

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114

ROBERT G.¹,
Appellant

v.

CITY OF FALL RIVER,
Respondent

Docket Number:

G1-XX-XXX

Appearance for Appellant:

Robert G., *pro se*.

Appearance for Respondent:

Gary P. Howayeck, Esq.
City of Fall River
One Government Center
Fall River, MA 02722

Presiding Officers:

Paul M. Stein, Commissioner
Caroline E. De Luca, Deputy General Counsel

SUMMARY OF DECISION

Despite several missteps in the process, the Commission upheld the bypass of a candidate for appointment as a municipal police officer (1) who had failed to disclose several instances of prior negative employment history in his applications to the City of Fall River's Police Department as well as to another police department to which he had previously applied; and (2) whose ability to de-escalate a conflict was questioned by a former supervisor.

DECISION

On October 31, 2023, the Appellant, Robert G., acting pursuant to G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from the decision of the City of Fall River (Fall

¹ After careful review, and in accordance with our Standard Governing Disclosures of Sensitive Personal Data, the Commission has opted to use a pseudonym for the Appellant to appropriately balance their privacy interests with the Commission's statutory obligation to provide the public with a transparent record of its deliberative process and interpretation of civil service law.

River) to bypass him for appointment as a permanent full-time police officer for the Fall River Police Department (FRPD).² The Commission held a remote pre-hearing on December 19, 2023 and an in-person full hearing at the UMass School of Law at Dartmouth on March 8, 2024. The full hearing was digitally recorded.³ Both parties submitted proposed decisions. For the reasons set forth below, the Appellant's appeal is denied.

FINDINGS OF FACT

Sixteen exhibits were introduced into evidence during the hearing (*Resp.Exhs. 1 through 13; App.Exhs. 1 through 3*). Based on the documents submitted and the testimony of the following witnesses:

Called by the City of Fall River:

- Joseph Galvao, FPD Lieutenant
- Paul Gauvin, FPD Chief

Called by the Appellant:

- Robert G., 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 Appellant, Robert G., is a life-long resident of Massachusetts who was born in Fall River, MA. He received his high school diploma and enrolled in a community college but did not

² 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.

³ A copy of the recording was provided to the parties. 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 they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

receive a degree. (*Resp.Exhs. 1, 4 & 8; Testimony of Appellant*)

2. The Appellant enlisted in the U.S. Army in 1997. He continues to serve with the Rhode Island National Guard (43rd Military Police (MP) Brigade). He has been deployed for MP duties in combat zones as well as in disaster response. He was deployed on active duty in 2009-2010, during which he was disciplined and temporarily reduced in rank (for reasons addressed further below). He was most recently deployed in 2022-2023, for which his DD214 reflects an Honorable Discharge from that most recent period of active duty. He currently holds the rank of Sergeant First Class (E-7). (*Resp.Exhs. 1 & 4; Testimony of Appellant*)

3. The Appellant was considered previously for appointment as a FRPD Police Officer in 2011. He received a conditional offer of employment that was revoked and the Appellant was bypassed after failing a psychological evaluation. The Appellant appealed his non-selection to the Commission which upheld the bypass. (Administrative Notice [[Robert G I \(2013\)](#)])

4. The Appellant has been employed as a full-time Correction Officer with a county sheriff's office since September 2014. In his current assignment, he is part of a "response team" that is called to support the unit staff in handling fighting or other stressful situations involving prisoners. He was disciplined three times for attendance issues: (a) a 2016 verbal warning in 2016 for tardiness; (b) a loss of pay (16 hours) in 2018 for absences over allowed amount; and (c) a loss of ½ hour pay in 2022 for another absence in excess of allowed amount. (*App.Exhs. 1 through 3; Respondent's Exhs. 6A, 6B & 6C; Testimony of Appellant & Lt. Galvao*)

5. On June 26, 2021, the Appellant took and passed the entry-level civil service examination for Municipal Police Officer administered by the state's Human Resources Division (HRD). His name was placed on the eligible list for appointment to the position of Police Officer established on September 1, 2021. (*Stipulated Facts*)

6. On October 28, 2022, the state's Human Resources Division (HRD) issued Certification #08944 to make original permanent appointments of 25 FRPD Police Officers. (*Resp.Exhs.1 & 10*)

