

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

PETER G. CYRUS,
Appellant

v.

CASE NO: G1-08-107

TOWN OF TEWKSBURY,
Respondent

DECISION

The Appellant, Peter G. Cyrus, filed this appeal to the Civil Service Commission (Commission) pursuant to G.L.c.31,§2(b), challenging the approval of the Massachusetts Human Resources Division (HRD) of reasons of the Town of Tewksbury (Tewksbury), as Appointing Authority, for bypassing him for appointment to the position of permanent intermittent police officer. Pursuant to the Commission rules, 801 CMR 1.00(11)(c), the Commission issued a Notice of Hearing dated June 11, 2009 referring the appeal to the Division of Administrative Law Appeals (DALA) for evidentiary hearing and preparation of a tentative decision. On June 8, 2009, the Commission received the recommended tentative decision of the DALA Administrative Magistrate Kenneth J. Forton, Esq. (dated June 5, 2009), copy attached.

On July 1, 2009, the Commission allowed the Appellant's request for an additional thirty (30) days in order to file his comments. The Commission received the comments of the Appellant on August 6, 2009. On August 21, 2009, the Commission allowed the Respondent's request for an additional twenty (20) days in order to file its comments. Those comments were received on September 17, 2009.

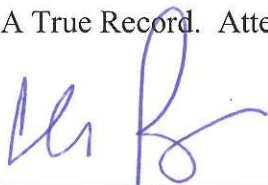
After careful review and consideration, on October 29, 2009, acting pursuant to 801 CMR 1.00(11)(c)(2), the Commission voted at an executive session to acknowledge receipt of the DALA tentative decision. A majority of the Commission voted to affirm and adopt the tentative decision only in part, for the reasons set forth in the explanation attached, and to order that the Appellant's appeal be *allowed*.

Relief to Granted to the Appellant

Pursuant to Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts of 1993, the Commission directs HRD to place the name of the Appellant, Peter Cyrus at the top of the current (and any future) certification for the position of permanent intermittent police officer in the Town of Tewksbury until such time as he has received at least one consideration for the position.. Tewksbury may not automatically disqualify the Appellant for consideration solely on for the same reasons for which he was bypassed in this appeal.

By 3-2 vote of the Civil Service Commission (Bowman [NO], Chairman; Henderson [AYE], Marquis [NO], Stein [AYE] and Taylor [AYE], Commissioners) on October 29, 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)(l), 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:

John P. Roache, Esq. (for Appellant)

Amy Leuchte, Esq. (for Appointing Authority)

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
98 NORTH WASHINGTON STREET, 4TH FLOOR
BOSTON, MA 02114

SHELLY L. TAYLOR
Chief Administrative Magistrate

Tel: 617-727-7060
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June ⁶/₇, 2009

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Peter G. Cyrus v. Town of Tewksbury
DALA Docket No. CS-08-539

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,


Shelly Taylor
Chief Administrative Magistrate

SLT/das

Enclosure

cc: John P. Roache, Esq.
Amy Leuchte, Esq.

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CIVIL SERVICE COMMISSION

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Peter G. Cyrus,
Petitioner

v.

Docket No. G1-08-107
DALA No. CS-08-539

Town of Tewksbury,
Respondent

Appearance for Petitioner:

John P. Roache, Esq.
Roache & Associates, PC
66 Long Wharf
Boston, MA 02110

Appearance for Respondent:

Amy Leuchte, Esq.
Labor Counsel, Town of Tewksbury
175 Derby Street
Hingham, MA 02043

Administrative Magistrate:

Kenneth J. Forton, Esq.

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SUMMARY OF RECOMMENDED DECISION

The decision of the Town of Tewksbury to bypass the Appellant for a permanent intermittent police officer position was affirmed where the Appellant was terminated by his last employer for absenteeism, his ex-wife attempted to file a restraining order against him, he has been charged with two crimes, and he was found responsible for seven speeding violations. There was no evidence that the Town was biased or engaged in favoritism when selecting candidates or bypassing the Appellant.

RECOMMENDED DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Peter G. Cyrus, appeals the decision of the Respondent, Town of Tewksbury, to bypass him for an original appointment to the

position of permanent intermittent police officer. The appeal was timely filed. A hearing was held over the course of six different days in 2008 (September 15, September 25, September 26, September 30, October 6, October 31), at the office of the Division of Administrative Law Appeals, 98 North Washington Street, Boston. There are seventeen (17) cassette tapes of the hearing.

I admitted eighty-two (82) documents into evidence. (Exs. 1-82.) I also marked six documents for identification. (A, B, C, F, H, I.) The Appellant testified on his own behalf. Three members of the Massachusetts Air National Guard testified on the Appellant's behalf: Lt. Col. David McNulty, Major Kenneth Fergamo, and Sr. Master Sgt. Wing Ng. Three former Axsys Systems coworkers testified for the Appellant: Todd Baker, Daniel Reardon, and Russ Fiers. Three police officers of the Wilmington Police Department testified for the Appellant, as well: Detective Brian Stickney, Sgt. David Axelrod, and Sgt. David McHugh. The Respondent called six of its own witnesses, including Town Manager David Cressman, Chief of Police Alfred Donovan, Deputy Chief of Police Timothy Sheehan, Detective Andre Gonzalez, and Lieutenant Ryan Columbus. The Town also called Brian Strandberg, one of Mr. Cyrus's supervisors from Axsys Systems.

At the conclusion of the hearing, I agreed to keep the record open until December 15, 2008 to accept post-hearing briefs from the parties. The filing deadline was extended to December 22, 2008. Upon receipt of the parties' briefs, the record was closed.

FINDINGS OF FACT

Based upon the documents entered into evidence and the testimony of the witnesses, I make the following findings of fact:

1. On November 21, 2007, the Civil Service Commission issued Certification List # 271101 to the Town of Tewksbury. It contained the names of twenty-seven (27) applicants for eight permanent intermittent police officer positions. (Exs. 2, 3.)

2. The Appellant, Mr. Cyrus appeared sixth on the list, tied with Paul J. Nicosia who was listed seventh on the list. (Ex. 3.)

3. Persons on the list were notified by the Civil Service Commission that the list had been issued to the Town of Tewksbury and that they should go to Tewksbury Town Hall to sign the list if they would accept an appointment. Twenty-three (23) of the applicants, including Mr. Cyrus, signed the list. (Ex. 3.)

Town of Tewksbury Police Hiring Process

4. The Town of Tewksbury employs a Town Manager who is the Appointing Authority for the Town. Mr. David Cressman has been the Town Manager for more than twenty years. (Testimony Cressman.)

5. As the Appointing Authority, Mr. Cressman ultimately decides who to hire as police officers in the Town. Mr. Cressman has hired the Town's police officers for over twenty years. (Testimony Cressman.)

6. To aid his decision-making process, Mr. Cressman follows a standard hiring process. First, each candidate must submit an employment application answering questions covering address history, education, employment, military service, references, foreign travel, credit history, criminal history, relatives, and medical history. The application also requires the candidates to state in one hundred words why they want to be police officers. (Testimony Cressman; *see, e.g.*, Ex. 11.)

7. Next, a background check on each of the candidates is performed by a superior officer of the Tewksbury Police Department. The officers attempt to speak with three former employers, three personal references and three neighbors for each of the candidates. For each background interview, the officers must follow a standard written questionnaire. The officers are instructed to attempt to obtain personnel records from the candidates' former employers. The Town also obtains each candidate's driving record and CORI criminal history. (Testimony Cressman, Sheehan; *see, e.g.*, Exs. 12, 13, 14, 15.)

8. Before the background checks are complete, Mr. Cressman and the Police Chief interview the candidates. Through his years of hiring police officers, Mr. Cressman has developed a set of twenty standard open-ended questions that he may ask in each interview, including questions on the desire to be a police officer, preparation for the job, community involvement, decision-making ability, and dealing with difficult people. There are also six questions regarding specific policing situations, mostly based on prior incidents in the Town. Typically, Mr. Cressman does not ask each question every time that he interviews candidates for positions. Rather, before the interviews begin, he selects roughly a dozen of the questions to ask each candidate. Each candidate is allotted twenty minutes for the interview. (Testimony Cressman, Donovan, Ex. 64.)

9. To evaluate the candidates' performance on the interview, Mr. Cressman assigns a number score from one (1) to six (6) for each response based on model answers that he has developed over the years that he has been hiring police officers for the Town. (Testimony Cressman; *see, e.g.*, Ex. 67.)

10. Recently the Town has begun to include a writing sample as part of its police officer hiring process. Each candidate is given thirty minutes to write an essay of

three hundred to four hundred words. The results of the essay are used to judge the candidates' writing skills, including punctuation, spelling, and sentence and paragraph structure. At the request of Chief Donovan, Mr. Cressman began to require the essay as part of the interview process because it came to Chief Donovan's attention that some of the Tewksbury police officers were deficient in their writing skills. (Testimony Cressman, Donovan, Sheehan; Ex. 68.)

11. After the interviews and essays are completed, Mr. Cressman receives the results of the background checks, as well as hiring recommendations, from the Police Chief. (Testimony Cressman, Donovan, Sheehan; Ex. 11.)

12. Mr. Cressman gives great weight to the results of the interview and writing sample in choosing candidates for police officer positions. He gives great weight, as well, to a candidate's record of community service, especially in Tewksbury. He uses the results of the background checks to supplement the information he receives in the interview process. He also uses the background checks to rule certain candidates out if a check produces any "red flags," like a felony conviction. (Testimony Cressman.)

Police Chief Donovan Was Excluded from the Instant Hiring Process

13. For the certification list that is the subject of this appeal, however, Police Chief Alfred Donovan, did not play his usual role in the hiring process because his son, Michael Donovan, was a candidate. (Testimony Cressman, Donovan.)

14. Michael Donovan's application to the Tewksbury Police Department was a contentious issue for Mr. Cressman and Chief Donovan. Mr. Cressman was concerned that any decision to hire or not hire Michael Donovan would raise at least the appearance of bias or favoritism. Mr. Cressman even asked Chief Donovan to encourage his son to

apply to a different jurisdiction for a police officer position. (Testimony Cressman, Donovan.)

15. Ultimately, Michael Donovan took the Civil Service exam for police officer, and his name appeared on Certification List # 271101. Mr. Cressman notified Chief Donovan that Donovan would be playing no part in the hiring decisions for Certification List # 271101 because the Chief's son was a candidate. Chief Donovan complied with Mr. Cressman's decision. (Testimony Cressman, Donovan, Sheehan.)

Hiring Process for Certification List # 271101

16. For Certification List # 271101, the Appointing Authority followed the Town's standard hiring process; however, Deputy Chief Timothy Sheehan played the role in the hiring process that would normally have been played by Chief Donovan. Deputy Chief Sheehan supervised the background checks and interviewed each of the candidates with Mr. Cressman. He also made the ultimate hiring recommendations to Mr. Cressman. (Testimony Cressman, Sheehan; Ex. 71.)

17. Mr. Cressman and Deputy Chief Sheehan interviewed fifteen candidates on January 4, 2008. Each candidate was asked the same questions as the others. Each of the candidates, including Mr. Cyrus, was allotted twenty minutes for the interview. Mr. Cyrus's actual interview took no more than twelve minutes, while the selected candidates' interviews lasted between eighteen and twenty-three minutes. Candidates could take as much or as little time as they wanted to answer each question. Mr. Cyrus gave short answer to the questions he was asked, while the selected candidates gave longer answers. (Testimony Cressman, Sheehan, Cyrus; Ex. 69.)

18. During the interviews, neither Mr. Cressman nor Deputy Chief Sheehan asked any questions regarding any applicant's employment application, but the

candidates were allowed to discuss any issues raised by their employment applications or any other issues the candidate wanted to bring to the Town's attention. Nor did Cressman and Sheehan ask any of the candidates about information found through the background checks because at the time of the interviews the background checks had not yet been completed. (Testimony Cressman, Sheehan, Cyrus.)

19. Following the standard practice, Cressman and Sheehan assigned a score, one (1) through six (6), to each answer provided by the candidates. The scores were derived by comparing the candidates' answers to model answers developed by Cressman and Sheehan. (Testimony Cressman, Sheehan; Ex. 70.)

20. At the conclusion of each of their interviews, the candidates were asked to complete the writing sample created by Deputy Chief Sheehan, who corrected the samples by judging them against a model answer that he had developed. Sheehan assigned the writing samples a score from one (1) to six (6). (Testimony Sheehan; Ex. 70.)

