and how people perform and then I go and

⁷ Cyrus testified at the hearing that he was given a fair opportunity to answer the questions asked (Volume IV, page 223).

⁸ The first and thirteenth ranked candidates were from a different certification list.

start looking at the background investigation as their [sic] reasons to confirm why I would be bypassing somebody, you know, things like that.

(Volume III, page 149). See also (Volume IV, pages 10-11).

III. Background Investigations

Deputy Sheehan assigned three officers to conduct background investigations of the candidates and gave them the following forms which he had created: "Personal Reference Verification Questionnaire," "Neighbor Verification Questionnaire," "Tenant Verification Questionnaire," and "Employment Verification Questionnaire." Deputy Sheehan requested that the investigators complete three of each form for each candidate if possible and spend approximately forty hours investigating each candidate. Deputy Sheehan had obtained each candidates' driving and criminal records and provided this information to the investigators. As to the orders he gave the investigators, Deputy Sheehan testified:

They would submit the sheets that I have provided to them. And if they found anything -- any point of interest that would preclude someone from being a police officer . . . give me some sort of indication as to what that was and how they came about it. And to provide me with any of the documentation that backed up anything they found.

(Volume V, page 268).

With respect to the background investigations, Cressman testified as follows:

Q: And, so you read [the police department's investigation packages] as part of your background investigations?

A: That's correct.

Q: Is this the same process you used for each candidate? Did you look at all the information on each candidate?

A: I didn't look at it for each candidate completely -- all of the information. I was looking at it particularly for the individuals I needed to bypass.

(Volume V, pages 163-164).

A. Cyrus's Background Investigation

Deputy Sheehan assigned Lt. Ryan Columbus ("Lt. Columbus") to conduct background investigations of five of the candidates, including Cyrus. In investigating Cyrus, Lt. Columbus spoke to two personal references, four neighbors, Cyrus' landlord, and four former employers. Cyrus' personal references and neighbors spoke positively about him (Exhibits 12 and 13).⁹ In addition, three of Cyrus' former employers, the Air National Guard, CSI Group, and Polymer Tech, gave positive references (Exhibit 15). The fourth employer, however, Axsys Systems ("Axsys"), gave a negative reference. Specifically, Axsys's Human Resources Director, Jane Kruszkowski ("Kruszkowski"), responded that Cyrus had been dismissed from his employment with Axsys¹⁰ and that he had a poor attendance record, was a poor performer, and had issues which could disqualify him for public service (Exhibit 15). Kruszkowski referred Lt. Columbus to Cyrus's disciplinary record.

Lt. Columbus obtained Cyrus's personnel file from Axsys, which contained a January 6, 2006 "Performance Appraisal," two personnel memos written by Brian Strandberg ("Strandberg"), Cyrus's supervisor, in August, 2006, and an October 31, 2006 notice of termination (Exhibits 74-77). The performance appraisal gave an overall performance rating of "Needs Improvement," and specifically noted that Cyrus's "schedule prohibits him from

⁹ Two of Cyrus's personal references mentioned Cyrus's ex-wife: one stated that she is bitter towards Cyrus and the other stated that she gives Cyrus a hard time.

¹⁰ Kruszkowski indicated that although Cyrus appealed the dismissal to an arbitrator, who changed the dismissal to a layoff, when a terminated employee appeals their termination, Axsys does not "waste their time contesting it" (Exhibits 15 and 79).

becoming a reliable member of the Stryker team. He is often unavailable when crisis arise," and that it is important for Cyrus "to improve his communication with co-workers in order to maintain a more positive team environment" (Exhibit 74). Cyrus received a "Needs Improvement" rating in the productivity, reliability, availability, and interpersonal relationship categories (Exhibit 74).¹¹ Further, on August 10, 2006, Strandberg reported that he had been approached by a co-worker of Cyrus's who reported that he had overheard "very offensive sexually based conversations between [Cyrus] and other employees" (Exhibit 75). Strandberg met with Cyrus who "insisted that he had never had an inappropriate conversation with anyone at work" (Exhibit 75). In addition, on August 10, 2006, Strandberg wrote a memo to Cyrus's file reporting that on August 7, 2006, he had heard Cyrus "continuously mumble the word 'asshole'" as he walked past Cyrus's desk (Exhibit 76). Cyrus again denied that he had done anything (Exhibit 76).¹² Cyrus was eventually terminated because of his "excessive absenteeism" (Volume IV, page 213).¹³

Further, Cyrus indicated in his employment application that he had been involved in a divorce proceeding. As it is the Town's policy to interview ex-spouses of police officer candidates, on January 16, 2008, Lt. Columbus interviewed Cyrus's former wife, Jane Cosman ("Cosman"). Lt. Columbus reported the following about the interview:

¹¹ Cyrus admitted during the hearing that he received another evaluation with a "Needs Improvement" rating (Volume IV, page 209).

¹² At the hearing, Cyrus denied that Strandberg ever met with or spoke to him regarding the two incidents (Volume IV, pages 174, 176, 216).

¹³ Cyrus admitted at the hearing that his "absenteeism was excessive" (Volume IV, pages 185, 221). During most of his time at Axsys, Cyrus was going through a contested divorce that required him to make several court appearances and changed his parental responsibilities.

I asked her what her feelings were when she found out that Peter could potentially be a Police Officer. She immediately stated that it scares her. She stated that she is in fear of him. She has no contact with him other than to drop her kids off for visitation rights. Jane advised me that she called a friend to advise her that if anything ever happened to her it would be a story for the TV show 48 hours. She went on to say that she feels Peter is a liar and has anger issues. She advised me that Peter was having several affairs during their marriage. She stated that in 2001 she attempted to get a restraining order against him and was turned down by the Wilmington Police Department because Peter had friends on [sic] the Department. There is a report that was written and on file at the Wilmington Police Department which corroborates her story. . . . She stated that Peter had guns that he was frantically attempting to get out of the house when they split up. This made Jane extremely fearful that he was going to hurt her. . . .

I asked Jane if there was any verbal of [sic] physical abuse. She stated that there was constant verbal abuse. She further stated that on one night in 2001 she accidentally bumped Peter in bed and he got upset that she hit his sore thumb. She stated the [sic] Peter violently grabbed her arm, pushed her head into a pillow and punched her in the back. When I asked her why she didn't call the Police she stated that she was [in] shock and she did not want to ruin her marriage. She just gave birth to their second daughter and she felt that if she went to the Police it would ruin her family.

(Exhibit 81).

