

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114
617-979-1900

GIANCARLO ENCARNACION-PEGUERO,
Appellant

v.

SALEM POLICE DEPARTMENT,
Respondent

Docket Number: G1-24-019

Appearance for Appellant: Lance A. Sobelman, Esq.
152 The Lynnway
Lynn, MA 01902

Appearance for Respondent: James F. Wellock, Esq.
Assistant City Solicitor
City of Salem Legal Department
98 Washington Street, 3rd Floor
Salem, MA 01970

Commissioner: Shawn C. Dooley

SUMMARY OF DECISION

The Commission affirmed the decision of the Salem Police Department to bypass an applicant for appointment as a reserve police officer based upon unique circumstances related to a past restraining order.

DECISION

The Appellant, Giancarlo Encarnacion-Peguero (Appellant), acting pursuant to G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from the decision of the City of Salem (Salem)'s Police Department to bypass him for appointment as a permanent reserve police

officer.¹ A remote pre-hearing conference was held on April 2, 2024. On July 9, 2024, I conducted an in-person full hearing. The hearing was recorded via Webex and both parties received a link to access the recording.² Both parties filed proposed decisions. For the reasons set forth below, the Appellant's appeal is denied.

FINDINGS OF FACT

The Appellant entered 14 exhibits (Appellant Exhibits 1-14) and the Salem Police Department entered five exhibits (Respondent Exhibits 1-5). Based upon the evidence and the testimony of the following witnesses:

Called by the Salem Police Department:

- Lucas J. Miller, Police Chief, City of Salem;
- Kevin McDonnell, Sergeant., City of Salem Police Department;
- Ms. A, Officer, City of Salem Police Department.³

Called by the Appellant:

- Fletcher Hall, former employer
- Robert McCarthy, former employer;
- Giancarlo Encarnacion-Peguero, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

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.

² Should either party file a judicial appeal of this decision, the plaintiff is 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. If such an appeal is filed, electronic copy of the hearing recording, previously sent to the parties, should be used to transcribe the hearing.

³ A pseudonym has been assigned to protect this police officer's anonymity and privacy concerns surrounding a past restraining order.

1. The Appellant, Giancarlo Encarnacion-Peguero, is a lifelong Massachusetts resident. He is a 2004 high school graduate who began a career in carpentry in 2008. The Appellant is 37 years old. (*Resp. Ex. 2*)

2. The Appellant has been self-employed since 2015. (*Resp. Ex. 2.*)

3. On March 23, 2023, the Appellant took and passed the civil service examination administered by the Massachusetts Human Resources Division (HRD). His name was placed on the eligible list established on July 1, 2023. (*Stipulated facts*)

4. On July 11, 2023, HRD issued Certification No. 09328 to the Salem Police Department. (*Stipulated facts*)

5. On August 15, 2023, the Appellant signed under the pains and penalties of perjury his application with the Salem Police Department. (*Resp. Ex. 2*)

6. As part of the application process, a background investigation was performed by Sergeant Kevin McDonnell. (*Testimony of McDonnell; Ap. Ex. 15*)

7. The Appointing Authority for police officers in the City of Salem is the Chief of Police, Lucas Miller. (*Testimony of Chief Miller*)

8. On January 3, 2024, Chief Miller notified the Appellant via mail of his decision to bypass him for appointment. This letter informed the Appellant of his right to appeal. (*Resp. Ex. 1*)

9. The bypass letter stated that the candidate was bypassed based on information obtained during a background and fitness for employment investigation for the following reasons:

Of particular concern are two incidents of personal misconduct which were reported to the Salem Police Department (one in 2011 and one in 2012) of you harassing females with whom you were in relationships with. An additional area of concern is your poor work history; from 2004 to 2011 you had eight different jobs and were fired from two of them.

