

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

BRIAN CARROLL,  
*Appellant*  
v.

Docket No.: G1-12-298

TOWN OF STONEHAM,  
*Respondent*

Appearance for Appellant:

Arthur C. Tourkantonis, Esq.  
390 Main Street, Suite 200  
Woburn, MA 01801

Appearance for Respondent:

Daniel C. Brown, Esq.  
Feeley & Brown P.C.  
1600 Boston Providence Highway  
Walpole, MA 02081

Commissioner:

Cynthia Ittleman<sup>1</sup>

**DECISION**

On November 3, 2012, the Appellant, Brian Carroll (“Mr. Carroll”), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (“Commission”), regarding the decision of the Town of Stoneham (“Appointing Authority” or “Respondent”) to bypass him for appointment to the position of permanent, full-time police officer. A prehearing conference was held at the offices of the Commission on November 20, 2013.

On December 3, 2012, the Commission issued an Order of Dismissal Effective May 31, 2013 (“Dismissal”), which is hereby incorporated by reference. The Dismissal provides that Mr. Carroll’s name shall not be removed from Stoneham police candidate Certification No. 00291

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Julie Muller in the drafting of this decision.

pursuant to Personnel Administrator Rules (“PAR”) section .09<sup>2</sup>, as the Respondent had sought, and that Mr. Carroll was to be considered for appointment if his name was appropriately ranked on the Certification. The Dismissal also provides that if the Respondent bypasses Mr. Carroll, the Commission would “accept and allow” a Motion to Revoke the Dismissal filed at the Commission by May 31, 2013 and reinstate this appeal.

By letter to Mr. Carroll dated August 8, 2013, the Respondent informed Mr. Carroll that he had been bypassed, the Respondent having appointed two candidates ranked below Mr. Carroll on the Certification. Mr. Carroll sent a letter dated September 23, 2013 to the Commission indicating that he was renewing his appeal based on the August 8, 2013 bypass. Being pro se, as he was in this case until the full hearing, Mr. Carroll did not send a copy of his September 23, 2013 letter to the Respondent. The parties attended a prehearing conference at the Commission on October 8, 2013 and discussed the renewed appeal, effectively reinstating Mr. Carroll’s appeal since the Respondent did not notify Mr. Carroll that he had been bypassed until the May 31, 2013 deadline in the Dismissal had passed. The Commission conducted a full hearing on December 12, 2013. The hearing was digitally recorded and both parties were provided with a CD of the hearing. The parties submitted proposed decisions. For the reasons stated herein, the appeal is denied.

## **FINDINGS OF FACT**

Twenty-eight (28) exhibits were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

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<sup>2</sup> PAR.09(2) state, “If an appointing authority concludes the appointment of a person whose name has been certified to it would be detrimental to the public interest, it may submit to the administrator a written statement giving in detail the specific reasons substantiating such a conclusion. The administrator shall review each such statement, and if he agrees, he shall remove the name of such person from the certification and shall not again certify the name of such person to such appointing authority for appointment to such position. For the purposes of this section, ‘appointments’ shall include promotions.” HRD had taken no action on the Respondent’s PAR.09 request.

*Called by the Appointing Authority*

- James T. McIntyre, Stoneham Police Chief
- Michael E. Botieri, Plymouth Police Chief
- Kevin P. Feeley, Jr., Esquire
- Robert Kennedy, Stoneham Police Sergeant;

*Called by the Appellant*

- Rosemarie Carroll, Appellant's Mother
- Brian Carroll, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence; a preponderance of the credible evidence establishes the following findings of fact:

1. Mr. Carroll took and passed the civil service examination for Police Officer on April 30, 2011. His name appeared on Certification No. 205294<sup>3</sup> as a candidate for employment as a Stoneham Police Officer. The Appointing Authority initially bypassed Mr. Carroll because the background investigation indicated that he had used a lot of sick time when he was employed at a Sheriff's Office, as indicated the July 20, 2011 letter from David Ragucci, the Town Administrator, sent to Mr. Carroll. (Testimony of Chief McIntyre; Exhibits 2A, 22)
2. In response to the July 20, 2011 bypass letter, Attorney Tourkantonis, on behalf of Mr. Carroll, wrote a letter to Mr. Ragucci to explain that Mr. Carroll was granted Family and Medical law leave by the Sheriff's Office. This is information that the Appointing Authority did not have at the time it issued the July 20, 2011 bypass letter. The Family

