

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

SCOTT BURNS,
Appellant

v.

G1-11-335

CITY OF HOLYOKE,
Respondent

Appellant (Pro Se):

Scott Burns

Respondent's Attorney:

Sara J. Carroll, Esq.
City of Holyoke, Law Department
536 Dwight Street
Holyoke, MA 01040

Commissioner:

Cynthia Ittleman¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Scott Burns (hereinafter “Burns” or “Appellant”), is appealing the decision of the City of Holyoke (hereinafter “City” or “Appointing Authority”), as the Appointing Authority to bypass him for original appointment to the position of reserve police officer. The Appellant filed a timely appeal with the Civil Service Commission (hereinafter “Commission”) on December 1, 2011. A pre-hearing was held on January 11, 2012. A full hearing was held on March 28, 2012. With the exception of the Appellant, the witnesses were sequestered during the full hearing. The parties submitted recommended decisions on April 25, 2012. The hearing was digitally recorded and a CD of the hearing was sent to each of the parties. For the reasons stated herein, the appeal is hereby denied.

¹ The Commission acknowledges the assistance of Law Clerk Mary B. Flaherty in preparing this decision.

FINDINGS OF FACT:

At the full hearing, three (3) joint exhibits were entered into evidence by the parties. In addition, the Appointing Authority entered twenty-two (22) exhibits into evidence at the hearing. The Appellant entered sixteen exhibits (16) into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses as appropriate:

For the Appointing Authority:

- James Neiswanger, Chief of Police, Holyoke Police Department
- David D. Fournier, Lieutenant, Professional Standards Division, Holyoke Police Department
- Frederick Seklecki, Captain, Holyoke Police Department

For the Appellant:

- Elaine Pluta, former Mayor of the City of Holyoke
- Ronald Dietrich, Chief Auxiliary Police Division
- Jean Dietrich, Colonel of the Auxiliary Police Division²

as well as all matters filed in this case, and all relevant statutes, caselaw, regulations and policies, a preponderance of the evidence establishes the following facts:

1. The Appellant has been employed as a 9-1-1 Police Dispatcher for the Holyoke Police Department (hereinafter “the Department”) since July 2000; initially he worked part-time but began full-time in 2001. (Stipulated Fact)
2. The Appellant was a member of the Holyoke Auxiliary Police Division, a volunteer unit, from 2001 until 2006. The Appellant resigned in March 2006 from this division after it discovered that he also belonged to both the West Springfield Police Auxiliary and South

² Ronald Dietrich, Chief of the Auxiliary Police Division, and Jean Dietrich Colonel of the Auxiliary Police Division, are married.

Hadley Police Auxiliary and the Appellant was asked to either resign or give up the other two auxiliary units. (Testimony of Ronald Dietrich; Appellant Exhibit 12)

3. The Appellant took and passed a Civil Service Examination for the position of Police Officer on April 25, 2009. He obtained a score of 97 and is noted as a non-veteran.
(Stipulated Fact)
4. The Mayor of Holyoke is the Appointing Authority for the Holyoke Police Department.
(Stipulated Fact)
5. On or about May 31, 2011, the City asked the State's Human Resources Division (hereinafter "HRD") for a Certification of candidates for the appointment of six (6) permanent reserve police officers. (Appointing Authority Exhibit 1)
6. On June 21, 2011, HRD sent the City Certification No. 201560, on which the Appellant's name appeared tenth. (Appointing Authority Exhibit 2)
7. Among those candidates willing to accept employment, the Appellant was ranked fourth.
(Stipulated Fact)
8. After obtaining Certification No. 201560, the City conducted background investigations of the candidates willing to accept employment who submitted the required application materials. The investigations were conducted and the subsequent reports were compiled by Lieutenant David D. Fournier and Sergeant David P. McCavick of the City's Police Professional Standards Division. (Testimony of Fournier)
9. As part of the background investigation, the investigators checked the employment application, credit, former employers and criminal and driving record of each applicant. When completed, the Department compiled background investigative reports containing

all the information uncovered during the investigations. (Testimony of Fournier, Appointing Authority Exhibit 9)

