

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place – Room 503
Boston, MA 02108
617-979-1900

LUIS E. COTTO,
Appellant

v.

G1-22-020

CITY OF TAUNTON,
Respondent

Appearance for Appellant:

Luis E. Cotto, *Pro Se*

Appearance for Respondent:

Thomas P. Gay, Jr., Esq.
Special Assistant City Solicitor
City of Taunton
City Hall – 15 Summer Street
Taunton, MA 02780

Commissioner:

Paul M. Stein

Summary of Decision

The Commission denied the bypass appeal of a candidate for appointment to the position of municipal police officer whose recent pattern of poor judgment in the three years preceding the bypass, including an OUI and negligent operation of motor vehicle while uninsured, reasonably justified his bypass. The Commission rejected the City’s other reason for bypass, concluding that its police department was not justified in bypassing the Appellant based on a new local test to predict whether the Appellant would meet the now front-loaded MPTC requirements prior to entrance in a police academy. Finally, the Commission identified portions of the hiring process that must be corrected, including the need to first complete all portions of a non-medical background investigation prior to issuing a conditional offer of employment, which triggers a medical and psychological evaluation.

DECISION

On February 8, 2022, the Appellant, Luis E. Cotto, acting pursuant to G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from the decision of the Municipal Council of the City of Taunton (Taunton), the Appointing Authority, revoking the conditional offer made to the Appellant and bypassing him for original appointment to the position of full-time

police officer in the Taunton Police Department (TPD).¹ The Commission held a remote pre-hearing via Webex videoconference on March 22, 2022 and a full hearing at the UMass School of Law in Dartmouth on August 26, 2022, which was digitally recorded.² The Respondent filed a Proposed Decision. For the reasons set forth below, Mr. Cotto's appeal is denied.

FINDINGS OF FACT

Fourteen (14) exhibits were introduced into evidence (Resp. Exhs. 1 through 14). Based on the documents submitted and the testimony of the following witnesses:

Called by Taunton:

- TPD Chief of Police Edward Walsh
- TPD Detective Peter MacDougall

Called by the Appellant:

- Luis E. Cotto, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes the following facts:

1. The Appellant, Luis E. Cotto, is a life-long Taunton resident. He currently lives with his significant other and his three children. Soon after graduation from the local regional technical high school in 2012, he joined the United States Army, serving on active duty as a Military Police

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 (formal rules), apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

² A copy of the digital recording was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

Officer until November 2018, attaining the rank of Sergeant. (*Resp.Exhs.8, 11 & 12; Testimony of Appellant*)

2. The Appellant works as a Correctional Officer for a county sheriff's office, working the 11:00 pm to 7:00 am shift. He was previously employed as a security guard at a Department of Youth Services (DYS) facility. (*Resp.Exh.8*)

3. The Appellant holds an active License to Carry (LTC) issued by the TPD on March 9, 2021. (*Resp.Exh.8*)

4. The Appellant took and passed the entry-level civil service examination for municipal police officer administered by the Massachusetts Human Resources Division (HRD) on June 24, 2021. His name was placed on the eligible list for municipal police officer established on September 1, 2021. (*Stipulated Facts; Administrative Notice [HRD letter dated to Commission dated March 18, 2022]*)

5. On September 8, 2021, HRD issued certification #08077 for original appointment of five permanent TPD police officers. The Appellant's name appeared in 7th place, tied with one other veteran. (*Stipulated Facts; Administrative Notice [HRD letter dated to Commission dated March 18, 2022]*)

6. By letter dated October 13, 2021, Taunton offered the Appellant a permanent full-time position as a TPD police officer, subject to a number of conditions including:

- Completion of a background investigation with no issues or derogatory³ information that would question fitness to be a Taunton Police Officer.
- Passing a Command Staff and Municipal Council employment interview.
- Passing the Human Resources Division Initial Hiring Physical Examination.
- Passing a psychological pre-screening.
- Passing the Human Resources Division's entry Physical Abilities Test.

³ As discussed in more detail below, non-medical background investigations must be completed *prior* to the issuance of a conditional offer of employment.

- Successful completion of a Massachusetts Police Training Committee (MPTC) approved Municipal Police Officer course or approved equivalent as well as any prerequisites to include departmental and MPTC entrance physical fitness tests.
- Completion of Taunton Police Department Field Training Program.
- Police Officer Standards and Training Commission (POSTC) certification.
- Any other requirements identified by the Chief of Police.