21. Deputy Chief Sheehan then tabulated the results of the interviews and the writing samples in a spreadsheet and ranked the candidates' performance. The candidates ranked in the following order: Russo, Donovan, Sitar, Miano, Paltrineri, Zarba, Nicosia and Pacini (tied), Ryser, Conley, Cyrus, Butler, Hickey, Newcomb, and Bain. Mr. Cyrus ranked eleventh out of the fifteen candidates. (Testimony Cressman, Sheehan; Ex. 70.)

Cyrus's Background Check

22. Deputy Chief Sheehan assigned Mr. Cyrus's background check to Lt. Ryan Columbus. Lt. Columbus has been a police officer for approximately ten years. He

received background investigation training at the Tewksbury Police Department.

(Testimony Sheehan, Columbus.)

23. Lt. Columbus followed the standard background check protocol established by the Department. For each of his assigned candidates, he spoke with three personal references, four neighbors and four former employers. (Testimony Columbus; Exs. 12, 13, 15.)

24. Mr. Cyrus's personal references and neighbors all gave positive references. (Testimony Columbus; Exs. 12, 13.)

25. Three of Mr. Cyrus's former employers gave positive references, but one employer, Axsys Systems, did not. (Testimony Columbus; Ex. 15.)

26. After completing his background check of Mr. Cyrus, Lt. Columbus wrote a brief memo to Deputy Chief Sheehan, stating two "points of interest" from the investigation: (1) "Interview with Ex-wife" and (2) "Employment history with Axsys Systems." (Testimony Columbus, Sheehan; Ex. 16.)

Cyrus's Axsys Systems Personnel Records

27. Lt. Columbus spoke with Axsys Systems's Human Resources Director, Jane Kruszkowski. She informed Lt. Columbus that Mr. Cyrus had been terminated, that he had a poor attendance record, and that he had a disciplinary record, evidence of which was included in Cyrus's personnel file. Ms. Kruszkowski stated that Mr. Cyrus is not eligible for re-hire with Axsys Systems. (Testimony Columbus; Exs. 15, 77.)

28. After some difficulty obtaining it, Lt. Columbus obtained a copy of Mr. Cyrus's personnel file. The file contained, among other things, a performance appraisal, two personnel memos written by Cyrus's supervisor, and a notice of termination. (Testimony Columbus; Exs. 74, 75, 76, 77.)

29. A review of the performance appraisal and memos raised several issues for Lt. Columbus. Cyrus had attendance issues, including not showing up for work and leaving work before the end of his shift without permission. Ultimately, Mr. Cyrus was terminated for failing to show up for work on three occasions after all of his time off had been exhausted and for leaving work early without informing a supervisor. (Testimony Strandberg, Cyrus; Ex. 77.)

30. During most of his tenure at Axsys Systems Mr. Cyrus was going through a contested divorce, which required him to make several court appearances. On several occasions Mr. Cyrus failed to show up for work, citing his divorce as the reason for his absence. (Testimony Strandberg, Cyrus.)

31. Additionally, Cyrus had several interpersonal problems with different co-workers. One personnel memo reported that Mr. Cyrus had been engaging in sexually offensive conversation with a woman coworker. Brian Strandberg, Mr. Cyrus's supervisor, noted in another memo that Cyrus was repeatedly mumbling the word "asshole" as Strandberg passed by and that Cyrus was making him feel uncomfortable. (Testimony Strandberg; Ex. 75, 76.)

32. Finally, Mr. Cyrus's last Axsys Systems performance appraisal was negative. Overall performance was rated "Needs Improvement." He received a "Needs Improvement" rating in Productivity, Reliability, Availability and Interpersonal Relationships categories. Deputy Chief Sheehan and Mr. Cressman weighed this evaluation heavily because the areas of performance where Cyrus was weakest are some of the most important performance areas for police officers. (Testimony Cressman, Sheehan; Ex. 74.)

33. His Axsys Systems supervisor commented on several deficiencies in Mr. Cyrus's performance. "Pete's schedule," his supervisor noted, "prohibits him from becoming a reliable member of the Stryker team. He is often unavailable when crisis [*sic*] arise. Pete needs to adjust his schedule to improve his reliability and prove his dependability to the Stryker team." He further noted, "[i]t is important for Pete to improve his communication with co-workers in order to maintain a more positive team environment." (Ex. 74.)

Lt. Columbus's Interview of Cyrus's Ex-Wife, J. C.

34. In his employment application, Mr. Cyrus was required to list all court actions, including divorce proceedings, to which he was a party. Accordingly, he listed his divorce from his first wife, J. C. (Ex. 11.)

35. It is the policy of the Town to interview ex-spouses of police officer candidates when conducting the background checks of the candidates. The Town follows this policy to determine how the candidates deal with personal conflicts and whether or not they can resolve their conflicts. (Testimony Cressman, Columbus.)

36. On January 18, 2008, Lt. Columbus went to the home of J. C. in Wilmington, Massachusetts to interview her as part of his background check of Mr.

Cyrus, after Ms. C. had not returned several telephone calls. Ms. C. appeared nervous and apprehensive about speaking with Lt. Columbus about Mr. Cyrus; she explained that she did not want to appear as though she was a scorned ex-wife. Upon being asked by Lt. Columbus what she thought about Mr. Cyrus becoming a police officer, C. said that she was scared at that prospect and that she fears Cyrus. She told a friend that if anything ever happened to her, it would be a story for the television show, "48 Hours." She thought Cyrus was a liar and that he had anger issues. She said

that he verbally abused her constantly and on one occasion violently grabbed her arm, pushed her head into a pillow and punched her in the back. She also said that Mr. Cyrus blamed her for his being terminated from his job at Axsys Systems. (Testimony Columbus; Ex. 81.)

37. Ms. C[REDACTED] also told Lt. Columbus that in 2001 she attempted to get a restraining order against Mr. Cyrus at the Wilmington Police Department but that she was prevented from filing an application because Cyrus had friends in the Department. Mr. Cyrus wanted to remove several guns and a gun safe from their former marital home, where Ms. C[REDACTED] was still residing, before the couple's divorce was finalized. C[REDACTED] said that this made her fearful that he was going to hurt her. (Testimony Columbus; Ex. 81.)

38. Lt. Columbus followed up on C[REDACTED]'s account by visiting the Wilmington Police Department and speaking with the Wilmington Police Department's Deputy Chief who pulled a police report from the gun safe incident. The report confirmed that C[REDACTED] sought a restraining order against Cyrus at the Wilmington Police Department on September 23, 2004. Sgt. David Axelrod interviewed C[REDACTED] and concluded that her complaint did not qualify for a restraining order and declined to assist her in filing one. (Testimony Columbus; Ex. 21.)

39. Sgt. Axelrod ultimately went to the C[REDACTED] household, removed the safe, and brought it and the guns back to the Wilmington Police Department so that Cyrus could pick them up at a later date. (Testimony Axelrod; Ex. 21.)

40. Lt. Columbus memorialized his conversation with Ms. C[REDACTED] and his research into her attempt to file a restraining order in a memo to Deputy Chief Sheehan,

dated January 18, 2008, which he included in the results of his background check.

(Testimony Columbus; Ex. 81.)

Cyrus's Driving History

41. Mr. Cyrus has been found responsible for seven (7) speeding violations, which occurred on September 22, 1988; August 14, 1988; May 19, 1988; April 3, 1987; January 29, 1987; April 14, 1986; and March 11, 1986. He was also stopped for speeding on November 13, 1991, but was found not responsible. (Exs. 18, 19.)

42. Mr. Cyrus has also been cited and found responsible for other moving violations, including improper passing, failure to use safety, driving to endanger, and illegal operation. (Exs. 18, 19.)

Cyrus's Criminal History

43. On July 31, 1986 Mr. Cyrus was arrested in Wilmington for being a minor transporting alcohol. After a hearing on August 31, 1986, he was found guilty and was required to pay a total of \$77.50 in fines and costs. (Ex. 20.)

44. On October 26, 1986 Mr. Cyrus was arrested in Tewksbury for malicious destruction of property worth one hundred dollars or less. On January 20, 1987 he admitted sufficient facts and the case was continued without a finding for six months. He was ordered to pay \$165.00 in restitution and fees. (Ex. 20.)

45. Lt. Columbus obtained copies of the docket sheets for both of Mr. Cyrus's criminal charges. (Testimony Columbus; Ex. 20.)

Selected Candidates' Driving Records

46. P█████ N█████ has been found responsible for six (6) speeding violations, which occurred on June 4, 1987; July 28, 1987; August 2, 1987; March 30, 1994; April 1, 1994; and December 2, 1994. (Ex. 38.)

47. Mr. N[REDACTED]'s license has been suspended eight times for either court defaults or failing to pay traffic fines. He has also been charged with multiple violations for operating with an expired inspection sticker, attaching plates, operating an unregistered and uninsured motor vehicle, illegal operation, bad check violations, and operating with improper equipment. (Ex. 38.)

48. M[REDACTED] D[REDACTED] has been found responsible for one (1) speeding violation, which occurred on March 12, 2008. His license has been suspended twice for failure to pay fines. (Ex. 28.)

49. A[REDACTED] P[REDACTED] has been found responsible for three (3) speeding violations, which occurred on June 22, 1991; October 27, 2001; and August 13, 1993. His license has been suspended at least three times, and he has failed to stop on three occasions. (Ex. 47.)

50. M[REDACTED] S[REDACTED] has been found responsible for one (1) speeding violation, which occurred on November 28, 2004. He has also been found responsible twice for operating without a valid inspection sticker and once for improper equipment. His license was suspended in 2006 for failure to pay a fine. (Ex. 60.)

Paul Nicosia's Criminal Record and Restraining Orders

51. Mr. N[REDACTED] admitted in his employment application that he was charged with assault with a dangerous weapon in 1986. He also noted that the charge was dismissed. (Testimony Columbus; Sheehan.)

52. On May 5, 1988, Mr. N[REDACTED] was charged with operation after revocation of registration. The court continued the case without a finding for approximately three months. He paid \$115.00 in fines and costs. (Ex. 38.)

53. On September 29, 1994, Mr. Nicosia was charged with operation after revocation of registration and operating an uninsured motor vehicle. The court continued the case without a finding for approximately three months. After he paid a \$30.00 fine and \$250.00 in costs, both charges were dismissed at the request of the Probation Department. (Ex. 38.)

54. On May 2, 1996, Mr. Nicosia was charged with operating an uninsured motor vehicle, operation after revocation of registration, attaching plates, and operating an unregistered motor vehicle. He was found responsible for the last charge and pled guilty to the rest. He paid a fine of \$500.00. (Ex. 38.)

55. On August 5, 1996, Mr. Nicosia was charged with operation after his license was suspended, operating a motor vehicle with defective equipment, and operating a motor vehicle with unnecessary noise. On the operation after suspension charge, the court continued the case without a finding for six months. He was found responsible on the remaining charges. However, all charges were dismissed at the request of the Probation Department after he paid \$135.00 in costs and assessments. (Ex. 38.)

56. Lt. Columbus obtained copies of the docket sheets for all of Mr. Nicosia's driving-related criminal charges, but he was unable to obtain a copy of the docket sheet or police report for the 1986 assault with a dangerous weapon charge. In lieu of these verifications, Lt. Columbus asked Nicosia what the alleged dangerous weapon was, and Nicosia told him that it was a shod foot. (Testimony Columbus; Exs. 37, 38.)

57. In his employment application, Mr. Nicosia listed three restraining, or 209A, orders that were filed against him: one by his former wife, Catherine (Nicosia) G., and two by his current wife, Jennifer P.

58. On January 24, 2008, C [REDACTED] G [REDACTED] went to the Tewksbury Police Station to discuss Mr. N [REDACTED]'s candidacy with Lt. Columbus. Ms. G [REDACTED] related that she filed the application for a restraining order, as best she could recollect, because she wanted out of their marriage and wanted Mr. N [REDACTED] to stop calling her on the telephone. There was no physical abuse, she said, but he did yell a lot. She and Mr. N [REDACTED] have a fifteen-year-old daughter; she said he has never missed a child support payment. Finally, Ms. G [REDACTED] said that she has no fear of her ex-husband and no concerns regarding his possibly becoming a police officer. (Testimony Columbus; Ex. 39.)

