

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Decision mailed: 3/14/08
Civil Service Commission CB

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

CRAIG ERICKSON,
Appellant

v.

TOWN OF OXFORD,
Respondent

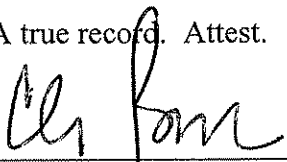
Case No.: G1-05-149

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on March 13, 2008 to acknowledge receipt of the report of the Administrative Law Magistrate dated February 1, 2008. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Marquis and Taylor, Commissioners [Henderson – Absent]) on March 13, 2008.

A true record. Attest.



Christopher C. Bowman
Chairman

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)(I), 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:

James B. Triplett, Esq. (for Appellant)
Marc L. Terry, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)



COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

98 North Washington Street, 4th Floor

Boston, MA 02114

www.mass.gov/dala

Tel: 617-727-7060

Fax: 617-727-7248

February 1, 2008

Christopher Bowman, Chairman
Civil Service Commission
One Ashburton Place, 5th Floor
Boston, MA 02108

James B. Triplett, Esq.
25 Camp Hill Drive
Oxford, MA 01540

Marc L. Terry, Esq.
Mirick, O'Connell, DeMallie & Lougee, LLP
1700 West Park Drive
Westborough, MA 01581-3941

RECEIVED
2008 FEB - 7 A 10:21
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

Re: *Craig Erickson v. Town of Oxford – Police Department*, G1-05-149, CS-07-629 (DALA)

Dear Chairman Bowman, Attys. Triplett and Terry:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c), they have 30 days to file written objections to the decision with the Civil Service Commission, which may be accompanied by supporting briefs.

Very truly yours,

Sarah H. Luick
Sarah H. Luick
Administrative Magistrate

encl.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Craig Erickson,
Appellant

v.

Docket Nos. G1-05-149,
CS-07-629 (DALA)

Town of Oxford – Police Department,
Appointing Authority

Appearance for Appellant:

James B. Triplett, Esq.
25 Camp Hill Drive
Oxford, MA 01540

Appearance for Appointing Authority:

Marc L. Terry, Esq.
Mirick, O'Connell,
DeMallie & Lougee, LLP
1700 West Park Drive
Westborough, MA 01581-3941

Administrative Magistrate:

Sarah H. Luick, Esq.

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

2008 FEB -7 A 10:22

RECEIVED

RECOMMENDED DECISION

Pursuant to G.L.c.31, §2(b), the Appellant, Craig Erickson, has appealed to the Civil Service Commission to find insufficient, the reasons given by his Appointing Authority, the Town of Oxford – Police Department, to bypass him for appointment to the position of Police Officer, which reasons were accepted by the Commonwealth's Human Resources Division on March 30, 2005. (Ex. 2) Mr. Mahoney timely appealed the bypass by letter of April 21, 2005, received April 22, 2005 by the Civil Service Commission. (Ex. 1)

I held a hearing on August 30, 2007 for the Civil Service Commission at the offices of the Division of Administrative Law Appeals (DALA), 98 North Washington

Street, 4th Floor, Boston, MA 02114. Various documents are in evidence. (Exs. 1 – 11)

The hearing was transcribed. The Appointing Authority presented the testimony of Sergeant Anthony Saad. The Petitioner testified on his own behalf with his counsel not present. His counsel's request to have the hearing continued had been denied by the Civil Service Commission. The Appointing Authority had assented to this continuance request. Following the hearing, the Petitioner's counsel filed a brief as did the Appointing Authority. Briefs were filed by October 15, 2007. Thereafter, on October 26, 2007, the Appointing Authority filed a Motion to Strike a portion of the Petitioner's brief. This Motion is denied with the Appointing Authority's reasons for the Motion taken as legal argument only.

FINDINGS OF FACT

Based on the documents entered into evidence (Exs. 1 – 11), and arguments presented, I make the following findings of fact:

1. Craig Erickson worked as an Intermittent Police Officer from 1999-2001 for the Town of Webster. He attended a Police Academy part time before being hired by the Town of Webster. He then trained with a Webster Police Officer on how to do patrolling, ticketing, using radar equipment, and learning about criminal law. He also received firearms training and first responder training. He worked part time filling in on regular police officer eight hour shifts. (Testimony)

2. Mr. Erickson grew up in Oxford. He was hired to be an Intermittent Police Officer in the Oxford Police Department in July 2001. He did not repeat the training he went through while working for the Webster Police Department. He had training of driving around with Oxford Police Sgt. Green on his 3:00 PM to 11:00 PM

shift, and then began to fill in on regular police officer shifts as needed. He did have to re-qualify in firearm use. He did not have to again go through first responder training. His required certifications continued upon starting work in Oxford. (Testimony)