(Resp.Exh.9)

7. TPD Detective Peter MacDougall was assigned to complete a background investigation on the Appellant. He prepared a detailed “Background Investigation Summary”, containing the results of his review of the Appellant’s military history, driver’s history, criminal history, a home visit, interviews with the Appellant’s current and former domestic partners and social media accounts. *(Resp.Exh.8; Testimony of MacDougall)*

8. The background investigation revealed that the Appellant had committed a number of motor vehicle infractions, and been the subject of a criminal charge, while on active military duty:

- 2/15/2015 – Speeding in TN
- 5/1/2015 – Reckless Driving in KY
- 6/13/2015 – Arrested for Public Intoxication/Underage Drinking in TN
- 10/2/2016 – Speeding in TN

(Resp.Exhs.1 through 3, 8 & 14)

9. In addition, the background investigation revealed two more recent motor vehicle infractions:

- On November 22, 2018, a few days after his release from active duty, the Appellant was arrested in Bridgewater MA and charged with OUI, Negligent Operation of Motor Vehicle, Failure to Stop/Yield, and Marked Lane Violation. The Appellant was observed crossing a double yellow line on several occasions, swerving from side to side, nearly striking a

parked vehicle, and stopping his vehicle in the center of an intersection. The Appellant failed three field sobriety tests, admitting to the responding officer that he “shouldn’t have been driving.” After being taken to the police station, he refused a breathalyzer test, and his license was suspended. (*Resp.Exhs.4, 6 through 8 & 14*)

- On July 8, 2021, the Appellant was involved in a motor vehicle crash in Raynham, MA when he attempted a left-hand turn, failing to yield the right of way to a passing vehicle, causing front-end damage to the Appellant’s vehicle and extensive left-side damage to the other vehicle. Upon follow-up investigation, the responding officer determined that the Appellant’s automobile insurance had lapsed in March 2021 and he issued the Appellant a citation for Failure to Yield and Operating an Uninsured Motor Vehicle. (*Resp.Exhs.5 through 8 & 14*)

10. On August 26, 2021, the Appellant appeared for a recorded “Command Staff and Municipal Council employment interview” before a panel of TPD officers. After completing a set of pre-determined questions, the panel asked the Appellant specific questions about the incidents on his driving history and criminal record. The Appellant acknowledged that the records of his arrest for OUI in 2018 and the 2021 citations for driving without insurance and causing a collision with another motorist were substantially accurate. He claimed that these infractions taught him a lesson and he was now a different person. (*Resp.Exh.14*)

11. The Appellant passed a medical examination and psychological screening. He failed one component of a new test administered by the TPD to gauge whether the Appellant would pass the now-frontloaded fitness standards required of the Massachusetts Police Training Committee (MPTC) prior to entrance into a Police Academy. (*Resp.Exh.12*)

12. By letter dated December 8, 2021, the Appellant received notice that the Taunton City Council had “motioned to rescind” his conditional offer of employment. No reasons for that action were provided to the Appellant. (*Resp.Exh. 10*)

13. On February 8, 2022, the Appellant brought this appeal to the Commission. (*Claim of Appeal; Stipulated Facts*)

14. By letter dated February 18, 2022, the Appellant received notice that set forth the reasons for his non-selection:

You presented a challenge [for] the review committee as you had a generally favorable military term of service and positive review from your current employer, the [name redacted] County Sheriff’s Office. Two major issues arose during the hiring process that the Command Staff felt impacted your candidacy.

1. You were released from active duty on November 18, 2018. Four days later on November 22, 2018, you were arrested for operating under the influence of alcohol in Bridgewater. This was three years ago and it showed a lack of judgment. This was not your first motor vehicle violation nor your first alcohol related arrest After review of the various charges, as well as the recent nature of the OUI and operating uninsured, . . . there is not enough information and time separation to show that these issues do not still exist and that you would be able to successfully be a police officer.
2. One of the conditions of employment is successful completion of a physical fitness test. Prior to entrance to the police academy, all candidates must successfully pass a pre-enrollment test. This department conducts a test to assess candidates for the MPTC. The department will work with candidates and give them several opportunities to take this test. You were given the opportunity and failed the sit-up portion of the test. You did not avail yourself of assistance in this matter and did not show up for the scheduled retest. . . .