Job History

10. From approximately 2004 until 2011, the Appellant had eight different jobs and was terminated from two of them: Desrosier Construction and TF McCarthy Sons, LLC. (*Resp.Exh.2*)

11. While working for TF McCarthy Sons, LLC over 14 years ago, the Appellant struggled with tardiness. In March 2009, the Appellant was eventually terminated after being arrested (charges later dismissed) and not returning to work that day. The company's owner felt compelled to terminate the Appellant after his arrest. (*Testimony of Robert McCarthy*)

12. Mr. McCarthy, the owner of TF McCarthy Sons, has been told by the Appellant's subsequent employers that he always arrives early to work. (*Testimony of Robert McCarthy*)

13. Mr. McCarthy continued to stay in contact with the Appellant and, after noticing significant growth and maturity, re-hired the Appellant for temporary jobs. (*Testimony of Robert McCarthy*)

14. The Appellant next worked for Thompson Construction for nine months and for Greylock Construction for nine months, before being hired by F.G. Hall Construction, where he worked from 2011 to 2015. (*Exhibit 2*)

15. While working for Fletcher Hall, the Appellant was punctual, showed great attention to detail, and displayed a strong work ethic. (*Testimony of Hall, Exhibit A3*)

16. While transitioning into retirement, Mr. Hall allowed the Appellant to take over much of his client base. When Mr. Hall eventually retired, he kept in touch with previous customers, who only had good things to say about the Appellant's work. (*Testimony of Fletcher Hall*)

Restraining Order

17. In 2011, the Appellant and an individual who now serves as a Salem Police Officer, Ms. A, were in some form of relationship⁴. While Ms. A was at the Appellant's apartment, the Appellant accessed Ms. A's phone without her permission. *(Testimony of Ms. A)*
18. The Appellant then angrily accused Ms. A of communicating with other men. *(Testimony of Ms. A)*
19. Ms. A did not believe that she and the Appellant were in a "romantic relationship" at this time, making his reaction particularly alarming to her. After the incident, Ms. A took her phone from the Appellant, and he drove her home. *(Testimony of Ms. A)*
20. Ms. A woke up the next day to find that her phone had been "blowing up with calls and text messages" from the Appellant. He insisted that they needed to talk, but Ms. A felt uncomfortable with his persistence and ignored the messages. *(Testimony of Ms. A)*
21. Over the following two days, the Appellant followed Ms. A to work and parked outside the building and/or drove in front of her building throughout her work shift. *(Testimony of Ms. A and the Appellant)*
22. Ms. A went to the police department and showed the officer her phone, which contained numerous missed calls and messages from the Appellant. The officer then blocked the Appellant's number from Ms. A's phone to prevent further communication. *(Testimony of Ms. A)*

⁴ The Appellant said they were in a dating / sexual relationship. Ms. A said she did not feel they were in a dating relationship but could not recall if it was sexual.

23. An emergency restraining order per Mass. Gen. Laws chapter 209A⁵ was applied for and allowed, prohibiting the Appellant from contacting Ms. A. (*Testimony of Ms. A*)
24. At the return hearing (approximately 3 days later) for the 209A, the Appellant appeared and Ms. A did not; and the emergency restraining order was vacated. (*Testimony of the Appellant*)
25. Several months after the restraining order was dismissed, Ms. A and the Appellant rekindled their relationship.⁶ (*Testimony of the Appellant*)
26. Chief Miller was aware that Ms. A was a Salem Police Officer but did not discuss this issue with Ms. A until after he issued the bypass letter. (*Testimony of Chief Miller*)

Facebook Post Incident

27. In 2012, when the Appellant was 24 or 25 years old, MM, along with her mother, reported that Appellant had posted unflattering Facebook messages regarding MM's weight and called her a "lush." Once the Appellant was notified by the Officer who took the incident report from MM that the Facebook post was upsetting to MM, he apologized and took down the post. (*Testimony of Sergeant McDonnell, Resp. Ex. 4*)
28. MM was interviewed by the recruit investigator regarding the Appellant. She was very positive about the Appellant and thought he would make a good police officer. (*Testimony of Sergeant McDonnell*)
29. MM stated that the Facebook incident was just "kid stuff" and that they have the same circle of friends. She has even hired the Appellant to work as a carpenter at her home and

⁵ Ms. A refers to this as a "harassment order" but the police report submitted as an exhibit demonstrates that the order sought and obtained was a 209A. (Exhibit 5) The actual records for the 209A were unable to be located and the Salem District Court has no ability to produce said records.

