

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

RYAN DORGAN,
Appellant

v.

G1-15-24

CITY OF METHUEN,
Respondent

Appearance for Appellant:

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163 Merrimack St.
Haverhill, MA 01830

Appearance for Respondent:

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Commissioner:

Cynthia Ittleman¹

DECISION

On January 28, 2015, the Appellant, Ryan Dorgan (Mr. Dorgan), pursuant to G.L. c. 31, §2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the City of Methuen (City) to bypass him for original appointment as a reserve police officer.

A prehearing conference was held at the offices of the Commission on February 17, 2015. On April 9, 2015, the Commission received the parties' joint request for relief for the Appellant under St. 1993, Chapter 310. Asked to provide the City's reasons therefor, the City indicated that, upon further review, at least some of the matters on which it relied to bypass Mr.

¹ The Commission acknowledges the assistance of Law Clerk Evan A. Johnson in the drafting of this decision.

Dorgan were stale. On April 30, the Commission denied the request at that time stating that there were three (3) other bypass appeals pending at the Commission regarding their non-selection for Methuen reserve police officer and there was no indication that they too had been given further consideration. Relief was also denied at that time in view of the City's initial bypass letter alleging that Mr. Dorgan had sought an advantage through political influence and, subsequently, the City issued a second modified bypass letter. Therefore, the Commission determined that no action should be taken on the 310 relief request without further information regarding the status of the other bypassed candidates and additional information regarding the reasons for bypass. The Commission has since conducted hearings and issued decisions in regard to those three other bypass appeals.²

A full hearing in the instant case was held at the Commission offices on July 8, 2015.³ The hearing was digitally recorded and both parties were provided with a CD of the hearing.⁴ The parties filed post-hearing briefs. As indicated herein, the appeal is denied.

FINDINGS OF FACT:

Twenty-two (22) exhibits⁵ were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

² Phillips v. Methuen, G1-15-45 (July 9, 2015)(appeal allowed); Cote v. Methuen, G1-15-25 (August 6, 2015)(appeal denied); and Dwinells v. Methuen, G1-15-46 (August 6, 2015)(denied).

³ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with G.L. Chapter 31, or any Commission rules, taking precedence.

⁴ 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 substantial evidence, arbitrary or 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.

⁵ In response to my request at the hearing, post-hearing the City supplied the redacted background investigations for the twelve (12) candidates who bypassed Mr. Dorgan. While the background investigations were not marked as exhibits, they were entered into the record and are cited herein as "Background Investigations," preserving the applicants' anonymity. Also submitted post-hearing at my request and entered into the record without exhibit numbers are: Affidavit of Mr. Dorgan regarding people he asked to contact the Appointing Authority in support of his candidacy; Affidavit of Chief Solomon concerning who drafted the explanations for each candidate selected and not selected and reasons for the two (2) different bypass letters sent to Mr. Dorgan (the first on January 5, 2015 and the second on January 8, 2015); and suspension notices Mr. Dorgan received from the Registry of Motor Vehicles.

Called by the City:

- Joseph Solomon, Chief of Police, City of Methuen
- Steven Smith, Police Sergeant, City of Methuen
- Michael Pappalardo, Police Lieutenant, City of Methuen

Called by the Appellant:

- Ryan Dorgan, Appellant

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

1. Mr. Dorgan is a thirty (30)-year old single man who resides in Methuen, Massachusetts. He has one (1) minor child. (Testimony of Mr. Dorgan and Respondent's Exhibit 1)
2. Mr. Dorgan graduated from Newbury College in 2008, majoring in criminal justice. (Testimony of Mr. Dorgan and Appellant's Exhibit 5)
3. Mr. Dorgan is currently employed at the Suffolk County Sheriff's Department (Sheriff's Department) as a Correction Officer, where he has worked since 2008. (Testimony of Mr. Dorgan)
4. On June 15, 2013, Mr. Dorgan took the civil service examination for police officer and received a score of 98. (Testimony of Mr. Dorgan and Respondent's Exhibit 3)
5. Joseph Solomon (Chief Solomon) is the Chief of Police for the City. He has been the Chief of Police since September 2002. (Testimony of Chief Solomon)
6. Early in February 2014, Chief Solomon contacted the City's Human Resources Department to begin the process of hiring twenty-one (21) reserve police officers for the City Police Department. (Testimony of Chief Solomon and Respondent's Exhibit 3)

