

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

ALEX DIAZ,
Appellant

v.

G1-17-074

LOWELL POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Alex Diaz
Pro se

Appearance for Respondent:

James F. Wellock, Esq.
Assistant City Solicitor
City of Lowell – Law Department
City Hall
375 Merrimack Street, 3d Floor
Lowell, MA 01852

Commissioner:

Cynthia A. Ittleman, Esq.

DECISION

On April 19, 2017, the Appellant, Alex Diaz (Mr. Diaz or Appellant), pursuant to G.L. c. 31, s. 2b, filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the Lowell Police Department (LPD or Respondent) to bypass him for appointment to the position of permanent full-time police officer. A pre-hearing conference was held on May 8, 2017 at the Mercier Community Center in Lowell. A full hearing was held at the same location on June 5, 2017.¹ The hearing was digitally recorded and both parties were provided

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

with a CD of the hearing². The parties submitted post-hearing briefs. For the reasons stated herein, the appeal is allowed.

FINDINGS OF FACT:

Twenty-four (24) exhibits were entered into evidence at the hearing: Appellant's Exhibits (A.Exs.) 1 – 16; and Respondent's Exhibits (R.Exs.) 1 - 8. Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent:

- James Fay, Sergeant, LPD
- Timothy Crowley, Captain, LPD

Called by the Appellant:

- Alex Diaz, Appellant
- Ms. A, Appellant's fiancé

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

1. The Appellant is Hispanic. At the time of the Commission hearing, the Appellant was thirty-five (35) years old, he was engaged to be married and had young children. In addition to his record of employment, the Appellant served in the Army National Guard from 2012 to 2015, where he was involved in transport of a variety of large vehicles. He received an honorable discharge. During his military service, the Appellant received awards, including the Distinguished Leadership Award in a transportation battalion and

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

being selected as the leader of the transport course. (R.Ex. 4; A.Exs. 7 through 11, and 14; Testimony of Appellant)

2. I take Administrative Notice that Lowell is a civil service community that currently has no upper age limit for entry-level police officers.³ (see <https://www.mass.gov/service-details/civil-service-police-departments>)
3. The Appellant took and passed the April 25, 2015 civil service police officer examination. (Testimony of Appellant; R.Ex.5) The Appellant did not take the 2017 exam.⁴ (Testimony of Appellant)
4. The Respondent requested a certification from which to hire thirty (30) full-time permanent police officers. The state's Human Resource Division (HRD) issued certification 04301 to the Respondent on January 24, 2017 and informed candidates listed thereon to sign the certification at the LPD. Sixty-one (61) candidates, including the Appellant, signed certification 04301. The Appellant was ranked thirty-second (32nd) among the candidates who signed the certification. (R.Ex. 5)
5. The Appellant completed an application for employment. (R.Ex. 4) The Respondent conducted background investigations of the candidates who signed the Certification, including the Appellant, which investigation included a review of the interested candidates' driving records. (Testimony of Fay)

³ G.L. c. 31, s. 58A provides, "Section 58A. Notwithstanding the provisions of any general or special law to the contrary, in any city, town or district that accepts this section, no person shall be eligible to have his name certified for original appointment to the position of firefighter or police officer if such person has reached his thirty-second birthday on the date of the entrance examination. Any veteran shall be allowed to exceed the maximum age provision of this section by the number of years served on active military duty, but in no case shall said candidate for appointment be credited more than four years of active military duty." There is no indication in the record that the Appellant was older than thirty-two (32) years of age when he took the entry-level police officer exam.

⁴ See G.L. c. 31, s. 58 and HRD web page <https://www.mass.gov/service-details/civil-service-police-departments> regarding the age of police officer examinees and/or candidates.