59. On January 25, 2008, Mr. N [REDACTED]'s current wife, J [REDACTED] (P [REDACTED]) N [REDACTED], went to the Tewksbury Police Station to discuss Mr. N [REDACTED]'s candidacy with Lt. Columbus. Ms. N [REDACTED] had filed two restraining orders against Mr. N [REDACTED], but she had withdrawn them in less than two weeks. Ms. N [REDACTED] told Lt. Columbus that she "fabricated" the allegations of verbal and physical abuse, on one occasion, in order to continue an affair that she was having. In the other case, she and Mr. N [REDACTED] had broken up over an argument about money, and she wanted him out of the house. She had all positive things to say about Mr. N [REDACTED] now: that he is a great husband and father, that he is a hard worker, and that he is loyal and trustworthy. (Testimony Columbus; Ex. 40.)

Selected Candidates' Employment and Family Relationships

60. P [REDACTED] N [REDACTED] was employed as a civilian dispatcher by the Tewksbury Police Department from October 2007 until his appointment as a permanent intermittent police officer. (Testimony Cressman, Sheehan, Columbus; Ex. 37.)

61. D [REDACTED] M [REDACTED] was employed as a civilian dispatcher by the Tewksbury Police Department from April 2004 until his appointment as a permanent intermittent police officer. In his employment application, Mr. Miano listed his mother as employed

by the Town of Tewksbury at the North Street School. (Testimony Cressman, Sheehan, Columbus; Ex. 31.)

62. Michael S. [REDACTED] was employed as a civilian dispatcher by the Tewksbury Police Department from February 2005 until his appointment as a permanent intermittent police officer. S. [REDACTED] was also a member of the Tewksbury School Committee during his candidacy for the permanent intermittent police officer position. Mr. S. [REDACTED]'s mother works for the Town of Tewksbury as an administrative assistant, and his father is a Tewksbury fire fighter. (Testimony Cressman; Exs. 59, 61.)

The Appointment List and Mr. Cyrus's Bypass

63. At the conclusion of the hiring process, the Town of Tewksbury, by its Appointing Authority, David Cressman, ultimately selected six candidates from Certification List # 271101 for Permanent Intermittent Police Officer positions. Those candidates were Paul N. [REDACTED], Michael A. D. [REDACTED], David M. [REDACTED], Alex P. [REDACTED], J. [REDACTED] R. [REDACTED], and Michael S. [REDACTED]. (Testimony Cressman; Exs. 4, 5.)

64. On March 4, 2008, Mr. Cressman submitted to the Human Resources Division five reasons that he did not select Mr. Cyrus as a Permanent Intermittent Police Officer: poor employment evaluations and discipline; poor driver history; criminal record; untruthfulness on application; and apparent integrity, authority and anger issues. (Testimony Cressman; Ex. 6.)

65. On March 14, 2008, Luz M. Henriquez, Senior Compliance Officer on the Civil Service Unit of the Human Resources Division, wrote to Mr. Cressman to request specific examples of the reasons for bypass cited in his March 4 letter. She also requested that Mr. Cressman explain how the cited reasons are related to the position of Permanent Intermittent Police Officer. (Ex. 7.)

66. On April 2, 2008, Mr. Cressman responded to Ms. Henriquez's March 14 letter. He stated that he did not select Mr. Cyrus for the following reasons. First, Mr. Cyrus had poor employment evaluation and discipline. Cressman cited four examples from the Axsys Systems personnel file: a January 6, 2006 evaluation noting that Cyrus needed to improve his productivity, reliability, and dependability; an August 3, 2006 memo by his supervisor regarding hearing offensive and sexually based comments directed to woman employees; an August 7, 2006 memo by his supervisor regarding inappropriate comments and the use of the internet for personal reasons; and Cyrus's October 31, 2006 termination from Axsys Systems. "Based on this employment history," Cressman wrote, "he is unlikely to succeed as a police officer as he has productivity, reliability, and inappropriate behavior issues." (Ex. 8.)

67. Second, Mr. Cressman cited Cyrus's poor driving record: "Ten speeding tickets form [sic] 1986-2004 which reflects lack of care in driving which a police officer should demonstrate." (Ex. 8.)

68. Third, Mr. Cressman cited Mr. Cyrus's criminal record, including "1986 – Malicious Destruction of Property and Minor in Possession of Alcohol on two separate occasions with restitution on the Malicious Destruction of Property" and "2003 – Former wife applied for a restraining order at the Police Department due to guns in the house and fear of her spouse." (Ex. 8.)

69. Finally, Mr. Cressman cited "Untruthfulness on Application: Did not admit on his application that he was ever involved in court proceedings for the 1986 case despite a record of court proceedings but he has signed a statement in the application that it was all truthful. Thus, an untruthful individual would not be a good police officer." (Ex. 8.)

70. On April 11, 2008, the Human Resources Division sent a letter to Mr. Cyrus, with a copy of Mr. Cressman's bypass letter, which detailed the reasons he was not chosen. The Division wrote: "The Human Resources Division has determined that these reasons are acceptable for appointing the individuals ranked lower on this certification." (Ex. 9.)

71. On April 30, 2008, Mr. Cyrus filed a timely notice of appeal of the Town's April 11, 2008 decision to bypass him. (Ex. 10.)

CONCLUSION AND ORDER

The governing statute, G.L. c. 31, § 2(b), requires the Civil Service Commission to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." *City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 303 (1997); *Mayor of Revere v. Civil Serv. Comm'n*, 31 Mass. App. Ct. 315, 320 n.10, 321 n.11, 322 n.12 (1991). Reasonable justification, in the context of review, 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." *Selectmen of Wakefield v. Judge of the First Dist. Court of E. Middlesex*, 262 Mass. 477, 482 (1928); *Comm'rs of Civil Serv. v. Mun. Court of the City of Boston*, 359 Mass. 211, 214 (1971).

"In making that analysis, the commission must focus on the fundamental purposes of the civil service system—to guard against political considerations, favoritism, and bias in governmental employment decisions . . . and to protect efficient public employees from political control." *City of Cambridge*, 43 Mass. App. Ct. at 304, citing *Murray v. Second Dist. Court of East. Middlesex*, 389 Mass. 508, 514 (1983), *Kelleher v. Personnel Adm'r of the Dept. of Personnel Admin.*, 421 Mass. 382, 387 (1995), *Police Comm'r of*

Boston v. Civil Serv. Comm'n, 22 Mass. App. Ct. 364, 370 (1986). “When there are, in connection with personnel decisions, 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.” *City of Cambridge*, 43 Mass. App. Ct. at 304, *citing School Comm. of Salem v. Civil Serv. Comm'n*, 348 Mass. 696, 698-699 (1965), *Debnam v. Belmont*, 388 Mass. 632, 635 (1983), *Commissioner of Health & Hosps. of Boston v. Civil Serv. Comm'n*, 23 Mass. App. Ct. 410, 413 (1987).

“In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion.” *City of Cambridge*, 43 Mass. App. Ct. at 304-05, *citing Callanan v. Personnel Adm'r for the Comm.*, 400 Mass. 597, 601 (1987), *Mayor of Revere*, 31 Mass. App. Ct. at 320-321. In cases involving the bypass of a candidate on the civil service list in favor of another candidate ranked lower on the list it is appropriate to consider the comparative qualifications of each candidate in determining whether the appointing authority has demonstrated reasonable justification. The Commission, however, may not substitute its judgment about a valid exercise of discretion based on merit or policy considerations as weighed by the appointing authority. *City of Cambridge*, 43 Mass. App. Ct. at 304.

In this case, the Appointing Authority, Mr. Cressman, bypassed the Appellant, Mr. Cyrus, for a combination of four reasons: poor employment evaluations and discipline; his poor driving record; his criminal record, including an attempt by his ex-wife to take out a restraining order against him; and untruthfulness on his employment application. Mr. Cyrus challenges each of these stated reasons, arguing that they do not amount to reasonable justification to bypass him. Mr. Cyrus also alleges that the Town showed favoritism and bias in the selection process, resulting in “overtones of political

control or objectives unrelated to merit standards or neutrally applied public policy.”

City of Cambridge, 43 Mass. App. Ct. at 304.

Employment Evaluations and Discipline

Mr. Cressman testified that one of the two main reasons he bypassed Mr. Cyrus was his poor employment record at Axsys Systems. Cyrus worked there from December 2005 to November 2006. In that tenure of less than a full year, Cyrus received two poor employment evaluations written by two different supervisors. On his last evaluation, he received an overall grade of Needs Improvement, with low ratings in Productivity, Reliability, Availability and Interpersonal Relationships. Each of these areas of performance is extremely important in law enforcement, and it is the policy of the Town to hire police officers who can be depended upon to be productive, reliable, and available. Ultimately, Mr. Cyrus was terminated from Axsys Systems because he failed to report for work on three occasions without calling his supervisor and after all of his time off had been exhausted. It is obvious that the Town wants to promote a policy of good attendance, so the Town paid particular attention to attendance in its hiring decision. *See Frangie v. Boston Police Dep't*, 7 MCSR 252 (1994) (termination from sales position relevant in making police hiring decision).

There were also two disciplinary memoranda in Mr. Cyrus's personnel file. The first one said that he was heard having sexually offensive conversations with a female coworker. The other memo was written by one of Cyrus's supervisors who heard Cyrus muttering the word "asshole" repeatedly as the supervisor walked by Cyrus's workstation. These memoranda call into question Cyrus's ability to control himself in the work environment and raise issues of sexual harassment and insubordination. It is obvious that a police officer must exercise an exquisite amount of self-control in the

workplace, as police officers may be subjected to high-stress, and possibly life-threatening, situations on any given day at work. Sexual harassment and insubordination have no place among police officers either.

Mr. Cyrus attempts to explain his employment record and eventual termination at Axsys Systems by noting that he was still going through his divorce from his ex-wife, Jane Cosman, during his employment there. Mr. Cyrus presented several witnesses to attest to the fact that Ms. Cosman is an unreasonable person and that she made his life very difficult during this time. Putting aside the credibility of these friendly witnesses, a difficult divorce and unreasonable ex-wife do not excuse Mr. Cyrus's absences, lack of communication regarding absences, and the rest of the conduct noted in his personnel file. Police Officers must be able to do their jobs under not only the stresses of the job but also the stresses of their personal lives.

Mr. Cyrus also contests the veracity of the memoranda in his personnel file. He claims that he never engaged in sexually offensive conversation with anyone and that he was not muttering "asshole" under his breath when his supervisor walked by. The memoranda are mere hearsay, according to Mr. Cyrus. He argues that Lt. Columbus, who gathered the personnel records and did Mr. Cyrus's background investigation, should have delved into the veracity of the memoranda by engaging in a more thorough investigation, including interviewing Cyrus's coworkers, who testified at the hearing. Lt. Columbus was allotted forty hours to complete each background investigation. The investigations were extensive and included much more than an investigation of the candidates' employment histories. Lt. Columbus was not obligated to delve any deeper than the memos themselves in conducting the background check. The appointing authority may rely on records which it gets from an employer without independently

verifying every fact contained in them. *See, e.g., Kelly v. Cambridge Police Dep't*, 10 MCSR 112 (1997) (Commission allowed introduction of hearsay evidence in the form of a personnel file when affirming bypass based on unsatisfactory overall job performance at prior employer).

Finally, Mr. Cyrus points to his eighteen-year work history and argues that Mr. Cressman ignored the bulk of it and focused solely on Cyrus's employment at Axsys Systems. Cyrus also notes that he had the longest work history compared to the other candidates. Mr. Cyrus presented some evidence of an otherwise unblemished work history, which included some work with the Air Force and Air Force Reserves. This argument may make more sense if the difficulties at Axsys Systems occurred earlier in his life and working life, but they occurred less than two years prior to his candidacy for the police officer position. And, the issues raised by his performance at Axsys were not minor. In fact, they go to the heart of police work. Insubordination, sexual harassment and flagrant absenteeism are serious policy considerations that would have been irresponsible for Mr. Cressman to have ignored.

