

Decision mailed: 6/2/09
Civil Service Commission
Hem

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

CHRISTOPHER BULGER,
Appellant,

v.

G1-05-399

CITY OF QUINCY,
Respondent.

Appellant's Attorney:

James W. Simpson, Esq.
7 Park Street: Suite 209
Attleboro, MA 02073

Respondent's Attorney:

Kevin J. Madden, Esq.
City of Quincy
1305 Hancock Street
Quincy, MA 02169

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Christopher Bulger, (hereinafter "Bulger" or "Appellant") seeks review of the decision of the state's Human Resources Division (hereinafter "HRD") accepting the reasons of the City of Quincy (hereinafter "City" or "Appointing Authority") to bypass him for original appointment to the position of full-time police officer. A full hearing was held on January 15, 2009 at the offices of the Civil Service Commission (hereinafter "Commission"). One (1) CD was made of the hearing. Post-hearing briefs were due on April 30, 2009. The Appellant submitted his post-hearing brief on April 30, 2009 and the City failed to submit a brief.

FINDINGS OF FACT BY COMMISSIONER BOWMAN (HEARING OFFICER):

Five (5) exhibits were entered into evidence at the hearing. The record was left open for the City to submit the employment applications of the Appellant to the Commission. By agreement of the parties, the applications and accompanying material were provided to the Commission on February 12, 2009 under seal and were deemed confidential as it contains private financial information. The original applications and accompanying material are being returned to the City upon the issuance of this decision with impounded copies being retained by the Commission.

Based on the five exhibits, the above-referenced employment applications and the testimony of the following witnesses:

For the Appointing Authority:

- James Greene, police officer, Quincy Police Department;
- Sergeant Jennifer Tapper, Quincy Police Department;
- Lieutenant John Sullivan, Quincy Police Department;

For the Appellant:

- Christopher Bulger, Appellant;

I make the following findings of fact:

1. The Appellant is a forty-five (45) year old male who currently resides in Quincy. He graduated from Marshfield High School and attended Massasoit Community College. He is married and has three (3) children.
2. The Appellant served on the Boston Municipal Police Department from April 1985 to April 1998. He then served on the Northeastern University police force from April 1998 to April 2000 and has served on the Harvard University police force from April 2000 to the present. He also served as a part-time security officer at Carney Hospital from November 1995 to October 2000.

3. The Appellant was bypassed for appointment as a police officer in the City of Quincy for negative reasons in 2003 and for primarily the same reasons in 2005.¹
4. The City, in a February 21, 2005 letter to HRD, outlined the negative reasons associated with the decision to bypass the Appellant. In a subsequent letter to HRD dated September 20, 2005, the City outlined the positive reasons associated with the selected candidates.

Among the negative reasons proffered by the City regarding the Appellant included:

- “[The City] discovered that in 1999 Mr. Bulger provided an address at [address omitted and hereinafter referred to as “Quincy Address #1”]. Multiple other sources of information identified his address as [address omitted and hereinafter referred to as “Dorchester Address”] for the same time period. Mr. Bulger attributed the discrepancy to this registration of his motor vehicles at this wife’s mother’s address to avoid higher insurance payments. This is not a residency issue, but a question of Mr. Bulger’s veracity.”
- “On his 2005 Quincy Police Department application, Mr. Bulger listed six (6) motor vehicle accidents. On four of these accidents, he failed to include any other information relative to location and police department. Mr. Bulger stated that he had no recollection of these four accidents but knew that the omission of these accidents was an issue during his 2003 bypass. A check of Mr. Bulger’s license status with the Registry of Motor Vehicles indicates these four (4) surchargeable traffic accidents in 1990, 1986, 1985 & 1984. Mr. Bulger listed only two (2) on his 2003 Quincy Police Department application and he also failed to not a 1985 Lane Violation. Mr. Bulger also listed two (2) additional motor vehicle accidents on his 2005 Quincy Police Department application. These accidents were not found on his driver’s history.”
- “...Although specifically asked during the 2003 interview process, both verbally and in written form, Mr. Bulger never identified Carney Hospital as a past employer. Subsequently, Mr. Bugler confirmed that he was employed as a part time bus drive and had failed to disclose the information because had had forgotten. Mr. Bulger had been employed as “Parking / Security” at that facility for five years.” (Exhibit 1)

5. The City also listed other negative reasons for bypassing the Appellant including a high absenteeism rate while employed with the Boston Municipal Police Department; failure to disclose a suspension and written warning he received for this absenteeism; absenteeism

¹ The Appellant filed an appeal with the Commission regarding his 2003 bypass, but he subsequently withdrew that appeal.

while employed at Northeastern University; and failure to operate a cruiser with ‘proper care’ while employed at Harvard University.” (Exhibit 1)