6. It is the policy of the LPD, when reviewing candidates' driving records as a part of its background investigation, to focus on the candidates' driving records for the previous five (5) years. However, the LPD may also consider driving records up to ten (10) years old, although it would give less weight to such records. With respect to license suspension notices for payment defaults, the Respondent may give little consideration to them since they may relate to whether a candidate could afford to pay the related fine for a citation; the Respondent is more concerned with the underlying infraction for which the candidate received a citation than a payment default. (Testimony of Fay) In addition, Sgt. Fay testified that in reviewing the candidates' driving records, he put more weight on accidents in the candidates' records than on suspensions because RMV suspension notices can be confusing, indicating either that a driver's license has been suspended or that it will be suspended if the driver fails to pay a fine by a certain date. (Testimony of Fay)

7. The Appellant's driving record indicates the following, in pertinent part,

8/2/15 speeding (Appellant found **responsible**)
1/2/14 surchargeable accident
4/27/09 one-way street (**responsible**)
11/24/08 surchargeable accident
6/7/07 surchargeable accident
2/27/07 bad check – “blocked” indefinite, blocking subsequently released⁵
8/3/04 speeding (**responsible**)
4/30/04 failure to stop (**responsible**); lane violation (not responsible)⁶
11/7/03 surchargeable accident
5/18/03 speeding (**responsible**); notice of suspension for payment default, followed by release of suspension notice⁷; lane violation (not responsible)

⁵ There does not appear to be a citation related to the bad check entry on the Appellant's driving record.

⁶ There is an “Improper Equipment” citation also listed on 4/30/04 but there is no disposition indicating whether the Appellant was found responsible or not responsible for this citation.

⁷ There is inadequate information in the record to indicate whether the Appellant's license was actually suspended or he received a notice indicating that his license *would be* suspended if he did not pay an outstanding fine, except on the one (1) occasion when his license was reinstated after the notice of suspension. Sgt. Fay testified generally about the uncertainty about of similar entries in certain RMV records.

12/16/01 seat belt violation (**responsible**); notice of suspension for payment default, followed by release of suspension notice and then reinstatement
12/22/00 failure to stop (**responsible**); no registration/license in possession (**responsible**) – notice of suspension for payment default, followed by release of suspension notice
11/14/00 speeding (**responsible**); seat belt violation (**responsible**); failure to give signal (**responsible**); notice of suspension for payment default, followed by release of suspension notice
4/29/98 – surchargeable accident
(Respondent’s Exhibit)(R.Ex.) 1)

I take administrative notice that since the Appellant was thirty-five (35) years old at the time of the Commission hearing in 2017 and that, in 1998, when he was involved in his first accident, the Appellant was approximately twenty (20) years old. (Administrative Notice) As a young man, in his early twenties, the Appellant was poor. (Testimony of Appellant) The Appellant’s most recent suspension for payment default occurred in 2003, approximately fourteen (14) years before he applied to the LPD. (R.Ex. 1)

8. The Appellant’s 2015 speeding citation occurred when the Appellant was driving his fiancé to the hospital. At the time, the Appellant’s fiancé was thirty-six (36) weeks pregnant and believed she was in labor. (Testimony of Appellant; A.Ex. 13) The Appellant was not able to obtain a medical letter explaining this event in time to present it when appealing the citation. (Testimony of Appellant)
9. The Appellant’s 2014 surchargeable accident occurred when he was driving to work on January 2, 2014 during a blizzard. The Appellant was driving slowly but hit a snow bank (not another vehicle). (Testimony of Appellant; A.Exs. 15 and 16)
10. Question 22 on page 4 of the Appellant’s employment application asks, “Has your license to operate motor vehicles ever been revoked or suspended, in this state or any other?” (R.Ex. 4) The Appellant answered “no”. (Id.) Question 19a asks, “Have you ever been involved in a motor vehicle accident? If so explain below.” (Id.) The Appellant’s

application did not provide any information in this regard. (Id.) However, at the Appellant's interview at the LPD, the Appellant was asked if he had ever been in a "serious" driving accident and two (2) or the three (3) interviewers noted that the Appellant said that he had been in two (2) or three (3) such accidents. (R.Ex. 6)

11. After the background investigations were completed, Sgt. James Fay, Captain Crowley and Deputy Superintendent Friedl interviewed the Appellant. (Testimony of Fay; R.Ex. 6)

