

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

JASON A. FOPIANO,

*Appellant*

v.

G1-12-286

CITY OF CAMBRIDGE,

*Respondent*

Appearance for Appellant:

Pro Se  
Jason Fopiano

Appearance for Respondent:

Joshua R. Coleman, Esq.  
Collins, Loughran & Peloquin, P.C.  
320 Norwood Park South  
Norwood, MA, 02062

Commissioner:

Cynthia Ittleman<sup>1</sup>

**DECISION**

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Jason Fopiano (hereinafter “Mr. Fopiano” or “Appellant”), filed an appeal on October 12, 2012, regarding the decision of the City of Cambridge, the Appointing Authority (hereinafter “City” or “Respondent”), to bypass him for appointment to the position of police officer with the Cambridge Police Department (“Department”). The Appellant filed a timely appeal. A pre-hearing conference was held on November 6, 2012 and a full hearing was held on January 14, 2013 at the offices of the Civil Service Commission (hereinafter “Commission”). The hearing was digitally recorded. Both parties submitted post-hearing briefs: on February 7, 2013 by the Appellant, and on March 6, 2013 by the Respondent. For the reasons stated herein, the appeal is denied.

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

## FINDINGS OF FACT:

Nineteen (19) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

### *For the City:*

- Kelley King, Cambridge Police Sergeant;
- Christina Giacobbe, Chief Administrative Officer of Cambridge P.D.

### *For the Appellant:*

- Jason Fopiano, Appellant;

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

1. At the time of the Commission's hearing, Mr. Fopiano was thirty-three (33) years old. He has been a resident of Cambridge since 1999. Mr. Fopiano took the civil service examination for original appointment to police officer in 2010. He scored a 99. On November 25, 2011, the City requested a certification from the state's Human Resources Division ("HRD"). HRD furnished Certification No. 202581 to the City on December 23, 2011. Mr. Fopiano's name appeared sixth (6<sup>th</sup>) on the certification among those willing to accept employment. The City appointed seventeen (17) candidates from the Certification, eight (8) of whom were ranked below Mr. Fopiano. (*Stipulated Facts*)
2. On December 27, 2011, Mr. Fopiano completed his employment application and turned it into the Department. In the application is a form that Mr. Fopiano signed. The form stated, in part, "I swear (or affirm) that the information I have caused to be entered into the preceding pages of this application form for a police officer position in the Cambridge

Police Department is true and complete.” The form also stated “I understand that false or misleading information given herein or during interview(s) will result in my being disqualified from further consideration ... with the Cambridge Police Department.” The form lastly stated, “I understand that if I am untruthful I will be automatically disqualified from further consideration and my name will be removed from the Civil Service eligibility list.” (*Exhibit 7, p. 20*)

3. As part of the background investigation, Sgt. King reviewed Mr. Fopiano’s employment applications to current and former employers. (*Testimony of King*)
4. Upon receiving Mr. Fopiano’s application to his current employer, Pine Manor College, Sgt. King noticed that Mr. Fopiano stated that he had worked for the Cambridge Emergency Communications Center (“ECC”) from September 2004 to November 2006 as an emergency dispatcher/call taker. Mr. Fopiano did not include this employment on his application to the Department. Mr. Fopiano had also stated on his application to Pine Manor College that he had worked at Professional Ambulance Services (“PRO EMS”) from November 2006 to January 2008. However, on his application with the Department Mr. Fopiano stated he worked with PRO EMS from November 2006 to May 2007. (*Testimony of King; Exhibit 9*)
5. On January 13, 2012, Sgt. King and Sgt. Stephen Lefebvre interviewed Mr. Fopiano to seek clarification on his employment background. Mr. Fopiano admitted he had misstated his time with Cambridge ECC on his Pine Manor application and that he had actually worked there for two months before resigning. Mr. Fopiano also stated in this interview that the rest of his application was complete and that he did not omit any other prior employers. (*Exhibit 18*)