7. The Appellant's name appeared in 37th place on Certification #08944 and he was invited to sign the certification if he was willing to accept appointment. (*Resp.Exhs.1 & 10*)

8. The Appellant emailed the FRPD stating that he was interested in appointment but was presently on military deployment. As a result, the Appellant's name was placed on hold pending his return from the deployment. (*Resp.Exhs.10 through 12; Testimony of Lt. Galvao*)

9. Upon the Appellant's return from his military deployment, his name was placed at the top of the current certification (# 09385) issued to the FRPD for appointment of additional Police Officers. (*Resp.Exh.3; Testimony of Lt. Galvao*)

10. On or about September 10, 2023, the Appellant submitted the required on-line application for appointment to the FRPD. (*Resp.Exh.2*)

11. Upon review, Lt. Joseph Galvao, who performed the background investigation of the Appellant, noted a number of concerns in the Appellant's application, including, among other things:

- He answered "YES" to questions that asked if: (a) he had ever been demoted in rank; (b) received non-judicial or court-martial punishment while in the military; (c) had ever been fired/terminated; (d) was ineligible for rehire from any job; or (e) ever had his wages garnished or attached;
- He disclosed that, in 2012, he was terminated from his position as a loss prevention officer for a retail employer for a "bad stop".

- He responded negatively to a question about whether he had applied elsewhere; nonetheless, he listed the New Bedford Police Department (NBPD) as an agency to which he had applied for a job, but later indicated that he had been rejected by the NBPD for failure to disclose his termination by the retail employer.
- He responded “YES” to a question which asked if he ever asked for discounts from a business because he was a law enforcement officer.

(Resp.Exhs.2 & 4; Testimony of Lt. Galvao)

12. The Appellant also answered “NO” to a question regarding whether he had ever received any discipline or letters of reprimand. Lt. Galvao requested and received copies of the Appellant’s personnel file from the county sheriff’s office where he was currently employed. These documents indicated that the Appellant’s file contained the 2016, 2018 and 2022 disciplinary notices described above, all of which had been signed and acknowledged by the Appellant.

(App.Exhs.1 through 3; Resp.Exhs.2, 4, 6A, 6B, & 6C; Testimony of Appellant & Lt. Galvao)

13. Lt. Galvao spoke with a FRPD Detective Sergeant whom the Appellant listed on his application as someone familiar with the Appellant. The officer stated that the Appellant “might be someone who would escalate a situation rather than de-escalate.” *(Resp.Exhs.2 & 4; Testimony of Lt. Galvao)*

14. On October 5, 2023, Lt. Galvao spoke by telephone with the Appellant. Lt. Galvao explained that he had concerns with the Appellant’s suitability. *(Resp.Exhs.3, 4 & 8; Testimony of Lt. Galvao)*

15. Lt. Galvao’s notes of his October 5, 2023 telephone call identified three specific concerns

that he mentioned to the Appellant: (a) the 2011 bypass based on a psychological evaluation;⁴ (b) failure to disclose his discipline as a correction officer with the county sheriff; and (c) submission of a high school diploma rather than high school and college transcripts as required. During his testimony at the Commission hearing, Lt. Galvao recalled that, in addition to those three concerns, he may also have mentioned his conversation with the Appellant's prior supervisor who was now a FRPD detective. (*Resp.Exhs.3, 4 & 8; Testimony of Lt. Galvao*)

16. The Appellant told Lt. Galvao that he thought that the psychological bypass should not be used because "people change". As to the discipline at the sheriff's office, he told Lt. Galvao that he only had had a "verbal" counseling, and he did not think that anything "should have been in his file." At the Commission hearing, the Appellant agreed that he may have used a "loud" voice; he denied that he was "argumentative". (*Testimony of Appellant*)

17. Lt. Galvao offered the Appellant the opportunity to withdraw from the process. The Appellant initially agreed to withdraw but, the next day, told Lt. Galvao that he had changed his mind and wanted to pursue his application. (*Resp.Exh.4; Testimony of Appellant & Lt. Galvao*)

18. On or about October 17, 2023, believing his application was still pending, the Appellant forwarded copies of his high school and community college transcripts as requested. (*Resp.Exh.4; Testimony of Appellant & Lt. Galvao*)