Discrepancy Regarding Registration of Motor Vehicle

6. According to the Appellant’s employment application with the Quincy Police Department, he resided in *Dorchester* until *January 1999* at which time he then resided at [address omitted and hereinafter referred to as “Quincy address #2”].
7. A motor vehicle excise tax bill issued by the City of Quincy indicates that the Appellant had a vehicle registered at Quincy Address #1 as of April 24, 1998 and had another vehicle registered at Quincy address #1 on December 4, 1998², both dates which fall within the time period that the Appellant indicated on his application for employment that he was residing in Dorchester.
8. James Greene is the Quincy police officer who conducted the Appellant’s background check regarding his first application for employment in 2003. He was a good witness with high credibility. He listened carefully to the questions posed to him and only answered those questions for which he had a certain recollection. He did not appear to have any ulterior motive for providing testimony that may paint the Appellant in a bad light and I credit his testimony. (Testimony, demeanor of Greene)
9. According to Officer Greene, the Appellant told him during an interview that he (the Appellant) listed his automobile as being housed in Quincy at his mother or mother-in-law’s house in order to get a lower insurance rate. (Testimony of Greene)

² It appears to be undisputed that the Appellant purchased a house at Quincy Address #2 on December 24, 1998. The discrepancy at issue, however, involves why the Appellant had two vehicles registered at Quincy Address #1 in 1998 despite listing his residence as a Dorchester address for this time period.

10. During his testimony before the Commission, the Appellant stated that it is possible that he made the above-referenced statement to Officer Greene, but “that wasn’t the reason for it.”
(Testimony of Appellant)

11. The Appellant stated that one of the vehicles in question was primarily driven by his wife during the time period in question. According to the Appellant, his wife would park the automobile at her mother’s house at Quincy Address #1 and then board the subway at the nearby North Quincy T Station. According to the Appellant, this would have been the reason that one of the vehicles was registered at Quincy Address #1. Asked why the other vehicle was also registered at Quincy Address #1 in 1998, the Appellant stated that at some point he lived at his mother-in-law’s house. (Testimony of Appellant)

12. I am unable to credit the Appellant’s explanation regarding why his vehicles were registered at Quincy Address #1 in 1998. As opposed to an honest recollection of events, the Appellant’s answers on this issue were, at best, uncertain and not convincing. (Testimony, demeanor of Appellant)

13. Based on the credible testimony of Officer Greene, the information contained in the Appellant’s employment application and the Appellant’s unconvincing testimony before the Commission, I find that the Appellant, while residing in Dorchester in 1998, registered his two vehicles in Quincy in order to get a lower automobile insurance rate.

Poor Driving Record and Failure to Disclose Certain Surchargeable Accidents

14. The Appellant had a surchargeable automobile accident in Dorchester on June 24, 1984.
(RMV Driver History)

15. The Appellant had another surchargeable automobile accident in Dorchester on March 17, 1985. (RMV Driver History)

16. The Appellant had another surchargeable automobile accident in Dorchester on February 11, 1986. (RMV Driver History)
17. The Appellant had another surchargeable automobile accident in Roslindale on October 27, 1990. (RMV Driver History)
18. The Appellant was also cited for a lane violation in Hingham on July 21, 1985 and for failure to have an inspection sticker on January 19, 1998. (RMV Driver History)
19. The Appellant only listed two of the above-referenced surchargeable accidents on his 2003 employment application and failed to note the violations regarding a lane violation or lack of inspection sticker. (Appellant's 2003 Employment Application)
20. The Appellant testified before the Commission that he forgot about some of the accidents due to the length of time that had passed. In 2005, the Appellant went to his insurance company and had his driving record run and completed the 2005 employment application with this information. (Testimony of Appellant)

Failure to Disclose Employment at Carney Hospital

21. The Appellant worked as a part-time security officer at Carney Hospital from November 1995 to October 2000 and sometimes served as a supervisor. (Testimony of Appellant)
22. The Appellant failed to list the employment at Carney Hospital on his 2003 employment application with the Quincy Police Department.
23. The Appellant testified before the Commission that he did not list the employment at Carney Hospital because it was a per-diem job with no benefits and "I didn't think it was what they were looking for." (Testimony of Appellant)
24. Question 32 of the Quincy Police Department Application for Employment states, "List chronologically all employment, including summer and part-time employment while

attending school. All times must be accounted for. If unemployed for a period, indicate, setting forth dates of unemployment. Note: List your present position first. Include all jobs for the past ten years.” (Appellant’s 2003 Application for Employment)

25. The City discovered on its own that the Appellant worked at Carney Hospital and received a positive review regarding the Appellant’s employment history. (Testimony of Greene)

Other Negative Reasons

26. As referenced above, the City also listed other negative reasons for bypass the Appellant including: a high absenteeism rate while employed with the Boston Municipal Police Department; failure to disclose a suspension and written warning he received for this absenteeism; absenteeism while employed at Northeastern University; and failure to operate a cruiser with ‘proper care’ while employed at Harvard University.” (Exhibit 1)

27. Based on a careful review of the record, including all exhibits, the Appellant’s employment applications and his own testimony, I find that none of these other reasons have been sufficiently substantiated with the exception of failing to operate a cruiser with proper care with employed at Harvard.

