

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

TIMOTHY BARIAMIS,
Appellant

v.

Docket No. G1-04-394

TOWN OF TEWKSBURY,
Respondent

Appellant's Attorney:

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Marshfield, MA 02050

Respondent's Attorney:

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Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to M.G.L. c. 31, § 2(b), the Appellant, Timothy Bariamis (hereinafter "the Appellant"), filed this appeal with the Civil Service Commission (hereinafter "the Commission") claiming an action taken by the Respondent, Town of Tewksbury (hereinafter "the Town"), as Appointing Authority, bypassed him for original appointment to the position of permanent intermittent police officer in the Tewksbury Police Department without reasonable justification. The appeal was timely filed. A hearing was held on June 20, 2005 in the offices of the Commission. Two (2) tapes were made of the hearing. Post-Hearing Briefs were submitted by both parties as instructed by the Hearing Officer.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1 – 16) and the testimony of the Appellant, Town Manager David Cressman and Chief of Police Alfred J. Donovan, Jr., I make the following findings of fact, the first thirteen (13) of which were stipulated by the parties:

1. The Appellant has been employed by the Massachusetts Department of Correction (hereinafter “the DOC”) since 1998. He had the fifth highest score on Certification List No. 231084 issued by the Human Resources Division (hereinafter “the HRD”) on November 25, 2003. The list was intended for the appointment of ten (10) permanent intermittent police officers and was valid for a period of twelve (12) weeks. (Testimony of the Appellant and Exhibit 1)
2. A subsequent list with an additional ten (10) names was issued by the HRD on December 15, 2003, also under Certification List No. 231084. (Exhibit 2)
3. Individuals were notified by the HRD of the issuance of an eligibility list and their place upon it and several signed a statement of intent to accept the position, if offered, in accordance with regular Civil Service proceedings. (Id.)
4. Interviews for ten (10) permanent intermittent police officer positions commenced on December 8, 2003. Fourteen candidates were interviewed on that date. (Exhibit 3)
5. The balance of the candidates were interviewed on December 15, 2003. (Exhibit 4)

6. Town Manager David Cressman (hereinafter “Mr. Cressman”), then-Police Chief John R. Mackey (hereinafter “Chief Mackey”) and, then-Deputy Police Chief Alfred J. Donovan, Jr. (hereinafter “Chief Donovan” as he testified that he became Police Chief in December 2003) formed a panel that selected ten (10) candidates for appointment from the list and then forwarded the selections to the Tewksbury Board of Selectmen (hereinafter “the BOS”), by memorandum dated December 31, 2003, for final approval and hire. (Exhibit 5 and Testimony)
7. The Appellant was bypassed by the Town for a position, notwithstanding his score on the Certification List. (Stipulated)
8. On January 7, 2004, Mr. Cressman corresponded to the HRD with a list of appointees. (Exhibit 6)
9. On January 26, 2004, Mr. Cressman again corresponded with the HRD communicating his rationale for rejecting and/or bypassing candidates. (Exhibit 7)
10. Mr. Cressman stated in Exhibit 7 that the Appellant did not interview well, had a negative demeanor, had a prior conviction for trespassing, he was currently under treatment for depression, that he had had nerve damage from an industrial accident which required his absence from work for 350 days, and that he was speaking ill of a prior employer during the interview. (Id.)
11. On or about March 1, 2004, Mr. Cressman and Ms. Luz Henriquez from the HRD communicated further, based on the HRD’s request for additional information in connection with successful candidates. On or about March 4, 2004, Mr.

Cressman, on behalf of the Town, forwarded to the HRD the additional information sought. (Exhibit 8)

12. On July 13, 2004, the HRD advised the Appellant that it was supporting the decision of the Appointing Authority relative to the bypass and issued the Appellant appeal rights. (Exhibit 9)

13. On September 10, 2004, the Appellant filed an appeal of the bypass decision with the Commission. A Pre-Hearing Conference in this matter was scheduled and heard on January 18, 2005. (Exhibit 10 and Administrative Notice)