7. Responding to Chief Solomon's request to begin the reserve police hiring process, the City's Human Resources Department submitted a requisition to the state's Human Resources Division (HRD) on February 6, 2014 for a Certification. HRD sent Certification #01595 to the City on February 6, 2014 with approximately seventy (70) names on it. Mr. Dorgan was ranked 22nd on the Certification. (Appellant's Exhibit 4) He signed the Certification indicating that he would accept the position if offered. (Respondent's Exhibit 3)
8. When the City decides to hire full-time regular police officers, it hires from among the reserve police officers. (Testimony of Chief Solomon)
9. Chief Solomon increased the number of reserve police officers to be hired from twenty-one (21) to twenty-nine (29). The number of names on the Certification was sufficient to accommodate this increase.⁶ (Administrative Notice)
10. The reason for this increase was that the City Police Department had obtained sufficient funding to allow it to send eight (8) of the prospective reserve officers directly to the regular police academy to become full-time regular police officers. Since Chief Solomon wanted to have twenty-one (21) remaining reserve officers after those eight (8) reserve officers would be sent to the police academy, the number of candidates for reserve police officer was increased by eight (8) to twenty-nine (29). (Testimony of Chief Solomon and Administrative Notice)
11. Mr. Dorgan submitted a completed job application to the City on or about April 10, 2014. (Respondent's Exhibit 1)
12. Each candidate seeking appointment was required to undergo a background investigation. Sergeant Steven Smith⁷ (Sergeant Smith), who has been a sergeant for the City for ten (10)

⁶ Personnel Administrator Rules (PAR).09 provides that appointing authorities "may appoint only from among the first 2n+1 persons" on the certification, where "n" equals the number of appointments to be made. (Administrative Notice, PAR.09)

years, oversaw the background investigations and assigned them to individual detectives in the Department. (Testimony of Chief Solomon)

13. The investigations examined the applicants' criminal, education and driving histories and verified whether each applicant was truthful in their application. (Testimony of Sergeant Smith)

14. Mr. Dorgan's background investigation was completed on May 19, 2014. He was interviewed on June 19, 2014. (Respondent's Exhibits 2 and 7)

15. Mr. Dorgan's background investigation revealed no criminal record but it revealed prior issues with his current employer and an adverse driving history. The background investigation does not mention a minor custody dispute that Mr. Dorgan had regarding his child since the background investigation was completed May 19, 2014 and the minor custody dispute arose on August 27, 2014. Similarly, since the minor custody dispute arose on August 27, 2014, it could not be discussed at Mr. Dorgan's interview on June 19, 2014. (Respondent's Exhibits 2 and 7; Administrative Notice) The background investigation also does not reference 1) a phone call that Mr. Dorgan supposedly had with someone in the Human Resources office of his current employer in which it is alleged that he was rude; and 2) Mr. Dorgan's alleged contacts to "numerous individuals", including town officials, asking them to contact the Mayor in support of his candidacy, since both of these matters are stated to have occurred in December 2014, months after the background investigation. (Administrative Notice)

⁷ In a case heard by the Commission regarding the same applicant pool, it was revealed that candidates' applications were initially referred to Captain Kris McCarthy, whose step-son was appointed as a reserve police officer during this hiring cycle, for background investigations. Captain McCarthy did not conduct any of the background investigations himself but delegated the work to Sergeant Smith. Phillips v. Methuen, (G1-15-45)(2015)