CONCLUSION OF COMMISSIONER BOWMAN (HEARING OFFICER)

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.” Cambridge v. Civil Service Comm’n, 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 Civ. Serv. v. Mun. Ct.

of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 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 a 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). G.L. c. 31, § 43.

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, 332 (1983). See Commissioners of Civ. Serv. v. Mun. 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. Cambridge, 43 Mass. App. Ct. at 304.

The Appellant is a 45-year old resident of Quincy who is married with three children. He has spent several years working in law enforcement, including employment with the Boston Municipal Police Department, Harvard University and Northeastern University. He also worked part-time as a security officer at Carney Hospital. Although I don’t doubt his sincere desire to serve as a police officer in the Quincy Police Department, the City has provided reasonable justification for bypassing him for appointment.

First, for all of the reasons cited in the findings, I conclude that the Appellant, while a resident of Dorchester in 1998, registered two of his vehicles in Quincy in order to realize reduced automobile insurance rates. Second, I conclude that the Appellant has a poor driving history as evidenced by four surchargeable accidents and that the Appellant failed to list two of these accidents in addition to citations for a lane violation and no inspection sticker on his 2003 employment application. Third, the Appellant failed to comply with the instructions of the 2003 employment application when he did not list his 5-year employment with Carney Hospital. I am not swayed by the Appellant's statement that he didn't think this is the information that the City was looking for. Police officers are regularly required to complete incident reports and testify in court proceedings. In this capacity, they are not required to simply recount what they believe the inquiring party is looking for, but, rather, a full and accurate description of the events that occurred. The City is justified in weighing this omission, coupled with the other omissions referenced above, as a negative factor against the Appellant.

Finally, there was no evidence of any inappropriate motivations on the part of the City. All of the City witnesses were highly credible and showed a sincere commitment to selecting the best candidate for the City's police department. It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the

opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

For these reasons, I believe the City has shown through a preponderance of the evidence that it had reasonable justification to bypass the Appellant for appointment as a police officer and that the Appellant's appeal should be dismissed.

Civil Service Commission

A handwritten signature in black ink, appearing to read 'Chris Bowman', written over a horizontal line.

Christopher C. Bowman, Chairman
Hearing Officer (For the minority [Bowman, Marquis])

DECISION OF THE MAJORITY (HENDERSON, STEIN and TAYLOR)

Summary of the Majority Conclusion

The majority of the Commission concludes that the Appellant's appeal should be allowed. The majority concurs in the Hearing Officer's findings of fact that the evidence was insufficient to establish any justification for bypassing the Appellant on the basis of alleged attendance issues in prior employment; in fact, the Appellant provided essentially unrefuted testimony as to a solid record of good attendance during his thirteen year tenure as a Boston Municipal Police Officer. As to the other reasons for bypass, the majority concludes that the City did not meet its burden of proof by a preponderance of substantial, credible evidence to support a finding that any of those reasons amount to the sound and sufficient justification needed to bypass the Appellant over the nineteen other candidates selected by the City for appointment who were ranked below the Appellant on Certification #250232.

The City did establish that the Appellant had one vehicular accident as a Harvard University police officer, but there were no details of the accident presented in the evidence. The only indication that the accident allegedly may have involved the Appellant's negligence was a hearsay record of a written reprimand found by the City's investigator who personally reviewed the Appellant's entire personnel file at Harvard in 2003 (with the Appellant's permission). When asked, Harvard confirmed, in fact, the report had been improperly placed in the Appellant's file without his notice and "should be removed and has since been done" prior to the Appellant's 2005 bypass which is the subject of this appeal..

As to the evidence of the Appellant's driving record, the majority finds the City's reliance on an RMV report of incidents as much as twenty-one years old for which no details were provided was not justified. While there is some evidence that the Appellant had forgotten some of the

accidents, there was no evidence that, after they were called to his attention, he failed to take responsibility for them. The use of this type of imprecise, hearsay report of relatively stale incidents, when compared to the Appellant's more recent, unblemished record of good driving (no pending or prior driving offenses or accidents since 1992, the highest possible safe driver step rating attainable on his automobile insurance policy) is simply not the type of reliable evidence that can justify bypassing the Appellant, as it does not bear any rational relationship to the Appellant's current fitness to serve as a police officer.

Similarly, the majority concludes that the fact that the Appellant legitimately reported several of his motor vehicles garaged for insurance purposes at addresses in Quincy in 1998, prior to his moving to a permanent residence in Quincy, in December, 1998, cannot reasonably be deemed a disqualification for appointment. The Appellant fully disclosed what he had done in this respect on both of his written applications (in 2003 and 2005). He testified that he was advised by an insurance agent that it was permissible, as the cars were, in fact, principally parked at the listed address in Quincy, his family actually lived with his mother-in-law in Quincy for a period of time while they were saving up to buy a home in Quincy, and one of the cars was mainly used by his wife in commuting from the Quincy T station within walking distance from her mother's address. His mother-in-law babysat his two children during the day and the cars were parked there most of the time, for that period. When an investigation as thorough and microscopic as that conducted by the City, here, produces this slender a reed of arguably negative evidence, when weighed against the overwhelming positive evidence of the Appellant's qualifications from over twenty sources, including character references from neighbors and recommendations from all prior employers who said they would rehire him, including three police departments and the Carney Hospital (whom City criticizes him for leaving this part-time job off his application, not

for any negative employment references), the Commission is compelled to find the City's decision to emphasize such minor quibbles over all the other substantial evidence in Appellant's favor as an unreasonable, arbitrary and capricious exercise of its decision-making authority.