Criminal Record

The other main reason cited by Mr. Cressman for the bypass was Mr. Cyrus's criminal record, including domestic issues with his ex-wife. The April 2, 2008 bypass letter details two criminal charges in 1986, one for being a minor transporting alcohol and the other for malicious destruction of property worth less than one hundred dollars. Mr. Cyrus was found guilty of the minor in possession charge, and he admitted sufficient facts on the malicious destruction charge. Mr. Cressman did not accord much weight to Cyrus's two arrests, as they occurred more than twenty years ago and the charges were

fairly minor. This criminal record alone, Mr. Cressman admitted, would not have disqualified Mr. Cyrus from consideration for the position.¹

Mr. Cyrus argues that Mr. N[REDACTED]'s criminal record is worse than his, as Mr. N[REDACTED] admitted that he was charged in 1986 with assault with a dangerous weapon, a crime that can be prosecuted as either a misdemeanor or a felony. *See* G.L. c. 265, § 15B(b). Mr. N[REDACTED] was also charged with several instances of operation of a motor vehicle after either suspension or revocation and with attaching plates, operating a motor vehicle with defective equipment, and operating a motor vehicle with unnecessary noise. All of the motor vehicle charges except operating an unregistered motor vehicle were dismissed, and the last criminal charge against Mr. N[REDACTED] occurred twelve years prior to the hiring process, in 1996. The assault with a dangerous weapon charge was likewise dismissed, according to Mr. N[REDACTED]'s employment application.

It is the policy of the Town to obtain docket sheets for the criminal charges listed on an applicant's employment application. Lt. Columbus did that for Mr. Cyrus's two criminal charges. Lt. Columbus did the same for all of Mr. N[REDACTED]'s charges except the 1986 assault with a dangerous weapon charge. Lt. Columbus attempted to obtain the docket sheet for the assault charge from the Lowell District Court, but he was unable to get it. He also attempted to obtain the related police report for the assault charge, but he

¹ It is important to note, however, that the appointing authority acted within its discretion when it considered the admission of sufficient facts on the malicious destruction charge. A police officer applicant's criminal record, even when there is no conviction, is entitled to consideration in determining whether or not to appoint the applicant. The appointin authority may, likewise, consider the facts underlying an arrest, including those represented in a police report. *Thames v. Boston Police Dep't*, 17 MCSR 125 (2004); *Soares v. Brockton Police Dep't*, 12 MCSR 168 (2001); *Tracey v. City of Cambridge*, 13 MCSR 26 (2000); *Brooks v. Boston Police Dep't*, 12 MCSR 19 (1999); *Frangie v. Boston Police Dep't*, 7 MCSR 252 (1994).

could not. In lieu of the reports, Lt. Columbus asked Mr. N[REDACTED] what the dangerous weapon was alleged to be; Mr. N[REDACTED] told him that it was a shod foot.

It is troubling to me that Mr. Cressman did not have a docket sheet or police report for Mr. N[REDACTED]'s assault charge when he was making his hiring decisions. Nonetheless, I credit Lt. Columbus's testimony that he attempted to obtain the docket sheet and police report for the assault charge but was unable to do so. Lt. Columbus has no personal relationship with Mr. N[REDACTED] or any other motive to aid Mr. N[REDACTED] in the hiring process. Lt. Columbus's testimony was clear and lucid, and he appeared at ease when he related the details of his investigation of the charge.

Moreover, Mr. Cressman accorded little weight to Mr. N[REDACTED]'s criminal record because the most serious charge occurred more than twenty years prior to this hiring process and because all of the other misdemeanor charges, all but one of which was dismissed, occurred more than ten years prior to the hiring process. It was within Mr. Cressman's discretion how much weight to accord the candidates' criminal records, as his decision was based upon adequate policy considerations. *City of Cambridge*, 43 Mass. App. Ct. at 304-05.

Lt. Columbus's Interview with Jane Cosman

In his bypass of Mr. Cyrus, Mr. Cressman also cited a 2003 attempt by Cyrus's ex-wife, Jane Cosman, to obtain a restraining order against Cyrus. It is the policy of the Town to interview all parties to any court proceedings, including divorce, that the applicants list in their employment applications. This means that it is routine for ex-spouses to be interviewed by the Town during the background investigation.

Following the policy of the Town, Lt. Columbus attempted to interview the ex-spouses of the divorced or separated candidates. Since Mr. Cyrus listed himself as a

party to divorce litigation against his ex-wife, J. C., Lt. Columbus called Ms. C. several times to ask her to come to the police station to talk about their marital relationship and divorce. When Ms. C. never returned his calls, Lt. Columbus went to her residence to attempt to interview her.

When he arrived at Ms. C.'s home in Wilmington, she appeared nervous and reluctant to talk to Lt. Columbus about Mr. Cyrus. When Lt. Columbus asked her what she thought about Mr. Cyrus becoming a police officer, Ms. C. said that she was frightened at that possibility and that she continues to fear Mr. Cyrus. She thought that Cyrus was a liar and that he had anger issues. She also said that he verbally abused her and, on one occasion, physically abused her by violently grabbing her arm, pushing her face into a pillow and then punching her in the back. According to her, Mr. Cyrus continued to hold a grudge against her because he holds her responsible for his termination from Axsys Systems.

In addition to her opinion of Mr. Cyrus, Ms. C. also related an incident that led her to attempt to obtain a restraining order against Cyrus at the Wilmington Police Department. Mr. Cyrus wanted to remove several guns and a gun safe from their former marital home, where Ms. C. was still residing, before the couple's divorce was finalized. Afraid that Mr. Cyrus intended to hurt her, she went to the Wilmington Police Department to file for a restraining order. Sgt. David Axelrod told her that her complaint did not qualify her for a restraining order and declined to assist her in filing one. Instead, Sgt. Axelrod offered to go to the home, remove the safe and guns, and return them to the Wilmington Police Department, which he ultimately did. Ms. C. told Lt. Columbus that she felt that she was not treated fairly because Mr. Cyrus has several friends in the

Wilmington Police Department. Lt. Columbus confirmed Ms. C[REDACTED]'s story by obtaining the police report of the incident.

Lt. Columbus memorialized his conversation with Ms. C[REDACTED] in a memorandum addressed to Deputy Chief Sheehan, which Mr. Cressman eventually used to make his decision to bypass Mr. Cyrus. At the conclusion of his background investigation of Mr. Cyrus, Lt. Columbus also wrote a brief memorandum to Deputy Chief Sheehan listing the interview with Ms. C[REDACTED] and Mr. Cyrus's employment history with Axsys Systems as "points of interest."

Mr. Cyrus argues that the interview with his ex-wife should never have been considered by the Town because his wife is a difficult person who bears a grudge against him. To support this argument, Mr. Cyrus called several witnesses who testified that Ms. C[REDACTED] is a difficult person, that she is vengeful, and that she has not gotten over her divorce from Mr. Cyrus. Essentially, Cyrus also argues that Lt. Columbus should have done a more thorough background check by questioning Ms. C[REDACTED]'s credibility after interviewing all of the witnesses who Mr. Cyrus called at the hearing in this matter.

Lt. Columbus was under no obligation to perform a more in-depth background investigation merely because Ms. C[REDACTED] had a negative opinion of Mr. Cyrus becoming a police officer. Lt. Columbus was carrying out the Town's policy of contacting opposing parties from court actions in which a police officer candidate has been involved. The Town's policy helps the Appointing Authority see how the candidate deals with conflict and efforts to resolve conflict.

In Mr. Cyrus's case, the opposing party from his divorce litigation was his ex-wife, Ms. C[REDACTED]. Lt. Columbus went to her home to speak with her after she failed to return his telephone calls; she appeared nervous and apprehensive and did not want to be

perceived as a scorned ex-wife. She told him that she was in fear of Mr. Cyrus, that she was afraid that Mr. Cyrus may become a police officer, that Mr. Cyrus is a liar with anger issues, that Mr. Cyrus was regularly verbally abusive to her, and that on one occasion Mr. Cyrus was physically abusive. Using his training in background investigations, Lt. Columbus found Ms. Cosman's statements credible. If Lt. Columbus did not find her statements credible, then he could have discounted what she said or attempted to interview others to help him make a determination of her credibility, but he was under no obligation to do so. *See Kelly*, supra. Furthermore, Lt. Columbus was under no obligation to interview Bonnie Reed, Mr. Cyrus's girlfriend with whom he lived, as Cyrus suggests. The point of the Town's policy is to see how Mr. Cyrus deals with conflict in the legal system, not whether or not he gets along with the woman with whom he resides, where there is presumably less chance of ongoing conflict.

Mr. Cyrus also argues that the Appointing Authority overlooked the fact that Mr. Nissia had three restraining orders issued against him. On the contrary, Lt. Columbus interviewed Nissia's ex-wife, Caroline Nissia (G...), who filed the first restraining order against him, and his current wife, Jennifer P... (Nissia), who has filed two restraining orders against him. Following the Town's policy of interviewing opposing parties in court actions, Lt. Columbus interviewed both women. First, he interviewed Nissia's ex-wife. She said that she did not remember much about the incident that led up to her filing a restraining order in 1993. She said that at that time she wanted out of the marriage, and she felt a restraining order was the only way to cut off all contact with Nissia. She said that she never felt Nissia would harm her, but that she had doubts at the time that she filed the restraining order. She went on to say that Mr. Nissia is a "different person" and a great father now and that he works hard to make sure that the

children have what they need. They get along now. Finally, she had no concerns with Mr. N[REDACTED] becoming a police officer.

Next, Lt. Columbus interviewed N[REDACTED]'s current wife, who had filed two restraining orders against N[REDACTED], one in 1997 and one in 2002. In the restraining order applications, she made accusations of verbal and physical abuse by N[REDACTED] against her. She told Lt. Columbus that she "fabricated" the allegations of abuse and that N[REDACTED] never threatened to harm her, nor was she in fear of being harmed. She also disputed the facts contained in the two related police reports. She said that she and N[REDACTED] are now best friends and that N[REDACTED] is a great husband and father. She finds him loyal and trustworthy and hopes that he can become a police officer.

Although Mr. N[REDACTED] had three restraining orders issued against him and Mr. Cyrus had none issued against him, Mr. Cressman testified that having a restraining order issued against a police officer candidate is not an immediate disqualifier from appointment. In accordance with the policy of interviewing parties to court actions to ascertain how candidates resolve their conflicts, Lt. Columbus, Deputy Chief Sheehan and ultimately Mr. Cressman placed greater weight on the current sentiments of the women who filed the restraining orders, or, in the case of Ms. Cosman, attempted to file a restraining order. It was clear from Lt. Columbus's investigation that Ms. Cosman is afraid of Mr. Cyrus becoming a police officer and that she thinks he is a liar and has anger issues. Lt. Columbus also believed that Ms. Cosman was prevented from filing a restraining order by the Wilmington Police Department. Mr. N[REDACTED]'s ex-wife and current wife, on the other hand, now find N[REDACTED] to be an exemplary family man and father, and they hope that Mr. N[REDACTED] becomes a police officer.

Lt. Columbus has training in police investigations and has been a police officer for more than ten years. He has training in judging the credibility of the people that he interviews, and there was no reason elicited at the hearing in this matter to doubt his judgment as it relates to his interviews of Ms. [REDACTED], Ms. G. [REDACTED], and Ms. P. [REDACTED]. Moreover, it was within the Appointing Authority's discretion to place greater weight on the current opinions of these women than on the fact that restraining orders were issued. *City of Cambridge*, 43 Mass. App. Ct. at 304-05. Lt. Columbus's three reports make it clear that Mr. Cressman could feel comfortable that Mr. N. [REDACTED] had resolved his domestic issues, while Mr. Cyrus clearly had not.

Driving History

Another reason cited by Mr. Cressman for the bypass was Mr. Cyrus's driving record. The April 2, 2008 bypass letter says that Mr. Cyrus has received ten speeding tickets during the period 1986 to 2004. Mr. Cressman testified that he did not grant much weight to the candidates' driving histories and that Mr. Cyrus's driving record in isolation would not have been sufficient to bypass him. After a review of Mr. Cyrus's driving record, I find that Mr. Cyrus was found responsible for only seven speeding violations, and not the ten claimed by Mr. Cressman. The violations occurred between 1986 and 1988.

Mr. Cyrus argues that his driving record should not have been considered by the Town because his speeding violations occurred twenty or more years ago when he was a teenager, and four of the candidates have either more serious or more recent driving violations. A review of the evidentiary record shows that no Tewksbury candidate was found responsible for more speeding violations than Mr. Cyrus. Mr. N. [REDACTED], in

particular, has had his license suspended eight times, mostly for failure to pay fines, and has been charged with several other non-speeding violations.