14. I found Mr. Cressman to be a credible witness. His demeanor was professional and he offered a clear explanation as to the interview process and the importance the Town assigned to this process. He was candid and consistent in testifying that the interviews were the most critical factors in the overall selection process. He emphasized how vital a candidate's knowledge of community policing and past history of community involvement was to a successful applicant's selection. He further explained how he, as part of the selection panel, viewed the candidates' answers to the questions posed during the interviews. Mr. Cressman offered that he wishes to see, through the interview process, how a candidate "reveals himself under some stress". He stated that, in his lengthy experience in hiring police officers, he has always looked for three specific indicators of a candidate's value: experience, education and community involvement. (Testimony of Mr. Cressman)

15. In submitting the written reasons for bypassing the Appellant to the HRD dated January 26, 2004, Mr. Cressman stated specifically and in entirety that:

“Mr. Bariamis did not interview well. During interview process Mr. Bariamis spoke poorly of a prior employer in a negative and discouraging way. Mr. Bariamis expressed contempt for his prior employer because he would not give him a good recommendation. In addition, Mr. Bariamis expressed that the Lowell Police Department had screwed him in the past by not hiring him and that it was all politics. Mr. Bariamis turned his interview into a negative experience expounding on the negative things in his life instead of selling himself. Mr. Bariamis has [a] prior conviction for Criminal Trespass in Nashua, New Hampshire and has received a poor recommendation from one of his prior employers.

Also contributing to him not being a viable candidate is that Mr. Bariamis is currently being treated for symptoms of depression and is currently trying different medications to get it under control. Also Mr. Bariamis had an operation to repair nerve damage (May 2002) caused by an injury on his present job, that kept him out of work for 350 days.”
(Exhibit 7)

16. Testimony revealed that the “prior employer” cited in the bypass reasons was the Lowell Armored Car Service, Inc., for whom the Appellant worked for ten (10) months while also working part-time for the Essex County Sheriff’s Department.
(Testimony of Appellant)
17. Mr. Cressman testified that he was aware that the Appellant sustained his injury on October 31, 2001 while in the conduct of his duties as a Corrections Officer at the medium Massachusetts Correctional Institute at Shirley (hereinafter “MCI-Shirley Medium”) and that he made an adverse inference towards the Appellant’s candidacy based on this injury. I find that there was no reasonable justification, at that point in the selection process, to consider the Appellant’s line-of-duty injury as a bypass reason. If, later in the process, the required medical examination determined that the Appellant was unable to adequately perform the duties of a police officer due to physical limitations caused by this injury, then it certainly

could have been included as a reason. (Exhibit 16 and Testimony of Mr. Cressman)

18. The only note of concern in Mr. Cressman's testimony was his assertion that he had no information regarding recently discovered low testosterone levels that may have contributed to the Appellant's symptoms of depression. On page 10 of the Appellant's employment application, in the section entitled "XII PHYSICAL DATA", the Appellant hand-wrote the following:

"I have symptoms of depression. Currently trying medication to treat symptoms and trying to figure out if it is, in fact, depression or something physical in nature. Recently found to have low-serum testostero (sic)."

Since it is reasonable to deduce that Mr. Cressman learned of the Appellant's treatment for depression from this hand-written paragraph in the employment application, his testimony that he had no information relative to the Appellant's low testosterone level must be discounted. This inconsistency did not, however, diminish the credibility of his collective testimony. (Exhibit 11 and Testimony of Mr. Cressman)

19. The reasons discussed in Fact Numbers 17 and 18 constitute the second paragraph of the written reasons submitted by the Town to HRD in order to bypass the Appellant. The paragraph begins with the words, "Also contributing to him not being a viable candidate . . ." and is considered by the Commission to be a description of secondary reasons for bypass. I find that there exists no substantiation for including either reason for bypass and, as a result, the Commission shall disregard both in making its decision. The bypass reasons

contained in the first paragraph in the document shall thus be appraised as the primary, and only, reasons for bypassing the Appellant. (Exhibit 9)

20. I assign considerable weight to Chief Donovan's testimony as he, too, offered a credible account of the interview and selection process. He did not disparage the Appellant's overall candidacy but was clear in explaining the Appellant's particular interview remarks and responses that concerned him. Indeed, the Chief said he gained a favorable first impression of the Appellant upon meeting him. The Chief offered that he (the Chief) was committed to the Department engaging in community-based public service rather than strict, traditional law enforcement. He testified that he was looking for a candidate's grasp of community policing methods when considering a candidate's answers to interview questions. (Testimony of Chief Donovan)

