

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

THOMAS M. BROWN,
Appellant

v.

G2-04-264

TOWN OF DUXBURY,
Respondent

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Thomas Brown (hereafter "Brown" or Appellant") appealed the decision of the Personnel Administrator to accept the reasons of the Respondent, the Town of Duxbury (hereafter "Appointing Authority", or "Town"), bypassing him for promotional appointment to the position of sergeant in the Duxbury Police Department. A full hearing was held on September 28, 2006 at the offices of the Civil Service Commission.

FINDINGS OF FACT:

Fifteen (15) joint exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Enrique C. Cappucci, former Duxbury Police Chief (1986-1996);
- James M. Hussey, Cohasset Police Chief;
- Robert Hayden, Assistant General Manager, MBTA;
- Mark Deluca; current Duxbury Police Chief;

For the Appellant:

- Thomas Brown, Appellant;

I make the following findings of facts:

1. Thomas Brown is a tenured civil service employee in the position of police officer in the Town of Duxbury and has served in that position since December 20, 1999. He received a bachelors degree in criminal justice from Saint Anselm College and a masters degree in criminal justice from Curry College. He attended New England School of Law for one year. (Testimony of Appellant)
2. Prior to his appointment as a police officer, the Appellant was employed as a mutual fund account manager at State Street Bank. (Testimony of Appellant)
3. On or about May 2004, the Town of Duxbury requested a civil service certification list for the selection of 1 full-time police sergeant. (Exhibit 12)
4. On May 11, 2004, the state's Human Resources Division (HRD) certified civil service list number 240452 of eligible applicants for the position of police sergeant in the Town of Duxbury. (Exhibit 12)
5. The Appellant achieved a score of eighty-four (84) on the sergeant's exam which was used to generate the above-referenced certification list. (Testimony of Appellant)

6. The Appellant was ranked first among three candidates on the certification list.
Michael Carbone, another police officer, was ranked second on the same list. (Exhibit 12)
7. Mark DeLuca has been the Police Chief in the Town of Duxbury since 1999 and has been working for the Duxbury Police Department for 12 years. Prior to his tenure with the Town of Duxbury, he was employed by the Miami Police Department for 5 years. (Testimony of Chief DeLuca)
8. Upon receiving the above-referenced certification list with the names of three eligible candidates for the position of sergeant, Chief DeLuca recruited three individuals to serve on a panel and interview all three candidates. (Testimony of Chief DeLuca)
9. Enriquo C. Cappucci was one of the panelists that interviewed the three candidates. Mr. Cappucci served as the Chief of Police with the Town of Shirley from 1982 to 1986 before serving as the Duxbury Police Chief from 1986 to 1996. Mr. Cappucci testified that during his tenure as Duxbury Police Chief, the normal protocol regarding promotions was to conduct oral interviews with the eligible candidates from the appropriate civil service list. (Testimony of Cappucci)
10. James M. Hussey was the second member of the panel that interviewed the three candidates. He is currently the Chief of Police in the Town of Cohasset. At the time he served on the panel, he was a Captain at the Boston Police Academy. He was a police officer for the City of Boston since 1980 and eventually served as Superintendent-in-Chief of the Boston Police Department. (Testimony of Hussey)
11. Robert Hayden was the third member of the panel that interviewed the three candidates. He served twenty-eight (28) years in the Boston Police Department

eventually serving as Deputy Superintendent. He served as Police Chief in the City of Lawrence for three (3) years and also served as Undersecretary of Public Safety for the Commonwealth of Massachusetts. Most recently, he has been serving as the Assistant General Manager of the MBTA for the past six years. (Testimony of Hayden)

12. All three panelists testified that they did not discuss any of the candidates with current police Chief DeLuca prior to the interview. The panelists reported to the Duxbury Police Department to conduct the interviews one hour prior to the first interview and were given a set of questions and evaluation forms to complete.
13. The questions used by the panelists were the same questions developed and used during a previous promotional screening process in the Duxbury Police Department. They included five questions including four case scenarios in which the candidates were asked how they would handle the situation as a sergeant. Below each question on the sheet used by the panelist was a heading “Answer should include” followed by up to five (5) points that the candidate should mention during his answer. (Testimony of Chief DeLuca; Exhibit 5)
14. Each panelist was asked to rate the candidate on each of the five (5) questions on a scale of 1 to 5 with 1 being the lowest rating and 5 being the highest rating. Each panelist also rated each of the candidates on a scale of 1 to 5 on “uniform appearance”. When the individual scores from each question and the uniform appearance section were added together, the highest possible score any candidate could receive was a 30. In addition to the ratings, each panelist made detailed hand-

written notes that were attached to the evaluation forms and admitted as exhibits at the Commission hearing. (Exhibits 6, 7 and 8)