16. Mr. Dorgan received a one (1)-day suspension from the Sheriff's Department on January 4, 2010 for using his personal cell phone in the corrections facility on multiple occasions in violation of the pertinent Sheriff's Department policy. He received a three (3)-day suspension for violating the same policy on October 15, 2010 for bringing his cell phone to work for a family emergency. Mr. Dorgan could have requested permission to bring his cell phone into work for a day but he did not do so. In each of these two instances, Mr. Dorgan admitted bringing his cell phone into the facility. (Respondent's Exhibit 2; Testimony of Mr. Dorgan)
17. On March 20, 2012, Mr. Dorgan received a written warning for failing to provide acceptable documentation for his absence from work at the Sheriff's Department. The letter indicates that he had previously received an oral warning for the same conduct on a different occasion. What Mr. Dorgan had failed to do was to provide doctors' notes for some medical absences; he did not use more than the sick leave time afforded to him. (Respondent's Exhibit 2; Testimony of Mr. Dorgan)
18. Mr. Dorgan's adult driver history indicates that he was cited for speeding four (4) times between 2006 and 2009 and was found responsible for three (3) of those citations. He was repeatedly defaulted for failing to pay fines for various traffic offenses, his license was suspended on at least one occasion⁸ (2009), and he had a surchargeable accident in 2011. (Respondent's Exhibit 2)⁹

⁸ At my request, Mr. Dorgan produced two of the suspension letters he received from the Registry of Motor Vehicles. Both state, "You are hereby notified effective [one month from the date of the letter], your license/right to operate a motor vehicle **will be suspended by automatic application of law**, because of an outstanding balance on the citation noted below ... **In order to avoid this pending suspension** you must mail your check/money order for the assessment above **If you fail to comply with these instructions before the effective date of the suspension, your license or right to operate all motor vehicles ... will be suspended. ... If your license/right to operate becomes suspended** as a result of failing to comply with this notice, **at the time of your reinstatement you will be required to pay an additional \$100.00 reinstatement fee.** ..." Suspension Notices (emphasis added). While Mr. Dorgan's driving information seems to indicate that his adult license was suspended multiple times, on only one occasion on Respondent's Exhibit 2 does the Registry of Motor Vehicles document indicate that his license was "reinstated".

19. On August 27, 2014, Mr. Dorgan was involved in a minor custodial dispute over his young child. Mr. Dorgan has had an oral shared custodial agreement with the mother of his child for more than four (4) years during which time period there had been no custodial disputes. However, on August 27, 2014, the mother of Mr. Dorgan's child went to the City Police Department, where her father works as a sergeant, to complain that Mr. Dorgan would not deliver custody of their child to her when he allegedly should have. A police incident report states that the child's mother believed that Mr. Dorgan was to return their child to her on a Wednesday while Mr. Dorgan believed he was to return their child the next day. Detective McMenammon called Mr. Dorgan and advised him to "be civil in making arrangements for visitations", as noted in an unsigned "Officers Formal Report" composed on August 27, 2014 at approximately 6:00 p.m. Mr. Dorgan agreed to deliver his child to the Police Department by 7:00 p.m. (Appellant's Exhibit 12; Testimony of Mr. Dorgan)
20. Prior to Mr. Dorgan's interview, Chief Solomon created a team of panelists to interview applicants. Chief Solomon chose three (3) officers from different City Police Department bureaus. (Testimony of Chief Solomon)
21. Chief Solomon chose Captain Haggar, Lieutenant Pappalardo, and Lieutenant Mahoney to be members of the interview panel. The patrolman's union selected Detective McMenammon as its representative for the panel. No member of the panel was related to anyone who was hired during the 2014 hiring cycle for reserve police officers. (Testimony of Chief Solomon)

⁹ Both parties each introduced into the record a document relating to Mr. Dorgan's driving. Respondent's Exhibit 2; Appellant's Exhibit 6. The document produced by the City appears to be more extensive than the one produced by the Appellant. As such, I understand the City's document to be Mr. Dorgan's more detailed driver history and the Appellant's document to be Mr. Dorgan's less detailed driver record.