The majority recognizes that the job of a police officer requires highly skilled men and women of the utmost integrity and professionalism. The Appellant demonstrated his qualification to be appointed to the position of Quincy police officer by having repeatedly taken and passed the civil service examination, earning him a score that put him ahead of more dozens of other candidates. All original appointments as police officers are subject to a successful completion of a one year probationary period, during which each candidate is expected to prove himself worthy of his appointment. The Appellant's high place on the civil service list, his decades of prior service as a police officer and his uniformly positive character and employment record have earned him that opportunity.

Subsidiary Findings of Fact:

1. The Appellant completed two detailed and voluminous employment applications with the City for the position of police officer. He filed the first application on or about February 19, 2002 for the 2003 bypass and then filed his second application on or about April 26, 2005 for the 2005 bypass. (Employment applications and attached documentation)
2. The applications required the Appellant to include mandatory attachments of up to 17 other documents to be obtained by the applicant. (2003 & 2005 applications).
(Employment applications and attached documentation)
3. The City conducted numerous interviews and a background investigation of the Appellant subsequent to the filing of each employment application. Officer Jennifer

Kreigel filed an investigative report for the 2005 bypass, (Exhibit 2B) and Officer James Greene filed an investigative report for the 2003 bypass, (Exhibit 2A).

4. The Appellant was interviewed by Officer Kreigel for the 2005 bypass, during which he also verbally summarized to her what he believed were the reasons he was bypassed in 2003. He explained to her regarding the 2003 bypass that he had forgotten to list "...two minor motor vehicle accidents" on the 2003 application. He also explained that unbeknownst to him a letter of reprimand had been placed in his personal file for a minor accident while on duty at HUPD. He had forgotten about that minor accident. He explained that he reported it in the normal course to his supervisor and completed the normal paper work. He was not disciplined for it and not notified that a letter regarding it had been placed in his file. Upon learning of that letter of reprimand he requested that it be removed from his personal file and expected it to be removed. He further explained that he had forgotten to list on the 2003 application, his part-time, per diem employment at Carney Hospital from 1995-2000. HUPD Deputy Chief Regan confirmed to Officer Kreigel that the Appellant had not been notified of the letter of reprimand and that it should not have been entered into his file, the Appellant had requested its removal and that it had been removed from his personal file. Regan further stated "that it was not unusual for an officer to receive a written reprimand for a cruiser accident, regardless of how minor, and have the reprimand removed from the file at a later date if no other accidents or incidents occurred." Regan also confirmed that no other disciplinary action had been taken against the Appellant. (Exhibit 2B)
5. Officer Kreigel did interview four (4) members of the HUPD regarding the Appellant. All four gave strong recommendations that he be hired by the City of Quincy Police

Department. These HUPD members ranged from co-workers through supervisors up to Deputy Chief. Detective Julie Davies, a co-worker of the Appellant for five years described him as an above average police officer who writes thorough and accurate police reports. She further described him as being very helpful to victims, always reliable for back-up, doing a really good job and having a good rapport with supervisors and co-workers. Officer Kreigel also interviewed three (3) neighbors of the Appellant. All three of the neighbors gave her high recommendations that the Appellant be hired by the City as a police officer. Each neighbor cited one or more character trait he possessed to support their recommendation. (Exhibit 2B)

6. Officer James Greene attached to his 2003 investigative report, the pre-employment "Background Investigation" report of Detective Paul Westlund of the Harvard University Police Department, (HUPD). HUPD subsequently hired the Appellant as a police officer in April, 2000. (Exhibit 2A)
7. In the course of Westlund's investigation for the HUPD regarding the Appellant's prospective employment at HUPD; He interviewed three (3) named close-by neighbors, in person at their Hilda Street addresses (a cul-de-sac). All three of the named neighbors did provide positive recommendations to Westlund that he be hired as a police officer at HUPD. (Exhibit 2A).
8. The Appellant, as required, did attach to both his 2003 and 2005 applications, an original of his Massachusetts Driving Record, which he obtained from the Registry of Motor Vehicles, dated February 15, 2002 and April 29, 2005. He was charged a fee of \$15.00 for each Driver's Record. These Driver's Records listed no offenses or other action by the Registry. They only contained the statement: "According to the record of the Registry

of Motor Vehicles there is no record of any active offense or action for the previous ten years” (Employment applications and attached documentation)