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<sup>3</sup> This Certification Number was provided in Exhibit 22, the bypass letter from the City of Stoneham. This Certification Number does not appear in the information the State's Human Resources Division provided to the Commission in Exhibits 1 and 2A.

and Medical Leave law rendered the sick time use in question excused. In view of this explanation, the Respondent appointed Mr. Carroll to the position of Student Police Officer effective October 27, 2011. (Testimony of Chief McIntyre; Exhibits 23-24)

3. When applying for the position of Stoneham police officer, candidates for police officer positions sign a truthfulness acknowledgement. The truthfulness acknowledgment summarizes the importance of truthfulness as a police officer and warns that untruthfulness will result in disqualification from the hiring process and/or termination from employment. Mr. Carroll signed the truthfulness acknowledgment when he applied for the police officer position. (Testimony of Chief McIntyre; Exhibit 6)
4. Mr. Carroll was informed that he would participate in the Plymouth Police Academy commencing on November 14, 2011. (Exhibit 24)
5. On March 16, 2012, the student officers at the Plymouth Police Academy were split up into two groups; one group was at the firing range and the other group was at driving training, also known as EVOC. Mr. Carroll was one of the student officers at EVOC. At approximately 11:00 a.m., the student officers and Academy instructors reported to the lunch area. During lunch, Chief Botieri, a Senior Staff Instructor at the Academy, overheard a student officer telling others that student officers at the firing range had failed the firing exam. Chief Botieri asked the student officer where he had heard that information. The student officer reluctantly told Chief Botieri that Mr. Carroll was the one who told him. Chief Botieri then asked Mr. Carroll if he had a cell phone on him. Mr. Carroll said no, joking that he did not have enough money for his mortgage, let alone a cell phone. (Testimony of Chief Botieri and Mr. Carroll; Exhibits 12, 14)

6. As the student officers were leaving the lunch area, Chief Botieri asked Mr. Carroll if he had told another student officer that several student officers failed the firing exam at the firing range. Again, Mr. Carroll denied having such knowledge. Chief Botieri, in Mr. Carroll's presence, called over the student officer who had told him that Mr. Carroll supplied him with the information. Again, Chief Botieri asked the student officer where he had heard the information. The student officer, again, responded that he heard it from Mr. Carroll. Mr. Carroll, in response, repeatedly asked the student officer, "When did I tell you eight (8) students failed the range?" Chief Botieri asked Mr. Carroll again if he had his cell phone on him. This time, Mr. Carroll acknowledged that he had his cell phone with him and he showed it to Chief Botieri, whereupon Chief Botieri saw a message on it from a student officer that referenced the firearms training. Chief Botieri then took Mr. Carroll's cell phone. (Testimony of Chief Botieri; Exhibits 12, 14)
7. Upon returning to training, Chief Botieri pulled the same student officer he had spoken to earlier and Mr. Carroll aside. Chief Botieri asked the student officer again about the incident and the student officer repeated his prior statements. As Chief Botieri was returning Mr. Carroll's cell phone, he noticed another incoming text message. When asked about the text message, Mr. Carroll said he was only receiving text messages from that individual and that he did not send any text messages. Chief Botieri, however, saw text messages that Mr. Carroll had sent about the firing range as he saw Mr. Carroll scroll up on his cell phone, thereby contradicting Mr. Carroll's statement that he had not sent anyone text messages about the firing range. (Testimony of Chief Botieri; Exhibits 12, 14)