Lt. Columbus also obtained a September 23, 2004 Wilmington Police Department Incident Report, which stated that Sergeant David Axelrod ("Sgt. Axelrod") had had a conversation with Cosman regarding a restraining order. Specifically,

Jane is in the process of getting a divorce from her husband Peter. According to Jane, Peter moved out of the marital home back in November of 2003. . . . In the work area of the home on the wall was a strong box safe. According to Jane, she was aware that the safe contained handguns. Jane states she became aware of this fact last week when Peter asked if he could come to the house and get the items. . . . Jane states that she was feeling uncomfortable knowing that the weapons were in the safe and why he wanted them back. At no time did Jane ever state that Peter made any threats towards her or anyone in her family. After this part of the conversation, I did not feel that Jane qualified for a restraining order.

(Exhibit 21).

In addition, Cyrus's driving record revealed that he had been found responsible for seven

speeding violations between 1986 and 1998 (Exhibits 18 and 19). He was stopped for speeding on November 13, 1991, but was not found responsible (Exhibits 18 and 19). Cyrus has also been cited and found responsible for other moving violations, including improper passing, failure to use safety, driving to endanger, and illegal operation. Cyrus's criminal history included arrests in 1986 for transporting alcohol while a minor and malicious destruction of property (Exhibit 20). Cyrus was found guilty of the transporting alcohol while a minor charge and ordered to pay \$77.50 in fines and costs (Exhibit 20). Cyrus admitted to sufficient facts for the malicious destruction of property charge and the case was continued without a finding for six months (Exhibit 20). Cyrus was ordered to pay \$165 in restitution and fees (Exhibit 20).

On January 22, 2008, Lt. Columbus sent a memorandum to Deputy Sheehan noting that his "points of interest" with respect to the investigation of Cyrus were the interview with Cosman and his employment history with Axsys (Exhibit 16).

B. Other Candidates' Background Investigations

Nicosia has been found responsible for seven speeding violations between 1987 and 1994 and his license has been suspended eight times for either court defaults or failing to pay traffic fines (Exhibit 38). He has also been found responsible for operating with an expired inspection sticker and has written bad checks to the DMV. Nicosia indicated on his employment application that he was charged with assault with a dangerous weapon in 1986, but that the charge was dismissed (Exhibit 37). On May 5, 1988, Nicosia was charged with operation after revocation of registration (Exhibit 38). The court continued the case without a finding for approximately three months and Nicosia paid \$115 in fines and costs. On September 29, 1994, Nicosia was charged with operation after revocation of registration and operating an uninsured

motor vehicle (Exhibit 38). The court continued the case without a finding for approximately three months. After he paid a \$30 fine and \$250 in costs, both charges were dismissed at the request of the Probation Department. On May 2, 1996, Nicosia was charged with operating an uninsured motor vehicle, operation after revocation of registration, attaching plates, and operating an unregistered motor vehicle (Exhibit 38). He was found responsible for the last charge and pled guilty to the rest. He paid a \$500 fine. On August 5, 1996, Nicosia was charged with operation after his license was suspended, operating a motor vehicle with defective equipment, and operating a motor vehicle with unnecessary noise (Exhibit 38). On the operation after suspension charge, the court continued the case without a finding for six months. He was found responsible on the remaining charges. All charges were dismissed, however, at the request of the Probation Department after Nicosia paid \$135 in costs and assessments.

In his employment application, Nicosia also listed three restraining or 209A orders that had been filed against him: one by his former wife and two by his current wife (Exhibit 37). On January 24, 2008, Lt. Columbus spoke to Nicosia's former wife (Exhibit 39). She indicated that she filed the application for a restraining order because she wanted out of the marriage and she wanted Nicosia to stop calling her. She said that while Nicosia did not physically abuse her, he yelled a lot. She said that Nicosia is a different person now and that she has no fear of Nicosia and no concerns regarding his possibly becoming a police officer. On January 25, 2008, Lt. Columbus spoke to Nicosia's former wife (Exhibit 40). She had filed two restraining orders against Nicosia, but had withdrawn them in less than two weeks. She admitted that she had "fabricated" the allegations of verbal and physical abuse, once so she could continue having an affair and another time because she was upset Nicosia had broken up with her. She had all

positive things to say about Nicosia: that he is a great husband and father, that he is a hard worker, and that he is loyal and trustworthy.

Donovan has been found responsible for one speeding violation, which occurred on March 12, 2008 (Exhibit 28). His license has been suspended twice for failure to pay fines and he has been found responsible twice for not having an inspection sticker.

Paltrineri has been found responsible for speeding violations in 1991 and 1993 (Exhibit 47). His license has been suspended more than once and he has failed to stop on three occasions.

Sitar has been found responsible for one speeding violation, which occurred on November 28, 2004 (Exhibit 60). He has also been found responsible twice for operating without a valid inspection sticker and once for improper equipment. His license was suspended in 2006 for failure to pay a fine.

IV. Deputy Sheehan's Recommendations

On February 6, 2008, Deputy Sheehan sent his recommendations to Cressman (Exhibit 71). Deputy Sheehan suggested the following individuals for the available positions in the

following order: Donovan,¹⁴ Sitar,¹⁵ Paltrineri,¹⁶ Zarba,¹⁷ Miano,¹⁸ Nicosia,¹⁹ Conley,²⁰ and Hickey.²¹ Deputy Sheehan recommended bypassing Cyrus for the following reasons: "Poor Employment Evaluations and Disciplines, Poor Driver History, Criminal Record, Untruthful on

¹⁴ Under the "Rationalization for Selection" section, Deputy Sheehan wrote: "Excellent Employment Interview, Above Average Writing Sample, College Degree in Criminal Justice, 2 Yrs. Law Enforcement Experience, Excellent Community Service Record, Clean Criminal Record, Clean Background Investigation."

¹⁵ Under the "Rationalization for Selection" section, Deputy Sheehan wrote: "Excellent Employment Interview, Above Average Writing Sample, 3 Yrs. Public Safety Experience, Excellent Community Service Record, Clean Criminal Record, Clean Background Investigation, Currently Employed Tewksbury Police Dispatcher."

¹⁶ Under the "Rationalization for Selection" section, Deputy Sheehan wrote: "Above Average Employment Interview, 15 Yrs. Public Safety Experience, Above Average Community Service Record, Clean Criminal Record, Clean Background Investigation."

¹⁷ Under the "Rationalization for Selection" section, Deputy Sheehan wrote: "Above Average Employment Interview, Excellent Credit History, 3 Yrs. Law Enforcement Experience, Clean Criminal Record, Clean Background Investigation, Currently Employed Tewksbury Police Reserve Officer, Numerous Law Enforcement Instructor Certifications."