6) The Appellant did not avoid answering questions about his driving record. The interview panel asked each of the candidates the same questions, making notations in a few or less words on their question forms but did not rank the candidates' interview performance. Following the interviews, Superintendent Taylor met with two (2) Deputy Superintendents, Capt. Crowley and Sgt. Fay to review the candidates' files so that the Superintendent could decide whom to hire as the appointing authority. (Testimony of Fay and Crowley)

12. Superintendent Taylor selected fifteen (15) candidates, four (4) of whom were ranked below the Appellant. (R. Ex. 5) One of the selected candidates is the son of a Sergeant in the LPD who had previously been on active military duty; that candidate was ranked high on the Certification (and higher than the Appellant) and his father was not involved in the hiring process. (Testimony of Crowley)

13. Of the fifteen (15) selected candidates, seven (7) had no record of driving incidents.⁸ The remaining selected candidates had the following driving records:

Candidate #1 (ranked highest on the signed list (above the Appellant))
2007 surchargeable accident

⁸ The Appellant's Exhibits 1 through 5 are charts that the Appellant produced at the Commission hearing purporting to compare his driving record compared to certain selected candidates. However, at the hearing the Appellant learned that the notation "NR" on RMV records indicates that the candidate was found "not responsible", rendering the Appellant's comparative charts flawed.

2006 no inspection sticker (**responsible**)
2003 no inspection sticker and seat belt violation (not responsible)

Candidate #3 (ranked 3d on the signed list (above the Appellant))
6/26/12 license reinstated after candidate attended required national driver safety course
5/8/12 suspension based on three (3) surchargeable events within two (2) years
8/1/11 surchargeable accident;
2/17/11 failure to stop (**responsible**) and surchargeable accident;

Candidate #4 (ranked 4th on the signed list (above the Appellant))
3/24/16 failure to stop (not responsible)
3/9/16 speeding (not responsible)
4/21/15 reinstated after suspension for three (3) “surcharge” (sic) events
4/20/15 completion of national driver safety course following three (3) surchargeable events in (2) years
2/3/15 suspension based on three (3) surchargeable incidents
9/12/14 surchargeable accident
2/1/13 surchargeable accident
7/20/12 failure to stop (**responsible**)

Candidate #5 (ranked 5th on the signed list (above the Appellant))
10/22/15 default released
9/30/15 suspension payment default indefinite
7/22/15 surchargeable accident
8/4/14 expiration payment default “COR”⁹
7/23/14 suspension payment default indefinite
6/17/14 failure to stop (**responsible**); oversize vehicle (not responsible); no license in possession (not responsible)
3/3/11 expiration payment default release; suspension payment default indefinite;
2/3/11 suspension payment default indefinite
12/10/10 failure to stop (**responsible**)

Candidate #7 (ranked 7th on the signed list (above the Appellant))
3/24/16 surchargeable accident

Candidate #8 (ranked 8th on the signed list (above the Appellant))
3/21/16 surchargeable accident
2/6/13 speeding (**responsible**)
11/4/08 surchargeable accident

Candidate #12 (ranked 12th on the signed list (below the Appellant))
4/18/13 expiration bad check release
4/15/13 blocking bad check indefinite; bad check blocked
12/11/12 failure to stop (not responsible)

⁹ “COR” is not defined in the record.

6/24/09 unregistered/improper equipment (not responsible); allow
unlicensed/suspended operator (“NA”)
2/16/09 unregistered/improper equipment (“NP”); seatbelt violation (**responsible**)
12/11/07 surchargeable accident

Candidate #13 (ranked 13th on the signed list (below the Appellant))
6/17/09 no inspection sticker (**responsible**)

Candidate #15 (ranked 15th on the signed list (below the Appellant))
1/25/16 failure to stop (not responsible)
5/9/14 failure to stop (not responsible)

