

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

DAVID TRAINOR,
Appellant

v.

**SALEM POLICE
DEPARTMENT,**
Respondent

Case No.: G1-13-202

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

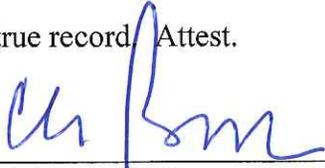
Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No written objections were received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Salem Police Department to bypass the Appellant for the position of permanent reserve police officer is affirmed and Mr. Trainor's appeal under Docket No. G1-13-202 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on March 20, 2014.

A true record Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt

of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:

David Trainor (Appellant)

Daniel Kulak, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk. ss.

Division of Administrative Law Appeals

**David Trainor,
Appellant**

v.

Docket Nos. **CS-13-563 (DALA),
G-1-13-202 (Civil Service Commission)**

**Salem - Police Department,
Respondent/Appointing Authority**

Dated:

JAN 31 2014

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

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Appearance for Appellant:

David Trainor, *pro se*

Appearance for Appointing Authority:

Daniel B. Kulak, Esq.
147 Russell Street
Peabody, MA 01960

Administrative Magistrate:

Sarah H. Luick, Esq.

Summary of Recommended Decision

The Respondent/Appointing Authority was justified in bypassing the Appellant for an original appointment to permanent reserve police officer. The process followed to evaluate the Appellant was the same process employed for all the candidates. The Appellant was given ample opportunity to address his employment background with the Appointing Authority to explain discrepancies between the investigation information, and his application and verbal responses. There was no pre-textual reason for bypassing the Appellant. The work history involving terminations and the Appellant's lack of accepting responsibility with not full and truthful responses led to the Appointing Authority's decision not to find him an acceptable hire.

RECOMMENDED DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, David Trainor, filed an appeal with the Civil Service Commission on September 11, 2013 seeking a review of the decision of July 12, 2013 of the Salem Police Chief as the Appointing Authority to bypass him for an original appointment to

the position of permanent reserve police officer. G.L. c. 31, § 27. (Exs. 1 & 3.) A hearing was held on November 22, 2013 for the Civil Service Commission on the merits of the bypass appeal by the Division of Administrative Law Appeals (DALA) at its offices at One Congress Street, 11th Floor, Boston, MA 02114. The hearing was digitally recorded.

Various documents are in evidence. (Exs. 1 - 10.) The Appointing Authority presented the testimony of Salem Police Department employees: Sgt. Robert Lubas; Sharon Lubas, Executive Assistant to the Salem Police Chief; and, Chief Paul Tucker. The Appellant testified on his own behalf. Both parties made closing arguments on the record.

FINDINGS OF FACT

Based on the evidence presented and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. David Trainor, born in 1990, grew up in Salem and graduated from Salem High School. He has always lived in Salem and resides with his family including his parents and four siblings. He spends weekends at his girlfriend's home in Wakefield where her mother also lives. He received a certificate in law enforcement from North Shore Community College, and he attends Salem State College. He is working toward receipt of an Emergency Medical Technician license. He has a firearms license issued by Salem. He enjoys shooting at a range and has membership in the Danvers Fish & Game club. He has done volunteering at Salem Hospital. He works out each week at a gym. He knows some Spanish. Mr. Trainor has no criminal record and no background involving any domestic violence. He does not own real estate, and his main debt is a car loan for which he is current in meeting payments. Mr. Trainor has no history of tobacco use, is a social drinker, does not use drugs, and does not engage in any regular gambling. He has registered with the military but has not enlisted for service. (Exs. 6, 7 & 8. Testimony of Mr. Trainor & Sgt. Lubas.)

2. Mr. Trainor has made prior recent efforts to be hired as a police officer. This is a job he has wanted to do for a long time. He applied in Portland ME, Enfield CT, and Nashua NH. He received no job offers from these efforts. (Exs. 6 & 8. Testimony of Mr. Trainor & Sgt. Lubas.)

3. Mr. Trainor currently works at Stoneham Ford as a lot attendant from October 2011. He works at least forty hours a week. He gasses vehicles, parks and moves vehicles, and assists customers. His supervisor, a retired police officer, finds him to have very good attendance, to do well serving customers, and to be dependable and cooperative. One lack his supervisor finds is difficulty with multi-tasking. He recommends Mr. Trainor for a police officer position. (Exs. 6, 7 & 8. Testimony of Mr. Trainor & Sgt. Lubas.)