(*Resp.Exh.12*)

15. Four candidates ranked below the Appellant were appointed and entered into the MPTC police academy. (*Resp.Exh.12*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes,

and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996).

Original appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G. L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 461, 474-78 (2019); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law’”. Brackett v. Civil Service Comm’n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See

also Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”).

The governing statute, G.L. c. 31, gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority's action” and it is not necessary that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission “. . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*,” then the occasion is appropriate for intervention by the commission.” Id. (*emphasis added*). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

ANALYSIS

In several respects, Taunton’s hiring process for original appointment of police officers to the TPD was flawed. Taunton should not have made a conditional offer of employment and submitted the Appellant to a medical examination and psychological screening before having completed its background investigation. Nor should the Appellant have been disqualified because he could not then meet one of the physical endurance tests that he would be required to pass at a later date in order to be admitted to the police academy. However, as these flaws were unrelated to another separately documented reason (i.e., a pattern of prior and recent criminal and motor vehicle violations) that does provide sufficient reasonable justification to conclude that the Appellant was

not then a suitable candidate for appointment, the Appellant's bypass must be upheld.⁴

First, the Appellant's record of criminal and motor vehicle infractions, alone, provides reasonable justification for Taunton's decision to bypass him. Public safety officers are vested with considerable power and discretion and must be held to a high standard of conduct. See, e.g., Falmouth v. Civil Service Comm'n., 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm'n., 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997); Police Comm'r v. Civil Service Comm'n., 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986).

The blemishes on the Appellant's record do not reflect one isolated instance or "youthful" indiscretion. Rather, they show a pattern of problematic behavior and questionable judgment as recently as the three years immediately preceding his application for appointment. Taunton took note of the many positive attributes that the Appellant possessed but, after weighing those positives against the negatives, concluded that the pattern of poor judgment, especially the 2018 OUI and the July 2021 negligent motor operation of an uninsured motor vehicle, was too serious and too recent to be excused. That conclusion is supported by a preponderance of the evidence and is reasonable justification to bypass him.⁵

⁴ The Appellant's appeal was filed 10 days before he received Taunton's February 18, 2022 letter stating that he had been bypassed and setting forth the reasons therefor. Neither party raised an objection to the Commission deciding this appeal based on the reasons stated in Taunton's letter dated February 18, 2022.

⁵ The Appellant argued that Taunton was not permitted to consider a first OUI offense as a reason to bypass him because it violated his rights as a veteran under the Brave Act, G.L. c. 276A, § 4, as amended by the Acts of 2022, c. 218, § 35. I have reviewed the statute and find that, for numerous reasons, the Appellant's situation does meet the requirements to be covered by the statute and, even if the statute applied, nothing in the law precludes Taunton from considering the Appellant's OUI as a reason to bypass him for appointment under Massachusetts civil service law.

Second, Massachusetts and federal law prescribe that a firm “bona fide” conditional offer based on an evaluation of “all relevant non-medical information” is necessary before a candidate can undergo medical or psychological screening. See G.L. c. 151B, § 4(16); Americans With Disabilities Act, 42 U.S.C. §§12112(d)(2)-(3); Massachusetts Commission Against Discrimination, “Guidelines; Employment Discrimination on the Basis of Handicap - Chapter 151B”, § IV & § V, <http://www.mass.gov/mcad/resources/employers-businesses/emp-guidelineshandicap-gen.html> (MCAD Guidelines).⁶ See also Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 682 n.5 (2012); O’Neal v. City of New Albany, 293 F.3d 998, 1007-1009 (7th Cir. 2002); Leonel v. American Airlines, Inc., 400 F.3d 702, 708 (9th Cir. 2005); Downs v. Massachusetts Bay Transp. Auth., 13 F.Supp.2d 130, 137-39 (D. Mass. 1998), citing, “ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations” (EEOC Notice 915.002 October 10, 1995).