22. Chief Solomon informed the panel members that after the interviews were completed they would meet with him to help decide which applicants would be hired. (Testimony of Chief Solomon)
23. The panelists individually scored each applicant's answer on a scale of 1-5 (a "1" denoted that the question was "answered poorly," a "3" denoted that the answer was "average," and a "5" denoted that the applicant "nailed it"). There was a space left for comments at the end of the questionnaire so interviewers could write down their general impressions of the applicants. (Testimony of Chief Solomon and Respondent's Exhibit 7)
24. Captain Haggar, Lieutenant Pappalardo, Lieutenant Mahoney, and Detective McMenammon interviewed Mr. Dorgan on June 19, 2014. (Testimony of Mr. Dorgan and Exhibit 5)
25. Captain Haggar gave Mr. Dorgan an average score of 3.45 on his interview and noted that Mr. Dorgan was "not a bad candidate." Lieutenant Pappalardo gave Mr. Dorgan an average score of 3.24 on his interview and noted that Mr. Dorgan was "somewhat adequate." Lieutenant Mahoney gave Mr. Dorgan an average score of 2.74 on his interview and noted that Mr. Dorgan was "a fair candidate at best." Detective McMenammon gave Mr. Dorgan an average score of 2.8 on his interview and noted that the Mr. Dorgan "stumble[d] on some answers" and that he "would pass on this candidate." (Respondent's Exhibit 7)(emphasis in original)
26. Approximately one month after the interviews were concluded, the interview panel and Chief Solomon met to discuss the candidates and make appointment recommendations to the City's Mayor, who is the appointing authority for the City. (Testimony of Chief Solomon and Detective McMenammon)

27. The recommended decision for each applicant's selection or non-selection was decided as a group. (Testimony of Chief Solomon)
28. The interview panel and Chief Solomon decided not to recommend hiring Mr. Dorgan. Prior discipline, inability to follow rules and regulations, a negative driving record, and a child custodial dispute were the reasons that the panel decided not to select Mr. Dorgan. (Testimony of Chief Solomon and Respondent's Exhibit 6)
29. Subsequent to Chief Solomon's meeting with the interview panelists but before bypass reasons were sent, Chief Solomon met with the City Mayor to discuss the candidates that he was recommending for appointment.
30. Chief Solomon "... assigned the task of drafting the explanation statements for selection and non-selection [of candidates] to Sgt. Smith." (Affidavit of Chief Solomon) Chief Solomon further attests that, "[u]pon information and belief, Sgt. Smith then enlisted the assistance of Detective McMenammon in the drafting of those statements." (Id.) When the statements were drafted, they were given to counsel for the City and reviewed by Chief Solomon and the Mayor and changes were made. The Mayor subsequently signed and sent letters to the candidates with explanation statements enclosed. (Id.)
31. Mr. Dorgan received a letter from the City dated January 5, 2015 stating that he was not selected to be a reserve police officer for the City. Enclosed with the letter were the reasons for his non-selection, stating,

The responses of this individual to the standard series of questions put forward to him and to all candidates during the interview process were sufficient.

While reviewing Mr. Dorgan's high school transcript, it was noted that his Total Cumulative GPA was [redacted].

Mr. Dorgan has a lengthy driving history. This history spans approximately nine years. These infractions include numerous moving violations as well as suspensions of driving privileges.

He has several discipline issues at his current job, the Suffolk County Sheriff's Department. Twice he was suspended for carrying a cell phone inside the House of Corrections without authorization. He was also issued a warning regarding sick time abuse in March of 2012. As of December 2014, Mr. Dorgan currently has 3.5 sick days available for use. He has been employed at the Sheriff's Department for six years where he is allocated fifteen sick days a year.

On August 27, 2014, Mr. Dorgan was involved in a civil custodial dispute involving his minor child after he failed to drop off the child at a predetermined time to the child's mother. (Methuen Police Department incident #529171).

