

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

DAVID P. DUFRESNE,
Appellant

v.

Docket No. G1-04-492

TOWN OF WEBSTER,
Respondent

Appellant's Attorney:

Pro se
David P. Dufresne

Respondent's Attorney:

Brian M. Maser
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101 Arch Street
Boston, MA 02110-1109

Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, David P. Dufresne (hereinafter "Appellant"), filed this appeal with the Civil Service Commission (hereinafter "Commission") on November 29, 2004, claiming that the Respondent, Town of Webster (hereinafter "Town") as Appointing Authority, bypassed him for original appointment as a permanent intermittent police officer for the Webster Police Department (hereinafter "Department"). The Appellant was notified of his bypass for appointment by the Human Resources Division (hereinafter "HRD") by letter dated February 25, 2005. As this appeal was filed on November 29, 2004, nearly two (2) months *prior* to the Appellant's

bypass notification, the appeal is considered timely filed. A full hearing was held in the Commission's offices on June 26, 2007. Witnesses offering sworn testimony were not ordered to be sequestered. One audiotape was made of the hearing. The parties submitted proposed decisions thereafter, as instructed.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1 - 8) and the testimony of the Appellant and Police Chief Timothy Bent, I make the following findings of fact:

1. On or about August 24, 2004, the Town requisitioned a civil service list from the HRD for the appointment of ten (10) permanent intermittent police officers. (Joint Exhibit 1)
2. Pursuant to G.L. c. 31, § 27 and Personnel Administration Rule (PAR) .09, the Town applied the required "2n + 1" formula to attain a list of eligible candidates for the ten (10) permanent intermittent police officer vacancies. Background checks were then performed on each eligible candidate who indicated their willingness to accept an appointment with the Town. The background checks included an in depth review of each applicant's application, qualifications, references, driving history and criminal record. The background checks of the interested applicants were performed by Detective James Hoover for the Department. After the background checks were completed, the Town designated a panel of three (3) members of the Police Department and former Town Administrator Robin Leal to interview

each of the candidates. The three (3) police officers that comprised the interview panel were then-Sergeant Timothy Bent¹, Sergeant Michaela Kelly, and Detective Hoover. (Joint Exhibit 1 and Testimony of Bent)

3. In October 2004, each of the eligible permanent intermittent patrol officer candidates from the civil service list were interviewed by the panel and asked the same pre-determined questions. Each interview was tape-recorded. (Joint Exhibit 8)
4. The qualifications that were evaluated by the panel included the following: (a) driving history; (b) criminal record; (c) background and experience; (d) suitability; (e) judgment; and (f) overall impression. At the conclusion of each interview, the panel discussed the applicant's suitability for appointment. A member of the panel thereafter made a recommendation to the Police Chief as to whether the applicant should be appointed based upon the totality of the information gleaned from the applicant during the interview and the impressions the applicant made to the panel. (Joint Exhibit 8 and Testimony of Bent)
5. Pursuant to G.L. c. 31, § 27, in January 2005, the Town submitted to the HRD the names of those applicants appointed to the position of permanent intermittent police officer and an attached list of reasons for appointing persons who were not highest on the list. These appointments and the attached list of reasons were subsequently approved by the HRD. (Joint Exhibit 4)

¹ Then-Sergeant Bent was appointed Police Chief by the Town in November 2005.

6. Six (6) candidates were chosen from certified list number 240895, of which one (1) scored below the Appellant. The list of reasons submitted to the HRD included the following for each successful candidate:

“James Young

Clean record; no driving violations. Good working history. Strives to educate himself by attending college; Strong communicator during interview – he looked straight at interviewers; showed confidence. Is familiar with the Webster Police Department and town as he is an Auxiliary Police Officer and his father is a Webster police officer. Many officers were involved in his upbringing. Good character.

Josh Collins

Clean record; no driving violations. Has experience in police work (Holland and Charlton), good character and attitude. Police Academy trained and has a two year business degree. Is familiar with the Webster Police Department and town as he is an Auxiliary Officer.

Robert Ela

Clean record; He has a similar community policing philosophy – believes in teamwork, high visibility in the community, work with youth, presented well in oral interviews; came to interview well prepared. Uses humor, likes to have fun; doesn’t take himself too seriously, yet has a command presence.

Jose Milette

Clean record, good work history with the Department of Defense, bilingual, pro-active in problem solving. Is familiar with the Webster Police Department as he is an Auxiliary Officer. Good judgment skills on questions during interview; good sense of humor; team player; some academy training.

Michael Bonasoro

The Town is willing to appoint contingent on completing the application process. Mr. Bonasoro is currently serving in Iraq and should return in approximately 18 months.

