

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

WALTER GEARY,
Appellant

v.

G-01-634

SALEM POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

Kevin G. Powers, Esq.
Rodgers, Powers & Schwartz
18 Tremont Street
Boston, MA 02108
(617) 742-7010
kgpowers@theemploymentlawyers.com

Respondent's Attorney:

Daniel B. Kulak, Esq.
40 Lowell Street: Suite 14
Peabody, MA 01960
(978) 532-2060
dan.kulak@verizon.net

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Walter Geary (hereafter "Geary" or Appellant") appealed the decision of the Personnel Administrator (hereafter "HRD") to accept the reasons of the Respondent, the Salem Police Department (hereafter "Appointing Authority", or "City"), bypassing him for original appointment to the position of permanent reserve police officer in the Salem Police Department. The Appellant filed a timely appeal with the Commission on April 20, 2001 and the case

languished largely as a result of repeated requests for continuances by both parties. A full hearing was scheduled for March 28, 2006 before an administrative magistrate from the Division of Administrative Law Appeals (DALA) designated to serve as hearing officer by the Chairman of the Civil Service Commission. Rather than go forward with a full hearing, the parties agreed to settle the matter. As part of the proposed settlement agreement presented to the DALA administrative magistrate the day of the scheduled hearing, the parties asked the Commission to exercise its powers inherent in Chapter 310 of the Acts of 1993 (“310 Relief”) and direct the state’s Human Resource Division (HRD) to place the Appellant’s name at the top of the next certified list for appointment to the position of reserve police officer in the Salem Police Department. The agreement of the parties also explicitly stated, “Previous investigation will not be used in any way, or read by any future investigators”. (emphasis added). Finally, the agreement stated that, “If Mr. Geary is hired his date of seniority will revert back to be the same date as Deena McNamee Fisher’s 2001 Hire.” (emphasis added) The DALA Administrative Magistrate recommended that the Commission accept the mutual agreement of the parties and grant the 310 Relief requested.

While the Commission, a quasi-judicial board that receives and processes hundreds of civil service appeals each year, regularly encourages parties to reach settlement agreements when possible, this agreement raised the collective eyebrow of the Commissioners. In particular, the explicit prohibition preventing the Salem Police Department from even reading the prior investigation as part of a subsequent hiring process coupled with the request for a retroactive seniority date reaching back over five years, prompted the Commission to review the above-referenced investigative letter that

formed the basis of the bypass. The 5 ½ page single-spaced investigative letter prepared by the Salem Police Department on March 16, 2001 is dedicated exclusively to the negative reasons for bypassing the Appellant. Such a detailed letter regarding a bypass appeal is almost unprecedented in the Commission's modern history. Given the lengthy 2001 investigative letter, coupled with the lack of any explanation as to why the City would now ask the Commission to order the placement of the Appellant's name first on the next civil service list and prohibit the City from even reading the prior report as part of the next selection process, the Commission balked at granting the requested 310 Relief absent some clarification and additional information from the parties. In a letter dated July 25, 2006, the Commission informed both parties that, "absent written documentation from the parties indicating that this (investigative) letter was made in error, through no fault of the Appellant", the Commission would not grant the 310 Relief.

On October 25, 2006, counsel for the Appellant submitted a "Statement of the Parties Why the Recommended Decision of Administrative Magistrate Judithann Burke Should be Adopted". The Statement contains a list of positive statements about the Appellant, with the following important caveat from the City: "While the City does not agree with the following facts, it nonetheless recognizes that it is possible that a fact finder could conclude the following based on the evidence." Two other sections of the statement indicate that, "the Parties reached the Agreement with an understanding that there was a substantial dispute as to many of the material facts" and "one of the other factors was the uncertainty on the part of both Parties as to the result after a hearing." (emphasis added) Based on this statement, the Commission formally denied the request to accept the mutual agreement of the parties and refused to grant the 310 Relief requested absent a

full hearing on the matter. A full hearing was conducted before the Commission on November 7, 2006 after the Commission denied yet another request by the City to postpone the hearing. One tape of the hearing was made.