21. Chief Donovan testified that he didn't feel the Appellant's previous trespass conviction really mattered as it occurred "too long ago" (July 1991). The Chief considered the Appellant's answers to all the formal interview questions to be reasonable. He stated, however, that the negative comments regarding the Appellant's previous candidacy to the Lowell Police Department (hereinafter "LPD") and, his experience with the Lowell Armored Car Service, Inc., were volunteered by the Appellant when asked if there was anything else he wished to add at the conclusion of the interview. The Chief believed that the Appellant "blew the interview" by unilaterally offering the negative final remarks. According to the Chief, he was concerned that, despite the Appellant charging that politics was a factor in his failed candidacy to the LPD, he (the Appellant)

was the only candidate to the Tewksbury Police Department for whom the Town received references from both a State Senator and a State Representative. (Testimony of Chief Donovan)

22. Mr. Cressman and Chief Donovan both expressed that the Appellant lacked the knowledge, understanding and experience in community policing and community involvement that they were seeking in successful candidates. Mr. Cressman testified, in fact, that the Appellant's deficiency in these areas was a "clincher" in his decision to bypass. However, the Town failed to include this as a specific reason for bypass and testimony on these issues shall also be disregarded by the Commission in making its decision. (Exhibit 9 and Testimony of Mr. Cressman and Chief Donovan)

23. The Appellant was a polite and well-spoken witness. He respectfully answered all questions. He appeared at ease and spoke clearly in an unhesitant and even tone. He explained his duties as a Correction Officer and submitted a letter of recommendation, dated October 20, 1998, attributed to – but not signed by – Captain William Ryan of MCI-Shirley Medium. The letter describes the Appellant's service as a Correction Officer as "distinguished". Further, Captain Ryan states that he considers the Appellant to be an "exceptional officer" and, is a "loyal, trusted, mature employee". (Exhibit 12 and Testimony of Appellant)

24. The Appellant credibly explained his line-of-duty injury sustained on October 31, 2001 and submitted into evidence a copy of an incident report, dated November 28, 2001, describing the circumstances of the injury. He thoughtfully discussed his efforts relative to his bout with symptoms of depression. He asserted that the

Town should not have included either matter as reasons for bypass. As stated above, the Commission concurs with that assertion. (Exhibit 16 and Testimony of Appellant)

25. The Appellant testified that he never said he was “screwed” by the LPD. He stated that he told his Tewksbury interviewers that the Lowell Armored Car Service, Inc. provided the LPD with a poor recommendation and that is why he was not offered a job. Under cross-examination by the Counsel for the Town, the Appellant admitted that he had constant poor relations with the owner of the armored car company. He also testified that he never mentioned “politics” in reference to his LPD candidacy and he did not know that his State Senator had called Tewksbury in reference to his candidacy there. (Testimony of Appellant)

26. It was with the statements in Fact Number 24 that the Appellant’s testimony broke down and became suspect. Mr. Cressman is clearly enough of a professional, and is unquestionably experienced enough in preparing bypass reasons for HRD, to not use the word “screwed” on his own volition to describe an injustice. I find that the Appellant’s testimony on this point was contradictory and his contention that he did not say he was “screwed” was not credible. (Exhibit 9 and Testimony of Appellant)

27. The Appellant further asserted that he never mentioned to his interviewers that the circumstances surrounding his failed candidacy to the LPD were related to “politics”. Again, it is contradictory that this particular word would be recalled in testimony by two credible witnesses as having been uttered by the Appellant but not recalled by the Appellant himself. Moreover, it is also a word, like

“screwed”, that would most likely not be used in a bypass letter by the Town Manager on his own accord. (Testimony of Appellant)

28. Perhaps most glaring of the contradictions in the Appellant’s testimony regarded the phone call by his State Senator to Tewksbury. It would be an extreme leap of faith for the Commission to find that a State Senator would place an *unsolicited* phone call to an Appointing Authority on behalf of a candidate for employment. The fact that the Town was also contacted by a State Representative on the Appellant’s behalf validates the Chief’s concern that the Appellant charged “politics” in one candidacy (LPD) while engaging politicians in another (Tewksbury). (Testimony of Appellant and Chief Donovan)