4. Mr. Trainor also currently works for Special Agent Consultants, owned by a retired FBI agent. He has done this work from 2009, and puts in at least ten hours a week. The company does contract security work for movie theaters. The owner finds Mr. Trainor to be a dependable worker who is not tardy and comes dressed appropriately for work. The owner has been impressed that Mr. Trainor has observed movie patrons carrying weapons. He recommends Mr. Trainor for a police officer position. A co-worker with Mr. Trainor finds him to be reliable when facing stressful situations and to be very professional. He is aware that Mr. Trainor has been working at securing a police officer position and feels that he would do a good job as a police officer. (Exs. 6, 7 & 8. Testimony of Mr. Trainor & Sgt. Lubas.)

5. Mr. Trainor has prior employment from June 2011 to November 2011 at a Chuck E. Cheese. He was a game room attendant who fixed and cleaned the games. He worked about three to ten hours a week. He was terminated from employment due to a mishandling of cash register money in November 2011 when Mr. Trainor was trying to move into a new area at work.

(Exs. 6 & 8. Testimony of Mr. Trainor & Sgt. Lubas.)

6. Mr. Trainor previously worked at Best Buy store for a month; September to October 2010. He did security work there and left because he did not like the job and because he took another job. He worked twelve to twenty hours a week. (Ex. 6. Testimony of Mr. Trainor.)

7. Mr. Trainor worked at an AMC movie theater from July 2009 to December 2010. He worked about six to thirty-five hours per week as a customer service/usher. He was terminated from this job. Mr. Trainor dated a co-worker who is his current girlfriend. Doing this was against corporate policy but they dated anyway over the objections of his managers. The reasons listed for his termination within his termination papers include:

- May 5, 2009 his register draw was \$18.75 short.
- June 5, 2009 his register draw was \$70.00 short and 7 passes were missing.
- July 2, 2009 his register was over \$17.00.
- August 27, 2009 unprofessional activity over the radio. He was discussing a guest in a negative manner.
- October 1, 2009 he as entitled to a 30 minute break. When he could not be located, he was contacted via the phone and stated that he was taking an hour.
- November 8, 2009 he was again unprofessional on the radio.

(Ex. 8.) Mr. Trainor would not acknowledge his termination paper and wrote on the paper the words, "suck dick" and "fuck yourself." Mr. Trainor is sure that he was only fired because he was dating his co-worker although he acknowledges that he was written up a number of times for mishandling funds and for improper use of the radio system. He acknowledges coming back late from a regular break. (Exs. 6, 7, 8 & 10. Testimony of Mr. Trainor & Sgt. Lubas.)

8. Mr. Trainor worked at Crosby's Supermarket from October 2007 through May 2009 in customer service in the produce area. He worked eight to thirty hours a week. He was asked to resign and agreed to do that after being involved in an altercation with two other co-workers. His supervisor at the time found Mr. Trainor to be confrontational and that he would not re-hire

him. On the other hand, he found him to be dependable, came to work appropriately dressed, and with good attendance including arriving for work on-time. His supervisor never saw him use tobacco, alcohol, or drugs, and did not understand that he had a gambling problem. Although Mr. Trainor acknowledged the agreement to resign in connection with the fight, he did not like working at Crosby's as he wanted a different kind of job that would have steady working hours. He helped a friend get a job at Crosby's and the friend got into a fight with another co-worker. This is the fight Mr. Trainor became involved in that led to his employer asking him to resign. (Exs. 6, 7 & 8. Testimony of Mr. Trainor & Sgt. Lubas.)

9. Mr. Trainor has worked from 2006 to the present for Brickhouse Moving during summer months. He has been a mover and a supervisor. He worked at Winfrey's Fudge during two summers between 2006 and 2010. (Exs. 6 & 7.)

10. Mr. Trainor has a current driver's license. He has the following driving record:

November 11, 2007 Fail To Use Care – Salem – responsible.
March 3, 2011 No Inspection Sticker – Reading – responsible.
March 3, 2011 No Registration in Possession – Reading – responsible.
April 8, 2011 Suspension Payment Default

(Ex. 8.)

11. Mr. Trainor took a civil service examination for police officer on April 30, 2011. He scored 98. On November 1, 2011 a certified list #00348 was created for the position of permanent reserve police officer for Salem. Mr. Trainor was tied with seven others at a rank of 19. (Stipulation. Exs. 2 & 4.)