9. Consistent with the foregoing clean driving record, the insurance paperwork submitted by the Appellant with his application shows that he qualified for the best safe driver step (SDIP) rating and the largest SDIP credit on his auto insurance policy. (Exhibit 4)
10. Officer Greene conducted a detailed check of the Appellant’s criminal history background. He did this by checking the Mass. Criminal History Systems Board, (CORI) the Mass. Probation Central File Database, (BOP) and Interstate Identification Index, (III). These sources produced no records on the Appellant. The Appellant also told Greene that he had never been in custody, arrested or charged with a criminal offense anywhere in the country. (Exhibit 2A)
11. The Appellant possesses a license to carry a firearm and that state issued license is and has been in good standing. Officer Greene also contacted Captain Lilly of the Mass. State Police Certification Unit and found that the Appellant’s license as a “Special State Police Officer” was in good standing, with no complaints or violations past or pending against him. (Exhibit 2A)
12. Officer Greene also interviewed four (4) members of the HUPD and all four gave strong positive recommendations that the Appellant be hired as a Quincy police officer. These members of the HUPD were not the same members interviewed by Officer Kreigel. Greene also noted in his report that the Appellant’s personal file at the HUPD contained “...multiple letters of commendation and appreciation ...”. (Exhibits 2A, 2B)
13. Officer Greene also interviewed for his report: two neighbors, two members of the Boston Municipal Police Department (BMPD) and six personal references, of whom five

were members of law-enforcement departments. All ten (10) of the people gave strong positive recommendations for the Appellant. Two of the personal references were well known to Officer Greene. Greene stated regarding these two, “...whom I trust to provide a candid assessment of Mr. Bulger’s character, recommended him without reservation/hesitation.” (Exhibit 2A)

14. The Appellant had been married to his wife Lisa for fifteen years at the time of the 2005 bypass. In 2003 Mrs. Bulger had been interviewed alone by two male police officers in a room at the Quincy Police Station. She was again interviewed at the Quincy Police Station in 2005. Among the subjects she was questioned about was any past incidents of domestic violence (emotional, physical or sexual) and how they handled conflict or problems. Mrs. Bulger denied any abuse and reported in 2005, that there had never been any abuse during their twenty years together. She also reported that her husband is the type of person who would do anything for her or anyone else. (Exhibits 2A, 2B)
15. Officer Greene did investigate the Appellant pertaining to the status of residency preference in the City of Quincy. Green determined that the [Appellant] “has had continuous residency in the City since early 2000; meeting the requirements for residence preference.” Greene also stated in his report that “During a review of Mr. Bulger’s motor vehicle excise receipts, I discovered that for 1999 Mr. Bulger provided an address of [1st Quincy address]. Multiple other sources of information indicated/identified his address as 62 Myrtlebank Avenue, Dorchester, MA. For that period.” Greene did not identify those multiple other sources of information in his report. (Exhibit 2A)
16. Officer Greene also testified in this matter and repeated in his testimony that the time in question regarding the 1st Quincy address was “1999”. Greene was specifically asked

what the “multiple other sources of information” were that he relied on but he was unable to identify any of those multiple other sources of information. (Testimony of Greene)

17. The time period of the alleged registration of a motor vehicle at the 1st Quincy address was not specifically pinned down, with questions referring to it as: “...at the time in question”; when quizzing the Appellant about it.(Testimony of Appellant)

18. The Appellant did testify that he and his family did reside at that [1st Quincy address], his Mother-in-law’s home, for a period prior to his purchase of the home at 97 Hilma Street, Quincy. He did this to save money for the purchase of the home. His mother-in-law babysat his two children there and that the car his wife drove was there “most of the time” for that period. (Testimony of Appellant)

19. The Appellant testified that he did use the [1st Quincy address] to register at least one of his two cars, after consulting his insurance broker and because the car or cars were principally parked at that address for that period. (Testimony of Appellant)

20. The Appellant and his wife purchased the home at 97 Hilma Street, Quincy on or about December 30, 1998.(Exhibit 3)

21. The Appellant insured a vehicle at 97 Hilma Street, Quincy from at least March, 1999. (Exhibit 4)

22. All of the excise tax bills from Quincy and Boston referred to in this matter were attached by the Appellant to his applications as required in the application process. (Administrative notice, Employment applications and attached documentation)

23. The Appellant attached to his 2003 application numerous documents including the following documents: EMT certificate, driver’s license, motor vehicle registrations and excise tax bills, driver’s record, Class A large capacity –License to carry firearms,

certificate of completion of basic training for police officers (Mass. Crim. Just. Train. Council), P&S and related documents on 97 Hilma St., certificate operation of infrared breath test (MCJTC), First Responder certifications (4), CPR certificate, Police firearms certificate (MCJTC), C.O.B.W.E.B. certificate, NRA police firearms safety certificate, NRA police marksman certificate, Boston Police Academy annual in-service training cert., and seven (7) other similar certificates, and four (4) letters/certificates of commendation or appreciation and a letter of recommendation from an elected public official. (Administrative notice, Employment applications and attached documentation)