⁶ The Appellant stated that they resumed a casual sexual relationship. Ms. A testified that she couldn't recall if they resumed a relationship.

noted that he is hardworking and responsible. (*Testimony of Sergeant McDonnell and A.Ex. 15*)

30. This incident did not rise to the level of criminality, nor did it require any additional police action. (*Testimony of Chief Miller*)

Legal Standard

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996).

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

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v.

Civil Service Comm’n, 483 Mass. 461, 474-78 (2019); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law’”. Brackett v. Civil Service Comm’n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”).

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

Public safety officers are vested with considerable power and discretion and must be held to a high standard of conduct. See, e.g., Falmouth v. Civil Service Comm’n., 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305,

rev. den., 428 Mass. 1102 (1997); Police Comm'r v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986).

The Respondent has the discretion to determine whether the Appellant's service is worth the inherent risk of hiring a candidate with a prior poor attendance record for a position in which punctuality is critical. See Cruceta v. Boston Police Dept., 25 MCSR 111 (2012) (upholding bypass for original appointment, noting city has discretion to consider employment record that included chronic tardiness in 2008 despite improved record of punctuality in 2011 along with other factors); Semexant v. Boston Police Dept., 34 MCSR 218 (2021) (BPD established reasonable justification to bypass a candidate for original appointment as a police officer based on his poor employment history that included performance issues, a history of absenteeism, tardiness, and failure to give proper notice of resignation in prior post.)

The Respondent has the discretion to determine whether the Appellant's service is worth the inherent risk of hiring a candidate with a history of personal misconduct consisting of harassing females. See Walsh v. Boston Fire Dept., 25 MCSR 301 (2012) (appellant's conduct while harassing former girlfriend also put the public safety at risk; appellant was "twenty-four or twenty-five years old, indicating that the conduct cannot be dismissed as youthful indiscretion.")

Analysis

Most of the facts in this case are undisputed. Between the ages of 19 and 25, the Appellant, by his own admission, frequently displayed poor judgment, including habitual tardiness that led to the termination of his employment. In addition, he admitted to two incidents that were reported to the police department. While neither of the two incidents led to the filing of criminal charges, and there were no accusations of violence or threats of violence, I carefully considered the events leading up to the issuance of an emergency restraining order.

While I credit the Appellant for taking responsibility and expressing remorse for both incidents, I appreciate the reluctance of the Salem Police Department to hire him as a Reserve Police Officer based upon this history. Adding to that history, the individual who filed the restraining order currently serves as a member of the Salem Police Department and has stated that she would not feel comfortable working with the Appellant. This presents a legitimate concern for the Police Chief and I respect that the overall morale and well-being of the officers under his care is a significant concern in hiring a person who might jeopardize that trust. The fact that this is a small department and there would undoubtedly be interactions on the job between these two individuals further exacerbates the situation.

I credit the fact that after both problematic incidents, once the Appellant was notified that his behavior was considered inappropriate by the individual making the complaint, he immediately took steps to rectify the situation. The Appellant admitted that his actions were immature and that he has grown significantly in the past 12 years.

While I considered the fact that the Appellant posted disparaging comments about MM on Facebook, I do not believe that they rise to the level of justifying a bypass. They were not threatening or ongoing and were immediately removed when he was asked to remove them. As MM herself stated, this was just “kid stuff” and they have remained friendly. She further stated to Sergeant McDonnell that she has since hired the Appellant to do work for her and that she would recommend Appellant for a job as a police officer.

While Ms. A was unable to remember many details surrounding her relationship with the Appellant, I do credit that an incident in 2011 occurred that rose to the level which allowed Ms. A to be granted an emergency 209A order. While the actual court filing is unfortunately missing or has been discarded, the CAD report submitted as an exhibit clearly establishes that an emergency

209A order was issued. A 209A order, unlike a harassment prevention order, requires a prior relationship between the parties, such as having been previously engaged in a dating relationship.⁷

Chief Miller acknowledged that it would have been extremely unlikely that the Appellant would have been bypassed had it not been for the two reported incidents. The Appellant's termination from a job when he was 18 years old is too far removed to be the basis of a bypass. Likewise, his termination resulting from an arrest that did not lead to any conviction or other criminal disposition is insufficient to sustain a poor work history. This is especially true given the Appellant's work history over the past 12 years. The testimony regarding the Appellant's work ethic, promptness, and professionalism since the terminations provides proof that the Appellant has matured and learned from the missteps of his youth. There is not an ongoing pattern of tardiness that would lead one to believe that the Appellant would not be suitable to be a police officer.