12. Mr. Trainor pursued this position with Salem. He went to an orientation meeting at the Salem Police Station about completing the application/questionnaire and to learn about the subsequent police background investigation and panel interview before superior officers. (Ex. 6. Testimony of Mr. Trainor & Chief Tucker.)

13. The application/questionnaire was eighteen pages. At the front of the document was the instruction that only the applicant was to answer the questions. The applicant was to supply answers "completely, accurately, and honestly." Supplementary pages could be used if needed. Mr. Trainor provided persons to contact for character references that included his girlfriend, his girlfriend's mother, and the owner of Special Agent Consultants. He listed where he had previously sought law enforcement positions and when. He provided a list of his current and prior jobs, including answers to questions of his reasons for leaving jobs, and if he had ever received any work discipline. He acknowledged that he was terminated from his AMC theater job answering that the reason was for dating a co-worker. He listed the reason for being terminated from Chuck E. Cheese as mishandling money when working the cash register. He listed the reason for stopping work at Crosby's Supermarket as being asked to resign because of an altercation with two co-workers. He did not further explain the circumstances of these terminations in any supplementary pages. Mr. Trainor provided his educational experiences and listed his interests, special abilities, sports and hobbies, including in his answer his criminal justice classes, his courses for first responder and EMT work, his use of the shooting range and the gym, and noting he had an interest in investigations, cars and volunteer work. He noted he has a slight ability to speak, understand, read and write in Spanish. He answered how he had registered for selective service under the heading in the application of military record. He listed his current driver's license. He noted his out of the United States travel as to Canada on a school trip in 2001 and to Bermuda in 2011 for a vacation with his girlfriend. He answered in the negative questions about having any criminal record. (Ex. 6. Testimony of Mr. Trainor & Sgt. Lubas.)

14. As per the hiring process, Mr. Trainor met with Sgt. Lubas and a Captain (who also

served on the interview panel) to review his application/questionnaire. The candidates had been instructed to bring in their credit report for this review. Mr. Trainor had not secured it reasoning that the investigation process would address his credit issues. This is what he told the officers as to why he lacked his credit report. He also explained that he only had a car loan. The officers told him he still had to bring in the credit report. He was able to secure it and brought it to the police station the next day. He had no problematic financial status. (Ex. 8. Testimony of Mr. Trainor & Sgt. Lubas.)

15. Following this meeting, Sgt. Lubas conducted a background investigation on Mr. Trainor, including investigating the information Mr. Trainor listed in his application/questionnaire. Sgt. Lubas completed his report on April 3, 2013. In it he discussed discrepancies between Mr. Trainor's application/questionnaire answers regarding his employment history and reasons why he was terminated from his jobs, and the information uncovered from the investigation that conflicted with Mr. Trainor's information. The conflicting information concerned his AMC theater job, no listing of work at a Five Below store, and reasons for his terminations from jobs. These discrepancies in addition to Mr. Trainor's failure to secure as asked, his credit report in a timely manner, were assessed in Sgt. Lubas's report. As he did for all the candidates he investigated, Sgt. Lubas made a recommendation. For Mr. Trainor it was for him to "be asked to participate in the next step of the process. He should have the opportunity to answer questions in regards to questionable behavior in his past." (Ex. 8. Testimony of Sgt. Lubas.)

16. The next step following the investigation, was for candidates to appear before a panel for questioning and for the candidate to be observed, and to allow the candidate to explain any problematic conduct uncovered from the investigation. Chief Tucker developed a group of

standard questions each candidate was asked, including hypothetical situations a police officer might encounter. The panel participants asked additional and follow-up questions if they wanted to. Following each panel interview the candidate was discussed by the panel. The panel for each candidate was Chief Tucker, Sgt. Lubas, and two Captains. By the time of the panel interview, the panel participants had the investigation reports and the application/questionnaire answers.

(Testimony of Chief Tucker, Sgt. Lubas & Mr. Trainor.)