Michael Corriveau

Clean record, excellent oral interview, military police experience. Is familiar with the Webster Police Department as he is an Auxiliary Officer.”

(Id.)

7. As a result of these appointments, the Appellant was bypassed for appointment to a permanent intermittent police officer position with the Town. The reasons for the Appellant's bypass were set out by the Town as follows:

“Dufresne, David

Driver History

- Suspended license, July 1996
- Suspended license, October 1995

Charged with Breaking and Entering in the nighttime, 1990.
Dismissed.

Defendant restraining order, 9/23/93

After his oral interview, interviewing sergeants were concerned about his attitude regarding chain of command. Interviewers also concerned that he was not truthful about knowledge of suspension of license.”

(Id.)

8. The Appellant filed this bypass appeal with the Commission on November 29, 2004, nearly two (2) months before he was notified of the bypass. (Joint Exhibit 2)
9. The Town asserted that there were several sound and sufficient reasons for bypassing the Appellant. For instance, all successful candidates appointed did not have a criminal record whereas the Appellant was arrested in the City of Worcester in February 1990. At that time, the Appellant was charged with Breaking and Entering (B & E) in the Nighttime with the Intent to Commit a Felony and Malicious Destruction of Property. Specifically, the Appellant was found to be present with a male companion who allegedly broke into an unoccupied vehicle and attempted to steal an AM/FM radio with a cassette player. The arresting officer observed the Appellant's car idling in a lot next to the location of the vacant car during the entirety of the event. A civil

restraining order was also taken out against the Appellant in 1993. (Joint Exhibits 6 and 7)

10. The Town also proffered that, during the round of interviews for the position of permanent intermittent police officer, the Town placed great weight on each applicant's driving history given the excessive losses the Town had suffered resulting from accidents involving members of the Police Department. While all successful applicants appointed did not have a significant negative driving history, the Appellant's driving history included speeding violations and two (2) instances in which his license had been suspended. The Appellant was also cited with operating to endanger in 1990 and driving on a suspended license in 1996. It is not disputed that subsequent to July 1996, there are no further entries on the Appellant's driving record. (Joint Exhibits 4 and 6)

11. Finally, the Town's interview panel expressed concern regarding the Appellant's veracity during the interview as he appeared to be evasive when responding to questions regarding his criminal and driving records. Specifically, the Appellant stated to the interview panel that he was not even present at the time of the incident resulting in his arrest in February 1990 while the police report clearly demonstrated otherwise. Secondly, the Town claims that the Appellant was not truthful in responding to inquiries regarding the number of times his license had been suspended. The Town noticed the HRD that all successful applicants performed better than the Appellant during their respective interviews. (Joint Exhibits 4 & 8 and Testimony of Bent)

12. The Appellant testified that he had spent nine (9) years in the United States Marine Corps and that he worked for the Department of Defense as a police officer for five (5) years as of the time of his hearing at the Commission. He related that he held a Step 9 driver's status for insurance purposes at the time of his interview at the Department and continues to hold a Step 9 status to this day. (Testimony of Appellant)
13. The Appellant also testified that he has always tried to be truthful and holds a federal security clearance. He asserted that his criminal charges had all been dismissed and were otherwise quite old by the time he sought employment in Webster. He further argued that the restraining order was brought against him by a woman with whom he was battling in court over paying child support for a child that was ultimately found not to be his own. According to the Appellant, the woman was subsequently ordered by the court to reimburse him over \$20,000 in erroneous child support payments. (Id.)
14. The Appellant presented to the Commission as polite and respectful. His military and law enforcement training was reflected in his speech. He was confident and unhesitant in his statements and appeared to be sincere. He seemed more relaxed in the Commission hearing than he was at his oral interview at the Department which was shown on the videotape marked as Exhibit 8. (Demeanor of Appellant and Exhibit 8)
15. In his videotaped interview at the Department, the Appellant repeatedly admitted making "mistakes" when asked about his driving and criminal history. He acknowledged that certain mistakes would follow him throughout

his life. However, he consistently noted that he “learned from his mistakes.” On the videotape, I found that certain of his answers were vague, cliché-riddled and lacking in depth. I also found that some of his answers to interviewers’ questions could easily have been construed as evasive or dismissive of responsibility. Despite this finding, however, I believe that the Appellant is, on balance, a man of integrity. I base this finding on my own personal observations as the hearing officer as well as the Appellant’s possession of a federal security clearance. (Exhibit 8)