On or around mid-December 2014, *Mr. Dorgan contacted numerous individuals, including Mr. James Weymouth, of the Methuen School Department, and other town officials in [sic] attempt to utilize political influence to gain a positive advantage in the selection process.* On December 17, 2014, Mr. Dorgan contacted his current employer's Assistant Director of Personnel, [redacted] and questioned her as to why the Methuen process was not going forward. [The Assistant Director of Personnel] said that Mr. Dorgan sounded angry and was somewhat rude. He demanded to see his personnel file and demanded to see copies of sick notes that he had passed in. At some point during the conversation Mr. Dorgan indicated that the delay was due to who his mother is.

The candidate was not selected because of past discipline issues at the Suffolk County Sheriff's Department where he is currently employed. The candidate displayed the inability to follow the rules and regulations and that is something that is of utmost importance within the Methuen Police Department. Additional factors that contributed to the candidate not being selected were his past and current sick time abuse, poor academic record, his attempt to use political influence to gain favor, his poor driving record which included loss of license, and his substandard credit rating. Also a point of concern is the failure to adhere to formal or informal visitation rights that have required the involvement of Police Officer(s) to mediate.

(Appellant's Exhibit 1)(*emphasis added*)

32. A short time after Mr. Dorgan's bypass letter was sent, Chief Solomon met with the Mayor.

The Mayor told Chief Solomon that Mr. Weymouth had not contacted him in support of Mr.

Dorgan's candidacy. Mr. Dorgan's mother contacted the Mayor during the hiring process.

Chief Solomon could not name any other of the "numerous individuals", including town

officials, whom Mr. Dorgan had allegedly contacted in an attempt to utilize political

influence to gain an advantage in the selection process. (Testimony of Chief Solomon) Mr.

Dorgan's mother contacted the Mayor twice in mid-December 2014 about the Police incident

report involving Mr. Dorgan's child custody incident in August 2014 and in support of his

candidacy. Mr. Dorgan did not ask anyone to contact the Mayor in support of his candidacy.
(Affidavit of Mr. Dorgan)

33. The Mayor directed the City Human Resources Department to compose a new bypass letter to be sent to Mr. Dorgan. The new bypass letter, dated January 8, 2015, stated, in part, “With regard to the previous notice of bypass forwarded to you on January 5, 2015, an updated attachment is enclosed. Please disregard the original attachment provided to you and replace it with the one that is enclosed with this communication. ...” (Appellant’s Exhibit 2)

Omitted from the reasons for bypassing Mr. Dorgan were his high school grade point average, his credit rating, and the assertion that Mr. Dorgan contacted “numerous individuals” who are town officials in an attempt to use political influence in support of his candidacy. (Testimony of Chief Solomon and Appellant’s Exhibit 2) Thus, the remaining reasons the City gave for bypassing Mr. Dorgan were: a lengthy driving history; several disciplines at his current employer regarding sick leave abuse and violations of the employer’s cell phone policy; the August 27, 2014 custodial complaint; and the reportedly angry conversation Mr. Dorgan had with someone in his employer’s Human Resources office. (Appellant’s Exhibit 2; Administrative Notice)

34. The City appointed twenty-six (26) permanent, reserve police officers, twelve (12) of whom were ranked below Mr. Dorgan on the Certification and bypassed him. (Stipulated Fact and Exhibit 2)

35. Mr. Dorgan filed an appeal with the Civil Service Commission on January 28, 2015
(Stipulated Fact)

Other Candidates

36. Among the candidates who signed the Certification and were appointed are:

- **Joseph Aeillo**, the son of a Methuen Police Officer (Ranked 10th), who did not bypass the Appellant;
- **Mark Parolisi**, the step-brother-in law of a Methuen Police Captain (Ranked 21st), who bypassed the Appellant;
- **Michael Havey**, the son of a Methuen Police Sergeant (Ranked 22nd), who bypassed the Appellant;
- **Justin Antoon**, the son of a City employee (Ranked 23rd), who bypassed the Appellant;
- **Joseph Alaimo**, the son of the City’s Former Deputy Police Chief, whose mother also works for the Police Department (Ranked 24th), who bypassed the Appellant;¹⁰
- **Patrick Fleming**, the son of a Methuen Police Officer (Ranked 27th), who bypassed the Appellant.