17. Mr. Trainor had his panel interview. He was asked about the reason for his being terminated from his position with the AMC theater. Despite the information Sgt. Lubas had obtained showing a number of issues with his conduct that led up to that job action including the mishandling of money, the improper use of the radio system, and the double regular break time taken, he insisted at the interview that he was only terminated because he was dating a co-worker against company policy. When he was confronted with the termination form that contained his swearing on it instead of agreeing to the listed reasons for his termination, he acknowledged using poor judgment in writing those words on the form, but continued to insist that he was only terminated due to dating a co-worker even though he had been written up a number of times. When he was asked about the termination from Crosby's Supermarket, Mr. Trainor provided a scenario where he defended his conduct while acknowledging the circumstances had involved an altercation at work. The panel found significant that these work events occurred within a few years of his applying for the police office position. The panel found significant that Mr. Trainor had not been fully disclosing in his application/questionnaire of the circumstances that led up to his losing his jobs at AMC in particular. Chief Tucker also found Mr. Trainor's job history at AMC, Crosby's and Chuck E. Cheese to show problematic conduct on the job. The panel and Chief Tucker acknowledged that this aspect of his background was the primary reason for

supporting a bypass of his appointment even though he had positive background factors and even though he had answered the hypothetical questions without any concerns. The panel all agreed Mr. Trainor should be bypassed. (Testimony of Chief Tucker, Sgt. Lubas & Mr. Trainor.)

18. Candidates with a rank on the certified list below Mr. Trainor were offered appointments. (Ex. 5.) Chief Tucker produced a bypass reasons letter of July 12, 2013 that he sent to Mr. Trainor. In the letter Chief Tucker informed Mr. Trainor that he was being bypassed,

based on information obtained during an investigation into your background and fitness for employment ... it was learned ... that you were terminated from two separate employers for mishandling money ... your untruthfulness when you indicated on your questionnaire you were terminated from AMC for dating a co-worker when in fact, as mentioned above; it was for unprofessional activity, and the mishandling of funds ... you failed to provide documents as requested [the credit report] at your initial interview.

Chief Tucker also explained to Mr. Trainor:

Police officers are held to the highest standards to enforce the laws of the Commonwealth and must exhibit honesty, integrity and perform their duties with transparency. As a result of the aforementioned reasons, I do not feel at this time you are a suitable candidate for employment with the Salem Police Department.

(Ex. 3.)

19. From his investigation, Sgt. Lubas spoke to persons who led him to understand that Mr. Trainor had worked at a store called Five Below. Mr. Trainor denied he ever worked there. His girlfriend had worked there. Sgt. Lubas's conclusion to the contrary was relied upon by the panel interviewers and by Chief Tucker who mentioned in his bypass letter as another reason for the bypass, Mr. Trainor's failure to include that employment in his application/questionnaire answers. Mr. Trainor had not worked there. Five Below has no record of him being an employee with that company in any job as explained in a letter from Five Below that Mr. Trainor secured, dated September 26, 2013. (Exs. 3, 8 & 9. Testimony of Mr. Trainor, Sgt. Lubas & Chief Tucker.)

20. Chief Tucker's bypass letter informed Mr. Trainor that candidates who had scored lower than he had on the examination but were on the certified list, had been selected for the reserve police officer job. Chief Tucker explained that "candidates ... [were selected] based on several factors to include: work performance, accomplishments, the interview process and complete and accurate applications." The bypass letter provided Mr. Trainor with his appeal rights. Mr. Trainor filed a timely appeal with the Civil Service Commission on September 11, 2013. (Exs. 1 & 3. Testimony of Chief Tucker.)

Conclusion and Recommendation

I conclude from the findings made that Chief Tucker as the Appointing Authority, had justifiable reasons for bypassing Mr. Trainor for an original appointment to the position of permanent reserve police officer. The findings show that the interview panel participants of Chief Tucker, Sgt. Lubas and the two Captains were in agreement that Mr. Trainor should not be hired at this time. Chief Tucker's concerns about why at this time he found Mr. Trainor not to be a suitable reserve police officer hire reflected his legitimate concerns that Mr. Trainor had a problematic work history and that he was not fully truthful and forthcoming in addressing his work history and the reasons for his terminations. It mattered to Chief Tucker that these work issues occurred within a few years of his applying for the position. Although Mr. Trainor's candidacy had positive aspects to it that Chief Tucker took into consideration such as no criminal history, no drug or alcohol or gambling issues, and no problematic driving record, they were not enough to overcome the problems with the work history and with Mr. Trainor's lack of candor in discussing the reasons for his terminations. In making this bypass decision, Chief Tucker made it clear that he was only addressing Mr. Trainor's current suitability for the position.