As explained in Ortiz v. Department of Correction, 33 MCSR 19 (2020): “The Commission has noted its concern with the practice to extend a ‘conditional offer of employment’ prior to completion of the background investigation, as that procedure makes problematic a subsequent disqualification for any nonmedical reasons.” In Nelson N v. Department of Correction, 35 MCSR xxx (2022) “[T]he (non-medical) background investigation and the medical / psychological evaluations were, once again, being conducted simultaneously” and the Commission reiterated: “Adherence to MCAD guidelines ensures that: a) employers do not gain access to a candidate’s sensitive medical information; and b) candidates are not subjected to inherently invasive medical

⁶ The MCAD Guidelines provide as follows: “An employer must make a conditional job offer before requiring a medical examination (and/or making inquiries). A conditional job offer is an offer of employment to a job applicant which is contingent upon the satisfactory results of a medical examination (and/or inquiry). Prior to making a conditional job offer, the employer should have evaluated all relevant non-medical information.” MCAD Guidelines at V(B)

and psychological evaluations, unless necessary. Put another way, if a candidate is going to be rejected for employment regardless of the outcome of the medical and psychological evaluations, then the candidate should not be required to undergo those evaluations.” See also Jane A. Doe v. Department of Correction, 35 MCSR ____ (2022); Rogers v. Boston Police Dep’t, 33 MCSR 244 (2020); Matoofi v. Department of Correction, 32 MCSR 285 (2019); Maldonado v. City of Lawrence, 31 MCSR 212 (2018); Duval v. Somerville, 30 MCSR 447 (2017); Morley v. Boston Police Dep’t, 29 MCSR 456 (2016); Michaud v. Town of Saugus, 28 MCSR 534 (2015).

Procedural error, however, does not require overturning an appeal in every case. See Sherman v. Town of Randolph, 472 Mass. 802, 813 (2015) (bypass may be upheld even where the appointing authority uses flawed procedures for selecting candidates, where the appointing authority has another independent reasonable justification on the merits for deciding to bypass a candidate, and the flaws in the selection process did not influence the decision on those other grounds). In the present appeal, the Appellant successfully passed the medical examination and psychological screening and there is no evidence that the procedural flaw in front-loading those examinations is intertwined with another, unrelated reason provided for Taunton’s bypass decision—namely, the Appellant’s documented record of problematic criminal and motor vehicle infractions. In the future, however, Taunton should take care that it conforms to the requirements of Massachusetts and federal discrimination laws and ensure that only candidates who have passed the evaluation of their suitability for “non-medical” reasons are required to submit to medical examinations and psychological screening.

Third, I have concern with Taunton’s requirement that a candidate for appointment as a municipal police officer must demonstrate to the appointing authority his or her ability to pass both the traditional HRD mandated Physical Abilities Test that has long been an established condition

for appointment and the more rigorous pre-admission physical performance test adopted in 2019 by the MPTC that the candidate will later be required to pass as a pre-requisite for entering a police academy.

I understand that an appointing authority invests considerable time and resources when it selects candidates to serve as police officers. An appointing authority has a legitimate reason to expect that a selected candidate's physical condition will not present a substantial risk that a candidate will not be admitted to, or be able to complete, the police academy.

Prior to 2019, however, police academy cadets were tested for physical performance throughout their training and only required to meet the MPTC performance standards as one condition for completing the academy; the introduction of a pre-admission performance requirement was met with considerable criticism from some members of the civil service community and this Commission. See Carnell v. Boston Police Dep't, 33 MCSR 68 (2020) (allowing bypass appeals of appellants who "came frustratingly close to meeting the new MPTC standards. . . . Based purely on commonsense, it is highly likely that the Academy's fitness training program, which begins on the first day of the Academy, would have allowed one Appellant to improve his time on the 300-meter run by at least 2.2 seconds or for the other Appellants to improve their performances (i.e. – 2 or 3 more sit-ups in a one minute test)); Cartwright v. City of Brockton, 32 MCSR 375 (2019) (bypass of police officers candidates overturned because they were unfairly required to submit to a pre-admission physical performance test without adequate notice and time to prepare).

In this case, the Appellant was able to meet all of the pre-admission physical performance requirements, save that he came up short in the number of sit-ups he could complete in a one-minute test. Taunton did not stress this reason as the basis for its bypass decision, and the evidence

does not support a conclusion that the Appellant's performance was so inadequate that he would unlikely be able to improve upon sufficiently that it could be used as a reasonable justification to bypass him. In short, this is not a valid reason to bypass the Appellant for appointment.

CONCLUSION

For all of the above stated reasons, the appeal of Luis E. Cotto, under Docket No. G1-22-020, is *denied*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein & Tivnan, Commissioners) on March 9, 2023.

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)(1), 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Luis E. Cotto (Appellant)

Thomas P. Gay, Jr., Esq. (for Respondent)