6. At the second interview on January 27, 2012, Mr. Fopiano admitted to omitting four (4) jobs on his application. These included Buono Pest Control, St. Elizabeth's Hospital, IPC Security, and Cambridge ECC. (*Testimony of Fopiano; Exhibit 19*)
7. Mr. Fopiano voluntarily resigned from the Department as a recruit in 2004. In his December 27, 2011 application, he stated that he left because his mother had been diagnosed with breast cancer. In the non-disciplinary separation notice with the academy in 2004, it states "Voluntary for personal reasons. Decided that this was not the rite [sic] job for me." While that notice may not have been written by Mr. Fopiano, he did sign the separation notice. (*Exhibit 7, p. 5; Exhibit 8*)
8. Mr. Fopiano's personnel file for Cambridge ECC revealed below average to average daily work performance reviews. His supervisor rated Mr. Fopiano average to below average on the assessment data. The supervisor reported that Mr. Fopiano never worked alone and struggled to grasp the tasks at hand, failing to obtain critical information from persons calling for assistance.<sup>2</sup> (*Exhibit 5*)
9. Mr. Fopiano did not disclose in his December 27, 2011 application to the Department that when he worked with PRO EMS he received a counseling email from his supervisor. In an email exchange, Mr. Fopiano's supervisor stated, "This is a follow up to our conversation regarding the trash left in the ambulance at the end of your shift on Friday, you are supposed remove [sic] all trash and not leave it there for the support services technician." Mr. Fopiano responded "[name redacted], I have it sorry." (*Exhibit 14*)
10. Mr. Fopiano omitted from his December 27, 2011 application that he had attended Northeastern University for two and a half years. Mr. Fopiano did list this under the

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<sup>2</sup> Mr. Fopiano states that he never saw these reviews since he only worked at Cambridge ECC for two months.

education section on an employment application to Buono Pest Control. (*Exhibit 11; Exhibit 7*)

11. On his 2004 application to the Department, Mr. Fopiano included in the education section that he had attended Bunker Hill Community College from September 2000 to January 2002. Mr. Fopiano omitted this from his December 27, 2011 application. (*Exhibit 6; Exhibit 7*)

12. At the second interview of Mr. Fopiano, on January 27, 2012, Sgt. King, Sgt. Lefebvre, and Officer Devon Brooks met with Mr. Fopiano to make sure all information regarding Mr. Fopiano's employment history was complete and accurate. The investigators repeatedly put in front of Mr. Fopiano information that was contradictory or omitted. Sgt. King stated in this interview, in part, "I have a mountain of conflicting information, conflicting to the point it is a bold faced lie," and, "What I'm going to do, I'm going to dig ... I'm going to talk to anyone and everyone who remembers you ... I will find it, mark my words." Mr. Fopiano also admitted in this second interview that he lied about how long he worked at Cambridge ECC. (*Exhibit 19*)

13. On February 17, 2012, Sgt. King sent Mr. Fopiano an email asking him to send a complete and accurate employment history due to the numerous discrepancies. Mr. Fopiano did not include his employment with IPC Security at the Burlington Mall in his response, stating that he forgot about his employment there. (*Exhibit 16*)

14. On August 16, 2012, The City sent Mr. Fopiano a bypass letter dated August 16, 2012. The letter stated that he was being bypassed and the City was recommending to state's Human Resources Division ("HRD") that he be removed from the eligibility. The reasons stated for bypass/removal were his numerous omissions regarding employment

and education, below average performance evaluations in previous employment reviews, providing false information on past employment applications, and providing false statements about the reason for leaving the Lowell Police Academy as a Cambridge Police recruit in 2004. (*Exhibit 4*)

15. Mr. Fopiano filed an appeal with the Commission on October 12, 2012. (*Administrative Notice*)

## DISCUSSION

### *Applicable Law*

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

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. *See City of Beverly v. Civil Serv. Comm’n*, 78 Mass.App.Ct. 182, 189 (2010). “In its review, the commission is to find the

facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” *Id.* at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). Further, “[t]he commission does not act without regard to the previous decision of the appointing authority, but rather decides whether 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.” *Id.* at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. Beverly at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone ... than in disciplining an existing tenured one.” *See City of Attleboro v. Mass. Civil Serv. Comm’n*, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly at 191. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” *Id.* (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)).