As to the two incidents in question, Chief Miller also acknowledged that the incident involving MM did not rise to the level of requiring further police action; nor did it rise to the level of criminality. As to the incident with Ms. A, Chief Miller testified that while it may not have risen to criminal conduct, it did warrant further police involvement which was achieved through filing a 209A. At the time of these incidents, the Appellant was 24-25 years old. While the Appellant has not had any further incidents involving alleged inappropriate behavior, the fact that he was an adult when these incidents took place is relevant as to weight.

The primary question is whether the 2011 incident with Ms. A is significant enough to bypass

⁷ M.G.L. c. 209A, § 1 states that family or household members includes those persons who "(e) are or have been in a substantive dating or engagement relationship, which shall be adjudged by district, probate or Boston municipal courts consideration of the following factors: (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the parties; and (4) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship."

the Appellant. As stated earlier, this is further complicated by the fact that Ms. A is currently a police officer in this department. While employers, including public safety agencies, may, after a thorough investigation, take account of a candidate's prior misconduct even in one instance, they should weigh any infraction against a candidate's entire life record, as opposed to making hiring decisions based simply on one or two incidents from their past. While the Appellant's actions here did take place 12 years ago, this case is complicated by the fact that the complainant is currently a member of the Department and will be required to work with the Appellant if he were appointed.

As to why the two incidents preclude Appellant from working as a police officer, Chief Miller testified that repeated incidents involving intimate partners shows poor judgment on the part of the Appellant that could impact his or her ability to respond to domestic violence calls. While there remains a question whether the Appellant engaged in a "pattern" of behavior, the fact that these actions took place when the Appellant was 24 and 25 respectively as opposed to still being in his teens, gives one reasonable pause.

. While there is an argument that there has not been a continued pattern of behavior and there needs to be a direct nexus between past acts and current suitability, the fact that the complainant, Ms. A, testified that she would feel uncomfortable working with the Appellant today cannot be ignored.

In summary, the Salem Police Department did have reasonable justification to bypass the Appellant and the Commission owes a level of deference to the Chief due to these unique set of facts. Nothing in this decision, however, should imply that the Commission feels that the Appellant should not be considered for employment as a police officer by other police departments, especially as the Appellant continues to show growth and maturity and continues to distance himself from these past incidents.

CONCLUSION

For all of the above-stated reasons, the appeal of Giancarlo Encarnacion-Peguero, under Docket No. G1-24-019, is *denied*.

Civil Service Commission

/s/ Shawn C. Dooley

Shawn C. Dooley, Commissioner

By a 4-1 vote of the Civil Service Commission (Bowman, Chair, - Yes; Dooley, Commissioner – Yes; Markey, Commissioner – Yes; McConney, Commissioner - Yes, & Stein, Commissioner - No) on December 5, 2024

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 to:

Lance A. Sobelman, Esq. (for Appellant)

James F. Wellock, Esq. (for Respondent)

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200

Boston, MA 02114

617-979-1900

GIANCARLO ENCARNACION-PEGUERO,

Appellant

v.

SALEM POLICE DEPARTMENT,

Respondent

Docket Number:

G1-24-019

DISSENTING OPINION OF COMMISSIONER STEIN

This is a close call for me. I agree that the SPD would be fully justified to bypass a candidate with a proven record of behavior that would present a credible risk of disruption to the Department due to a legitimate concern about the candidate's ability to work effectively with other members of the Department, due to a prior relationship with one of the members. I don't find, however, that the evidence of such risk of disruption has been supported by the preponderance of credible evidence. I therefore, respectfully, dissent.

CIVIL SERVICE COMMISSION

/s/ Paul Stein

Paul M. Stein

Commissioner

December 5, 2024