14. On March 15, 2017, Police Superintendent William Taylor wrote to HRD stating that the Respondent wanted to bypass the Appellant based on his driving record, stating that his driving record includes “eight (8) citations and five (5) accidents. Mr. Diaz has been cited for speeding on four separate occasions, most recently in 2015. Mr. Diaz’s last surcharge able (sic) accident was in 2014. Mr. Diaz has had several license suspensions as a result of payment defaults. It is our finding that hiring Mr. Diaz at this time may prove to be a liability ... An individual’s past driving history is the best predictor that we have of how they will operate a police cruiser ... The public expects a higher standard of behavior from its police officers (R.Ex. 3) Capt. Crowley confirmed in his testimony that the Respondent had based its decision to bypass the Appellant based on the Appellant’s entire driving record. (Testimony of Crowley) There is no indication in the record that the Respondent had any other concerns about the Appellant’s background. (Administrative Notice)

15. On April 19, 2017, the Appellant filed the instant appeal. (Administrative Notice)

16. On April 20, 2017, HRD sent an email message to the Appellant stating that the reasons for bypass provided by the Respondent were acceptable. (R.Ex. 3)

Applicable Law

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, s. 2(b) requires that bypass cases be determined by a preponderance of the evidence. A "preponderance of the evidence test requires the Commission to determine whether, on 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 Commission, 31 Mass.App.Ct. 315 (1991).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The issue for the commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

Analysis

The Respondent has failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. Concerns about police officers' ability to drive safely on duty, especially in emergencies, are valid but must be applied fairly and consistently or they run the risk of contradicting basic merit principles in their hiring decisions.

There are multiple problems associated with the Respondent's arguments concerning the Appellant's driving record. The Respondent bypassed the Appellant based solely on his driving record dating back to 1998, or nearly two (2) decades prior to his application for employment at the LPD, asserting that his driving record was far longer than any other candidate at the time that the Respondent bypassed him. The Appellant argues that the period of time covered by his driving record puts him at a disadvantage to a candidate who did not obtain a driver's license until many years later. In fact, the Respondent relied upon the Appellant's driving record back to 1998, without saying so, in its letter to HRD seeking to bypass the Appellant. Specifically, the Respondent's bypass letter to HRD stated that the Appellant had eight (8) citations (the oldest of which occurred in 2000); five (5) accidents (the oldest of which occurred in 1998); four (4) citations for speeding (the oldest of which occurred in 2000); and he received suspension notices several times for payment defaults (the oldest of which occurred in 2000). The Appellant's most recent citation was in 2015 for speeding when his fiancé suspected she was in labor with their first child. Prior to the 2015 speeding citation, the Appellant last received such a citation in 2004. The Appellant's most recent accident occurred in 2014 during a blizzard. Prior to the 2014 accident, he had not had an accident since 2008.

Sgt. Fay testified that in making hiring decisions, the Respondent looks at the candidates' driving records for the prior five (5) years but that it also considers the candidates' driving

records over the prior ten (10) years, although the older records are given less weight. However, Sgt. Fay also testified that he considered the Appellant's full driving record, which was nearly twenty (20) years old, stating that he believed it showed a pattern of poor driving. Capt. Crowley also testified that he considered the Appellant's full driving record. In addition, Supt. Taylor's bypass letter made no distinction in the weight given to the incidents in the Appellant's driving record all the way back to 1998. However, even the state's criminal offender record law provides, *e.g.*, that the criminal offender record shall include felony convictions for ten (10) years after disposition and five (5) years after disposition for misdemeanor convictions. G.L. c. 6, s. 172. Barring circumstances not in the record in this case, the Respondent should not consider candidates' driving records beyond the prior ten (10) year period. Moreover, candidates who have had drivers' considerably longer than other candidates must be put into the appropriate context to avoid unfairly magnifying and distorting the records.

In Stylien v. Boston Police Department, G1-17-194 (2018), the Commission determined that in order to provide a "fair and impartial comparison" of candidates' driving records, the records must "be put in the proper context." Id. Mr. Stylien's driving record contained a number of driving incidents and the Commission noted that part of his job of many years as Head Caseworker involved the daily driving of a school van, during rush hour, to transport students to a Boston special education program. In effect, this exposed Mr. Stylien to an increased risk of driving incidents to which other candidates were not exposed. Putting Mr. Stylien's driving record in this context, the Commission ruled, Mr. Stylien's bypass was not justified. The "proper context" in the instant appeal requires equitably comparing Mr. Diaz's driving record to those who the Respondent hired.