While it is true that other candidates had more recent violations on their record than the appellant, the Court has determined that it is within the appointing authority's discretion to consider any misconduct by the candidate regardless of staleness, absent a statutory bar to do so. *City of Cambridge*, 43 Mass. App. Ct. at 303-04. What's more, Mr. Cressman made it clear that he did not accord much weight to the candidates' driving records. Rather, he accorded much more weight to the interview and essay and the candidate's employment histories and made his hiring and bypass decisions based on the whole application and hiring process. See *Spicuzza v. Dep't of Corrections*, 12 MCSR 187 (1999) (appointing authority may use interview in civil service hiring process); *Marques v. Peabody Police Dep't*, 12 MCSR 164 (1999) (same); *Peavey v. Town of Plainville*, 11 MCSR 103 (1998) (same).

It is well within Mr. Cressman's discretion to assign different weights to the different aspects of the application and hiring process, so long as he has based his decision on adequate policy considerations. *City of Cambridge*, 43 Mass. App. Ct. at 304-05. In this case, Mr. Cressman has accorded some weight to the driving record because a police officer should demonstrate care in driving and a respect for traffic law.

Untruthfulness on Application

The final reason cited by Mr. Cressman for the bypass was Mr. Cyrus's untruthfulness on his employment application. The April 2, 2008 bypass letter states that Mr. Cyrus did not admit in his application that he had been involved in the court proceedings related to his two 1986 criminal charges. Mr. Cressman testified that he made an error in the bypass letter when he cited Mr. Cyrus's failure to list his 1986 court

proceedings because it is clear that Mr. Cyrus did list those criminal charges in his employment application. Therefore, this final reason is not supported by credible evidence. Notwithstanding this error, Mr. Cressman testified that even without this final reason for the bypass, he still would have decided to bypass Mr. Cyrus for the first three reasons—poor employment record, poor driving record, and criminal record—listed in the April 2, 2008 bypass letter.

Deputy Chief Sheehan testified that he meant to advise Mr. Cressman that Mr. Cyrus had been untruthful on his employment application by failing to list each and every of his former employers. There was a fair amount of testimony from several witnesses regarding the instructions on the employment application and how clear they were. While the instructions are not a model of clarity, none of this testimony is relevant to this bypass decision, as the failure to list certain former employers was not cited as a reason to bypass Mr. Cyrus.

Allegations of Bias or Political Considerations

Interviews

In addition to challenging each of the Appointing Authority's four stated reasons to bypass him, Mr. Cyrus also alleges that the Town showed favoritism and bias in the selection process, resulting in "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy." *City of Cambridge*, 43 Mass. App. Ct. at 304. Mr. Cyrus's charges of favoritism and bias fall into three broad categories, one regarding the interviews conducted, another regarding his background investigation and a third regarding perceived personal influence exercised by some of the candidates themselves and/or other employees of the Town of Tewksbury.

Mr. Cyrus charges that the interview process used by the Appointing Authority was biased in general and also specifically as applied to Mr. Cyrus. He advances several arguments to support the charge. First, he criticizes the interview process as “necessarily subjective in nature.” To the contrary, the interview was structured and objective. The interviews conducted by Mr. Cressman and Deputy Chief Sheehan covered questions that the two agreed upon before the candidates were interviewed. The questions included standard interview questions about strengths and weaknesses, questions about what the candidate has done to prepare to be a police officer, and questions regarding police response in a variety of fact scenarios, among others. Mr. Cressman had developed these questions and model answers to them over his twenty years of experience vetting and hiring police officers. During each hiring process, Mr. Cressman selects some of the standard questions to ask at the interviews. The interviewers took note of the candidates’ answers and filed them with the candidates’ applications. The answers were then compared to the model answers and given a rating of one (1) to six (6) by both Mr. Cressman and Deputy Chief Sheehan. Interviews are an acceptable method for making hiring decisions under the Civil Service law, and there was nothing biased in the interview process used here. *See Spicuzza, Marques, Peavey, supra.*

Mr. Cyrus also argues that one could draw a “fair and reasonable inference” that several of the candidates had access to or prior knowledge of the questions that were going to be asked at the oral interview. He predicates his inference on the fact that some of the candidates were already employed by the Town as civilian police dispatchers and one of the candidates was the police chief’s son. The problem with this argument is that it is purely hypothetical, as Mr. Cyrus did not present any evidence that any of the candidates had knowledge of the questions that would be asked before the fact. Chief

Donovan testified that he did not discuss the interviews or any other part of the hiring process with his son because he was excluded from the process by Mr. Cressman.

Mr. Cyrus further argues that by comparing the length of his interview with the length of the selected candidates' interviews, one can infer that the interview process was biased against him. Both Mr. Cressman and Deputy Chief Sheehan testified that they allotted twenty minutes for each candidate interview. Some were shorter than the allotted time and some took longer; the length of each interview was based on how much time each candidate took to answer the selected questions. It is true that Mr. Cyrus's interview appears to have lasted only twelve minutes compared to the interviews of the selected candidates whose interviews lasted between eighteen and twenty-three minutes. But, Mr. Cyrus never testified that he did not have adequate time to answer any of the interview questions; to the contrary, he testified that he answered each of the questions in turn. Mr. Cressman and Deputy Chief Sheehan similarly testified that Mr. Cyrus's answers were shorter on average than the selected candidates' answers. The lengths of the interviews, therefore, show no bias.

Mr. Cyrus also lastly contends that the interviewers should have dedicated part of the interview to asking him about his employment record at Axsys and the other "red flags" that came up after his background check was complete. The evidence shows that the background checks were not complete when the interviews were conducted. Moreover, if Mr. Cyrus wanted an opportunity to talk about his employment record, criminal record, driving record, or his relationship with his ex-wife he had an opportunity to discuss them with the interviewers at the interview. He never availed himself of that opportunity.

Background Investigation

Mr. Cyrus likewise charges that the background investigations performed by the Tewksbury Police Department must have been biased. His evidence for this proposition is as follows: Lt. Columbus failed to interview Officer Timothy B. Stack of the Los Angeles Police Department, who submitted a letter of recommendation to the Tewksbury Police Department; Lt. Columbus did not interview Mr. Cyrus's current girlfriend, with whom he lives; Mr. Cyrus's work history was not given the proper weight when compared to some other candidates' briefer and less impressive work histories; and, finally, the Appointing Authority failed to take account of the background check that was performed in connection with his work with the Air Force and his alleged resulting Top Secret security clearance.

All of this evidence fails to recognize the broad discretion that appointing authorities have in selecting police officers and fashioning consistent processes for doing so. *See City of Cambridge*, 43 Mass. App. Ct. at 304-05. The Town of Tewksbury does a thorough and consistent background investigation that includes checks on criminal records and driving records, interviews with former employers, randomly selected neighbors and candidate-selected personal references, all using standard questionnaires. It is not the job of the investigating officer to contact whomever the candidate wishes; his job, rather, is to perform a consistent background check without bias toward any candidate. Moreover, appointing authorities have the discretion to conduct their own background checks and not rely on the checks performed by other government entities. In the absence of any compelling evidence, I conclude that the background checks were not biased and did not show political favoritism.

Finally, Mr. Cyrus argues that a "reasonable inference" can be drawn that the Appointing Authority appointed several candidates because of their current employment

with the Town or because their relatives worked for the Town, rather than on merit-based principles. Mr. Cyrus focuses his argument on Michael Donovan, though he claims that the Appointing Authority also showed bias in favor of Michael Siro, David Miller and Paul Neri.

Michael Donovan is Police Chief Donovan's son. This relationship has the potential to create an obvious conflict, as existed in the hiring of a fire chief's son by the fire chief himself in *King v. Medford Fire Dept.*, 19 MCSR 317 (2006). In *King*, Medford's fire chief made hiring and bypass decisions from a civil service list that included his own son. As the Commission pointed out, state ethics laws generally prohibit public employees from taking official actions that will affect the financial interests of their immediate families. G.L. c. 268A, § 6. In the case at bar, however, Mr. Cressman barred Chief Donovan from taking any part in the hiring process precisely because the Chief's son was a candidate. Mr. Cressman even went so far as to suggest that the Chief's son seek employment as a police officer in another jurisdiction so as to avoid even the appearance of favoritism or bias.

Mr. Cyrus adds that it is likely that Michael Donovan had access to the questions that would be asked at the interview. Again, as discussed above, there is simply no evidence of this. Mr. Donovan did not testify at the hearing, and Chief Donovan testified that he and his son did not discuss the hiring process. Mr. Cressman and Deputy Chief Sheehan, as well, testified that they did not discuss the interview questions or any other part of the hiring process with Mr. Donovan or any other candidate. The mere fact that Michael Donovan was the Chief's son, without any evidence of favoritism or bias, is not enough to conclude that the Appointing Authority engaged in political favoritism or bias. *See City of Cambridge*, 43 Mass. App. Ct. at 304.

Mr. Cyrus makes similar charges against Michael S., David M. and Paul N., who were employed by the Tewksbury Police Department as civilian dispatchers at the time of the hiring process. Additionally, Mr. S. was a member of Tewksbury's School Committee during the same period, and both of his parents worked for the Town of Tewksbury. And Mr. M.'s mother worked for the Town of Tewksbury. Mr. Cyrus argues that, again, a "reasonable inference" can be drawn that, because of these individuals' family and personal connections to the Town of Tewksbury, the Appointing Authority wished to appoint them for reasons beyond basic merit principles. As in Mr. D.'s case, Mr. Cyrus presents no evidence that the Appointing Authority's hiring decisions were biased by these three candidates' employment and family circumstances. Without any evidence of bias, it is impossible to draw a "reasonable inference" to that effect.

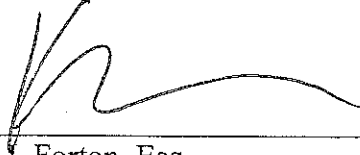
Despite Mr. Cyrus's assertions to the contrary, I find no evidence of bias, favoritism, or political considerations in Mr. Cressman's decision to bypass Mr. Cyrus.

Conclusion

The Appointing Authority's decision to bypass Mr. Cyrus was a lawful exercise of its discretion. Mr. Cressman enumerated legitimate policy concerns in determining which candidates were suitable for appointment, and he evaluated Cyrus's employment history, criminal history, and driving history in light of those policy concerns. Mr. Cyrus has not shown that Mr. Cressman applied the Town's policy considerations disparately between him and the appointed candidates. Nor has he demonstrated that Mr. Cressman's decision was anything less than a lawful exercise of discretion. This appeal is dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

A handwritten signature in black ink, appearing to be 'K. Forton', written over a horizontal line.

Kenneth J. Forton, Esq.
Administrative Magistrate

DATED:

JUN 05 2009

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

PETER G. CYRUS,
Appellant

v.

CASE NO: G1-08-107

TOWN OF TEWKSBURY,
Respondent

**THE COMMISSION MAJORITY'S REASONS FOR REJECTING
THE HEARING OFFICER'S RECOMMENDED DECISION**

After a careful review and consideration, the majority of the Commission determined that, in part, the findings and recommendations of the Administrative Magistrate are not consistent with applicable Civil Service Law and rules, and are not supported by the substantial evidence in the record.¹

Specifically, the DALA recommended decision: (1) applied the incorrect standard of review; (2) overlooks the established Commission decisions and applicable appellate case law concerning the appropriate use of hearsay evidence of criminal charges that did not result in a conviction; and (3) presents extraordinarily one-sided findings of fact that barely mention the evidence proffered by the Appellant and the nine witnesses he called on his behalf or explain why all of that testimony was ignored or discredited. Under a

¹ Pursuant to the Standard Rules of Adjudicatory Practice and Proceeding adopted by the Commission, the Commission is authorized to affirm and adopt the tentative decision of a hearing officer in whole or in part, except that the Commission is obliged to accept "*express* determinations" of credibility of witnesses "*personally appearing*" before the hearing officer.. 801 C.M.R. 1.00(1) (c)2. (*emphasis added*). See, e.g., Town of Brookfield v. Labor Rel. Comm'n, 443 Mass. 315, 322 (2005) (affirming agency credibility determinations so long as they are supported by a "thorough and reasoned explanation" in the record); Herridge v. Board of Reg. in Med., 420 Mass. 154, 163-66 (1995) [*Herridge I*], appeal after remand, 424 Mass. 201, 206 (1997) [*Herridge II*] (vacating decision after board failed to explain its credibility determinations as previously instructed in *Herridge I*); Jacobs v. Department of Social Svs., 21 Mass.L.Rptr. 569, 2006 WL 3292633 (Sup.Ct.) (Henry, J.) (vacating hearing officer's decision that gave "no reason for crediting the investigator's disbelief and not the plaintiff's testimony" and, thus, failed to provide the required "explicit analysis of credibility and the evidence bearing on it") See also Covell v. Department of Social Svcs., 439 Mass 766, 787 (2003); Doherty v. Retirement Bd., 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988)

correct application of the law and the evidence, the Commission majority concludes that Tewksbury failed to meet its burden to establish, by a preponderance of evidence, that any of the four reasons it proffered as grounds to bypass Mr. Cyrus, were justified and, thus, this appeal should be allowed.