(Respondent’s Exhibit 3 and Testimony of Chief Solomon)

37. One applicant who was hired and bypassed Mr. Dorgan, and was unrelated to a member of the City Police, had an extensive negative driving history including multiple infractions each year except 2009 – 2012 involving, for example, speeding tickets for which he was found responsible, defaults for failing to pay fines for various infractions and suspension of his driver’s license. This applicant’s driving record also includes multiple infractions in 2013.

(Background Investigations)

38. Lieutenant Pappalardo gave the applicant with the extensive negative driving history an average interview score of 3.975¹¹ and noted that the applicant was “trainable,” “polite,” and “seems very honest.” Detective McMenamon gave this applicant an average score of 3.52 and noted that the applicant was a “decent candidate,” had a “good history of family service,” and “would make a good candidate.” Captain Haggar gave this applicant an average score of

¹⁰ In 2010, the Commission overturned the City’s decision to terminate Chief Solomon as Police Chief. During the multi-day hearing regarding that appeal, then-Deputy Police Chief Joseph Alaimo, the father of Joseph Alaimo, stated that he would “walk through a wall for Joe Solomon.” See Solomon v. Methuen, 23 MSCR 441 (2010).

¹¹ No average score was provided by Lieutenant Pappalardo on the front of this applicant’s questionnaire. Lieutenant Pappalardo made a small mathematical error in adding up the scores for this applicant, giving this applicant 3 more points than his questionnaire scores indicate. With the error, this applicant averaged 3.975. Without the error, this applicant averaged 3.825.

3.11 and noted that this applicant “seemed like a decent candidate.” (Background Investigations)

39. A different applicant who was hired and bypassed Mr. Dorgan, and was unrelated to a member of the City Police, had negative employment histories with two law enforcement or law enforcement-related employers. While working for one of these employers, this applicant resigned instead of being fired in 2010. A supervisor of the other employer that this applicant had worked for prior to 2010 stated that the employer would not hire him again. (Background Investigations)

40. Captain Haggar, Lieutenant Pappalardo, and Detective McMenammon interviewed the applicant with negative employment histories. Captain Haggar gave this applicant an average interview score of 2.92 and noted that the applicant’s “background is questionable and should be followed up, possible 2nd interview,” “decent average candidate,” “has made some mistakes and relates he has changed and learned from these mistakes,” “did he change?” Lieutenant Pappalardo gave this applicant an average score of 3.31 and noted that the applicant had “‘bumps’ while at [one employer],” “states he left [another employer] due to financial reasons. [Supervisor] indicated [this applicant] chose to resign rather than be terminated.” Detective McMenammon gave this applicant an average score of 3.225 and noted that this applicant “was very eager to be good at past jobs. Seems to realize he made poor choices and regrets them,” and “could be considered after careful review.” (Background Investigations)

41. Chief Solomon thought that the applicant who chose to resign instead of being fired was “completely justified” in one of the events which led to his resignation. (Testimony of Chief Solomon)

DISCUSSION

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The Commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, citing Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, s. 1. It also means, "... assuring that all employees are protected against coercion for political purposes" Id. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

Pursuant to G.L. c. 31, s. 2(b), the Commission has the powers and duties, among other matters, "to hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator ..." Id. The Commission has the same powers and duties with respect to persons aggrieved by the action, or failure to act, by municipalities through G.L. c. 31, s. 2(c), and via delegation from HRD to the municipality under G.L. c. 31, s. 5(e).

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law." Comm'rs

of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971) (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Beverly citing Cambridge at 305, and cases cited. “It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree.” Town of Burlington v. McCarthy, 60 Mass.App.Ct. 914, 915 (2004). The essential issue being evaluated in a bypass appeal to the Commission remains whether or not the appointing authority has reasonable justification, under basic merit principles, to select a candidate whose performance on the civil service qualifying examination placed him lower than the bypassed candidate, thus skipping over a higher ranked candidate for a valid reason.