10. Based on the applicants' background investigative reports, the City appointed six (6) candidates to the position of permanent reserve police officer from Certification No. 201560. Two (2) of the six (6) candidates selected for appointment were ranked below the Appellant. (Stipulated Fact; Testimony of Chief; Appointing Authority Exhibit 3)
11. The City notified HRD of its reasons for bypassing the Appellant on October 28, 2011. HRD approved the bypass and notified the City and the Appellant on November 7, 2011. (Stipulated Fact; Appointing Authority Exhibit 11)
12. The City's reasons for bypassing the Appellant were negative reasons, namely: 1) a pattern of conduct marked by a neglect of financial responsibilities; 2) unfavorable work history marked by frequent absenteeism; 3) unfavorable work history marked by poor performance reviews; and 4) unfavorable work history marked by untruthfulness and a disciplinary record. (Appointing Authority Exhibit 11)
13. The Appellant filed a timely appeal with the Commission on December 1, 2011. (Stipulated Fact)
14. In 2008, as part of a prior hiring cycle, the Appellant applied for appointment to the position of reserve police officer at the Holyoke Police Department and was bypassed for appointment in January 2009, again for negative reasons. The reasons given for that bypass were 1) a non-renewable driver's license; 2) work history as a dispatcher with the City that was not favorable; and 3) a lack of credibility and candor as the Appellant omitted and/or misstated information on his application. The Appellant appealed the prior

bypass and the Commission upheld the City's decision to bypass the Appellant.

(Appointing Authority Exhibit 12; Testimony of Neiswanger)

Appellant's Credit History

15. As part of the background investigation, the City reviewed each applicant's credit history.

To this end, Lieutenant Fournier obtained credit reports of each applicant from an outside agency. (Testimony of Fournier)

16. The Appellant's background investigation report revealed a poor credit history including a Chapter 7 Bankruptcy filing in Massachusetts, which was discharged in January 2009.

(Appointing Authority Exhibits 13-15)

17. Currently, the Appellant has a utility account that remains in collection and a house in foreclosure proceedings. (Appointing Authority Exhibits 11, 13)

18. The City considered the Appellant's poor credit history an indication that he neglected his financial responsibilities, which indicates a pattern of disregard for the law, a lack of responsibility, and poor judgment, impacting his suitability for employment as a police officer. (Appointing Authority Exhibit 11; Testimony of Neiswanger)

19. An applicant's credit history is indicative of his character and responsibility. That the Appellant filed for bankruptcy shows a lack of responsibility and creates a cause for concern about the Appellant's susceptibility to illegal and fraudulent behavior including coercion and bribery. (Testimony of Neiswanger)

Frequent Absenteeism

20. As part of the background investigation, the City evaluated the Appellant's work history.

(Appointing Authority Exhibit 11)

21. Although Lieutenant Fournier did not have detailed access to and information regarding the other candidates' use of sick time, he had such access with regard to the Appellant because he was already a member of the Department as a Dispatcher. Lieutenant Fournier had access to and evaluated the Appellant's use of sick time in his position as Dispatcher. (Testimony of Fournier)
22. An evaluation of the Appellant's use of sick time through examination of payroll records of the Holyoke Police Department shows a liberal use of the 15 sick leave days per year allowed pursuant to the collective bargaining contract. Had the Appellant accrued all of his sick days for his nine years of employment as Dispatcher, he would have accumulated 135 sick leave days in total. However, at the time of the bypass decision at issue in this case, the Appellant had only one and a half days of sick leave time remaining, using nearly 15 days each year. (Testimony of Neiswanger; Appointing Authority Exhibits 9, 11, 18)
23. The Appellant's use of sick leave time indicated occasions on which he used a sick leave day to extend a vacation or his days off. (Testimony of Fournier)
24. The Appellant's use of sick leave time is consistent with the use of sick leave time by the other dispatchers in his department. (Testimony of Seklecki)

Poor Performance Reviews

25. As part of the background investigation, the Department reviewed each Applicant's work history. Lieutenant Fournier sent evaluation forms to each applicant's previous employers asking the employer to rate the applicant on a series of categories on a range of "Excellent, Good, Fair, and Poor." (Testimony of Fournier; Joint Exhibit 3)