3. With time, Mr. Erickson's name was near the top of the list of Intermittent Police Officers to be used to offer work as a need arose within the Oxford Police Department. Mr. Erickson held no other employment, and was in a position to always accept an offer to work. He ended up working so many shifts that he was working for periods of time full time per week for months at a time. He had two occasions between 2001-2004 when he worked forty hour work weeks for four to six months at a time. The remaining time periods, he typically worked two to four shifts per week. (Stipulation. Testimony)

4. Mr. Erickson felt he got along well with his fellow officers. He was often supervised by Sgt. Anthony Saad. He also worked with fellow Intermittent Police Officers, Kenneth C. Mead, Jr. and Paul J. McCarthy. They both started November 2002. He worked more often with Mr. Mead, about one or two shifts per week. (Testimony)

5. Mr. Erickson was aware that Mr. Mead had attended the full time Police Recruit Training Academy in 2004 at his own expense. He knew Mr. McCarthy worked for an ambulance company. (Testimony)

6. The Oxford Police Department has had about seventeen to twenty full time Police Officers with as many as five to fifteen Intermittent Police Officers. Now, there are only about five Intermittent Police Officers. The Oxford Police Department has decided to use fewer Intermittent Police Officers and hire more full time permanent

Police Officers. The goal is to phase out all use of Intermittent Police Officers.

(Testimony)

7. The goal of Mr. Erickson in taking this position with the Oxford Police Department, is to become a permanent Oxford Police Officer. He has been aware of the goal of the Oxford Police Department to use fewer and fewer Intermittent Police Officers and to instead hire more permanent full time Police Officers. He has been aware of his competition in terms of securing an appointment to permanent Police Officer, including the skill sets of Mr. Mead and Mr. McCarthy who were the two persons just below him in terms of experience as an Intermittent Police Officer in Oxford. (Testimony)

8. Sgt. Saad was assigned to address the training needs of the Intermittent Police Officers when he scheduled first responder training for them. He had to be sure they all were up to date on firearm, CPR, and first responder certifications. Firearm training is done annually. First responder training has to be done about every two or three years to stay current. Mr. Erickson attended a first day of first responder re-certification training. There was a day two of further first responder training toward re-certification scheduled for 6:00 PM on November 23, 2004 which Mr. Erickson was scheduled to attend. He was aware that such first responder training sessions tended to be offered on a number of occasions, but he knew he was expected to complete these particular two days of training. (Testimony)

9. Mr. Erickson worked the November 22-23, 2004 11:00 PM to 7:00 AM shift. By then, he had a head cold that made him tired. He rested at home following the end of this shift. He never attended the 6:00 PM training session. He never called the

Police Department to report he would not attend it, nor did he inform anyone before leaving work after his shift ended that he would not be attending it. (Ex. 11. Testimony)

10. After missing the training session, Mr. Erickson did not take the initiative to report on why he had not attended this training. The evening of November 24, 2004, Sgt. Saad sent an email to Mr. Erickson stating that he received notice from the first responder training officer that Mr. Erickson had not attended his scheduled training session. Sgt. Saad asked Mr. Erickson to provide to him "in writing by December 5, 2004 ... [the reason] why you did not complete this training." He attached to this email a copy of what Sgt. Saad had received from the training officer which showed that Mr. Erickson had only attended only one of the first responder training sessions. This memo to Sgt. Saad was dated November 24, 2004. (Ex. 10. Testimony)

11. Mr. Erickson waited until the December 5, 2004 deadline to respond to Sgt. Saad. He sent him an email stating the following:

I made the first class on Saturday morning 11/20/04 at 9:00 a.m. I couldn't make the second scheduled class on 11/23/04 at 6:00 p.m. I had my year and a half old daughter and could not get ... someone to watch over her. I have had conversation with Officer Ricky Hall [the First Responder Training Officer] and he is going to reschedule another class so I can be certified in "First Responder." (Ex. 10)

12. Mr. Erickson was engaged to the mother of his one and a half year old daughter, Kerry Darden. (Testimony)

13. Upon receiving this email, Sgt. Saad was suspect of what Mr. Erickson used as his excuse for not attending the training. He was under the impression that Kerry Darden had moved with her young daughter to California. He decided to investigate. He was able to contact Ms. Darden on December 17, 2004. She was actually in Fall River.

Sgt. Saad went out to meet with her. She spoke to him and gave him a written statement.