THE APPLICABLE STANDARD OF REVIEW

The recommended decision applies an unduly narrow standard of review of a bypass decision under G.L.c.31, Section 2(b). That statute provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator [HRD] a written statement of his reasons for appointing the person whose name was not highest.”

Rule PAR.08(3) of the Personnel Administration Rules, promulgated by HRD to implement this statutory requirement, provides:

“A bypass will not be permitted unless HRD had received a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed to [HRD] shall later be admissible as reason for selection or bypass in any proceedings before [HRD] or the Civil Service Commission. The certification process will not proceed, and no appointments or promotions will be approved, unless and until [HRD] approves reasons for selection or bypass.”

These requirements create a standing presumption that candidates will be selected according to their relative placement on the eligibility list, which creates a rank ordering based on their scores on the competitive qualifying examination administered by HRD for the position. See, e.g., Barry v. Town of Lexington, 21 MCSR 589, 597 (2008) citing Sabourin v. Town of Natick, 18 MCSR 79 (2005) (“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.”).

Thus, contrary to what the recommended decision suggests, an Appointing Authority does not have unfettered “broad discretion” to pick among candidates for civil service appointments who, as here, have qualified for the position by taking and passing a competitive examination, subject simply to limited oversight for signs of undue political influence. Rather, in order for a candidate higher on the list to be bypassed, the appointing authority must submit “sound and sufficient” reasons that affirmatively justify picking a lower ranked candidate, which must be supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. See, e.g., Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (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” has been taken “consistently with ‘basic merit principles’ as provided in G.L.c.31,§1, which gives assurances to all civil service employees that they are ‘protected from arbitrary and capricious actions’.”); Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate reasons for the bypass”)²

² The DALA decision relies on oft-cited language found in City of Cambridge, 43 Mass.App.Ct. at 304-05, quoting from Callanan v. Personnel Adm’r, 400 Mass. 597, 601 (1987). The Callanan opinion arose in an entirely different context of considering the broad statutory discretion of the Personnel Administrator [HRD] to *establish* eligible lists, and had nothing to do with the “sound discretion” standard applicable to bypass decisions by appointing authorities from those lists. This quotation, actually dicta, must be taken in context with the established requirements for “sound and sufficient” reasons that must be provided to “justify” a “valid” bypass, acknowledged by the rest of the opinion in City of Cambridge and the other authority it cites (especially the Revere case, which was a bypass appeal), and which are described elsewhere in this Decision. See also Goldblatt v. Corporation Counsel, 360 Mass. 600, 666 (1971) (“The appointing authority . . . may select, in the exercise of a sound discretion, among persons eligible for promotion or may decline to make any appointment.”)

All candidates must be adequately, fairly and equivalently considered. Evidence of undue political influence is one relevant factor, but it is not the only measure of arbitrary and capricious decision-making by an appointing authority. See, e.g., Suppa v. Boston Police Dep't, 21 MCSR 685 (2008). The Commission has been clear that it will not uphold the bypass of an Appellant where it finds that “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). See Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (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 (1995), rev.den., 423 Mass. 1106 (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 [all] basic merit principles”); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme requiring approval by HRD, subject to appeal to the Commission, was “sufficient to satisfy due process”).

In a bypass case, the Commission is charged to review whether the Appointing Authority sustained this burden of affirmatively proving, based on a preponderance of the evidence presented at the hearing before the Commission, that it had “reasonable”

justification for making an exception to the legislative expectation that selection will be made on rank ordering, which is necessary to allow a bypass. E.g., City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (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.”)

A “preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321, 577 N.E.2d 325, 329 (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*) 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)

Under these established principles, the Commission majority concludes that Tewksbury did not meet its burden to establish that the four reasons proffered justify bypassing Mr. Cyrus. Those reasons are not supported by the substantial evidence in the record and application of correct principles of law and/or can be equally applied to the lower ranked candidates who were selected. In addition, substantial evidence infers that improper bias may have tainted the decision-making process to the Appellant’s prejudice.

THE RECOMMENDED DECISION

The Commission majority incorporates and adopts the following Findings of Fact set forth in the Recommended Decision: 1 through 26, 34-35, 39-57, 60-71. As to Findings 27-33, 36-38 and 58-59, the Commission is obliged to adopt the Administrative Magistrate's express credibility determination concerning certain testimony from Lt. Columbus about the substance of the information he reported during his investigation, and the thoroughness of his investigation. (*Conclusion and Order*, pp.24, 27, 28-29) The Commission is not obliged to give weight to, and the Commission majority does not credit, the hearsay reports of persons who did not testify, and also rejects certain testimony of Brian Strandberg (Axsys Systems supervisor) and other hearsay evidence concerning Axsys Systems, for the reasons more fully explained below. The Commission majority rejects the Administrative Magistrate's Conclusions and Order to the extent it relies on the rejected Findings of Fact, on an erroneous standard of review as described above, and is inconsistent with the specific findings and conclusions below on the merits.

EMPLOYMENT HISTORY

The first reason provided by Tewksbury Town Manager Cressman for bypassing Mr. Cyrus was his "Poor Employment Evaluation and Discipline", citing four particulars from his employment at Axsys Systems in 2006 – a performance evaluation that noted a "need to improve productivity, reliability and dependability", alleged sexual harassment, inappropriate personal use of internet and subsequent termination by the employer. (*Exhibit 8*) This employment history was one of the two main reasons for his bypass (the other being the restraining order taken out against him by his ex-wife, discussed below). (*Recommended Decision, Finding of Fact #32; Conclusion & Order*, p. 20)

The allegations surrounding Mr. Cyrus's employment record at Axsys were strenuously disputed by Mr. Cyrus. (*Testimony of Appellant; Appellant's Written Objections*, pp. 4-6; *Appellant's Post Hearing Memorandum*, pp.16-21). The Recommended Decision contains little reference to this conflicting evidence and makes no express credibility determinations or other "thorough and reasoned" explanation or analysis of this critical, conflicting evidence.

- The Axsys supervisor who testified, Brian Strandberg, was not a percipient witness to the most serious allegation of sexual harassment, making this charge based entirely on totem-pole hearsay. (*Exhibit 75; Strandberg Testimony*) Mr. Cyrus was never privy to either of the memorandum written by Mr. Strandberg or any of the allegations of inappropriate behavior in those documents. (*Testimony of Appellant, Strandberg*)

- The performance evaluation (*Exhibit 74*), which Tewksbury weighed "heavily" (*Recommended Decision, Finding of Fact #32*), was made four months into Mr. Cyrus's tenure as an Axsys production worker. The statements contained in the evaluation are multilayer hearsay, corroborated by a telephone conversation with an Axsys Human Resources employee without personal knowledge of the facts. (*See Recommended Decision, Finding of Fact #27, #32, #33*); *Appellant's Written Objections*, p.4) His "Needs Improvement" rating meant "Performance is slightly below or just meets minimum requirements. Improvement is necessary to fully 'meet job requirements' ". The only non-task-specific criticisms were "Pete's schedule prohibits him from becoming a reliable member of the Stryker team" and "It is important for Pete to improve his communication skills with co-workers". He was marked high on Creativity: "Pete often

proposes ideas to improve upon the processes . . . Some of these proposals have been implemented and have improved the reliability of the assembly.”

- Three current Axsys employees from the same production unit (some working side-by-side) with Mr. Cyrus – who would have every reason to avoid giving testimony critical of their employer – corroborated Mr. Cyrus’s testimony, called into question most of the negative criticism of him, attesting he was uniformly regarded as a good worker who got along with others and, that the specific allegations against him are as likely explained by petty office politics, inexperienced management and the personality quirks of other employees. (*Testimony of Appellant, Strandberg, Baker, Reardon & Fiers*)³

- Substantial conflicting evidence also surrounds Mr. Cyrus’s attendance issues, namely, two unexcused early departures and a final absence resulting in termination. The Administrative Magistrate found that Mr. Cyrus’s work attendance was affected by his on-going divorce proceedings. (*Finding of Fact #30*). Mr. Cyrus testified Axsys knew he needed a flexible work schedule to accommodate child visitation obligations and court appearances necessary to enforce his visitation obligations over the resistance of his ex-wife, which testimony was corroborated by other evidence. (*Testimony of Appellant, Strandberg, Det. Stickney*) Mr. Cyrus testified that, as to the final absence, he tried to call in to report his absence, but the company voice mail was down, and he could not get through. (*Testimony of Appellant*)

³ The Axsys witnesses called on behalf of the Appellant include a technician with 30 years experience as a production supervisor, a career assembler with over 40 years experience, and an engineer with over ten years experience in optical science. The production unit manager, Brian Strandberg, an optics engineer in his mid-twenties, had assumed that position, his first managerial job, in January 2006. Mr. Strandberg’s testimony consisted largely of reciting the contents of memorandum he had placed in Mr. Cyrus’s Axsys file about which he had little, if any, personal knowledge or specific present recollections at the time he testified. Mr. Strandberg appeared at the hearing accompanied by an attorney, apparently supplied by Axsys. (*Testimony of Appellant, Strandberg, Reardon, Fiers & Baker*)

- Mr. Cyrus's testimony that he was not made aware of any attendance issues was corroborated by the Decision of the Massachusetts Department of Workforce Development Decision (12/28/06) that Mr. Cyrus was entitled to unemployment benefits following his termination by Axsys, which included the following findings:

"The facts in this case show that . . . on October 10th and 16th, [Mr. Cyrus] was not sanctioned for leaving the shift without permission. . . The claimant was allowed to continue to work without consequence. . . .

"The facts also show that despite the claimant's efforts to provide notice to the employer of the reason for his last absence on October 20th, the claimant was not able to reach the employer because the voice mail system was inoperative due to the company's move to another location. . . . The claimant made the effort to protect his employment rights but to no avail due to a circumstance beyond his control.

"The weight of the evidence also fails to show that the claimant's discharge resulted from a knowing violation of a reasonably and uniformly enforced policy or rule . . ."

(Exhibit 79) (*emphasis added*)⁴

- The equivocal and conflicting evidence about Mr. Cyrus's brief employment with Axsys, is made even more problematic by what appears to be an undisputed, and unblemished record with every other employer he worked for in the past twenty years, including high praise for his military record with the Air National Guard, where his assignment required him to be cleared at the "Top Secret" security level, after a thorough background check of his criminal, employment, financial and personal life history for a ten year period (that would have gone back to 1997). (*Exhibit 11; Testimony of Appellant, Lt.Col. McNulty, Major Fergamo, SMS Wing Ng*) The Commission majority finds this evidence is entitled to substantial weight in reconciling the disputed issues regarding the situation at Axsys and, finds particularly persuasive, the fact that three senior military

⁴ Apparently Mr. Cressman relied on Axsys's October 2006 notice to the unemployment office claiming that Mr. Cyrus was terminated for "willful misconduct" but was not privy to the fact that that Axsys's assertion was rejected and overturned two months later. (*Exhibits 78 & 79; Testimony of Cressman*)

supervisors (a Lt. Colonel, a Major and a Senior Master Sergeant) would appear personally to testify and give what appears to have been credible, specific evidence in support of their high opinions of Mr. Cyrus. The Recommended Decision inexplicable takes no note of this powerful corroborating evidence.