26. The employment evaluation filled out by Colonel Jean Dietrich, of the Holyoke Auxiliary Police Division (hereinafter “Colonel Dietrich”), on behalf of the Appellant’s employment as a volunteer Auxiliary Police Officer, revealed some negative feedback, including a direct indication that she would not rehire the Appellant based on his record with the Holyoke Auxiliary Police Division. (Joint Exhibit 3)
27. The evaluation form was submitted to the Holyoke Police Department in 2008, at the time of the Appellant’s first application for employment as a reserve police officer with the Department. Lieutenant Fournier did not send out any new evaluation forms while conducting the Appellant’s background investigation in 2011 because there had been no change in the Appellant’s work history status. (Testimony of Fournier)
28. The Appellant had a reputation of tending to undermine authority and was very critical of the Auxiliary activities. Specifically, the Auxiliary had a “doubling badging” rule that officers were not supposed to be employed by other units, and the Appellant ignored that rule by also participating in the West Springfield Auxiliary and the South Hadley Auxiliary. When confronted about it, the Appellant explained that Holyoke should change its rule and offered his advice on to whom the rule should apply. (Testimony of Colonel Dietrich)
29. Chief Ronald Dietrich of the Holyoke Auxiliary Police Division (hereinafter “Chief Dietrich”) sent a recommendation letter on December 6, 2004 for the Appellant, recommending his employment at the Amherst Police Department, for which he was applying at the time. The recommendation letter was an accurate description of Chief Dietrich’s opinion that the Appellant was a member in good standing at that time. However, the evaluation form Colonel Jean Dietrich submitted to the Holyoke Police

Department in 2008, as part of the background investigation for the Appellant's first application for employment as a reserve police officer with the Department, was the Holyoke Auxiliary Police Division's most recent and complete opinion of the Appellant, who had resigned from the Auxiliary in 2006. (Appellant Exhibit 11; Joint Exhibit 3; Testimony of Chief Dietrich)

30. As a paramilitary organization, officers of the Holyoke Police Department are expected to follow the rules, orders, and directions given to them. (Testimony of Neiswanger)
31. The employment evaluation filled out by Captain Seklecki in 2008 stated that the Appellant had excellent dispatcher abilities. It also conveyed concerns about the Appellant's abilities to accept criticism and discipline, explaining that the Appellant "becomes extremely offensive and puts himself in attack mode," and that the Appellant had a tendency to write memoranda to other people, rather than accept criticism. The Appellant is not, however, considered to be violent or aggressive. (Appointing Authority Exhibit 19; Testimony of Seklecki)
32. The position of dispatcher is task-oriented, involving data-entry and procedural decision-making. In contrast, the position of Police Officer requires independence and reasonableness in making decisions on the job. (Testimony of Seklecki)
33. As part of the background investigation, Lieutenant Fournier contacted the Appellant's current supervisor for an update on the 2008 evaluation he submitted to the Holyoke Police Department for the Appellant. The only additional noteworthy incident was a verbal exchange between the Appellant and a fellow dispatcher on February 23, 2009, for which the Appellant was disciplined for use of vulgar language and for initiating the exchange, resulting in a three-day suspension. The Appellant appealed the suspension

and it was settled in arbitration, reducing the sanction to a written reprimand (Testimony of Fournier; Appointing Authority Exhibits 9 and 22; Testimony of Seklecki)

34. An applicant's work history is extremely important in the hiring process because it demonstrates how the applicant may perform in the future. None of the six (6) applicants selected for appointment had negative evaluations submitted on their behalf. (Testimony of Fournier)

Untruthfulness and Disciplinary Record

35. As part of the background investigation, the Department reviewed two instances in which the Holyoke Police Department disciplined the Appellant for abuse of sick leave. (Appointing Authority Exhibit 9)
36. In May 2006, the Appellant called in sick at his primary job as police dispatcher for the Holyoke Police Department in order to work a secondary job as a special police officer in South Hadley. For this, he was charged with violating the Holyoke Police Department's policies on outside employment, fictitious injury or illness, conduct unbecoming a dispatcher, and untruthfulness in official dealings and he was sanctioned with a written reprimand. (Appointing Authority Exhibit 20; Testimony of Neiswanger)
37. In June 2008, the Appellant again called in sick to his primary job as dispatcher in order to work for the South Hadley Auxiliary Police Division, resulting in a two-day disciplinary suspension. (Appointing Authority Exhibit 21; Testimony of Neiswanger)
38. With regard to the disciplinary actions in Findings of Fact Nos. 36 and 37, the Department was more concerned about the actual charges that were involved than the discipline that resulted. As a Police Officer, the Appellant would have to be credible in a court of law. Because of the conduct in these instances of untruthfulness it would be easy

to impeach him on the witness stand. Therefore, the documented untruthfulness carried significant weight in the decision to bypass the Appellant. (Testimony of Neiswanger)