¹⁸ Under the "Rationalization for Selection" section, Deputy Sheehan wrote: "Above Average Employment Interview, Excellent Credit History, 4 Yrs. Public Safety Experience, Clean Criminal Record, Clean Background Investigation, Currently Employed Tewksbury Police Officer."

¹⁹ Under the "Rationalization for Selection" section, Deputy Sheehan wrote: "Above Average Employment Interview, Military Experience, 6 Yrs. Public Safety Experience, Bedford Chief Recommendation, Currently Employed Tewksbury Police Dispatcher."

²⁰ Under the "Rationalization for Selection" section, Deputy Sheehan wrote: "College Degree in Criminal Justice (Honors), Military Experience, 10-15 Yrs. Law Enforcement Experience, E.M.T., Clean Background Investigation."

²¹ Under the "Rationalization for Selection" section, Deputy Sheehan wrote: "Military Experience, 8 Yrs. Law Enforcement Experience, Good Credit History, Clean Criminal Record, Clean Background Investigation."

Application, Apparent Integrity, Authority, and Anger Issues.”²²

V. Cressman’s Selections

On February 27, 2008, Cressman selected six candidates from the certification list for the permanent intermittent police officer positions: Nicosia, Donovan, Miano, Paltrineri, Ryser, and Sitar (Exhibits 4 and 5). Of these six, four had ties to the Town, including three who were working as dispatchers for the Tewksbury Police Department. Specifically, Nicosia had been a dispatcher for the Tewksbury Police Department since October, 2007, Donovan was the Tewksbury Police Department Chief’s son, Miano had been a dispatcher for the Tewksbury Police Department since April, 2004 and his mother was employed by the Town at the North Street School, and Sitar had been a dispatcher for the Tewksbury Police Department since February, 2005, was a member of the Tewksbury School Committee, his mother worked for the Town as an administrative assistant, and his father was a Tewksbury fire fighter. Cyrus was not selected and neither was Pacini, Butler, Bain, Conley, Hickey, nor Zarba.²³ Cressman testified to the following regarding his selection process:

As I said, we started back at the interview process. Who did well in the interview process, who did well in, in the writing process and we moved on from there. . . . And then, and then from there [the] police department did their background eavl –

²² Sheehan recommended bypassing three other candidates for the following reasons: (1) Pacini: “Inexcusable Criminal and Immoral Conduct Over Last 2 Yrs. Hampton, N.H. and Freedom, N.H., Untruthful on Application, Apparent Integrity, Authority, and Anger Issues”; (2) Butler: “Poor Employment Interview, Poor Writing Sample, Very Poor Credit History, Poor Driver History, Untruthful on Application”; and (2) Bain: “Poor Employment Interview, Poor Writing Sample, Very Poor Criminal History to Include Sufficient Facts to Distribution of Narcotics, Poor Driver History, Untruthful on Application, Apparent Integrity, Authority, and Anger Issues.”

²³ Zarba was also a dispatcher for the Tewksbury Police Department and was tied with Donovan, Miano, Paltrineri, Ryser, and Sitar on Certification List #271101.

investigation. They identified, you know, any issues concerning them. Uh, you know, for example, uh, you know, like Alex Paltrineri (phonetic), you know clean criminal record, clean background investigation. Things like that were listed all in Deputy Chief Sheehan's memorandum and that then guide[d] and confirmed those individuals.

(Volume III, page 187).²⁴

On March 4, 2008, in separate letters, Cressman informed the Human Resources Division ("HRD") of the reasons why he selected Nicosia, Donovan, Miano, Paltrineri, Ryser, and Sitar as police officers.²⁵ Cressman also stated the reasons he bypassed Pacini, Butler, Bain, Conley, and

²⁴ Out of the candidates who scored in the top eight in the interview process, six were appointed. As noted above, the candidate who ranked first was from a different certification list, Zarba, who ranked sixth in the interview process, was not appointed.

²⁵ Specifically,

Cressman stated that he chose Nicosia because his "six years of Public Safety employment experience including the last year in Tewksbury as a Dispatcher suggests that he will have a successful career as a Permanent Intermittent Police Officer," he has excellent recommendations from his former employer, the Bedford Police Chief, and his current employer, Deputy Chief Sheehan, and he had an above average interview.

Cressman stated that Donovan's "two years of experience in the law enforcement field combined with a Bachelor's degree in Criminal Justice predicts success as a Permanent Intermittent Police Officer and his college degree indicates initiative and interest in preparing for this position." Further, Donovan had an above average interview and an excellent community service record "indicating his interest and involvement in the community."

Cressman selected Miano because his four years of employment as a dispatcher for the Tewksbury "predicts success as a" police officer, he had an above average interview, and he had a clean criminal record, credit history, and background investigation.

Cressman indicated that he selected Paltrineri because his fifteen years experience as a firefighter in another town "is a good predictor of success in this position," he had excellent reference reports from his current employer, and he had an above average interview.

Cressman selected Ryser because he was pursuing a Bachelor's degree at UMass Lowell, "which demonstrates initiative plus he has shown initiative to be NERPI trained," his two years experience as a police cadet for the Lexington Police Department "combined with excellent references from his employer is a good predictor of success," he had an above average interview, and he has a strong background of community involvement and participation which demonstrates his interest in the community.

Finally, Cressman selected Sitar because his three years of public safety experience as a dispatcher for Tewksbury "is a good predictor of success for this position," "his current pursuit of a college degree while working full-time is a demonstration of initiative in attempting to improve

Hickey.²⁶ Cressman stated that he did not select Cyrus for the following reasons: (1) poor employment evaluations and discipline; (2) poor driving history; (3) criminal record; (4) untruthfulness on application; and (5) apparent integrity, authority and anger issues (Exhibit 6).

On March 14, 2008, HRD sent Cressman a letter requesting additional information on all the candidates, noting that "the selection reasons should show a direct correlation and relate to the job position" (Exhibit 7). HRD also stated: "... the bypass information submitted for review must be specific, factual and detailed. Based on the documents received it would appear that the information used from the CORI, Driver records and Community Service areas has not been applied consistently to all the candidates." For Cyrus, the HRD requested Cressman to "identify, explain and provide examples of: (1) 'Poor employment Evaluation and Discipline', (2) 'Poor Driver history' and relate to the position, (3) 'Criminal Record', (4) 'Untruthfulness on Application.' (5) 'Apparent Integrity, Authority, and Anger issues'."²⁷

himself," he had an above average interview, and "of all the candidates he has demonstrated the most community involvement mentoring youth in youth sports activities and serving as an elected School Committee member."