In sum, the Commission majority concludes, that, when all of the evidence in the record is considered, and giving due weight to the percipient evidence produced by both parties on this issue as the Commission majority finds credible, the preponderance of the evidence fails to establish that Tewksbury has proved that Mr. Cyrus's past employment history justifies his by-pass for appointment as an intermittent police officer. The Commission find no reason to reject Mr. Cyrus's testimony and those of his corroborating witnesses, none of whom who would have any motive or bias against Tewksbury, and accepts that testimony as credible. The hearsay evidence about incidents at Axsys, which are contradicted by the testimony of percipient witnesses, carry less weight, as does the testimony of Mr. Strandberg, whose motive to defend his questionable decision to terminate Mr. Cyrus is obvious, and whose testimony cannot be reconciled with the other objective, contradictory evidence. This case is closely analogous to the facts in Connelly v. Boston Police Dep't, 21 MCSR 111 (2008), in which the Commission unanimously reversed the bypass of a candidate for Boston Police Officer, holding that the alleged, disputed termination of that appellant by one employer did not justify the bypass in light of the appellant's otherwise outstanding and unblemished record in both civilian and military jobs.

DRIVING RECORD

The second reasons for bypassing Mr. Cyrus stated in the Tewksbury Town Manager's bypass letter to HRD was his "Poor Driving Sample", i.e. "Ten speeding tickets from 1986-2004". (*Exhibit 8*) The Tewksbury Town Manager testified that "Mr. Cyrus's driving record in isolation would not have been sufficient to bypass him" (*Cressman Testimony; Conclusion and Order, p.29*) The Administrative Magistrate found that the Town Manager had exaggerated the extent of Mr. Cyrus' speeding record, all of which had occurred more than twenty years ago, from 1986 to 1988, when he was a teenager (*Ex. 18; Conclusion and Order, p.29*) and that some of the selected applicants had more serious and more recent violations on their record. (*Conclusion and Order, pp. 29-30; Appellant's Objections to Recommended Decision, p.7*)⁵ Nevertheless, the Administrative Magistrate upheld this reason for bypass because "it is within the appointing authority's discretion to consider any misconduct by the candidate regardless of staleness, absent a statutory bar to do so." (*Conclusion and Order, p. 30*) The Commission majority rejects this conclusion on two grounds.

First, the conclusion is contrary to the Commission's position concerning stale evidence of misconduct. See, e.g., Ramirez v. Springfield Police Dep't, 10 MCSR 256 (1997) (appointing authority may be need additional reasons in future by-pass appellant on grounds of past criminal record to rebut appellant's claim of rehabilitation); Radley v.

⁵ The details, omitted from the Recommended Decision, were summarized in the Appellant's Post Hearing Memorandum, pp. 24-25. One other selected candidate (who was the son of the Chief of Police) had a seven year record that included three moving violations, most recently being found responsible for speeding in March 2008, among other infractions. (*Exhibits 28 & 29*). Another selected candidate had a record over a ten year period of six speeding violations, numerous license suspensions for court defaults and non-payment of fines, as well as other violations (*Exhibit 38*). A third selected candidate was found responsible for speeding four times, failure to stop three times, and had his license suspended three times (*Exhibit 47*). A fourth selected candidate had four moving violations from 2004 to 2007, including speeding, and had his license suspended for failure to pay a fine, most of which occurred while he was employed as a dispatcher for the Tewksbury Police Department. (*Exhibit 25*)

Brookline Police Dep't, 10 MCSR 289 (1997) (noting appellant's "redeeming factors must be given added weight" and "past indiscretions should play a lessened role")

Second, as noted above, the Commission has been clear that it will not uphold the bypass of an Appellant where it finds that "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). Here, the Administrative Magistrate acknowledged that the stated reason was untrue, as it exaggerated the number of Mr. Cyrus's violations and mischaracterized them continuing until a few years ago, when, in fact, the incidents were the decades-old product of a youthful driver. Also, Mr. Cressen apparently relied on a 2004 incident that was not a part of his official driving record. (*Exhibits 18 & 19; Testimony of Cressman*) Finally, as noted below, the substantial evidence of the poor driving records of at least four selected candidates was largely overlooked by the Recommended Decision, but leads the Commission majority to conclude that Tewksbury has not proved that it applied the same criteria consistently and fairly to all candidates.

CRIMINAL RECORD

The third reason for disqualifying Mr. Cyrus was his criminal record, i.e., a 1986 record of "Malicious Destruction of Property and Minor in Possession of Alcohol with restitution on the Malicious Destruction of Property" and a 2004 incident in which his ex-wife "applied for a restraining order at the Police Department due to guns in the house and fear of her spouse." (*Exhibit 8*) The Tewksbury Town Manager did not accord much weight to the criminal offenses, as they occurred more than twenty years ago and the

charges were fairly minor, and that criminal record, alone would not have been a disqualifier. (*Conclusion & Order*, pp. 22; *See also Testimony of Chief Donovan*)

As to the Malicious Destruction of Property charge, the Appellant testified that he broke a fence while attempting to jump over it to get to a nearby restaurant. He “admitted to sufficient facts”, paid \$150 to fix the fence, and the case was dismissed. (*Testimony of Appellant*) The Minor in Possession charge, involved an unopened six-pack of beer found in the rear seat of an automobile parked in a schoolyard. (*Testimony of Appellant*) As it appears Mr. Cyrus took full responsibility for his actions, both as a teenager and at the hearing, and the Administrative Magistrate made no finding that his testimony on this matter lacked credibility, the Commission cannot conclude that a preponderance of the evidence justifies the use of these extremely stale and minor (no pun) offenses as a basis for bypass twenty years later.

Moreover, contrary to the conclusion of the Administrative Magistrate, the Commission has previously decided that, absent a guilty finding, or extrinsic, specific and reliable evidence of guilt, an “admission to sufficient facts”, alone, cannot be used as a reason to bypass a candidate, as a matter of law. See, e.g., Fortes v. Department of Correction, CSC Case No. D1-09-31, --- 22 MCSR --- (2009); Suppa v. Boston Police Dep’t, 21 MCSR 614 (2008).⁶ See also Burns v. Commonwealth, 430 Mass. 444, 449-451, 720 N.E.2d 798, 803-805 (1999) (state police officer discipline based on CWOFF reversed as legal error); Wardell v. Director of Div. of Empl. Sec., 397 Mass. 433, 436-37, 491 N.E.2d 1057, 1059-60 (1986) (“Criminal charges not resulting in conviction do not provide adequate or reliable evidence that the alleged crime was committed. To the

⁶ The Suppa appeal is presently pending judicial review.

extent that the ‘deliberate misconduct’ relied upon by the board refers to the alleged criminal act of the employee, there was no substantial evidence on the record to warrant his disqualification [from receiving unemployment benefits]”)

The alleged domestic abuse order could be a disqualifying reason, but the substantial evidence established that the factual basis of this charge was untrue. The Administrative Magistrate’s findings of fact and conclusions rest entirely on hearsay statements made to Lt. Columbus by Jane Cosman, Mr. Cyrus’s ex-wife, who did not appear and testify. The two independent witnesses with personal knowledge of the situation were Detective Stickney and Sgt. Axelrod, whose testimony and contemporaneous police report of the alleged incident directly contradicts what Lt. Columbus reported he was told about the incident by Ms. Cosman. (*Testimony of Det. Stickney; Sgt. Axelrod*) The Administrative Magistrate gives no reason to discredit any of the testimony or Sgt. Axelrod’s contemporaneous report. It should suffice to say that, after weighing all the evidence, the hearsay statements by Ms. Cosman made years after the fact and with a clear motive for bias (which her own statement acknowledged), are outweighed by substantial evidence of percipient witnesses that discredits her. For example, the discrepancies are glaring between Sgt. Axelrod’s official incident report, corroborated by his clearly articulated recollection of the incident at the hearing, and Lt. Columbus’s interview report:

Lt. Columbus’s Interview Report (Exh. 81)

Their *marriage ended in 2001* after the birth of their second child. . . .

She stated that *in 2001 she attempted to get a restraining order against him and was turned down by the Wilmington Police because Peter has friends on the Department. . . .*⁷

Sgt. Axelrod’s Incident Report (Exh.11)

According to Jane, *Peter moved out of the marital home back in November 2003.*”

On this date [09/23/2004] I had conversation with a Jane Cyrus, 72 Marion Street, in regards to a restraining order.

⁷ Actually, Ms. Cosman’s uncle was a Wilmington police officer. (*Testimony of Sgt. Axelrod*)

She stated that she is in fear of him . . .
[S]he called a friend to advise her
that if anything happened to her
it would be a story for the TV show 48 hours

She stated *there was constant verbal abuse.*

She stated that Peter had guns that he was
frantically trying to get out of the house
when they split up. This made Jane
extremely fearful that he was going to hurt
her.

There is *a report* that was written and on file
at the Wilmington Police Department which
corroborates her story.

At no time did Jane ever state that
threats towards her or anyone in her
family. After this part of the
conversation I did not feel that Jane
qualified for a restraining order.

Since [2003] *the two of them have had*
little conversation.

According to Jane, she became aware
of this fact [that the safe contained
hand guns] last week [i.e. Sept 2004]
when Peter asked if he could come to the
house and get these items. Jane at one
time was willing to bring the safe to the
[police] station and have Peter retrieve
the safe at the station.

The *incident report states: “Family*
Disturb. No Assault” and describes Mrs.
Cyrus as a “Reporting Party” and Mr.
Cyrus as a “Participant”

Although the Commission majority accepts the Administrative Magistrate’s finding that Lt. Columbus’s interview report is an accurate statement of what he was told, the inconsistencies between the statements attributed to her in that report with the statements contained in Sgt. Axelrod’s contemporaneous report, alone, leads the Commission majority to give little, if any, weight to that highly charged hearsay. In addition, the credibility of Ms. Cosman (formerly Jane Cyrus) is further placed in extremely serious doubt by the testimony of three police officers with life-long, extensive and percipient knowledge about both Mr. Cyrus and Ms. Cosman. (*Testimony of Sgt. Axelrod, Sgt. McHugh & Det. Stickney*) The Administrative Magistrate inexplicably leaves out describing any of the highly-relevant testimony of these witness with a vague swipe at “the credibility of these friendly witnesses” (*Conclusion & Order, p.21*) The Commission majority rejects any suggestion that three consummate professional career police officers,

one with a master's degrees in criminal justice, would slant testimony, made under oath and tested on cross-examination, from what they personally knew to be true.

In addition, the Administrative Magistrate leaves out any reference to the fact that the Chief of Police in Tewksbury, himself, recently approved Mr. Cyrus for a license to carry a "large capacity" firearm on his person at all times, i.e. a "concealed weapon". (*Exh. 73; Testimony of Chief Donovan*)

Finally, the Commission majority notes that, if Mr. Cosman was ever truly in fear at any time in the four years after Mr. Cyrus retrieved his guns *in 2004*, she did not need the Wilmington Police to bring charges; it is a relatively simply procedure for her to seek a restraining order on her own at any time. (*Testimony of Det. Stickney*) See also G.L.c.209A,§3,§3A,§4&§9. It is undisputed that no domestic abuse restraining judicial order was ever requested or issued, even temporarily, and there was neither sworn testimony of such alleged abuse nor any judicial determination to that effect, which would present a considerably different case for upholding the bypass.

The Commission majority, must conclude, therefore, based on all of the evidence, that Mr. Cyrus had demonstrated that the substance of Ms. Cosman's present claims are unreliable and not worthy of belief and that Tewksbury has not proved that it is justified to have bypassed him for that reason.

UNTRUTHFULNESS ON APPLICATION

The fourth reason stated by Town Manager Cressman for bypassing Mr. Cyrus was his "Untruthfulness on Application", because he allegedly "Did not admit on his application that he was ever involved in court proceedings for the 1986 case". (*Exhibit 8*)

If this assertion were true, it could be, alone, a legitimate disqualifier.⁸ Mr. Cyrus, however, did plainly disclose both of the 1986 criminal cases in Section IX(b) of his Employment Application. (*Exhibit 11*) Mr. Cressman testified that his statement in his letter to HRD in this regard was erroneous, and the Administrative Magistrate found that the untruthfulness charge had not been substantiated. (*Conclusion and Order*, pp. 30-31) The Commission majority incorporates and adopts the Conclusion and Order of the Administrative Magistrate in this regard.

THE BIAS CLAIM

As set forth above, Tewksbury has failed to meet its burden to establish “sound and sufficient” reason that justified any of the four grounds used to bypass Mr. Cyrus, which alone, requires that this appeal be allowed, independent of any proof that the selection process was otherwise biased. The Commission majority concludes, however, that the Administrative Magistrate overlooked critical evidence that, indeed, an unlawful bias did exist that worked against Mr. Cyrus’s chances of appointment and, therefore, addresses this final point as well.