The deference that the Commission owes to the appointing authority is “especially appropriate” in respect to the hiring of police officers. Beverly, 78 Mass.App.Ct. at 188. The Commission is mindful of the standard of conduct expected of officers of the law. See Dumeus v. Boston Police Dep’t, 24 MCSR 124 (2014)(finding that a police officer must be a model of good citizenship). An officer of the law “carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 474 (1995). Police officers “voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

Analysis

The City has established by a preponderance of the evidence that it had reasonable justification to bypass Mr. Dorgan but not for all of the reasons provided in view of the flawed process here. I begin this analysis articulating two key premises: 1) police officers are held to a higher standard precisely because of the authority they are given in their job in order to enforce the law and protect the public; and 2) basic merit principles requires an apolitical hiring process free of favoritism and bias. The first indication of the flawed process here is that there were two (2) different bypass letters sent to Mr. Dorgan. The first is dated January 5, 2015 and the second is dated January 8, 2015. The second letter contained some of the reasons given for bypassing Mr. Dorgan but deleted others. Specifically, the second letter omitted the following: Mr. Dorgan’s high school grade point average; allegations that Mr. Dorgan asked “numerous individuals”, including town officials, to contact the Mayor on his behalf; and Mr. Dorgan’s credit rating. Both letters state that Mr. Dorgan was bypassed based on his employment history, his lengthy driving record, a custodial dispute and an angry conversation he had with someone in his current employer’s Human Resources office.

With regard to Mr. Dorgan's employment history, the bypass letter enclosures state that Mr. Dorgan received two disciplinary suspensions in 2010 for bringing his cell phone into the correctional facility in the Sheriff's Department in violation of the Department's policy. Mr. Dorgan admitted his actions to his employer. In the six years he has been employed at the Sheriff's Department, Mr. Dorgan was also disciplined once regarding sick leave. The City refers to Mr. Dorgan's conduct in this regard as "sick leave abuse." Although Mr. Dorgan has not exceeded the number of sick leave days afforded to him, his employer issued him a warning in 2012 for failing to provide acceptable documentation for his use of sick leave time. The City conducted a reasonably thorough review of these matters and had reasonable justification to bypass Mr. Dorgan on this basis. I note that one candidate who bypassed Mr. Dorgan and who is not related to anyone in the Police Department has a worse job history at two law enforcement or law enforcement-related jobs than Mr. Dorgan. At one job, the other candidate resigned to avoid being fired; in the other job, a supervisor indicated that the employer would not hire the other candidate again. Again, that does not change Mr. Dorgan's employment history but it certainly raises further questions about the City's hiring process. Further, in view of Chief Solomon's indication that a candidate's job history at a law enforcement position is especially important, it is not clear how the candidate with such a poor law enforcement or related job history is selected over someone with a few minor disciplines over a six-year career in a corrections facility.

With regard to Mr. Dorgan's driving record, the bypass letter enclosures include information stating that Mr. Dorgan has "a lengthy driving history" spanning nine (9) years including numerous moving violations, license suspensions. Mr. Dorgan's adult driver history is shorter than his whole record (including his junior operator driving record) but indicates that he was cited for speeding four (4) times between 2006 and 2009 and was found responsible for

three (3) of those citations. He was repeatedly defaulted for failing to pay fines for various traffic offenses, his license was suspended on at least one occasion (2009), and he had a surchargeable accident in 2011. The City conducted a reasonably thorough review of these matters and had reasonable justification to bypass Mr. Dorgan on this basis. That said, I note that the City hired one candidate who bypassed Mr. Dorgan and is not related to someone in the Police Department who has had a comparable, if not worse, driving record. That does not change Mr. Dorgan's problematic driving record but it certainly raises questions about the City's hiring process. Further, it is not clear how the candidate with the same or worse driving record than Mr. Dorgan poses any less of a safety or liability concern to the City than Mr. Dorgan.