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. “Police officers are not drafted into public service; rather, they compete for

their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to perform their official responsibilities.” Police Commissioner of Boston v. Civil Service Commission, 22 Mass.App.Ct. 364, 371 (1986).

### *Analysis*

A preponderance of the evidence establishes that the City of Cambridge had reasonable justification to bypass the Appellant for appointment to the position of police officer. Honesty and integrity are essential for a police officer. In addition, “Appointing authorities must rely upon applicants to fill out the forms fully and correctly.” Costa v. City of Brockton, 26 MCSR 242 (2013). Mr. Fopiano had repeated instances of omitting and/or stating incorrectly information regarding prior employers as well as omitting a prior educational institution that he had attended. On applications to other employers, such as Pine Manor College, Mr. Fopiano provided conflicting and contradictory information. The primary example of this is his reference to employment with Cambridge ECC and PRO EMS on his application to Pine Manor College. Specifically, Mr. Fopiano overstated his length of employment of both of these prior employers. Further, Mr. Fopiano omitted his employment with Cambridge ECC on his current application to the Department but included it in his application to Pine Manor College, his current employer, stating that he had worked there for two years. In actuality, Mr. Fopiano had only worked at Cambridge ECC for two months’ time. Similarly, there was conflicting information on his current application to the Department as to how long Mr. Fopiano worked at PRO EMS. Mr. Fopiano stated on his current application to the Department that he worked for PRO EMS for seven months, while stating in his application to Pine Manor College that he had worked at PRO EMS for thirteen months. Mr. Fopiano admits to misstating the duration of his employment with



both prior employers on his Pine Manor College application, as well as omitting other employers on his current application to the Department.

The Department offered Mr. Fopiano ample opportunity to correct these errors and provide a complete and accurate history of his employment background. The Department interviewed Mr. Fopiano on two separate occasions in January 2012 and, on both occasions, he had to provide more information about his employment background because he failed to provide a complete and/or accurate employment history on his application. Further, in a subsequent email to Sgt. King in February 2012, Mr. Fopiano neglected to include another former employer, IPC Security. Mr. Fopiano failed to provide a reasonable explanation for the false statements and/or material omissions on his current employment application to the Department.

The City also bypassed Mr. Fopiano for another reason. Mr. Fopiano received poor job evaluations from Cambridge ECC (which has the same appointing authority as the position the Appellant sought here), despite the brief time period he worked there. Although Mr. Fopiano contends that he had not seen these reviews, Sgt. King based part of her summary on his personnel file which contained his evaluations. *See* Ex. 5. Therefore, the City had reasonable justification to bypass and recommend removal of Mr. Fopiano's name from the eligible list for this reason.

One of the City's reasons for bypassing Mr. Fopiano and recommending his removal from the eligible list is not supported by a preponderance of the evidence. Specifically, the City's allegation that Mr. Fopiano provided a false statement on his current application regarding the reasons for leaving the academy in 2004 is not supported by a preponderance of the evidence. On Mr. Fopiano's current application to the Department, he asserts that he left the police academy in 2004 because his mother was diagnosed with breast cancer. In 2004, the Appellant

signed a resignation note that said that he withdrew from the academy for “personal reasons” and because it was not right for him. The 2004 statement and the 2011 statement are not mutually exclusive. As a result, the City has not proved that the statement in this regard on the Appellant’s current application was false by a preponderance of the evidence. Nonetheless, for all of the other reasons noted above, the City had reasonable justification to bypass the Appellant.

### CONCLUSION

The City’s decision to bypass Mr. Fopiano is affirmed and the Appellant’s appeal under Docket No. G1-12-286 is hereby *denied*.

Civil Service Commission

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Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on June 26, 2014.

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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.

Notice:

Jason Fopiano (Appellant)

Joshua R. Coleman, Esq. (for Respondent)

John Marra, Esq. (HRD)