If the LPD review of the Appellant's driving record in this case was limited to the prior even ten (10) years, a different result may have occurred. In the ten (years) prior to the Appellant's application to the LPD, his driving record included: the one (1) speeding incident in 2015 (relating to his fiancé's pregnancy), accidents in 2007, 2008 and 2014 (the latter incurred during a blizzard and did not involve another car), a bad check (in 2007) and a one-way street citation in 2009. By comparison, three (3) candidates who were selected and ranked above the Appellant on the signed certification had problematic driving records. Candidate #3's¹⁰ most recent incident was the suspension of his or her license in 2012, which was later reinstated after he or she was required to attend the national driver safety course for having had three (3) driving incidents (two (2) surchargeable accidents (2011 and 2012) and a failure to stop (responsible) in 2011) within two (2) years. Candidate #4's¹¹ most recent incident (for which he was found responsible) involved the completion of the national driver safety course in 2016 after his or her license was suspended in 2015 based on three (3) incidents (car accidents in 2013 and 2014, and a 2012 failure to stop). Candidate #5's¹² most recent incident is a surchargeable accident and subsequent suspension for payment default in 2015, a failure to stop in 2014 followed by another suspension for payment default, a failure to stop in 2010 and subsequent suspension for payment default. I find that the driving records of candidates #4 and #5 contain more recent, condensed and troublesome incidents than the Appellant's driving record over the pertinent time period. The Appellant's bypass also ignored the accolades that the Appellant received for his role in an Army National Guard transportation battalion, where he drove a variety of large vehicles, and for his leadership therein. The Respondent did not apply a uniform standard when it bypassed the

¹⁰ Candidate #3 was referred to as Candidate A at the hearing.

¹¹ Candidate #4 was referred to as Candidate B at the hearing.

¹² Candidate #5 was referred to as Candidate C at the hearing.

Appellant based on his driving record in comparison to the driving records of candidates #4 and #5.

Sgt. Fay also testified that the Respondent does not consider driving record suspensions for payment defaults on a candidate's driving record because it may only indicate the candidate's inability to pay a fine. Rather, he stated, the Respondent considers the citations underlying the payment defaults. However, as noted above, Supt. Taylor's bypass letter specifically relied, *inter alia*, on the Appellant's payment default suspensions. In addition, the bypass letter does not indicate that the Appellant's last suspension was in 2003, fourteen (14) years prior to his application to the LPD. Further, the Appellant testified that around that time, as a young man, he was poor and unable to afford the payments. Thus, the suspension notices for payment defaults in the Appellant's driving record should have been put in the proper context, especially since the most recent one occurred fourteen (14) years before he applied to the LPD. Based on the inequities in the Respondent's consideration of the Appellant's driving record, the Respondent did not establish reasonable justification for bypassing the Appellant.

Conclusion

Accordingly, for the above stated reasons, Mr. Diaz's appeal, filed under Docket No. G1-17-074, is hereby **allowed** and, pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts of 1993, HRD shall:

- place the name of Alex Diaz at the top of current and future certifications for the position of permanent full-time police officer in the City of Lowell until he is appointed or bypassed; and
- if the Appellant is selected for employment based on this relief, he shall receive a retroactive civil service seniority date for civil service purposes only, the same as those individuals appointed from certification 04301. This retroactive civil service seniority date shall not entitle the Appellant to any additional compensation or benefits, including creditable service for purposes of retirement.

Civil Service Commission

/s/Cynthia A. Ittleman
Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 28, 2019.

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

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:
Alex Diaz (Appellant)
James T. Wellock, Esq. (for Respondent)
Mark Detwiler, Esq. (for HRD)
Michele Heffernan, Esq. (HRD)