19. On or about October 17, 2023, Lt. Galvao drafted a letter for the signature of FRPD Police Chief Gauvin to inform the Appellant that he had been bypassed for appointment to the FRPD. The letter enumerated more than a dozen specific reasons for bypass. The letter concluded:

⁴ The FRPD did not have access to the 2011 psychological evaluation itself, but only the description that was contained in the Commission's prior 2013 Decision. (*Resp.Exh.4; Testimony of Chief Gauvin & Lt. Galvao*)

“Based on the totality of all of the circumstances, we have concerns of your suitability for the position of police officer . . . at this time. These concerns are largely based on your previous psychological examination where you were found not to be suitable. In addition, failure to include three disciplinary actions at the [county sheriff’s office] raise questions of truthfulness, good moral character, accountability, good decision-making, work habits and attention to detail are essential qualities of a police officer and we feel that at this time some improvement in these categories are needed in order to possibly be considered in the future.

20. After review of the background report and the draft bypass letter, Chief Gauvin signed the letter, and it was emailed to the Appellant on October 24, 2023. (*Resp.Exh.3; Testimony of Chief Gauvin & Lt. Galvao*)

21. According to Chief Gauvin, some of the reasons stated for bypassing the Appellant were not as important to him as others. Two issues concerned him most, and which he believed, alone, justified the bypass. First, the Appellant appeared to have an apparent pattern in failing to disclose prior employment discipline, i.e., omitting his termination from the retailer for a “bad stop” as a loss prevention officer when he applied to become a NBPB Police Officer and the failure to disclose his recent discipline in his current employment at the county sheriff’s department in his FRPD application. Second, the concern expressed by a current FRPD detective that the Appellant had issues about de-escalation of a situation, which was especially critical to Chief Gauvin. (*Testimony of Chief Gauvin*)

22. Chief Gauvin also clarified that, while he did take note of the Appellant’s 2011 psychological bypass, he did not consider the 2011 evaluation as significant a factor as the more recent problems with his employment history and failure to make complete and accurate disclosures during the application process with the NBPB and the FRPD. The reference in the bypass letter to the prior psychological bypass being “largely” the reason for the current bypass were not his words but, rather, drafted by Lt. Galvao. Chief Gauvin knew that the Appellant would be entitled to a new, full medical and psychological evaluation had the Appellant passed the

background investigation and been given a conditional offer of employment. (*Testimony of Chief Gauvin & Lt. Galvao*)

APPLICABLE CIVIL SERVICE LAW

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, called a “certification”, with candidates’ names ranked 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).

An Appointing Authority is well within its rights to bypass an individual for fudging the truth as part of an application for a civil service position. It is reasonable to infer that a person who does

so in order to get a job will be inclined to lie on the job. See O'Brien v. Somerville, 25 MCSR 292 (2012). See also Minoie v. Town of Braintree, 27 MCSR 216 (2014); Polin v. Randolph, 23 MCSR 229 (2011). However, the serious consequences that flow from finding that an applicant violated the duty of truthfulness require that such charges be carefully scrutinized so that an applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. See, e.g., Boyd v. City of New Bedford, 29 MCSR 471 (2016); Morley v. Boston Police Dep't, 29 MCSR 456 (2016); Lucas v. Boston Police Dep't, 25 MCSR 420 (2012) (mistake about appellant's characterization of past medical history).

ANALYSIS

The decision of the FRPD to bypass the Appellant was far from perfect. The FRPD improperly relied on a 2011 psychological bypass as well as some stale and trivial concerns, many of which could have been resolved by a more thorough review. Nevertheless, despite these flaws, the preponderance of the evidence supports the conclusion that the bypass decision is independently and reasonably justified for sound and sufficient reasons. Specifically, the FRPD is entitled to expect that a person who seeks to become a FRPD police officer does not conceal (whether by design or negligence) facts about his past that are relevant to the candidate's suitability for such a position. The FRPD is also entitled to rely on the good faith opinions of its own professional staff who express concerns that a candidate may not be suitable for appointment. Finally, the preponderance of the evidence established that the Appellant's lack of attention to important details in the written application raise reasonable concern about his suitability to perform the duties of a FRPD police officer.