The City also bypassed Mr. Dorgan based on a custody event involving his minor child on August 27, 2014 and his conversation with someone at the Sheriff's Department Human Resources office in mid-December, 2014. Since both events occurred after Mr. Dorgan's background investigation report of May 19, 2014 and his interview on June 19, 2014, the Appellant had no opportunity to respond, undermining the City's reasonably thorough review of these matters.

There can be no question that any inappropriate custodial conduct does not meet the high standard of conduct to which police officers are held. However, what precludes a determination that the City had reasonable justification for bypassing Mr. Dorgan based on this incident is that the mother of Mr. Dorgan's minor child is the daughter of a member of the Methuen Police Department and the possible influence, albeit indirect, this fact may have had on Mr. Dorgan's candidacy. Needless to say, child custody issues can present emotionally trying times for an entire family, not just the child. In this case, the timing of the custodial event raises questions since it occurred during Mr. Dorgan's candidacy and after several years of apparently

satisfactory, voluntary custodial arrangements without any other Police involvement. While the unsigned Police incident report indicates that Det. McMenamon handled the custody complaint and wrote the incident report about it, not the member of the Department who is a grandfather of Mr. Dorgan's child, Mr. Dorgan was not given the opportunity to comment on this matter since it occurred after his interview and the background investigation on him had been completed. Therefore, the City did not have reasonable justification to bypass Mr. Dorgan based on the cited custodial event.

The City did not establish by a preponderance of the evidence that it had reasonable justification to bypass Mr. Dorgan based on a rude and/or angry conversation it states he had with someone at the Sheriff's Department Human Resources office about his sick leave records and Mr. Dorgan's candidacy for the position of reserve police officer in Methuen. Like the custodial event, the conversation at issue occurred after Mr. Dorgan's interview and background investigation. As a result, the City did not provide Mr. Dorgan with the opportunity to respond and the City did not conduct a reasonably thorough review of this matter. Having failed to conduct a reasonably thorough review of Mr. Dorgan's conversation with someone at the Sheriff's Department Human Resources office, the City did not establish that it had reasonable justification for the bypass based on this conversation.

Another troubling part of this case is the allegation in the January 5, 2015 bypass letter that Mr. Dorgan contacted "numerous individuals", including town officials, asking them to contact the Mayor in support of his candidacy and its absence in the January 8, 2015 bypass letter. The only person named in this regard in the January 5, 2015 letter was Mr. Weymouth, whom, the Mayor informed Chief Solomon, did not contact him in this regard. Mr. Dorgan's mother contacted the Mayor asking about Police incident report concerning the custody problem

and, of course, supported her son's candidacy. However, when Chief Solomon was asked to identify the other "numerous individuals", he could not name any. Thus, the reason that the initial bypass letter stated that Mr. Dorgan had contacted "numerous individuals", including town officials, to inquire on his behalf is a mystery. Regardless, basic merit principles includes, "... assuring that all employees are protected against coercion for political purposes" (G.L. c. 31, s. 1) Any inappropriate actions in these regards undermine this fundamental purpose of the civil service system. Assuming that the City conducted a reasonably thorough review to determine that Mr. Dorgan had engaged "numerous individuals", including town officials, to persuade the City to hire Mr. Dorgan, and that the City established by a preponderance of the evidence that Mr. Dorgan took such actions, it would have had reasonable justification to bypass him, in addition to his driving and employment histories. However, since this matter was not included in the City's list of reasons for bypassing Mr. Dorgan in its January 8, 2015 letter and, further, Chief Solomon testified at the Commission that he did not know the "numerous individuals" who were supposedly involved in such an effort, I reach no conclusion thereon.

The issues regarding the custody event and the conversation with someone at the Sheriff's Department Human Resources office aside, the City had reasonable justification to bypass Mr. Dorgan based on his driving and employment histories.

Conclusion

For these reasons, Mr. Dorgan's appeal under Docket No. G1-15-25 is hereby *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman, Esq.
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on September 3, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:

Thomas J. Gleason, Esq. (for Appellant)

Anne Randazzo, Esq. (for Respondent)

Mark Detwiler, Esq. (for HRD)

John Marra, Esq. (HRD)