24. The Appellant attached identical or similar and updated documentation to his 2005 application as he had for his 2003 application. (Administrative notice, Employment applications and attached documentation)

25. The September 21, 2005 bypass letter from the City to HRD is three and one-half pages long of mostly negative reasons. This letter was authored by the prior Mayoral administration. The Appellant's name appeared at the top of the list, certification #250232. (Exhibit 1)

26. This bypass letter lists as the first reason for bypass being the listing of six (6) motor vehicle accidents on his application, but failing to list information such as location and police department for each accident. The letter then states that: "A check of Mr. Bulger's license status with the Registry of Motor Vehicles indicates these four (4) surchargeable traffic accidents in 1990, 1986, 1985 & 1994. Mr. Bulger listed only two (2) on his 2003 Quincy Police Department application and also failed to note a 1985 Lane violation. Mr. Bulger also listed two (2) additional motor vehicle accidents on his 2005 [QPD] application. These accidents were not found on his driver's history." (Exhibit 1)

27. The bypass letter next lists as a reason for bypass, numerous dates of notice regarding absenteeism and tardiness from his prior employer BMPD, during his 13 years of employment there as a police officer. These referenced dates are from 1987-1998, and an unreported cruiser accident while employed at Harvard University as a police officer. However, the bypass letter goes on to state that HUPD admitted that the letter had been placed in his personal file without notice to him and that it was subsequently removed from his file. (Exhibit 1)
28. However, the bypass letter fails to state that Mr. Corso the BMPD business manager, when interviewed by Officer Greene described the Appellant as a “good employee”. Corso also described the BMPD anticipatory system for monitoring employee’s use of “leave” on a quarterly basis, despite the employee’s allowance of leave time on an annual basis. The Appellant’s personal file at the BMPD also contained “multiple letters documenting perfect attendance for some quarters and letters of commendation for exceptional police work...”(Exhibit 2A)
29. The bypass letter then lists the next negative reason, the Appellant’s failure to list on his 2003 application, his part-time, per diem employment at Carney Hospital from 1995-2000. The letter refers to the appellant’s explanation that he had forgotten to list this job. There was not a chronological gap in the Appellant’s employment history since he did list his continuous full-time employment. (Exhibit 1)
30. The last reason for bypass listed in the letter is the Appellant’s use in 1999 of the 1st Quincy address to register and insure a motor vehicle, while “multiple other sources of information identified his address as 62 Myrtlebank Avenue, Dorchester. The letter goes on to identify the address as his wife’s mother’s address and it being used to avoid higher

insurance premiums and that this was an issue of veracity not a residency issue. (Exhibit 1)

31. The bypass letter ends with a request to HRD that the Appellant's name be removed from the eligibility list for police officers, pursuant to the personnel administrator rules (PAR .09) (Exhibit 1)

32. The parties had previously filed a joint request for relief pursuant to Chapter 310 of the Acts of 1993, based on a settlement agreement. That joint request was denied by Commission Chairman Bowman and voted unanimously by the Commission on May 1, 2008. Commissioners Henderson and Taylor did vote for the denial of the joint request at that time, due to the procedural circumstances and not due to alleged facts pertaining to the reasons for bypass. The facts pertaining to the bypass were undetermined at that time. Commissioners Henderson and Taylor believed at that time that due to the Appellant being unrepresented by counsel as his prior attorney had since joined the new incoming mayoral administration for the City of Quincy, that he should be given the opportunity to hire a new attorney. It was anticipated by Commissioners Henderson and Taylor that once the Appellant hired a new attorney that he would then begin to either negotiate a settlement agreement or prepare the matter for a full hearing. (Administrative notice)

33. The City's bypass justification to HRD indicates that the positive references of many of the candidates who scored below the Appellant on the qualifying exam read quite similarly to the positive statements about the Appellant gleaned from the investigation of him, although some of these other candidates appear to have far less law enforcement experience. Several of the positive profiles of the lower ranked selected candidates make note of the candidate's ties to the City police department or other City connections. One

selected candidate had 35 years of employment as a civilian with the Quincy Police Department. One selected candidate had only one summer (2004) employment as a seasonal Nantucket police officer. However, he had also served a student internship with the Quincy Police Department. Several other selected candidates did student internships at the Quincy Police Department. None of the selected candidates who bypassed the Appellant had anywhere near the amount of police training or experience of the Appellant. (Exhibit 1)

34. In addition, some of the lower ranked candidates who were selected for appointment had no prior experience in law enforcement, such as candidates whose current employment was described as one-year experience as a “field crew” supervisor for a construction company; five years experience as a Verizon Splice Service Technician, liquor distributor salesman; three-year’s experience as a bank employee; ten year’s experience as a valet parking attendant; one year as a security officer at MGH; and four years as a geologist. (Exhibit 1)

Applicable Legal Standards

Basic merit principles as defined in G.L. c. 31, §1 require that employees be selected and advanced “on the basis of their relative ability, knowledge and skills”, using “fair treatment of all applicants and employees in all aspects of personnel administration” and protection from coercion for “political purposes” and from “arbitrary and capricious actions.” “A civil service test score is the primary tool in determining relative ability, knowledge and skills and in taking a personnel action grounded in basic merit principles.” Sabourin v. Town of Natick, 18 MCSR 79 (2005); Compare Flynn v. Civil Service Comm’n, 15 Mass.App.Ct. 206 (1983). Here, the

Appellant's score on the civil service examination was higher than those of at least a dozen other candidates.