(Ex. 10. Testimony) She wrote:

[My daughter] was with me on November 23, 2004 ... I was also asked if Craig Erickson was with me on this same date. I answered No, to this. [Sgt. Saad] asked how do I recall memory of this date. I answered I keep a record on my calendar of all Craig's visits with his daughter. Craig was visiting at my house with [his daughter] ... on the 24th of November which was the day before Thanksgiving from 9:00 a.m. to about 1:30 p.m. After telling [Sgt. Saad] ... this he informed me that Craig told him that he had to take care of his daughter on the evening of November 23, 2004. I responded, "that was not true she was with me at home and Craig was not here." (Ex. 10)

14. Mr. Erickson responded to this information Sgt. Saad received from Ms. Darden. In a report to Sgt. Saad, he admitted after talking to his fiancée that he had not been with his daughter the evening of November 23rd as he first reported. He explained that he was confused by the time he filed his response by Sgt. Saad's deadline. He wrote that he now recalled he missed the training because he had a "chest cold and diarrhea," and that the training "did not come to mind." Mr. Erickson continues to be sure that it was having the cold that was the reason he did not attend the training session. (Ex. 10. Testimony)

15. On December 19, 2004, Mr. Erickson was informed by Sgt. Saad that his reason for not attending the November 23, 2004 training session was "unacceptable." (Ex. 10. Testimony)

16. By memorandum of December 17, 2004, Sgt. Saad filed a report with the Oxford Police Chief, Charles K. Noyes, that Mr. Erickson had filed a "Fabricated Statement" concerning his reason for not attending the training session. Sgt. Saad wrote that he after he asked Mr. Erickson to provide a reason in writing for failing to attend the

training session that the reason he gave of caring for his one and one-half year old daughter was investigated and found not to be true. Sgt. Saad explained how he was suspicious of this reason as he understood the child's mother was living out of state, and so he contacted the child's mother, taking a statement from her that confirmed that Mr. Erickson had not been with his daughter as he claimed. Sgt. Saad reported that the child's mother "was positive" that Mr. Erickson had not been with his daughter on November 23, 2004 because she keeps a record of his visits to his daughter and November 23rd was not on this list. Sgt. Saad reported that she told him he had seen his daughter the next day, November 24th from 9:00 a.m. to 1:30 p.m. Sgt. Saad provided the signed statement of the child's mother to Chief Noyes as well as Mr. Erickson's first email and later written information with the reason for his absence from the training. Sgt. Saad provided his conclusion to Chief Noyes that he felt Mr. Erickson had violated Oxford Police Department Rules and Regulations at Rule 6.9 on Truthfulness, Rule 12 on Filing Reports, and Rule 12.2 on Falsifying Records. (Ex. 10. Testimony)

17. Mr. Erickson did not receive formal discipline as a result of this course of events regarding his failure to attend the November 23, 2004 training. (Ex. 3. Testimony)

18. Mr. Erickson's name topped the December 1, 2004 list of Intermittent Police Officer Civil Service candidates willing to accept appointment to the position of permanent full time Oxford Police Officer; requisition number 241172. Behind him on the list were Mr. Mead and then Mr. McCarthy. There were six names in total on this list of persons who signed that they were willing to accept this appointment. Two new appointments were made off this list. (Exs. 4, 5, 6, 7 & 8)

19. On February 8, 2005 Chief Noyes provided written recommendations on the candidates for the position of permanent Police Officer to the Oxford Board of Selectmen, the Appointing Authority. He recommended the appointments of Mr. Mead and Mr. McCarthy. For each of the remaining candidates he explained why he did not select them. (Ex. 3)

20. Chief Noyes wrote regarding Mr. Erickson that he worked in 2004, 1216 hours or 152 eight hour tours of duty where he encountered 36 incidents or events, along with responding to 1,362 calls. Chief Noyes noted:

Patrol Sergeants have made the following comments
... "needs to be more thorough with the facts at hand
and be able to follow up cases until not able to go further";
"does not write reports on incidents that require them; has
not shown a willingness to learn, has been spoken to about
his report writing and offered help but has not done anything
to improve problem." (Ex. 3)

Chief Noyes also noted that Mr. Erickson had failed to attend scheduled training for certification as a first responder, and that when asked why he did not attend the session,

"he gave conflicting explanations as to his absence ... was
counseled on this incident and informed of his responsibility
to inform the department of any inability to attend training
in the future." (Ex. 3)

Chief Noyes did not recommend his appointment because of "these negative reports and his inconsistent performance of duties." (Ex. 3)