15. All three panelists ranked another police officer, Michael Carbone, as #1 and the Appellant as #2. Panelist Cappucci gave Carbone a total of 26 points and the Appellant 20 points. Panelist Hussey gave Carbone a total of 28 points and the Appellant 23 points. Panelist Hayden gave Carbone a total of 29 points and the Appellant 25 points. (Exhibits 6, 7 and 8)
16. All three panelists testified as witnesses for the Town at the Commission hearing regarding this appeal. They had been sequestered at the outset of the hearing. All three panelists testified that the Appellant focused too much on his experience as a mutual fund manager at State Street Bank and wasn't able to show how he would use that experience as a police sergeant. A common theme among all the panelists was that the Appellant offered incomplete or partial answers that resulted from his limited five years of experience as a police officer at the time of the interview.
17. Panelist Cappucci was concerned that the Appellant, in response to a question regarding a domestic dispute, didn't seem to understand that an arrest would have been required in the case scenario described to him and offered only a "half-answer" in response to a question regarding a high speed chase. (Testimony of Cappucci and Exhibit 6)
18. Panelist Hussey was also concerned about the Appellant's partial answer in regard to the question regarding a high speed chase, testifying that the Appellant failed to mention one of the more important factors in considering whether or not to terminate such a chase – weather conditions. Hussey was also concerned that the Appellant, in

response to a scenario in which he is the first to respond to a homicide scene, failed to recognize that the first priority is to identify the victim. (Testimony of Hussey and Exhibit 7)

19. Panelist Hayden was concerned that the Appellant, in response to a question regarding an officer reporting to duty with alcohol on his breath, suggested that the officer be sent home. Hayden was concerned that sending such an officer home in his own car was a recipe for disaster and, again, reflected a lack of real-time experience. (Testimony of Hayden and Exhibit 8)

20. In sharp contrast to their evaluation of the Appellant, all three panelists expressed strong confidence in the performance of Michael Carbone, the candidate that was selected for the position. Carbone has over ten (10) years of experience as a Duxbury police officer including four years as a detective. All three panelists testified that Carbone's answers were more thorough, complete and strongly reflected his greater experience with all facets of police duties and responsibilities. (Testimony of Cappucci, Hussey and Hayden and Exhibits 6, 7 and 8)

21. Panelist Cappucci testified that Carbone's answers incorporated his duties as detective and that he offered "better, more thorough answers" to each question. Cappucci, summing up his preference of Carbone over the Appellant, testified that, "you can't put a supervisor on the street who *thinks* he knows what he's doing". (Testimony of Cappucci)

22. Panelist Hussey was impressed that Carbone listed all of the conditions that should be considered when deciding whether to call off a high speed chase and believed that

Carbone's answer in regard to arriving at a homicide scene reflected his experience as a detective. (Testimony of Hussey)

23. Panelist Hayden testified that Carbone was "more sure of himself...there was no hesitation...he was more self-assured". (Testimony of Hayden)
24. Chief DeLuca also sought input from three superior officers in the Duxbury Police Department. None of them recommended the Appellant. Two of them recommended Carbone and one recommended the third candidate. (Testimony of Chief DeLuca and Exhibits 2, 3 and 4)
25. Chief DeLuca also testified at the Commission hearing. He testified that while Duxbury is "lucky to have all three candidates", he concurred with the interview panel that Carbone was the better choice due to his experience, communication skills and greater self-confidence. (Testimony of Chief DeLuca)
26. The Appellant testified on his own behalf at the Commission. He disputed some of the testimony of the panelists, specifically testifying that he did mention weather conditions in response to the question about a high-speed chase and he did mention that the domestic dispute incident did represent an "arrestable offense". In regard to sending an officer home who had alcohol on his breath, the Appellant testified at the Commission that "if the officer was impaired, I would have had him driven home" and then talked about .06 on a breathalyzer being the minimum standard for arrest. (Testimony of Appellant)
27. Both during direct testimony and cross-examination, the Appellant focused more on a literal dissection of the law and less on real-life experiences, leaving this Commissioner with the same impression left with the three panelists. Put simply, the