The appointing authority, in circumstances such as those before us, may not be required to appoint any person to a vacant post. However, the appointing authority is expected to exercise "sound discretion" under the particular circumstances of the appointment. The appointing authority, in the exercise of sound discretion may select among persons eligible for appointment or promotion or may decline to make any appointment. See Goldblatt v. Corporation Counsel of Boston & others, 360 Mass. 660, 666 (1971); Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv., 348 Mass. 184, 187-193 (1964). See also Corliss v. Civil Serv. Commrs., 242 Mass. 61, 65; (1922) Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431 (1969). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572 (1940).

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. E.g., City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, rev.den., 428 Mass. 1102, 687 N.E.2d 642 (1997) (Commission may not substitute its judgment for a "valid" exercise of appointing authority discretion, but the Civil Service Law "gives the Commission some scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground."). See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001) ("The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system

[citation] to insure decision-making in accordance with basic merit principles the commission acted well within its discretion.”); MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action”). See also, Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission “sufficient to satisfy due process”) All candidates must be adequately and fairly considered. The Commission has been clear that a bypass is not justified where “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).

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001). “Abuse of discretion occurs . . . when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and improper factors are assessed but the [fact-finder] makes a serious mistake in weighing them.” E.g., I.P.Lund Trading ApS v. Kohler Co., 163 F.3d 27, 33 (1st Cir.1998).

Conclusion

Applying these principles to the evidence in this appeal, the majority concludes that the City has not met its burden of proof.

The Appellant was twice bypassed for appointment to the position of police officer in the City of Quincy, once in 2003 and the second time in 2005. The Appellant's employment application in the 2003 bypass is dated February 19, 2002. The Appellant's employment application in the 2005 bypass is dated April 26, 2005. The Appellant's second bypass is the subject matter of this appeal.

The Appellant here was bypassed for appointment as a police officer despite effectively performing the duties and functions of a police officer for nearly twenty years at the time of the bypass. The City performed two detailed background investigations on the Appellant, the first in his 2003 bypass and the second in his 2005 bypass. The City interviewed twenty or more people in the process of these investigations. Those interviewed included: prior and current employers, supervisors, co-workers, neighbors, political officials, family and personal references including experienced law-enforcement personnel. The Appellant received unanimous, strong positive recommendations that he be hired as a police officer, from all of these people. Two of the personal references were well known to Investigating Officer James Greene. Greene stated regarding these two, "...whom I trust to provide a candid assessment of Mr. Bulger's character, recommended him without reservation/hesitation." Not one person contacted by the City even hinted that the Appellant lacked the character or honesty to be a police officer.

The general areas of concern for an employer produced a positive picture of the Appellant. The Appellant had no criminal record or any criminal activity at all in his background. He filed a clean Driver's Record from the Registry of Motor Vehicles with each application. He had no

negative recommendations from any prior employers, neighbors or acquaintances. All prior employers said they would re-hire him. The Driver's Record was among up-to 17 different documents which were required to be filed as attachments to his applications. The 4-6 motor vehicle accidents over a twenty year period were disclosed by the Appellant as best he could remember and then in 2005 after receiving new more detailed information from his insurance carrier. Any and all information used to support the negative reasons for bypass were provided by the appellant in his application or required attachment documents or through the release he signed.

Thus, this is not a situation in which an appointing authority would be justified in bypassing a candidate on the basis of clearly described, multiple, serious driving infractions within a reasonably recent time proximity, or in which the candidate refused to "take responsibility" for his mistakes. See Driscoll v. Boston Police Dep't, 20 MCSR 477 (2007); Geary v. Salem Police Dep't, 19 MCSR 435 (2006); Smith v. City of Lynn, 18 MCSR 74 (2005). Rather, these are situations where the information is much too stale and lacking sufficient specificity to be a reliable basis on which to make an informed employment decision. See Pacini v. Medford Fire Dep't, 18 MCSR 351 (2005); Halliday v. Boston Police Dep't, 10 MCSR 45 (1997); Avellino v. City of Medford, 9 MCSR 12 (1996)

On the face of the Appellant's application he appears to be overwhelmingly qualified for the position of police officer in the City of Quincy or any other municipality for that matter. The fact that he is a Quincy resident, strongly supported by his neighbors is consideration in his favor. The Appellant is highly trained and certified in both general and specialized police officer courses. He has some college courses. He has a twenty years track record of successful police officer performance. He received numerous commendations for police related work. He is

licensed to carry a firearm and proficient in firearm use and safety. The City would benefit from hiring such a person by saving money for training and the elimination of the risk of hiring an unknown or untested person.