First, the FRPD erroneously used the Appellant's 2011 psychological bypass as a reason for bypassing him again in 2023. A medical or psychological evaluation that has been obtained before

an appointing authority has excluded all non-medical reasons for bypass cannot form the basis for a bypass decision. As stated by the Commission in Duval v. City of Somerville, 30 MCSR, 447, 457 (2017):

It is a crucial tenet within basic merit principles under civil service law to assure, among other things, “fair treatment of all applicants and employees in all aspects of personnel administration without regard to . . . handicap . . . and with proper regard for privacy . . .” G.L. c. 31, §1. Both the federal Americans With Disabilities Act, 42 U.S.C. §§12112(d)(2)-(3), and the Massachusetts Employment Discrimination Law, G.L. c. 151B, §4(16), strictly regulate how employers may acquire and use private, medical information about a candidate for employment, essentially, precluding inquiry into a candidate’s medical history without first having made a bona fide, i.e., “real”, offer of employment based on an evaluation of “all relevant non-medical information. *See, e.g., Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 682, n.5 (2012); *O’Neal v. City of New Albany*, 293 F.3d 998, 1007-1009 (7th Cir. 2002); *Downs v. Massachusetts Bay Transp. Auth.*, 13 F.Supp.2d 130, 137-39 (D. Mass. 1998), *citing*, “ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations”, (EEOC Notice 915.002 October 10, 1995); Massachusetts Commission Against Discrimination, “Guidelines; Employment Discrimination on the Basis of Handicap-Chapter 151B”, §IV & §V, <http://www.mass.gov/mcad/resources/employers-businesses/emp-guidelines-handicap-gen.html>

Thus, the FRPD background investigator had no cause to refer to the 2011 psychological bypass in his report and recommended bypass letter to Chief Gauvin. We do not find this error fatal, however, to the decision under the circumstances of this case. Here, we are persuaded that Chief Gauvin’s decision was driven by non-medical factors and he knew, if the Appellant had successfully passed the background investigation, he would, again, be given a conditional offer of employment and be moved forward in the process for an interview and, ultimately, a fresh medical and psychological screening. While the process was flawed, I credit the testimony of Chief Gauvin that he knew the rules and that, in fact, his decision was based on the non-medical factors he cited independent of the prior psychological examination and, despite the language in the bypass letter, the latter did not play a material role in that decision.

Second, we are persuaded that many of the more than a dozen other non-medical reasons cited in the bypass letter, individually or in combination, are insufficient to reasonably justify bypassing the Appellant. Most of these reasons are based on events that date back more than twenty years, many of which were known to the FRPD in the hiring process in 2011 and did not prevent the Appellant from receiving a conditional offer at that time. The FRPD did not press many of these reasons at the Commission hearing and we are persuaded that no reasonable justification could be established based solely on these stale examples.

Third, we credit the testimony of Chief Gauvin that the primary reasons that formed the basis for his decision are several specific, recent examples of the Appellant's actions that do raise a reasonable concern about his suitability to serve as a FRPD police officer at this time. These reasons include: (a) the Appellant's failure to disclose a history of discipline at his current employer on his application and his equivocation about that record during his background interview, seemingly implying that he had forgotten entirely about the two disciplines which resulted in a loss of pay; (b) his termination from a retailer (after his 2011 bypass), and failure to disclose that termination in his 2019 application to the NBPD; (c) a series of questionable responses on his application, including answering "YES" to whether he had ever asked for discounts as a law enforcement officer, and answering "NO" to whether he had ever applied to any other law enforcement agencies for employment. Although I do not dispute the Appellant's position that that these errors were simply oversights, that begs the larger question raised by the FRPD of whether a person who is so negligent in responding to such serious questions possesses the attention to detail that the FRPD is entitled to demand from its sworn police officers.

In sum, notwithstanding the FRPD's procedural missteps, we are persuaded that the preponderance of the evidence has established several reasonably justified and independent grounds for bypassing the Appellant.

CONCLUSION

For the reasons stated herein, the Appellant's appeal under Docket No. G1-23-224 is hereby *denied*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein, Commissioner

/s/ Caroline E. De Luca

Caroline E. De Luca, Deputy General Counsel

By vote of the Civil Service Commission (Bowman, Chair; Dooley, Markey, McConney & Stein, Commissioners) on November 14, 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:

Robert G. (Appellant)

Gary P. Howayeck, Esq. (for Respondent)