²⁶ These letters are not in the administrative record.

²⁷ For the other candidates who were bypassed, the HRD requested Cressman "identify, explain and provide examples of":

(1) Pacini: "(1) 'Inexcusable criminal and immoral conduct over the past two years', (2) 'Untruthfulness on his application', (3) [']Apparent Integrity, Authority, and Anger issues'";

(2) Butler: "(1) 'Poor employment interview,' (2) 'Poor Writing Sample', (3) 'Very poor credit history' and relate to the position, (4) 'Poor Driver History' and relate to the position (5) 'Untruthfulness on Employment Application.'";

(3) Bain: "(1) 'Poor employment interview', (2) 'Poor Writing Sample', (3) 'Criminal History includes Sufficient Facts to Distribution of Narcotics,' (4) 'Poor Driver History, and relate to the position (5) 'Untruthfulness on Employment Application', (6) 'Apparent Integrity, Authority, and Anger issues.'";

(4) Conley: "(1) 'Below average employment interview', (2) 'Concern over issues in the Background Investigation that may place him in a difficult situation in terms of performing his

On April 2, 2008, Cressman elaborated on his initial reasons for bypassing Cyrus. Specifically, as to "Poor Employment Evaluation and Discipline," Cressman cited four examples from the Axsys' personnel file: a January 6, 2006 evaluation noting that Cyrus needed to improve his productivity, reliability, and dependability; an August 3, 2006 memo by his supervisor regarding offensive and sexually based comments; an August 7, 2006 memo by his supervisor regarding inappropriate comments and the use of internet for personal reasons; and that he was terminated on October 31, 2006. As to "Poor Driving Sample," Cressman stated that the ten speeding tickets from 1986 - 2004 reflects a lack of care in driving "which a police officer should demonstrate."²⁸ For "Criminal Record," Cressman cited two examples: (1) 1986-Malicious Destruction of Property and Minor in Possession of Alcohol on two separate occasions with restitution on the Malicious Destruction of Property; and (2) 2003- former wife applied for a restraining order at the Police Department due to guns in the house and fear of her spouse. Finally, as to "Untruthfulness on Application," Cressman wrote that Cyrus did not admit on his application that he had been involved in the court proceedings related to his two 1986 criminal

job";

(5) Hickey: "(1) 'Below average employment interview', (2) 'Employment performance appraisals indicated tardiness and only adequate performance' and relate to the position."

²⁸ The administrative records shows and the DALA magistrate found that Cyrus was found responsible for only seven speeding violations, the last one occurring in 1988.

charges and that "an untruthful individual would not be a good police officer" (Exhibit 8).²⁹

²⁹ Cressman did not elaborate on the fifth category from his March 4, 2008 letter. In addition, at the hearing, Cressman testified that he was mistaken about the "Untruthfulness on Application" reason as Cyrus had admitted on his application that he had been involved in court proceedings related to the two 1986 criminal charges (Volume III, pages 185-186). Even discarding the "Untruthfulness on Application" reason, however, Cressman would still have bypassed Cyrus (Volume III, page 186).

³⁰ Cressman also sent letters elaborating on the reasons why he selected Nicosia, Donovan, Miano, Paltrineri, Ryser, and Sitar. Specifically,

(1) Nicosia: Cressman elaborated that Bedford Chief James Hicks "indicated that [Nicoisa] was very mature and worked well with others and would recommend without hesitation Mr. Nicoisa as a full-time police officer" and Deputy Chief Sheehan stated "that he works most often unsupervised and has had no problems during his training and employment from October, 2007 to date" and that these recommendations are "predictors of future success as a Police Officer." Further, Nicosia scored seventh out of 15 in the interview and did "exceptionally well based on a question demonstrating decision making skills under stress and a question on communications and how it applied to his position as a law enforcement officer – excellent decision making and communication skills are a necessity for excellent performance in the job" (Exhibit 36).

(2) Donovan: Cressman specified as to the above average interview that he scored second out of fifteen interviewed "as he answered well questions on community involvement, decision making under stress, and integrity. With his answer on community involvement he demonstrated knowledge of the community which is a necessity for a police officer. His answers on decision making and integrity has [sic] highlighted two attributes that a police officer should have." For community involvement, Cressman noted that Donovan has been an assistant wrestling coach at the high school for the past three years, an assistant wrestling coach for the Police Athletic League for the past three years, and a volunteer at the Christmas parade for 6 years. Finally, as to current employment, Cressman stated: "June, 2006 to present Mr. Donovan is a Correctional Officer at Billerica House of Correction. Assistant Deputy Superintendent Rick Hopkinson indicated that he has an excellent work ethic and attitude, [is a] well rounded individual and [has] the ability to multi-task and [he] is very impressed with him as a young man with only two years experience" (Exhibit 23).

(3) Miano: Cressman stated that Miano "scored 4th out of 15 candidates [in the interview] and he scored extremely well on a question involving integrity even when it makes you unpopular, a question on the role of a police officer in society as a social worker and crime fighter, and a question on decision making under stress. Based on the necessity that a police officer have integrity and be able to make decisions under stress, these are good predictors that he will have a successful career as a police officer combined with understanding the role of a police officer in society." In addition, Cressman noted that Miano has no in-state or out-of-state incidents on the Board of Probation or Interstate Identification Index and has excellent credit. Further, the Tewksbury Police Department, Lowe's, and three neighbors "all indicated positive

characteristics about his excellent character that would lead the Town to consider hiring him and that he would have a successful career." Finally, Miano had been a dispatcher for the Tewksbury Police Department for four years and a reserve police officer for Tewksbury for three years (Exhibit 30).

(4) Paltrineri: Cressman relayed that the excellent references were as follows: "Wellesley's Fire Chief Rooney stated that he had perfect attendance, [was] a hard worker, and [had] no issues and stated in his opinion he was qualified to be a police officer as he does not get rattled and stays focused," and "Beth Keegan, Supervisor for Armstrong Ambulance stated he scores excellent on honesty and integrity and co-workers feel he is the best." Further, "these references are excellent predictors of success as a police officer needs to be a hard worker, honest and be respected by their co-workers." As for the above average interview, Paltrineri scored fifth out of fifteenth and "scored well on a question identifying the key core strengths of a police officer (honesty, integrity and strong communication skills) and a question on his ability to diffuse a situation with a difficult person. Based on his answers to these questions he showed a knowledge of what is important as a Police Officer, demonstrated an ability to perform in a stressful situation and an ability to diffuse an incident with a difficult person, all of these are characteristics required to be a successful police officer." Finally, Cressman noted that Paltrineri has been a firefighter for Wellesley since February, 2003 and an EMT/Paramedic for Armstrong Ambulance since March, 2003 (Exhibit 44).