When an Appointing Authority bypasses an otherwise eligible candidate it must provide

both a reasonable justification for doing so, as well as proof that such a justification could be applied fairly to all potential candidates. *Brackett v. Civil Service Commission*, 447 Mass. 233, 241 (2001); *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). In hearing bypass appeals, the Civil Service Commission must determine whether the Appointing Authority has “sustained its burden of proof that there was reasonable justification for the action taken.” *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 304. Reasonable justification requires that the Appointing Authority base its actions on adequate reasons, supported by credible evidence, guided by common sense, and weighed by an unprejudiced mind. See *Wakefield v. First District Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928); *Civil Service Commission v. Municipal Court of Boston*, 359 Mass. 214 (1971). In sustaining its burden of proof, the Appointing Authority must prove its justification by a preponderance of the evidence. G.L. c. 31, § 2(b). I conclude the Respondent/Appointing Authority’s proof satisfies these standards for its bypass determination.

Appointing Authorities are granted wide discretion when choosing individuals from a certified list of eligible candidates. The Civil Service Commission cannot substitute its views and preferences for those of the Appointing Authority. *Burlington v. McCarthy*, 60 Mass. App. Ct. 914 (2004). Rather, the Civil Service Commission’s role is to “protect against overtones of political control, objectives unrelated to merit standards, and assure neutrally applied public policy.” *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 304; *Revere v. Civil Service Commission*, 31 Mass. App. Ct. 315, 321 (1991); *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). The Civil Service Commission reviews the legitimacy and reasonableness of the Appointing Authority’s reasons for bypassing an Appellant. *Beverly v. Civil Service Commission*, 8 Mass. App. Ct. 182, 187 (2010). So long as the Appointing Authority provides

sound and sufficient reasons for the bypass and applies its policies equally, the Civil Service Commission should not intervene.

There was no proof of any pre-textual reason in the decision to bypass Mr. Trainor, and no proof of any improper factors given consideration regarding Mr. Trainor's candidacy. The fact that Chief Tucker was in error in believing that Mr. Trainor had failed to acknowledge employment at Five Below did not emerge as a key factor in Chief Tucker's decision to bypass Mr. Trainor. The confirmation that he had not worked at Five Below did not come until Mr. Trainor presented a letter dated September 26, 2013 from Five Below corporate headquarters stating he had never worked for Five Below. Also not a key factor in Chief Tucker's decision was Mr. Trainor's failure to provide the credit report. Rather, it was Mr. Trainor's excuse when confronted for not providing the credit report that added to the main concerns Chief Tucker had on the issue of Mr. Trainor being fully truthful and forthcoming in the information he gave in connection with the hiring process.

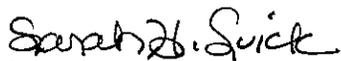
There was sufficient evidence presented by the Appointing Authority to show the process that it used to evaluate candidates for an original appointment to the position of permanent reserve police officer. This was shown from the content of the application/questionnaire, the report on the background investigation of Mr. Trainor, and the panel interview questioning about discrepancies found between the candidate's answers in the application/questionnaire and what the background investigation uncovered. The panel interview also involved a set of standard questions asked of each of the interviewed candidates. There was a discussion among the panel participants following each panel concerning the candidate just before them. This was also shown by the testimony of Sgt. Lubas and Chief Tucker describing the process engaged in to evaluate not only Mr. Trainor but all the other candidates, including the standards employed in

considering the significance of both positive and negative information uncovered. Both Sgt. Lubas and Chief Tucker were shown to have had experience with this kind of hiring process. No evidence demonstrated the process used in the past was changed in any way for a political or favoritism outcome to the detriment of an otherwise deserving candidate. The process provided ample opportunity for a candidate to explain the details of any problematic situation, but just explaining the details would not necessarily mean the problematic conduct would be eliminated as a negative factor for hiring, or that the initial failure to provide full details would not signal a lack of truthfulness.

Mr. Trainor presented his genuine desire to become a Salem police officer. What he has been doing with his education efforts and with the security work he is doing, all point to someone trying to measure up to the criteria for being hired into that position. I found these positives were taken into consideration by Chief Tucker based on his testimony, but I also found that Chief Tucker's reasons for bypassing Mr. Trainor at this time to be justifiable and not arbitrary or improper.

For these reasons, I recommend that the Civil Service Commission affirm the action taken by the Appointing Authority and dismiss Mr. Trainor's bypass appeal.

**DIVISION OF ADMINISTRATIVE
LAW APPEALS**



Sarah H. Luick

Administrative Magistrate

Dated: **JAN 31 2014**