The Commission majority agrees that, on paper, Tewksbury’s standard selection process, including the interview process, meets acceptable minimum requirements that the Commission has prescribed to assure that such procedures give all applicants a fair and level chance and are not incapable of meaningful review. While some degree of subjectivity is inherent (and permissible) in any interview procedure, care is needed to preserve the “level playing field” and “protect candidates from arbitrary action and undue

⁸ The Commission majority notes, however, as stated in the Employment Application, an applicant for employment is not required to disclose certain prior criminal records, including, among other things arrests that did not result in a conviction and stale misdemeanor convictions more than five year old, as prescribed by M.G.L.c.151B,§4(9).

subjectivity on the part of the interviewers”, which is the lynch-pin to the basic merit principle of the Civil Service Law. E.g., Flynn v. Civil Service Comm’n, 15 Mass.App.Ct. 206, 208, 444 N.E.2d 407, 409, rev.den., 388 Mass. 1105, 448 N.E.2d 766 (1983). The Commission’s Decisions have commented on a wide range of interview plans, some of which are commendable and some more problematic. Examples of the former: Boardman v. Beverly Fire Dep’t, 11 MCSR 179 (1998). Examples of the latter: Mainini v. Town of Whitman, 20 MCSR 647, 651 (2007); Horvath v. Pembroke, 18 MCSR 212 (2005); Fairbanks v. Town of Oxford, 18 MCSR 167 (2005); Saborin v. Town of Natick, 18 MCSR 79 (2005); Sihpol v. Beverly Fire Dep’t, 12 MCSR 72 (1999); Bannish v. Westfield Fire Dep’t, 11 MCSR 157 (1998); Roberts v. Lynn Fire Dep’t, 10 MCSR 133 (1997). While Tewksbury’s procedures might bear some updating and improvement – the Commission strongly urges that current technology warrants video or audio recording – they were not so patently subjective as to be grounds for disturbing the selection of candidates as procedurally arbitrary and capricious.

That said, the Commission majority finds that the results of the selection process are a “red flag” that leads to a disturbing inference that the selection process concealed an unlawful bias, whether intentional or subconscious, to eliminate enough higher ranked applicants to reach down to select lower ranked applicants with Tewksbury connections.

The Certification, from which the applicants were selected, had requisitioned to hire 8 permanent intermittent police officers. (*Exhibits 2 & 3*) Tewksbury actually hired only 6 officers. (*Exhibits 4 & 5*) The first six applicants on the list who signed willing to accept, all veterans, were bypassed; the next six applicants were submitted to HRD for approval to hire. (*Exhibits 2 thru 6*) At least five of these six selected candidates had ties to

Tewksbury, one was the son of the Police Chief, one was a School Committee member (whose parents both were employed by the town), and three worked as civilian dispatchers for the Tewksbury Police Department. (*Exhibits 24,33,51,59,61,69B,69D, 69E,69G&71*) Five of the six selected applicants fell into the lowest group of test scores of all candidates selected; a seventh candidate, also in this lowest scoring group, and also another a town employee, was recommended to be hired, but for was not included in the list of six names submitted to HRD. (*Exhibits 3, 70 & 71*) No one on the list below the Tewksbury School Committee member and Tewksbury dispatcher group was interviewed. (*Exhibits 3, 70 & 71*)

The relationship between the certification rank, the interview scores and the candidates Tewksbury connections is also problematic.

<u>Certification Rank</u>	<u>Interview Rank</u>	<u>Tewksbury Connection</u>
1	7	
2	11	
3 Tie	14	
3 Tie	9	
4	12	
5 Tie [CYRUS]	10	
5 Tie	7	Tewksbury Police Dispatcher
6 Tie	2	Son of Tewksbury Police Chief
6 Tie	4	Tewksbury Police Dispatcher
6 Tie	5	
6 Tie	8	TPD Intern/Tewksbury Athletics
6 Tie	3	Tewksbury Sch.Comm. & Police Dispatcher
6 Tie	6	TPD Dispatcher

(*Exhibits 3, 70 & 71*)

The above chart of the interview metrics (showing that candidate's order on the certification to be essentially inversely proportional to the order of their interview performance), when taken along with some of the subjective judgments that were made along the way, invite a reasonable inference of an intent to use whatever they could find on the more highly ranked candidates in order to get down to the Police Chief's son, the

School Board member, and the other Tewksbury connected-applicants. (*See Testimony of Dep. Chief Sheehan, Mr. Cressman*) While it is true that Chief Donovan delegated his responsibility for handling the actual selection process to the Deputy Chief, his son's identity was no secret; in fact, the Chief had at least one conversation with the Town Manager about his son, in which he suggested that Tewksbury was his son's best chance, given the preference to town residents. (*Testimony of Mr. Cressman*)

The pass given to another candidate who was a Tewksbury police dispatcher (and tied with Mr. Cyrus on the certification list), and who had a record of actual domestic abuse restraining orders against him, while not problematic standing alone, adds to the troubling scenario when viewed through this lens of potential political overtones and favoritism.⁹ The Commission majority has grave doubt that an objective assessment would lead an unbiased evaluator to accept, on the one hand, derogatory hearsay statements of Ms. Cyrus's ex-wife (that was contradicted by an official police report and the sworn testimony of the reporting officer), yet, on the other hand, credit unsworn recantations of a Tewksbury police dispatcher's ex-wife and his current spouse, both of whom had actually obtained domestic abuse restraining orders on multiple occasions, overlooking their presumably prior sworn statements they would have had to have made to obtain such restraining orders (that their unsworn statements recanted). (*Exhibits 37,39 & 40*). cf. City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, rev.den., 426 Mass. 1102 (1997) (candidate was properly bypassed for lying to cover for a domestic

⁹ The Commission majority rejects the Appellant's argument that, by selecting one candidate with a record of domestic abuse restraining orders actually entered against him, alone, necessarily precludes bypassing a different candidate for the same reason. (*Appellant's Written Objections*, p. 7-9) If convincing proof of Mr. Cyrus's record of alleged abuse had been established through a preponderance of the evidence presented at the hearing, i.e. a judicial determination or other substantial credible evidence, and the appointing authority showed legitimate, mitigating circumstances to distinguish the two situations, the Commission would not be inclined to find that judgment unjustified, but those were not the circumstances here.

partner). The Commission majority also notes that this candidate also had a documented record, at another police department for whom he previously worked, of “an error of judgment” due to “some personal issues he had at the time”, and was “counseled” about potential sick leave abuse. (*Exhibit 41*)

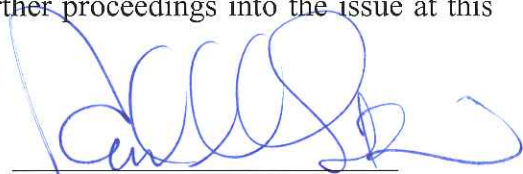
Similarly problematic was bypassing Mr. Cyrus for what has been determined unjustified, and in part, flat out mistaken, citation to his twenty-year old teenage criminal and driving record, while excusing the criminal and driving records of the selected Tewksbury-connected applicants (including the Chief’s son who had been stopped for speeding months within months of the selection process, and the School Committee member, who also worked as a Tewksbury Police Dispatcher, and who also had problematic driving record spanning the years 2004 through 2007). (*Exhibits 28,29,38,47 & 60; Testimony of Chief Donovan*)¹⁰

Civil service law does not preclude consideration of a candidate’s tie to the community in which he or she desires to serve, and appointing authorities, such as Tewksbury, are allowed to establish a residency preference, which allows residents to be placed ahead of non-residents. See Mass.G.L.c.31,§58. Thus, there is nothing inconsistent with basic merit principles in fairly and impartially picking Tewksbury residents over other equally ranked candidates. What is not permitted, however, is the application of different criteria, other than residence per se, in evaluating qualified applicants that discriminates among candidates based on their personal ties to the appointing authority. When the risk that such favoritism or bias may be present, as it is here, the appointing

¹⁰ The School Committee member’s Verification of Employment form completed by a Tewksbury Police Lieutenant, states, in response to a question “What do you think of the applicant?”, that he “Knows how to keep is mouth shut.” (*Exhibit 61*)

authority should strive to ensure that its process is inscrutable. That cannot be said to have been done in this case.

Bias and favoritism are a serious violation of the merit principles. If bias were the only basis on which to allow this appeal, the Commission majority would have been inclined to recommit the matter to the Administrative Magistrate to take further evidence and make further findings on this issue that would confirm what the present record tends to imply. In particular, the Commission would be interested to have more detail about the interview assessments, as well as the details which resulted in all six military veterans ranked above the selected candidates being bypassed, largely for similar reasons used to bypass Mr. Cyrus that the Commission majority found to be unjustified by the evidence, and why the candidates selected for interview happened to stop with the Tewksbury-connected group. Here, however, as the other, independent grounds are sufficient to establish the Appellant's bypass was not justified, the Commission majority, in the interest of closing the matter, declines to order further proceedings into the issue at this time.



Paul M. Stein
Commissioner
For the Majority

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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PETER G. CYRUS,
Appellant

v.

G1-08-107

TOWN OF TEWKSBURY,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The majority's reasons for rejecting the magistrate's recommended decision are contrary to years of precedent-setting judicial decisions and, recently, a series of Superior Court decisions strikingly on point. See Boston Police Dep't v. Suppa, Suffolk Super. Ct. No. 08-5237 (2010) (3-2 majority decision reversed); Reading v. Civil Service Comm'n, Middlesex Superior Court No. 09-CV-0111-F (2009) (3-2 majority decision reversed); Boston Police Dep't v. Plaza, Suffolk Super.Ct. No. 2008-03620 (2009) (3-2 majority decision reversed); Shrewsbury v. LaFlamme, Worcester Super. Ct. No. 2008-02124 (2009) (3-2 majority decision reversed); Beverly v. Civil Service Comm'n, Essex. Super. Ct. No. 08-1794 (2009) (3-2 majority decision reversed).

While recognizing that it is not within its authority to substitute its judgment about a valid exercise by the Town of Tewksbury of its discretion in making hiring determinations, the majority does just that, determining on its own how much weight the Town should have given to various factors, including the Appellant's past criminal behavior, poor driving record and prior employment record.

Further, the majority, none of whom served as the hearing officer, erroneously make their own independent credibility assessments of key witnesses, including the Appellant, to justify their decision. (“The Commission [majority] finds no reason to reject Mr. Cyrus’s testimony and those of his corroborating witnesses, none of whom who would have any motive or bias against Tewksbury, and accepts that testimony as credible.” Page 10 of Majority decision) (emphasis added)

Further, citing its recent decision in Suppa, the majority admonishes the magistrate for concluding that the Town could consider the Appellant’s past criminal behavior as a reason for bypass. As referenced above in the first paragraph, the Superior Court recently *reversed* the majority’s decision in Suppa. More specifically, I am deeply troubled by the majority’s conclusions in which they independently discredit the domestic abuse allegations of the Appellant’s ex-wife, and, in doing so, dismiss her serious charges that she was dissuaded from filing a restraining order by the Wilmington Police.

Again assuming the role of the hearing officer, the majority, based on “inferences” concludes that the selection process “concealed an unlawful bias, whether intentional or subconscious, to eliminate enough higher ranked applicants to reach down to select lower-ranked candidates with Tewksbury connections.” (emphasis added). This is absurd. The hearing officer, after listening to multiple witnesses and reviewing all of the evidence, reached a supportable conclusion based on well-reasoned findings that there was no bias.

The magistrate, after several days of hearings, concluded that the Town presented sound and sufficient reasons for its decision to bypass the Appellant. There was ample evidence in the record to support his thorough, articulate and well-reasoned decision. The choice by the hearing officer not to refer in a decision to a particular piece of evidence does not imply the failure to consider that evidence when ruling on the issue. (Asselin v. Civil Service Comm’n, Hampden

Super.Ct. No. 98-1299 (1999) citing Catlin v. Board of Registration of Architects, 414 Mass. 1,6 (1993)

The majority erred by substituting its judgment for that of the Town and rejecting the magistrate's recommended decision.

For all of the above reasons, I respectfully dissent.



Christopher C. Bowman
Chairman
January 19, 2010