16. I find that the Appellant did do well in explaining the nature of the restraining order taken out against him in 1993 and find that this order was frivolous and not sustainable as a reason for bypass. While no evidence was produced to refute the Appellant’s explanation that the B & E charges against him in 1990 were only a matter of “being in the wrong place at the wrong time”, I note that his explanation at his interview fell short of being completely convincing as to why his car was adjacent to the crime scene. The Town stipulated to the charges having been dismissed in that episode. Nevertheless, the candidates appointed to the positions were all listed as having “clean records” with no need for explanation or nuance. (Exhibit 4)
17. I find that the Department’s concerns about the Appellant’s attitude regarding chain of command issues within a law enforcement agency were a matter of the Department’s discretion. The Appellant did not excel in answering questions posed to him relative to several hypothetical scenarios where he was asked to consider the chain of command in making decisions. In answer to a

question as to how he would handle a motor vehicle stop of his own mother, the Appellant offered that he would give her a citation. I found, as did the interview panel, that this answer was awkward and somewhat disingenuous. (Exhibit 8)

18. I find that the Department made it clear to the HRD that “because the town has experienced excessive losses due to a great amount of driving accidents in the past year, we have also weighted heavily on negative driving records.” This is a legitimate reason for bypass. The Appellant’s driving history, coupled with his inability to convince the interview panel of its insignificance, was ultimately the fatal flaw in his candidacy. (Exhibits 4 and 6)

19. I found no evidence that the Town bypassed the Appellant for reasons relating to political influence or any other impermissible or non-merit based reasons.

CONCLUSION:

The Civil Service Commission grants wide latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion. Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987). In a bypass appeal, the CSC must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was “reasonable justification” for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority’s actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided

by common sense and 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).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, the Commission must consider the fundamental purpose of the Civil Service System which is “to protect against overtones of political control, objectives unrelated to merit standards and assure neutrally applied public policy.” If the Commission finds that there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy”, then it should intervene. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. City of Cambridge at 304.

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). All candidates must be adequately and fairly considered. The Commission 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).

Pursuant to G.L. c. 31, § 27, the Town was required to appoint ten (10) of the highest twenty-one (21) names (the “2n+1” formula) on the certification list who were willing to accept the position. Section 27 also requires that an Appointing Authority file with the Personnel Administrator a statement of reasons each time it appoints a candidate ranked lower on the “eligibility list” over a candidate ranked higher on such list. In the instant matter, the Town submitted its statement of reasons for bypassing the Appellant and those reasons were approved by the HRD. The Town’s primary reason for bypassing the Appellant was the fact that the successful candidates did not have any entries on their criminal records or driving records and because the successful candidates performed better and were truthful in their respective interviews.

There existed reasonable justification to bypass the Appellant from the position of permanent intermittent police officer for the Town. As stated previously, the Appellant’s driving record includes numerous motor vehicle infractions. The Appellant was cited with driving to endanger and two (2) speeding tickets in the Town of Leicester in the span of less than twelve (12) months. Thereafter, the Appellant received two (2) additional speeding citations and had his license suspended on two (2) occasions in 1995 and 1996.

It is not disputed that, subsequent to July 1996, there are no further entries on the Appellant’s driving record. Given the Town’s scrutiny of negative driving records due to the recent spate of driving accidents in which Town police vehicles were involved, however, the Town was justified in bypassing the Appellant, in part, for his driving

record. It was apparent that the Appellant did not “learn from his mistakes” of earlier moving violations which occurred in 1990 and 1991 as he received additional speeding tickets and drove on a suspended license in 1996. These facts contradicted the Appellant’s stated ability to learn from and correct adverse behavior.

In addition, the Appellant’s criminal record was not without incident. He was arrested in February 1990 in the City of Worcester, charged with Breaking and Entering and Malicious Destruction of Property. In November 1990, he was charged with Operating to Endanger. In July 1996, he was charged with Operating with a Suspended License. The Appellant’s inability to completely and convincingly answer questions regarding these incidents led the Town’s interviewers to reach the conclusion that he was being evasive. The Commission finds that that conclusion is a reasonable exercise of discretion on the part of the Town.

Based upon a preponderance of the credible evidence presented at hearing, the Commission finds that the Town has sustained its burden of proving reasonable justification for bypassing the Appellant. Therefore, the appeal on Docket No. G1-04-492 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By a 3 – 2 vote of the Civil Service Commission (Bowman, Chairman; Marquis and Guerin, Commissioners – voting Yea) [Henderson and Taylor, Commissioners – voting Nay] on February 14, 2008.

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)(1), 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:

David P. Dufresne

Brian M. Maser, Esq.