(5) Ryser: With respect to the above average interview, Ryser "scored 8th out of 15 and scored well on a questions [sic] regarding integrity and community involvement. As a police officer integrity is critical for successful job performance and his knowledge of the community is important for a police officer. Finally, he demonstrated strong initiative by attending the Reserve Police Academy and secured First Responder Certificate with no job requirement." Cressman listed Ryser's involvement and participation in the community (i.e., volunteered at Tewksbury Recreation Center, has been a youth soccer and basketball referee since age 12, serves on the Board of Directors of Tewksbury Youth Baseball, volunteered for Tewksbury High football and basketball program, and is a referee for Police Athletic League Basketball) which demonstrates a strong interest in the community (Exhibit 51).

(6) Sitar: Cressman stated that Sitar scored third out of fifteenth in the interview and "scored well on questions on community involvement, ability to make sound decisions under stress, and decision making which may be unpopular with his peers, and both integrity questions. As a police officer, a candidate should know the community, be able to make sound decisions under stress and decisions which may be unpopular with their peers plus have integrity. These are all factors which predict future job success as a police officer." Cressman listed Sitar's involvement in the community: nine years youth football coaching experience, two years girls basketball coaching experience, counselor for six years at Tewksbury Recreation Center, selected by youth as "Counselor of Year" for two years, and has served on the school committee for two years. Finally, Cressman stated that Sitar has been a police dispatcher for Tewksbury for three years and his supervisor has indicated that Sitar "is qualified to be a police officer because he has the ability to make good assessments" (Exhibit 58).

VI. DALA's Decision

On April 11, 2008, the HRD approved the bypass of Cyrus (Exhibit 9). On May 5, 2008, Cyrus appealed to the Commission (Exhibit 10). DALA Magistrate Kenneth J. Forton held hearings on September 15, September 25, September 26, September 30, October 6, and October 31, 2008. On June 5, 2009, the magistrate issued a decision affirming the Town's bypass of Cyrus. The magistrate evaluated Cyrus's employment, criminal, and driving history and concluded that Cressman "enumerated legitimate policy concerns in determining which candidates were suitable for appointment, and he evaluated Cyrus's employment, criminal, and driving history in light of these policy concerns."³¹

With regard to Cyrus's employment, the magistrate cited the low ratings in productivity, reliability, availability, and interpersonal relationships he received on his employment evaluation at Axsys and noted that "each of these areas of performance is extremely important in law enforcement, and it is the policy of the Town to hire police officers who can be depended upon to be productive, reliable, and available." Further, Cyrus's termination because of excessive absences goes against the Town's policy of promoting good attendance. The disciplinary memoranda in Cyrus's personnel file "call into question Cyrus's ability to control himself in the work environment and raise issues of sexual harassment and insubordination" when police officers "must exercise an exquisite amount of self-control in the workplace" The magistrate did not give weight to Cyrus's attempts to explain his employment record and eventual termination by blaming his divorce and unreasonable ex-wife. The magistrate stated: "a

³¹ The magistrate found that the untruthfulness of application reason was not supported by substantial evidence.

difficult divorce and unreasonable ex-wife do not excuse Mr. Cyrus's absences, lack of communication regarding absences, and the rest of the conduct noted in his personnel file. Police Officers must be able to do their jobs under not only the stresses of the job but also the stresses of their personal lives." The magistrate indicated that the Town may rely on records it gets from an employer without independently verifying every fact contained therein in response to Cyrus's argument that the memoranda in his personnel file were not true and Lt. Columbus should have engaged in a more thorough investigation. Finally, while the magistrate acknowledged Cyrus's evidence of "an otherwise unblemished [eighteen-year] work history," he found that because the problems at Axsys occurred less than two years prior to his candidacy and because the issues raised were not minor, i.e., "they go to the heart of police work," the Town would have been irresponsible in ignoring the evidence of insubordination, sexual harassment, and flagrant absenteeism.

The magistrate noted that Cressman accorded little weight to Cyrus's criminal record because the two arrests occurred more than twenty years ago and the charges were fairly minor. The magistrate cited Cressman's testimony that Cyrus's criminal record alone would not have disqualified Cyrus from consideration for the position. With regard to Cyrus's domestic issues with his ex-wife, the magistrate, referencing Lt. Columbus's training in police investigations and ten-year history as a police officer, credited Lt. Columbus's determination that Cosman's statements about her attempts to obtain a restraining order against Cyrus, including that she was prevented from filing a restraining order by the Wilmington Police Department, were credible. The magistrate also stated that Lt. Columbus confirmed Cosman's story by obtaining Sgt. Axelrod's report of the incident. The magistrate concluded that Lt. Columbus "has training in

judging the credibility of the people that he interviews, and there was no reason elicited at the hearing in this matter to doubt his judgment as it related to his interviews of Ms. Cosman . . .”

With respect to Cyrus’s driving record, the magistrate cited Cressman’s testimony a candidate’s poor driving history in isolation would not have been sufficient to bypass him. The magistrate found that Cyrus was found responsible for only seven speeding violations, the last one occurring in 1988. Cyrus had argued that his driving record should not have been considered by the Town because the violations occurred twenty or more years ago and other candidates had either more serious records or more recent driving violations. The magistrate stated that it is within the appointing authority to consider any misconduct regardless of its staleness.

Finally, the magistrate found no evidence of bias, favoritism, or political considerations in Cressman’s decision to bypass Cyrus. Specifically, the magistrate dismissed Cyrus’s allegations regarding bias in the interviews and background investigations and the perceived personal influence exercised by some of the candidates and/or other employees of the Town. The magistrate found no bias in the interview process because the interviews were structured and objective. Further, even though Cyrus’s interview was shorter than the rest of the candidates, Cyrus testified that he answered each of the questions. The magistrate also noted that background checks were not completed when the interviews were conducted and Cyrus did not avail himself of the opportunity to raise any issue he thought necessary during the interview. The magistrate found that the Town does thorough and consistent background investigations and there was no evidence that the background investigations were biased. Finally, the magistrate concluded that Cyrus had not presented any evidence of favoritism or bias with respect to his claim that a “reasonable inference” can be drawn that the Town appointed several candidates

because of their ties to the Town.