29. I find, by a preponderance of the credible evidence, that the Appellant spoke negatively of his past employer, Lowell Armored Car Service, Inc., in light of his testimony, the testimony of the Chief and Mr. Cressman and the affidavit submitted to the Massachusetts Commission Against Discrimination (hereinafter “MCAD”) which was entered into evidence in the instant matter¹. In the final analysis, I find that the Appellant made several attempts to craft his answers relative to the negativity of his interview in the best possible light. In doing so, he sacrificed the credibility of his assertions needed to prevail in this decision. (Testimony of Appellant)

30. I find that the interview component of the selection process was conducted appropriately. The candidates were interviewed individually and had the same

¹ The Appellant provided the affidavit for a former co-worker at Lowell Armored Car Service, Inc. who had filed a case with the MCAD against the president of that company, Glenn McCann. In the affidavit, the Appellant attests to Mr. McCann having issues with alcohol abuse, poor anger management and violent behavior in the workplace.

questions posed to each of them by the panel. This method provided for a fair consideration of all candidates. Through credible evidence, the Town was able to credibly show that a poor interview performance of this kind is a valid reason for bypassing an applicant. For example, the following excerpt is taken from the reasons for selection the Town submitted to HRD relative to the selection of candidate Sonia Newton from Certification No. 231084:

“Over the past several years Ms. Newton has interviewed for a police officer position on several occasions as she did not perform as well as other candidates in the interview. In contrast, this time she had an excellent interview where she expressed more self-confidence and knowledge than in past interviews and did better than some of the other candidates.”

This passage also indicates that a poor interview performance is not necessarily an automatic disqualifier for future employment. (Exhibits 3, 3A, 4 and 6)

CONCLUSION:

The law grants wide latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion. Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987). In a bypass appeal, the Commission must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was “reasonable justification” for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority’s actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct

rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). A “preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.” Borelli v. MBTA, 1 MCSR 6 (1988).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, the Commission must consider the fundamental purpose of the Civil Service System which is “to protect against overtones of political control, objectives unrelated to merit standards and assure neutrally applied public policy.” If the Commission finds that there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy”, then it should intervene. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. In the instant matter, the only political overtones in the selection process were engendered by legislators’ overtures on behalf of the Appellant’s candidacy. City of Cambridge at 304.

Interviews are indisputably a subjective component of a selection process. When conducted properly, interviews can define a candidate by allowing the employer to consider his or her past as prologue. The Town empanelled seasoned individuals to interview the candidates. It took appropriate steps to conduct the interviews fairly and to similarly consider each applicant. All evidence entered into the record of this appeal clearly demonstrates that the Town, in accordance with basic merit principles, “assur[ed] fair treatment of all applicants”. M.G.L. c. 31, § 1.

The negativity that the Appellant introduced to the selection process was significant enough to constitute the primary reasons for his bypass. Weighing the Appellant’s negative viewpoint towards a former employer (and a potential employer) against the future prospect of his temperament and conduct as a Tewksbury Police Officer was a valid policy consideration.

In making its bypass decision based on the interview performance by the Appellant, the Town neutrally applied its public policy of fairly and similarly interviewing all candidates. There is absolutely no evidence in the record of this appeal to suggest that the Town’s action was arbitrary or capricious. Therefore, the Commission declines to intervene and overturn this valid personnel decision. Although the Appellant failed in this quest to become a Tewksbury Police Officer, there is no indication that this means he is permanently excluded from the Town’s employ. Indeed, considering the Town’s past practices, there is reason to believe that a better performance in the process might bring him success in a future candidacy. Be that as it may, however, the Town sustained its

burden of proving reasonable justification to bypass the Appellant. For all the reasons stated herein, the appeal on Docket No. G1-04-394 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Taylor, Guerin, Marquis and Bowman, Commissioners) on January 25, 2007.

A true record. Attest:

A motion for reconsideration may be filed by either party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL c. 30A, s. 14(1) for purpose of tolling the time for appeal.

Pursuant to MGL, C. 31. s. 44. any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under MGL. C. 30 A. s. 14 in the superior court within thirty days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:
Frank J. McGee, Esq.
Michael J. Long, Esq.