Upon a more thorough examination of his application(s) and background, we find his qualifications in every respect to be very impressive. He possesses all of the ability, knowledge, skill, temperament and character that are required for the position of police officer. Additionally he has the specialized training, licenses and experience of a police officer. He has successfully performed the duties and functions of a police officer for approximately 20 years at the time of this bypass. The Appellant has had a long standing Mass. Special Police Officer commission which is administered by the State Police. This commission has been maintained in good standing without any complaints. He has completed the required Police Academy and received numerous other certifications of specialized police training. He had received numerous commendations for police performance. All of these certificates and commendations were attached to his application.

It seems that the City went over his background and cherry picked subsidiary facts or circumstances from the huge volume of information on the Appellant and then negatively characterized, or drew negative inferences from what they selected. The Appellant gave a reasonable or plausible explanation to each of the City's raised concerns regarding these sometimes old circumstances. The Appellant had simply forgotten about some of them.

The Appellant had the right to be considered for appointment based on a fair consideration of his relative ability, knowledge and skills or "basic merit principles" pursuant to G.L. c. 31 sec 1. Therefore the Respondent lacked reasonable justification to bypass the Appellant for appointment to the position of police officer.

The Appellant was qualified by law and HRD to be on the certified eligibility list for appointment. Yet, the City in its bypass letter made a request of a PAR 09 removal of his name from the list. This is rare action and only appropriate in extreme circumstances. This unusual request is an indication of possible political overtones in the appointment process.

All of the people contacted by the City investigators on both applications provided strong and positive recommendations that he be hired as a police officer. These people, numbering approximately twenty, included family, friends, professional acquaintances, neighbors, co-workers, superiors, employers and public officials. The recommendations were very positive and each pointed to at least several admirable character traits he possessed. In the City's 2005 investigative report, the investigative Officer James M. Greene interviewed six personal references, five of whom were in the law-enforcement field. All of the references gave positive feedback in support of the Appellant. Officer Greene knew two the references, whom he trusted *"...to provide a candid assessment of Mr. Bulger's character, recommended him without reservation / hesitation."*

The application process for this position was rigorous and demanding. The Appellant was required to complete and file a voluminous and detailed employment application with numerous mandated releases and attachment documents. This process usually has a short turn around time for filing. The Appellant did collect the required documentation, complete the detailed application and submit the completed application before the deadline of 12:00 noon on May 2, 2005. (See Application Check Lists and Certifications, received February 12, 2009 and filed under seal).

The Appellant did file the completed application with releases and attached documents, in a timely fashion. One of the required attachment documents he filed with his application was his

Mass. Driver's Record from the Registry of Motor Vehicles. This record, dated 4/29/2005 reported that: "According to the record of the Registry of Motor Vehicles there is no record of any active offense or action for the previous ten years."

In addition the Appellant had no criminal record reported by the Mass. Board of Probation and the Mass. Criminal History Systems Board, and this fact was not contested by the City.

The information relied upon by the City in this bypass was almost entirely self-disclosed by the Appellant on his employment application(s) and accompanying documentation.

RELIEF TO BE GRANTED TO THE APPELLANT

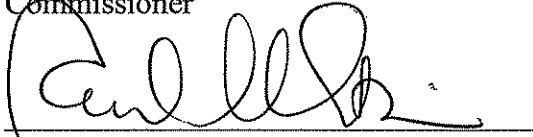
Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs that name of the Appellant, Christopher Bulger, be placed at the top of the eligibility list for original appointment to the position of Police Officer so that his name appears at the top of any current certification and list and/or the next certification and list from which the next original appointment to the position of Police Officer in the Quincy Police Department shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as a QPD police officer. The Commission further directs that, if and when Christopher Bulger is selected for appointment and commences employment as a QPD police officer, his civil service records shall be retroactively adjusted to show, for seniority purposes, as his starting date, the earliest Employment Date of the other persons employed from Certification # 250232.

For all of the above reasons, the appeal under Docket No. G1-05-399 is hereby *allowed*.

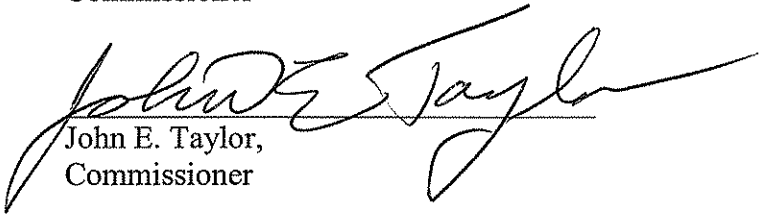
Civil Service Commission,



Daniel M. Henderson,
Commissioner



Paul M. Stein,
Commissioner



John E. Taylor,
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman voted No; Henderson voted Yes, Marquis voted No, Stein voted Yes and Taylor voted Yes, Commissioners) on May 20, 2009.

A True Record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 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 to:

James W. Simpson, Jr. Atty.

Kevin Madden, Atty.

John Marra, Atty. (HRD)