21. Sergeant Saad's experience with Mr. Erickson is that he does need to be more thorough with attention to particular facts, that he needs to do more follow up on cases, and that he does not write reports on incidents when he should. But, Sgt. Saad noted he improved in some of these areas after being spoken to about a need for

improvement. Sergeant Saad has found that Mr. Erickson will come forward with questions he has, and that he has shown a willingness to learn. (Testimony)

22. Chief Noyes did not recommend candidates other than Mr. Mead and Mr. McCarthy. Another candidate was found to be seeking an appointment to the Hartford Connecticut Police Department, although Chief Noyes found him showing potential with a good knowledge of the law and police work. Because of "his current status with the Hartford Police Department and the lack of work observation here," Chief Noyes did not find him "as qualified as higher ranked candidates" for the appointment. Regarding another candidate, Chief Noyes found her to be improving, attending trainings on her own time and expense, willing to learn, but only an Intermittent Police Officer from April 2004, and "not better qualified than higher ranked candidates." For another candidate, Chief Noyes noted that the candidate "continues to improve his skills as a police officer" but only started the job in June 2004. He found him "not as qualified as higher ranked candidates." (Ex. 3)

23. Regarding Mr. Mead, Chief Noyes noted he had worked 1108 hours or 138 tours of duty with 32 incidents or events, and that he responded to 1,714 calls. He noted how he had completed the full time police officer recruit training program on his own time and at his own expense. He noted how he had "over 800 academic hours of instruction," and had certifications in four highway safety related programs that are useful for patrol work. Chief Noyes noted that patrol sergeants have found Mr. Mead to always accept his assigned task, and that his reports "are prepared well." These patrol sergeants also reported that Mr. Mead "uses good judgment in situations," is becoming more confident in his work, does a "thorough job writing and following up reports and is

not afraid to ask a question about something he's trying to gather information on." He was also reported as having a "good working knowledge of the law." Chief Noyes noted he had no "negative reports." He wrote that Mr. Mead "is better qualified than the higher ranked officer," and he recommended his appointment. (Ex. 3)

24. Sergeant Saad agrees with Chief Noyes' assessment of Mr. Mead. He has not known him to tell falsehoods, or to need more work on doing his reports, or to need to do better follow ups. He was not exclusively Mr. Mead's supervisor, but has worked with him and observed him in the field as well as reviewed his reports. He has found him willing to learn. (Testimony)

25. Regarding Mr. McCarthy, Chief Noyes noted he had worked 929 hours or 116 tours of duty, with 40 incidents or events, and that he responded to 1,285 calls. Chief Noyes pointed out how Mr. McCarthy's "training and experience as a full-time EMT reflects in his work as a police officer ... [can] handle calls and deal with people." Chief Noyes noted how sergeants have found him to have "a calm demeanor in tense situations whereby he retains the ability to work through difficult circumstances," and how he does "a thorough job in all his tasks ... is articulate and concise in his report writing ... handles himself well in violent situations; confident; very good working knowledge of the law." He recommended his appointment. (Ex. 3)

26. Sergeant Saad has had experience supervising Mr. McCarthy. He has not known him to tell falsehoods, or to need to do better on follow ups. He has found his reports to be sufficient, and has found him willing to learn. (Testimony)

27. At their February 15, 2005 meeting the Oxford Board of Selectmen went along with Chief Noyes' recommendations after interviewing the candidates. They voted

to appoint Mr. Mead and Mr. McCarthy to fill the two permanent full time Oxford Police Officer positions. (See, Ex. 9)

28. The Oxford Board of Selectmen forwarded their appointments onto the Commonwealth's Human Resources Division for approval of their appointments of Mr. Mead and Mr. McCarthy. The Selectmen listed their reasons for appointing them. (Exs. 3, 6, 7 & 8)

29. In regard to their failure to appoint Mr. Erickson who was higher on the list than both Mr. Mead and Mr. McCarthy, the Selectmen sent the Human Resources Division Chief Noyes' February 8, 2005 report on the candidates for the position. (Ex. 3)

30. The Human Resources Division accepted the Selectmen's reasons for bypassing Mr. Erickson. In a letter of March 30, 2005, the Human Resources Division notified Mr. Erickson he was bypassed for appointment. He was provided with his appeal rights. He then filed a timely appeal with the Civil Service Commission. (Exs. 1 & 2)

Conclusion and Recommendation

The Appointing Authority has met its burden of proof, and the Appellant can be bypassed for appointment to the job of permanent Oxford Police Officer from this particular list and appointment process.