Appellant can demonstrate his “book smarts”, but is limited in the area of “street smarts” needed to perform the duties of a sergeant. (Testimony, Demeanor of Appellant)

28. On May 28, 2004, the Town notified HRD that it had selected Officer Carbone, the #2 candidate on the civil service list, over the Appellant and provided the positive reasons for selecting Carbone. (Exhibit 10)

29. HRD approved the reasons for bypass and the Appellant appealed that decision to the Civil Service Commission. (Exhibits 13, 14 and 15)

CONCLUSION:

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by 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). G.L. c. 31, s. 2(b) requires that bypass cases be determined by a preponderance of the evidence. 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).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The issue for the commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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."

Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. City of Cambridge, 43 Mass. App. Ct. at 304.

Thomas Brown is a well-educated professional who had four years of experience as a police officer when the promotional opportunity for the sergeant's position arose in 2004. Michael Carbone had over ten years of experience as a police officer at the time including four years as a detective. Both of these officers appeared among the three eligible candidates on the civil service promotional list for sergeant, with Brown ranked first and Carbone ranked second.

Duxbury Police Chief Mark DeLuca assembled an interview panel to assess the three candidates on the civil service list and asked them to submit their recommendation to him. The three panelists included a former Duxbury Police Chief, a former Captain at the Boston Police Academy who is now the Police Chief in Cohasset and the current Assistant General Manager of the MBTA who previously served as the Police Chief in

Lawrence, Deputy Superintendent of the Boston Police Department as well as Undersecretary of Public Safety for the Commonwealth of Massachusetts. Absent recruiting the Joint Chiefs of Staff, it is hard to imagine how Chief DeLuca, who did not sit on the panel, could have assembled a more experienced, competent or objective group of panelists to interview the candidates. Each of the panelists testified before the Commission. Their decades of law enforcement experience, insight, and integrity was evident to anyone in the hearing room. The Town of Duxbury was fortunate to have received their volunteer services in selecting their next police sergeant.

While each of the panelists raised concerns about the Appellant's answers to individual questions, they shared a common assessment that the Appellant, when compared against the candidate listed second on the civil service list, was unable to answer the questions in a complete and thorough manner, largely because of his lack of experience. In a post-hearing brief submitted to the Commission, the Appellant argues that "training and experience" is already factored into the civil service scores and rankings. Therefore, according to the Appellant, it is unfair for the panelists to cite Carbone's experience as a positive factor contributing to his bypass. The Commission disagrees. In this case, each of the panelists indicated that the Appellant's lack of experience contributed to his partial and incomplete answers to questions posed to him. That is a fair and relevant observation to be considered by the Town in the selection process which is not necessarily captured by a written civil service examination.

More broadly, the Appellant argues that the Town "totally disregarded the results of the competitive examination and based the promotions made in this case to a significant and substantial degree upon the scores given to the candidates by the panel who

interviewed and questioned the candidates.” The Appellant goes on to argue that, “in effect, the appointing authority has substituted the questions by the panel and the answers to those questions by the candidates for the competitive civil service examination administered by (HRD)” and labels the Appointing Authority’s actions as “totally impermissible conduct”. The Commission staunchly disagrees. Not only is an interview process, which includes questions upon which each panelist uses a common scoring method *permissible*, it should be *encouraged*. Paper and pencil civil service examinations should not be used as the sole determinant when making hiring and promotional decisions, particularly when it concerns appointments as important and sensitive as a police sergeant. While it is fair game for the Commission to assess whether an interview process is conducted on a level playing field free of political or personal bias, it would be contrary to the concept of basic merit principles, not to mention public safety, for the Commission to discourage public sector employers from exercising their valid discretion via an interview process.

In the instant case, the interview process, including the panelists chosen, was above reproach. The recommendation of the three-member panel was unanimous and based on fair and reasonable job-related criteria that indicated that Michael Carbone was the preferred candidate. The Town bypassed Mr. Brown with just cause, providing sound, rationale reasons for its decision and there is no evidence of inappropriate motivations or objectives on the part of the Appointing Authority that would warrant the Commission’s intervention.

For all of the above reasons, the appeal under Docket No. G2-04-264 is hereby
dismissed.

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Bowman, Guerin, Marquis and Taylor, Commissioners) on November 30, 2006.

A true record. Attest:

Commissioner

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 M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) 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:

Frank McGee, Esq.

Robert Troy, Esq.

John Marra, Esq. (HRD)