8. Chief Botieri contacted the Plymouth Police Academy Director, John DeGutis, and informed him about the situation. When Director DeGutis arrived on site, he and Chief Botieri questioned Mr. Carroll in Director DeGutis' cruiser. During this discussion, Director DeGutis asked Mr. Carroll if he had been untruthful to Chief Botieri and Mr. Carroll responded that he had been untruthful. (Testimony of Chief Botieri, Exhibit 14)
9. Mr. Carroll explained to Chief Botieri and Director DeGutis that he told the other student officer that several student officers failed at the firing range, not eight (8) students. The discrepancy in the number of students who failed at the firing range is the reason Mr. Carroll denied reporting that student officers had so failed. (Testimony of Chief Botieri, Exhibit 12)
10. Because of this incident involving Mr. Carroll and his cell phone, several student officers, including Mr. Carroll, were instructed to write reports, summarizing what happened. (Exhibits 8-13)
11. Unauthorized use of a cell phone is considered a Class III offense while untruthfulness is considered a Class I offense. Most student officers will graduate the Academy if they receive a Class II or III offense. Class I offenses are the most serious. (Testimony of Chief Botieri; Exhibits 17-18)
12. On March 26, 2012, Mr. Carroll was dismissed from the Academy for untruthfulness. (Exhibit 15)
13. On March 27, 2012, an Academy Level Administrative Review of the decision to dismiss Mr. Carroll took place. This hearing was attended by current Stoneham Chief of Police, Chief McIntyre; former Stoneham Chief of Police Richard Bongiorno, and a Lieutenant of the Stoneham Police Department ("Department"). Former Chief Bongiorno was

supportive of Mr. Carroll and said that if he was allowed to continue, he would be disciplined within the Department. (Testimony of Chief McIntyre; Exhibit 16)

14. At the March 27th hearing, Chief Botieri asked Mr. Carroll whether he remembered being in formation at the Academy and the student officers being asked, “Is there anyone here who does not remember that Student Officer Kerr was the only one that could use a phone?” All twenty-six (26) student officers, including Mr. Carroll, raised their hands in acknowledgement that Student Officer Kerr was the one allowed to have a cell phone. Mr. Carroll said he did not remember hearing this question and said he must not have been present. In response, Chief Botieri called the squad leader into the hearing room, who stated that Mr. Carroll was in formation when the question was asked and that there could have been no confusion about the directive concerning cell phones. Mr. Carroll then admitted that he was in formation at that time. (Testimony of Chief Botieri; Exhibit 6)
15. At the conclusion of the Academy Level Administrative Review, Director DeGutis upheld his prior decision to dismiss Mr. Carroll from the Academy. In a March 27, 2012 letter to Marylou Powers, Director of Training, Director DeGutis states, “Student Officer Carroll was given the opportunity to answer questions posed to him by Sr. Staff and the Stoneham Police Department about his untruthfulness. During this process he failed to persuade me to overturn my decision to separate him from this Police Academy. Therefore [sic] I am upholding my decision to separate.” (Exhibit 16)
16. On March 29, 2012, as a result of the Academy Level Administrative Review and his failure to complete the required training, Mr. Carroll was terminated from the Department. (Exhibit 21)

17. Mr. Carroll appealed the Academy Level Administrative Review decision to the Municipal Police Training Committee (“MPTC”). The MPTC hearing took place on May 2, 2012 with Mr. Carroll and Attorney Tourkantonis present. After considering the documents submitted and the testimony from Director DeGutis, Chief Botieri, Senior Staff Instructor Mota, Captain Rogers, Mr. Carroll, and his parents, the MPTC Standards Subcommittee voted unanimously to uphold the separation of Mr. Carroll from the Plymouth Police Academy. This dismissal, however, does not preclude him from applying and attending another police academy in the future. (Exhibit 20A)
18. On September 24, 2012, the Respondent requested a Certification of police candidates from the State’s Human Resources Division (“HRD”) in order to fill two vacancies at the Respondent’s Police Department.<sup>4</sup> (Exhibits 1, 2A)
19. In a letter dated September 24, 2012, the Appointing Authority informed Mr. Carroll of its decision to ask HRD to remove his name from the Stoneham Police Officer candidate Certification pursuant to PAR.09<sup>5</sup> due to his prior dismissal from the Plymouth Police Academy because of a disciplinary issue. The September 24, 2012 letter was signed by Mr. Ragucci. (Exhibit 3)
20. Mr. Carroll filed the instant appeal with the Commission on November 3, 2012 because of the Respondent’s decision to ask HRD to remove his name from the Certification, pursuant to PAR.09. (Exhibit 5)

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<sup>4</sup> This appears to be a Certification for two more positions, also from the 2011 examination. *See* note 2, *supra*.