Both parties filed briefs recognizing the pertinent burden of proof to support a bypass. G.L.c.31, §2(b) calls upon the Civil Service Commission to determine whether or not, upon a preponderance of the evidence, that the Appointing Authority had a reasonable justification for bypassing the Appellant and instead appointing the two persons next below him on the list. Both parties recognize how reasonable justification

means the bypass decision had to be made “upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and by correct rules of law.” Selectmen of Wakefield v. Judge of First District court of Eastern Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Court of the City of Boston, 359 Mass. 211 (1971) Once that standard is met, the Civil Service Commission is not able to substitute its judgment for that of the Appointing Authority. Both parties also stress how the Civil Service Commission is “to protect against overtones of political control, objectives unrelated to merit standards, and assure neutrally applied public policy.” Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 304 (1997); Revere v. Civil Service Commission, 31 Mass.App.Ct. 315, 321 (1991); Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). This is all proper to use as standards to determine if the bypass was justified.

The Appellant argues that Sgt. Saad went outside the scope of proper conduct in tracking down Mr. Erickson’s fiancée to investigate whether or not he was actually caring for his young daughter the evening of November 23rd. The Appellant argues that the fact that he may have been wrong and that it was the next day he was with his daughter, simply shows that by the time he wrote the December 5th email to Sgt. Saad, his memory was not that fresh. He did correct the issue by writing a report to explain how he had simply been not feeling well with a cold and diarrhea that night (although he did not say he had been suffering from diarrhea at this hearing). The Appellant argues that this course of conduct does not show he engaged in any of the serious misconduct Sgt. Saad asserted. No evidence shows he received discipline in regard to this matter despite Sgt. Saad’s assertions to Chief Noyes that there were rule violations including asserting

falsehoods. He was advised not to skip required trainings. The Appellant argues that this matter should not be used at all to block his appointment.

I disagree. The Appellant's conduct in not attending the training session as well as his subsequent conduct in what he reported as to why he did not attend the training session, are not credible. No matter what the true reason was for missing that training session, I conclude he was not forthcoming in acknowledging he should have at least informed his employer or at least the trainer in advance that he was not going to attend the training. Since he worked the tour of duty that ended at 7:00 AM on that day of training, failing to come forward with the information he would not be attending does not show good judgment. Also, through the time of this hearing, he gave three different reasons for not attending: being with his young daughter, suffering from a chest cold and diarrhea, and suffering from a cold. It is also not understandable why he would have waited until Sgt. Saad's deadline of December 5th to report on why he did not attend the training. That delay makes no sense. He never explained at the hearing why he did not respond sooner when the reason for not attending would have been fresher in his mind. In any event, I do not find credible that he got confused and simply could not recall the actual reason he missed the training. He did not receive discipline over this matter, but was spoken to about the need to go to required trainings. Because he did not receive formal discipline over this matter does not mean Sgt. Saad engaged in any improper conduct of trying to entrap Mr. Erickson into making false statements by investigating why one of the Intermittent Police Officers he supervised had failed to attend required training particularly when he found his excuse to be suspect. This matter stands as a

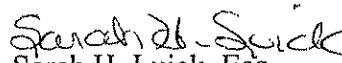
supportable, justifiable and proven reason for finding this evidence of a deficiency of job performance that can support a bypass determination.

In terms of the other issues Chief Noyes relies upon that Mr. Erickson has deficiencies in his job performance, such evidence is not fully overcome by Sgt. Saad's testimony that revealed positive aspects about Mr. Erickson's abilities. Sgt. Saad found Mr. Erickson was willing to learn and that he had improved in his job performance upon certain issues being raised to him. That does diminish the overall negative report Chief Noyes made of Mr. Erickson's skills at work, but does place this aspect of Mr. Erickson's job performance on a par with the evaluations made of Mr. Mead and Mr. McCarthy.

The Appellant points out that he had the longest experience performing police work among all the candidates, including being used for months at a time to fill in for a Police Officer out on leave. He contends the Appointing Authority, the Selectmen, did not give sufficient consideration to that experience, and was likely biased against giving this factor much weight by filtering their review of him by too much reliance upon Chief Noyes' report on him. Mr. Erickson was always aware he had competition for an appointment to the position of permanent Police Officer. Experience on the job is not the only factor that an Appointing Authority can consider.

In conclusion, I recommend that the Civil Service Commission find the Appointing Authority had reasonable justifications for the bypass of the Appellant.

DIVISION OF ADMINISTRATIVE
LAW APPEALS


Sarah H. Luick, Esq.
Administrative Magistrate

DATED: February 1, 2008