Thus, the magistrate concluded that Cyrus had not shown that Cressman applied the Town's policy considerations disparately between him and the selected candidates or that the Town's decision was "anything less than a lawful exercise of discretion." Accordingly, the magistrate dismissed Cyrus's appeal.

VII. The Commission's Decision

On January 19, 2010, the Commission issued its decision. The Commissioner adopted the magistrate's Findings of Fact with the caveat that as to certain Findings of Fact, it would not credit the hearsay reports of persons who did not testify. The Commission also rejected certain testimony of Strandberg and other hearsay evidence concerning Axsys.

The Commission concluded that the four reasons submitted by Cressman for Cyrus's bypass were not justified because "those reasons are not supported by substantial evidence in the record and application of correct principles of law and/or can be equally applied to the lower ranked candidates who were selected." With respect to Cyrus's employment history, the Commission indicated that Cyrus "seriously disputed" the allegations surrounding his employment record at Axsys and that the magistrate did not reference or make credibility determinations regarding the "critical, conflicting evidence." Further, the Commission pointed to Cyrus's "undisputed, and unblemished record with every other employer he worked for in the past twenty years, including high praise for his military record with the Air National Guard"

The Commission concluded:

when all of the evidence in the record is considered, and giving due weight to the percipient evidence produced by both parties on this issue as the Commission majority finds credible, the preponderance of the evidence fails to establish that Tewksbury has

proved that Mr. Cyrus's past employment history justifies his by-pass for appointment as an intermittent police officer. The Commission find[s] no reason to reject Mr. Cyrus's testimony and those of his corroborating witnesses, none of whom who [sic] would have any motive or bias against Tewksbury, and accepts that testimony as credible. The hearsay evidence about incidents at Axsys, which are contradicted by the testimony of percipient witnesses, carry less weight, as does the testimony of Mr. Strandberg, whose motive to defend his questionable decision to terminate Mr. Cyrus is obvious, and whose testimony cannot be reconciled with the other objective, contradictory evidence.

Regarding Cyrus's driving record, the Commission determined that the magistrate should not have considered Cyrus's "stale evidence of misconduct" and additionally overlooked the substantial evidence of the poor driving records of at least four selected candidates.³² The Commission concluded that Tewksbury did not prove that it applied the same criteria consistently and fairly to all candidates.

For Cyrus's criminal record, the Commission again concluded that the Town could not use "these extremely stale and minor . . . offenses as a basis for bypass twenty years later." The Commission also discounted the magistrate's findings regarding Cosman. Specifically,

The alleged domestic abuse order could be a disqualifying reason, but the substantial evidence established that the factual basis of this charge was untrue. The Administrative Magistrate's findings of fact and conclusions rest entirely on hearsay statements made to Lt. Columbus by Jane Cosman, Mr. Cyrus's ex-wife, who did not appear and testify. The two independent witnesses with personal knowledge of the situation were Detective Stickney and Sgt. Axelrod, whose testimony and contemporaneous police report of the alleged incident directly contradicts what Lt. Columbus reported he was told about the incident by Ms. Cosman. . . . The Administrative Magistrate gives no reason to discredit any of the testimony or Sgt. Axelrod's contemporaneous report. It should suffice to say that, after weighing all the evidence, the hearsay statements by Ms. Cosman made years after the fact and with a clear motive for bias (which her own statement acknowledged), are outweighed by substantial evidence of percipient witnesses that discredits her.

The Commission then points out the "discrepancies" between Sgt. Axelrod's and Lt. Columbus's

³² The Commission also noted that Cressman exaggerated the number of Cyrus's violations and mischaracterized them as continuing until 2004.

reports. The Commission stated that while it accepted the magistrate's finding that Lt. Columbus's report is an accurate statement of what he was told, the Commission gave it little, if any, weight because of the inconsistencies between the statements attributed to Cosman and the statements in Sgt. Axelrod's report.³³

Although Tewksbury's failure to establish "sound and sufficient" reason that justified any of the four grounds used to bypass Cyrus required that Cyrus's appeal be allowed "independent of any proof that the selection process was otherwise biased," the Commission addressed Cyrus's bias claim, finding that the magistrate overlooked critical evidence that an unlawful bias did exist. The Commission found that the "results of the selection process are a 'red flag' that leads to a disturbing inference that the selection process concealed an unlawful bias, whether intentional or subconscious, to eliminate enough higher ranked applicants to reach down to select lower ranked applicants with Tewksbury connections." The fact that the candidates' order on the certification list was "essentially inversely proportional" to the order of their interview process, "when taken along with some of the subjective judgments that were made along the way," invited a "reasonable inference of intent to use whatever they could find on the more highly ranked candidates in order to get down to the" candidates with connections to Tewksbury. The Commission found it problematic that Cyrus was bypassed for his twenty-year old teenage criminal and driving record, while the Town excused the criminal and driving records of the Tewksbury-connected applicants. The Commission especially had trouble with the "pass" given to Nicosia. Specifically, "the pass given to another candidate who was a Tewksbury police

³³ The Commission accepted the magistrate's finding that the untruthfulness charge had not been substantiated.

dispatcher (and tied with Mr. Cyrus on the certification list), and who had a record of actual domestic abuse restraining orders against him, while not problematic standing alone, adds to the troubling scenario when viewed through this lens of potential political overtones and favoritism.”

The Commission concluded:

If bias were the only basis on which to allow this appeal, the Commission majority would have been inclined to recommit the matter to the Administrative Magistrate to take further evidence and make further findings on this issue that would confirm what the present record tends to imply. In particular, the Commission would be interested to have more detail about the interview assessments, as well as the details which resulted in all six military veterans ranked above the selected candidates being bypassed, largely for similar reasons used to bypass Mr. Cyrus that the Commission majority found to be unjustified by the evidence”

As the Commission found that Tewksbury failed to establish sound and sufficient reason that justified any of the four grounds used to bypass Cyrus, it declined to order further proceedings in the matter and reversed DALA’s decision.

The Chairman of the Commission dissented, pointing out that the Commission substituted its judgment for that of the Town, “determining on its own how much weight the Town should have given to various factors, including the Appellant’s past criminal behavior, poor driving record and prior employment record” and “erroneously mak[ing] their own independent credibility assessments of key witnesses, including the Appellant, to justify their decision.” The Chairman was particularly troubled by the Commission’s independent discrediting of Cosman’s domestic abuse allegations. With respect to bias, the Chairman found “absurd” the Commission’s determination that the selection process concealed an unlawful bias. The Chairman concluded that there was ample evidence in the record to support the magistrate’s decision.