FINDINGS OF FACT:

Thirteen (13) exhibits were entered into evidence at the hearing (Joint Exhibits 1-5; Appellant Exhibits 6-9; and Appointing Authority Exhibits 10-13). The record was kept open to allow the Appointing Authority to produce additional information relative to police officers working or having an ownership interest in a bar or liquor establishment. The additional information, a copy of which was sent to counsel for the Appellant, was received by the Commission on November 15, 2006 and entered as Appointing Authority Exhibit 14. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- None
(Counsel for the Appointing Authority stated at the hearing that they were unable to produce any witnesses due to the Commission's refusal to reschedule the date of the hearing which occurred on Election Day, stating that all available officers were deployed at polling places. Further, the Captain who conducted the initial investigation is no longer employed by the Salem Police Department.)

For the Appellant:

- Walter Geary, Appellant;

I make the following findings of facts:

1. The Appellant, Walter Geary, is a 48-year old resident of Salem who is married with three children. In addition to a full-time job as a courier, he owns and operates a lounge in Revere. He is an avid athlete and once sought to become a professional football player. (Testimony of Appellant)

2. In April or May 1999, the Appellant took the civil service examination for the position of permanent reserve police officer. (Exhibit 1)
3. On or about April 13, 2000, the City received Certification Number 200426 from HRD which contained the names of eligible candidates to fill 18 reserve police officer positions in the Salem Police Department. The City subsequently received authorization to hire 21 officers. (Exhibits 1, 3 and 4)
4. Based upon the amended authorization, the City was to select 21 individuals from the highest 43 on the Certification who would accept the appointment. The Appellant was ranked 27th among those individuals willing to accept employment. (Exhibit 1)
5. The City selected 20 candidates for appointment, including five candidates that were ranked lower than the Appellant on the Certification. (Exhibit 1)
6. Sometime in April 2001, the City forwarded to HRD both the positive reasons for selecting the twenty (20) candidates as well as the negative reasons for not selecting the candidates that were bypassed, including the Appellant. HRD subsequently accepted the reasons for bypassing the Appellant to which the Appellant filed a timely appeal with the Commission. (Exhibits 1-5)
7. The City grouped the negative reasons for bypassing the Appellant into the following three categories: a) Poor past employment record or history; b) Poor associations; and c) Poor driving history. (Exhibit 2)

Poor past employment record or history

8. One of the former employers listed by the Appellant on his application for employment with the Salem Police Department was Kenny & Sullivan's Inc. in Chelsea, which was once owned by the Appellant's father. The Appellant indicated

that he worked at Kenny and Sullivan's for five years (from 1987 to 1992) and listed his job title as "proprietor". (Exhibit 10)

9. According to the City, the Chelsea Police Department told their investigator that Kenny & Sullivan's, Inc. was closed down as a result of substantial drug activity. Further, in a letter to the Appellant dated March 16, 2001 outlining the reasons for his bypass, the City wrote to the Appellant, "[d]uring the oral review board in November of 2000, you told the board that you began locking the door and only allowing selected individuals into the bar to reduce the amount of drug activity, however, the persons involved in this activity still seemed to be getting into the bar." (Exhibit 2)
10. During his testimony before the Commission, the Appellant offered little insight into his tenure at Kenny and Sullivan's, testifying that he started as a bartender and purchased the business from his father in 1985. According to the Appellant, the business closed when his father decided he wanted to sell the underlying property. (Testimony of Appellant)
11. Another employer listed on the Appellant's application for employment is a fence company in Revere in which the Appellant indicated he worked installing fences from 1992 to 1994. (Exhibit 10)
12. According to the Salem Police Department, the proprietor of the fence company at the time the Appellant was employed there has a criminal record and a poor reputation. When the City tried to contact the proprietor of the business at a restaurant in Revere owned by his family, a family relative told the Salem Police Department that he was not permitted to come around because he owes money to his family and is involved with illegal narcotics. (Exhibit 2)