<sup>5</sup> A PAR.09 refers to Section 09(2) of the Personnel Administration Rules stating, “If an appointing authority concludes the appointment of a person whose name has been certified to it would be detrimental to the public interest, it may submit to the administrator a written statement giving in detail the specific reasons substantiating such a conclusion. The administrator shall review each such statement, and if he agrees, he shall remove the name of such person from the certification and shall not again certify the name of such person to such appointing authority for appointment to such position. For the purposes of this section, ‘appointments’ shall include promotions.”



21. On November 7, 2012, HRD issued Certification No. 00291 to the Respondent, on which Mr. Carroll's name is ranked 15<sup>th</sup> tied with one other candidate. (Exhibits 1, 2A)
22. On November 20, 2012, a prehearing conference was held at the Commission and was attended by Mr. Carroll and Attorney Feeley, who was representing the Respondent. (Exhibit 5)
23. During the prehearing conference, Mr. Carroll, under his breath, called Attorney Feeley a vulgar name. After the prehearing conference, Attorney Feeley, Mr. Carroll, and Mr. Carroll's parents all got in the same elevator leaving the Commission. While on the elevator, Mr. Carroll confronted Attorney Feeley, with whom he was visibly angry, and used expletives to convey his anger. When the elevator reached the first (1st) floor, Mr. Carroll's father pulled Attorney Feeley aside and asked him not to report to the Appointing Authority what just happened. Attorney Feeley explained that he has an obligation to the Appointing Authority, his client, to report it. (Testimony of Attorney Feeley and Mr. Carroll)
24. On November 29, 2012, the Commission issued an "Order of Dismissal Effective May 31, 2013." The Order states in relevant part,
- "Consistent with the Commission's conclusion in Radochia [v Somerville], G1-11-145], the decision to *remove* an individual from current and future certifications (for the life of the eligible list in question) via PAR.09 shall be made by HRD (emphasis in original) and shall not be delegated to the Appointing Authority. As such, Mr. Carroll's name remains on Certification No. 00291 . . . . In the event that Mr. Carroll is bypassed for appointment by an individual ranked lower than him on Certification No. 00291, the Commission will accept and allow a Motion to Revoke this Order of Dismissal seeking to reinstate the Appellant's appeal under docket number G1-12-298 for further consideration of that appeal." (Exhibit 5)
25. On August 8, 2013, Mr. Ragucci sent Mr. Carroll a detailed letter, stating that Mr. Carroll was being bypassed for employment with the Stoneham Police Department and

explaining why the two individuals below Mr. Carroll on the Certification were hired instead of him. The letter explains that Mr. Carroll was bypassed because of his “separation from the Plymouth Police Academy for untruthfulness, [his] admissions in the Academy Level Administrative Review that [he] lied, and [his] actions toward a representative of the Town of Stoneham.” (Exhibit 6). The letter states further that Mr. Carroll provided an incomplete employment application in that he did not submit a copy of his high school diploma or transcript from Middlesex Community College. Even though he has applied to the Department before and provided these documents, each application needs to include the necessary documents. This alone, however, is not a reason to bypass Mr. Carroll. (Testimony of Chief McIntyre; Exhibit 6) The letter also states that the Respondent was unable to complete part of Mr. Carroll’s background investigation because none of the three (3) persons he listed as references returned the investigating sergeant’s calls. Finally, the letter states that Mr. Carroll, like all candidates, signed truthfulness statement as part of their employment application, which states, “Any statements or omissions, either written or verbal, given by an applicant, which prove to be false or misleading, will result in the applicant being disqualified from consideration and/or termination from employment with the Stoneham Police Department[.]” and that the candidates were reminded of their truthfulness obligation during their employment interviews. (Exhibit 6)

26. By letter from Mr. Carroll to the Commission, dated September 23, 2013, Mr. Carroll informed the Commission that he had been bypassed by the Respondent by letter dated August 8, 2013. Pursuant to the Commission’s Dismissal order issued previously, this appeal was reinstated.