DISCUSSION

The role of the Civil Service Commission is to determine “on the basis of the evidence before it, whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority.” Brackett v. Civil Serv. Comm’n, 447 Mass. 233, 241 (2006); see G. L. c. 31, § 2(b). For the appointing authority’s action to be reasonably justified, it must be based “upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” Id., quoting Selectmen of Waketield v. Judge of First Dist. Court of Eastern Middlesex, 262 Mass. 477, 482 (1928). “In making that analysis, the commission must focus on the fundamental purposes of the civil service system — to guard against political considerations, favoritism, and bias in governmental employment decisions” Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 304 (1997). The Commission may intervene when there are overtones of political control or objectives unrelated to merit standards or neutrally applied public policy in personnel decisions. Id.

In its review, the Commission hears evidence and finds facts anew. Leominster v. Stratton, 58 Mass. App. Ct. 726, 727 (2003). Thus, the Commission is not limited to examining the evidence that was before the appointing authority. Id. The Commission, however, must look at whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision. Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006); see Beverly v. Civil Serv. Comm’n, 78 Mass. App. Ct. 182, 187 (2010) (unpublished decision) (commission’s role is relatively narrow in scope: reviewing legitimacy and reasonableness of appointing authority’s

actions). The Commission may not “substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Cambridge, 43 Mass. App. Ct. at 304. Thus, while the finding of the facts is the province of the Commission, not the appointing authority, the Commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Beverly, 78 Mass. App. Ct. at 188; see Cambridge, 43 Mass. App. Ct. at 304-305 (appointing authorities are invested with broad discretion in selecting public employees). “Such deference is especially appropriate with respect to the hiring of police officers” because of the “high standards to which police officers appropriately are held.” Beverly, 78 Mass. App. Ct. at 188; see Cambridge, 43 Mass. App. Ct. at 305 (“Prior misconduct has frequently been a ground for not hiring or retaining a police officer.”).

A party aggrieved by a final decision of the Commission may seek judicial review under G. L. c. 31, § 44. Pursuant to G. L. c. 31, § 44, the court reviews the Commission’s decision to determine if it violates any of the standards set forth in G. L. c. 31A, § 14(7), including whether there is substantial evidence in the record for the Commission’s decision. G. L. c. 30A, § 14(7)(e); see G. L. c. 30A, § 1(6) (substantial evidence means such evidence as reasonable mind might accept as adequate to support a conclusion, after taking into consideration opposing evidence in record). In this case, the Commission disagreed with certain of the magistrate’s findings. As the magistrate was the finder of fact in this case, his credibility determinations are entitled to substantial deference by the Commission and the court. Vinal v. Contributory Retirement Appeal Bd., 13 Mass. App. Ct. 85, 101 (1982) (subsidiary findings are entitled to some deference).

I. Reasonable Justification

Cressman bypassed Cyrus for four reasons: (1) poor employment history at Axsys; (2) poor driving record; (3) criminal record, including his ex-wife's report to the police; and (4) untruthfulness on his application.³⁴

A. Driving Record

The magistrate determined that Cressman had exaggerated the number and dates of Cyrus's speeding violations. In upholding Cyrus's driving record as a reasonable justification for bypass, the magistrate focused on Cressman's testimony that a candidate's poor driving record alone would not provide sufficient reason for a bypass. With the exception of Nicosia, the candidates with poor driving histories, Donovan, Paltrineri, and Sitar, did not have other "red flags" in their background investigations. Thus, contrary to the claim of the Commission, the Town not only acknowledged the poor driving records of other candidates, but applied the same criteria consistently and fairly to all candidates by determining that Donovan, Paltrineri, and Sitar's driving records alone did not provide a justifiable reason not to hire them. See Cambridge, 43 Mass. App. Ct. at 305 (it is for appointing authority to decide how to weigh importance of certain factors).

B. Employment History

It is clear that the Commission did not afford the magistrate substantial deference with respect to his credibility findings regarding Cyrus's employment history. In support of its decision, the Commission relies heavily on Cyrus's testimony, including his "strenuous" dispute

³⁴ As discussed above, Cressman later testified that he was mistaken about Cyrus having been untruthful on his application. The magistrate accordingly found that the untruthfulness on application allegation did not provide reasonable justification for Cyrus's bypass.

of the allegations made by Axsys. The magistrate, however, did not credit Cyrus's testimony regarding the veracity of the memoranda in his personnel file and discounted the testimony of Cyrus with respect to his divorce and difficult ex-wife being the cause of his absences, lack of communication regarding his absences, and other conduct. As these are credibility determinations, the magistrate's findings were entitled to substantial deference. Vinal, 13 Mass. App. Ct. at 101. Instead, the Commission impermissibly substituted its own judgment regarding Cyrus's credibility for that of the magistrate and the Town. See Commission Decision, page 10 ("The Commission finds no reason to reject Mr. Cyrus's testimony . . . and accepts that testimony as credible.").

The Commission also found that the Town and the magistrate failed to give proper weight to Cyrus's "undisputed, and unblemished record with every other employer he worked for in the past twenty years, including high praise for his military record with the Air National Guard . . ." The magistrate had found that the Town was justified in giving more weight to Cyrus's employment history at Axsys as opposed to the rest of his employment history because the problems at Axsys occurred less than two years prior to his candidacy and because the issues raised, i.e., insubordination, sexual harassment, and flagrant absenteeism, went to the heart of police work. The Commission stated that the evidence relating to Cyrus's employment record outside of Axsys "is entitled to substantial weight in reconciling the disputed issues regarding the situation at Axsys . . ." ³⁵

³⁵ The Commission gave less weight to hearsay evidence about incidents at Axsys, which was contradicted by the testimony of percipient witnesses, and to the testimony of Strandberg, "whose motive to defend his questionable decision to terminate Mr. Cyrus is obvious, and whose testimony cannot be reconciled with the other objective, contradictory evidence." The Commission seems to ignore, however, that Cyrus admitted his absenteeism was excessive and

Within the Town's broad discretion in selecting public employees it can decide not to take the risk inherent in hiring someone who has, so the Town may reasonably think, had issues with insubordination, sexual harassment, and flagrant absenteeism with a previous employer. See Cambridge, 43 Mass. App. Ct. at 305 (commission conceded relevance of bypassed candidate's record, but chided appointing authority with "having given those incidents undue weight in light of the enthusiastic letters about her work performance"; court found that was impermissible substitution by commission of its judgment for that of appointing authority about importance of candidate's criminal record balanced against her work record); see also Beverly, 78 Mass. App. Ct. at 190-191 (parties disputed whether past misconduct ever occurred; court determined that absent proof the city acted unreasonable, commission bound to city's determination that it was unwilling to bear risks of hiring candidate). There was evidence in the record before the Town indicating that Cyrus had engaged in certain inappropriate behaviors. Thus, the Town was not unreasonable in determining that it was unwilling to bear the risk of hiring Cyrus. The Commission impermissibly substituted its judgment for that of the magistrate and the Town as to the weight to be given this evidence. Cambridge, 43 Mass. App. Ct. at 305.