Alleged Bias of the Holyoke Police Department

39. The Appellant's union affiliation did not influence the Department's decision to bypass the Appellant. Chief Neiswanger did not begin to serve as Chief of Police until July 2011 and thus had no influence over the Appointing Authority's original decision to bypass the Appellant in 2009. (Testimony of Neiswanger)

40. Any conflicts which may have existed between the Appellant and the former Chief of Police or former Mayor were unknown to Chief Neiswanger, Lieutenant Fournier and Captain Seklecki. (Testimony of Neiswanger; Testimony of Fournier; Testimony of Seklecki)

41. Former Mayor Elaine Pluta's interactions with the Appellant were good and positive but "superficial" in nature, as she did not know him on a personal level. (Testimony of Pluta)

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. at 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1. 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 at 304.

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 at 304. 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).

Bypass cases are decided based on 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 probable than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315 (1991). G.L. c. 31, § 43.

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 Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189 190-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 824-826 (2006). The Commission owes “substantial deference” to the

appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates. Beverly citing Cambridge at 305, and cases cited.

CONCLUSION

The Appellant has been employed as Police Dispatcher for the City of Holyoke since 2001. With regard to his performance in that position, he has received favorable evaluations, including testimony by his supervisor of his excellent dispatcher abilities. However, a background investigation revealed that the Appellant's credit and work histories proved unfavorable and the City has shown sound and sufficient reasons, by a preponderance of the evidence, for bypassing the Appellant for the position of reserve police officer.

The Appellant's credit history was negative, including a bankruptcy filing as well as an open account with a utility that is in collection and a house in foreclosure proceedings. This indicates a tendency of the Appellant to neglect his financial duties and thus his unsuitability for public safety work as a reserve police officer. The Appointing Authority expressed concern about the implications this would have with respect to the Appellant's duties as a police officer, as officers with outstanding debt are more likely to be susceptible to coercion and bribery.

Furthermore, the Appellant's work history is marked by frequent absenteeism, negative evaluations, and two instances of disciplinary action for untruthfulness. The background investigation revealed that the Appellant used his sick leave time liberally, having used nearly all 15 allowed sick leave days each year, including occasions when he used sick leave days immediately before or after his days off or vacation time. Although other dispatchers may have

done the same, the city may view this as a problem in a reserve police officer position. Further, the Appellant was disciplined on two occasions for having called in sick to his primary job as dispatcher in Holyoke in order to work a secondary job as a special police officer for the South Hadley Auxiliary Police Division. These instances caused significant concern for the Appointing Authority, as they reflect dishonesty and truthfulness and credibility are crucial characteristics for police officers. The instances of dishonesty diminish the Appellant's credibility and, therefore, his ability to testify as a witness. It was also this type of behavior that led two of his superiors, Colonel Dietrich and Captain Seklecki, to submit poor performance evaluations of the Appellant. The Appellant enlisted as a volunteer Auxiliary Police Officer in three separate Auxiliary police divisions concurrently, a violation of the Holyoke Auxiliary Police Division's policy on "double badging." When the Division became aware that the Appellant had been double badging, the Appellant told the Division that it ought to change its rule, suggesting to whom the rule should and should not apply. This type of behavior supports the Appointing Authority's position that the Appellant undermined authority. The ability of a police officer to follow the rules and orders given to him is critical to the paramilitary function of a police department. The evaluation of the Appellant's dispatch supervisor for his position as dispatcher for the Holyoke Police Department confirms this. Specifically, Captain Seklecki noted that the Appellant had difficulty accepting discipline and criticism. An applicant's work history is demonstrative of how the applicant may perform in the future. The negative work history of the Appellant, combined with the Appellant's poor credit history, caused the Appointing Authority to conclude that Appellant was not suitable for employment as a reserve police officer and to bypass him. The Appellant alleged that the Appointing Authority is biased against him due to his union and political affiliations. However, there is no evidence to suggest that the City had any

personal bias against the defendant for union affiliations, political affiliations, or otherwise. The City has thus demonstrated, by a preponderance of the evidence, sound and sufficient reasons for its decision without evidence of inappropriate motivations or objectives on the part of the City that would warrant the Commission's intervention.

For all of the above reasons, the appeal under Docket Nos. G1-11-335 is hereby *denied*.

Civil Service Commission

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on August 23, 2012.

A true record. Attest:

Commissioner

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

Under the provisions of G.L.c.31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L.c.30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

Scott Burns (Appellant)

Sara J. Carroll, Esq. (For the Appointing Authority)

John Marra, Esq. (HRD)