## DISCUSSION

### *Applicable Law*

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm’n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Comm’rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971) (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. *See* City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 189 (2010). “In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” *Id.* at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). Further, “[t]he commission does not act without regard to the previous decision of the appointing authority, but rather decides whether 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.” *Id.* at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification”

shown. Beverly at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone as a new... officer than in disciplining an existing tenured one.” See City of Attleboro v. Mass. Civil Serv. Comm’n, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly at 191. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Id. (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)).

The Commission is also mindful of the standard of conduct expected of officers of the law. “An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Serv. Comm’n, 38 Mass. App. Ct. 473, 474 (1995). “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

#### *Analysis*

The Appointing Authority has established, by a preponderance of the evidence, that it had reasonable justification to bypass Mr. Carroll. Mr. Carroll, as a student officer at the Plymouth Police Academy, was repeatedly untruthful to Chief Botieri as well as to his fellow student officer. Mr. Carroll was asked whether or not he had a cell phone on him and he denied it until Chief Botieri asked him again. Mr. Carroll also denied that he told another student officer that student officers had failed at the firing range that day but Mr. Carroll later admitted that he did in fact tell the other student officer this information. After Chief Botieri took Mr. Carroll’s phone,

he noticed other incoming text messages on it. Mr. Carroll denied sending text messages to the people who texted him but he later admitted, in the report he wrote summarizing the incident, that this was also not true. Furthermore, at the Academy Level Administrative Review hearing, Mr. Carroll denied hearing the directive concerning cell phones, stating that he was not there when the directive was given. When a witness was called who reported that Mr. Carroll was indeed present when this directive was given, Mr. Carroll admitted that he was present when the cell phone directive was given.

Mr. Carroll displayed a pattern of untruthfulness stemming from the March 16, 2012 incident at the Academy. At the Commission's hearing, Mr. Carroll acknowledged that he was untruthful. Truthfulness is a crucial trait for police officer and police officer candidates. Indeed, Mr. Carroll was aware of this, at least when he was a police officer candidate, as he signed a truthfulness acknowledgment, stating clearly the importance of truthfulness, when he applied to become a Stoneham Police Officer. The truthfulness acknowledgement explains that if a candidate or police officer is untruthful, it will result in the candidate or police officer being dismissed. Because Mr. Carroll displayed a pattern of untruthfulness, culminating in his dismissal from the Academy, the Appointing Authority had sound and sufficient reasons to bypass Mr. Carroll and it was in their discretion to do so. Mr. Carroll's seriously inappropriate behavior towards Attorney Feeley, who was representing the Appointing Authority at a November 20, 2013 prehearing conference, does not help Mr. Carroll.<sup>6</sup>

Mr. Carroll does not refute that what he did was wrong at the Academy. He admitted at the Commission hearing that he was untruthful. Although he may now regret his actions, they constitute sound and sufficient reasons to bypass Mr. Carroll. It is within the Appointing

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<sup>6</sup> The Respondent was represented at the Commission hearing by Attorney Brown, who is Attorney Feeley's law partner.

Authority's discretion to determine that he displayed a concerning pattern of untruthfulness that calls into question his credibility and integrity to be a police officer. His behavior at the November 20, 2013 prehearing conference only provided further justification for the Appointing Authority's decision.

### Conclusion

For the reasons stated herein, the Appointing Authority had reasonable justification to bypass Mr. Carroll. Therefore, Mr. Carroll's appeal filed under Docket No. G1-12-298 is hereby *denied*.

Civil Service Commission

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Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on September 4, 2014.

A true record. Attest:

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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:

Arthur C. Tourkantonis, Esq. (for Appellant)  
Daniel C. Brown, Esq. (for Respondent)  
Ernest Law, Esq. (HRD)