C. Cosman

Once again, it is clear that the Commission did not afford the magistrate substantial

that Strandberg had personal knowledge of Cyrus's insubordination. With respect to the sexual harassment allegations, the magistrate clearly found Strandberg more credible regarding the issue than Cyrus. See Embers of Salisbury v. Alcohol Bev. Control Comm'n, 401 Mass. 526, 530 (1988) (administrative agency can give probative value to evidence which is exclusively hearsay only if evidence carries with it an indicia of reliability); Boston Police Dep't v. Suppa, 79 Mass. App. Ct. 1121 (unpublished decision) (quotations and citations omitted) (proceedings governed by G. L. c. 30A "need not observe the rules of evidence observed by courts so long as the evidence admitted is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs").

deference with respect to his credibility findings about Cosman. The Commission rejected Cosman's statements to Lt. Columbus as "untrue," choosing instead to credit Sgt. Axelrod's account of the incident and the testimony of three police officers regarding Cyrus's relationship with Cosman. The magistrate, however, made an express determination that Lt. Columbus's judgment of Cosman's credibility was reliable and his findings were entitled to substantial deference. Vinal, 13 Mass. App. Ct. at 101; see also Embers of Salisbury v. Alcohol Bev. Control Comm'n, 401 Mass. 526, 530 (1988) (administrative agency can give probative value to evidence which is exclusively hearsay only if evidence carries with it an indicia of reliability, particularly where the out of court declarant was unavailable and not subject to cross examination). The Commission impermissibly substituted its own judgment regarding Cosman's credibility for that of the magistrate and the Town. See Commission Decision, page 19 ("Mr. Cyrus has demonstrated that the substance of Ms. Cosman's present claims are unreliable and not worthy of belief."); see also Dissent, page 2 ("I am deeply troubled by the majority's conclusions in which they independently discredit the domestic abuse allegations of [Cosman], and, in doing so, dismiss her serious charges that she was dissuaded from filing a restraining order by the Wilmington Police.").

After examining the entire record, the court concludes that the Commission exceeded its authority when it minimized the significance of Cyrus's work performance issues and discredited Cosman's statements regarding the restraining order incident. The magistrate's determination that the Town's bypass of Cyrus was reasonably justified was based on substantial evidence in the record because it was based on poor reviews Cyrus received from an employer for attendance issues and his disrespecting a supervisor, as well as his relationship with his ex-wife. The

Commission might think that Cyrus is fit to be a police officer. That decision, however, is left to the discretion of the Town. See Cambridge, 43 Mass. App. Ct. at 305 (“Whether to take such a [hiring] risk is . . . for the appointing authority to decide.”). When an individual such as Cyrus has had insubordination and unreliability issues with a previous employer and has been involved with a domestic violence claim, it is for the Town, not the Commission, to decide whether to take on the risk inherent in hiring that individual. See id.

II. Bias

The basic tenant of the civil service law is to protect the service from arbitrary and capricious actions and to avoid overtones of political motivation, favoritism, and bias in employment. See id. at 304; McHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632 (1996). The Commission may intervene when there are overtones of political control or objectives unrelated to merit standards or neutrally applied public policy in personnel decisions. Cambridge, 43 Mass. App. Ct. at 304.

A “bypass” occurs when a candidate who is higher on a certification list is not appointed in favor of another candidate who is lower on the certification list. See Bielawski v. Personnel Administrator of the Division of Personnel Administration, 422 Mass. 459, 460 (1996), citing G. L. c. 31, § 27. Here, six of the first seven candidates on Certification List #271101 were bypassed, including Cyrus. With the exception of Nicosia who tied for sixth place with Cyrus, the candidates selected were ranked lower than the six candidates bypassed. Four of the candidates selected had ties to the Town. Because Nicosia was tied with Cyrus, Cyrus was not bypassed for Nicosia.

While the end results of the selection process, together with Cressman’s testimony that he

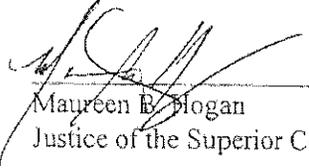
gave significant weight to the interview process and used the background investigations to find reasons to bypass, raise an issue as to possible bias in favor of candidates with family or personal connections to the Town, there is insufficient evidence in the record demonstrating that the selection process was tainted by bias, favoritism, or political motivation, which resulted in the bypass of Cyrus. Except for Nicosia, the candidates selected with connections to the Town all had clean background investigations and clean criminal records, as well as high scores in the interview process and on their writing samples. Several of them had advanced degrees or were pursuing advanced degrees and all had public safety experience. With the exception of Nicosia, the only "red flag" cited by Cyrus for the selected candidates who had ties to the Town was their histories of driving violations. Cressman testified, however, that a candidate's poor driving record alone would not provide sufficient reason for a bypass. Additionally, while Nicosia's driving history and background raised concerns similar to some of the reasons given for bypassing Cyrus, Cyrus was not "bypassed" for Nicosia because Nicosia and Cyrus tied for sixth on the certification list.

In contrast to the candidates selected, the reasons given for the bypass of the five other candidates bypassed indicate that they all had serious issues in their background investigations, criminal records, employment histories, and/or interviews. There is no evidence that these reasons were not substantiated or based in fact. Similarly, as stated above, the Town's bypass of Cyrus was reasonably justified and based on substantial evidence in the record because it was based on poor reviews Cyrus received from an employer for attendance issues and his disrespecting a supervisor, as well as his relationship with his ex-wife. Accordingly, the magistrate's conclusion that Cyrus presented no evidence that the Town's hiring decisions were

based on employment and family connections to the Town as opposed to basic merit principles is supported by the record.

ORDER

For the reasons stated above, it is hereby **ORDERED** that the plaintiffs' Motion for Judgment on the Pleadings is **ALLOWED**, and the Commission's decision is **REVERSED**.


Maureen B. Bogan
Justice of the Superior Court

Dated: August 30, 2012