13. The most recent employer listed on the Appellant's 2001 application for employment was Airborne Express (now DHL) where the Appellant had been employed as a driver for four years. (Exhibit 10)
14. According to the Salem Police Department, "three supervisors did not give this department a positive report about your work record. All three supervisors have indicated to this department that you are prone to problems and are considered to be an average to below average employee. One supervisor clearly stated that he does not recommend you for a reserve police officer position and would not want you to be an officer responding to his home for a problem." (Exhibit 2)
15. During his testimony before the Commission, the Appellant, who still works at DHL, strongly disagreed with the above-referenced assessment of his work performance, and questioned the validity of the above-referenced statements considering that his supervisors denied making such statements when he inquired with them about it.
(Testimony of Appellant)
16. The Appellant presented three letters of recommendation from employees of Airborne Express, two of whom identified themselves as Mr. Geary's supervisor. In a letter dated September 16, 2002, Paul Danesi, Field Services Supervisor, states in part, "I have been Walter's supervisor for the past two years...Some of (the) attributes which he brings to work are courage, compassion, allegiance, intellect, and respect...He has been one of my most loyal drivers...He has proven to me that he is a natural born leader and not just a follower." In a letter dated September 6, 2002, Kevin Napaver, Operations Supervisor, states in part, "I have been Mr. Geary's supervisor since April of 2002. Mr. Geary has an incredible work ethic combined with great leadership and

customer service skills. Mr. Geary remains calm and excels with his skillful decision making under very stressful work situations.” (Exhibits 7A, 7B and 7C)

17. During his direct testimony, the Appellant testified that he had never been disciplined during his tenure at DHL. When shown a “letter of reprimand” dated February 3, 1998 from a supervisor at what is now DHL, the Appellant acknowledged that his prior testimony was not correct. (Exhibit 11 and Testimony of Appellant)
18. When shown a “Warning” from another supervisor at what is now DHL dated August 24, 1999, the Appellant indicated that he didn’t view the warning in question as a formal disciplinary matter. (Exhibit 12 and Testimony of Appellant)
19. Also listed under employment information on the Appellant’s 2001 application for employment with the Salem Police Department was Club Caravan in Revere at which the Appellant was then employed as the manager since 1994. (Exhibit 10)
20. At the Commission hearing, which was being held five years after the bypass in question occurred, the Appellant testified that he is now the *owner* of Club Caravan in Revere. According to the Appellant, his wife’s parents owned the club for many years. His father-in-law, now deceased, left the club to the Appellant’s mother-in-law, from whom the Appellant subsequently purchased the club. (Testimony of Appellant)
21. According to the Appellant, he now works full-time at DHL in addition to being the owner of Club Caravan in Revere, which is only open at night. (Testimony of Appellant)
22. The Appellant described Club Caravan, which has a capacity of 200-250 people, as a dance club (which serves food) for which he has only been required to appear before

the City's licensing board regarding two minor issues involving a fight between customers. The Appellant testified that he takes several precautions to minimize any potential problems at the club including the use of metal detectors, requiring all patrons to be searched prior to entering, prohibiting the wearing of hats as well as the use of several security cameras. (Testimony of Appellant)

23. Asked by this Commissioner how we would be able to serve as a reserve police officer given that he already maintains the equivalent of two full-time jobs, the Appellant testified that he would need to get more information about the hours required of a reserve police officer and determine if he could adjust his schedule accordingly. (Testimony of Appellant)

24. Asked by counsel for the City if he was aware that the Salem Police Department does not allow Salem police officers to work at establishments licensed to serve alcohol, the Appellant said he was not, but indicated that he would probably have to "pass it (the club) off to my wife" if he was appointed to serve as a reserve police officer. (Testimony of Appellant)

25. The record was left open for the City to provide documentation regarding the City's policy regarding the employment of police officers in establishments licensed to serve alcohol. In response, the City subsequently forwarded a letter dated November 14, 2006 from the Salem Police Chief stating in part, "fifteen years ago I issued an order prohibiting the hiring of police officers for private details at bars and liquor establishments because of the potential conflict of interest." Moreover, the Police Chief stated, "I would not approve of an officer being employed or having an ownership interest, whether in the city or outside, in a business such as a bar or liquor

establishment; this type of establishment is specifically regulated by law enforcement.

As a police officer, employment in such a business could affect the officer's independence, judgment or action in the performance of his police duties." (Exhibit 14)

Poor Associations

26. On his application for employment with the Salem Police Department, the Appellant was asked to list three personal references and to list members of any law enforcement agencies whom is he is acquainted with. (Exhibit 10)

27. When the Salem Police Department tried to contact the first personal reference ("Reference #1") listed by the Appellant, they were told by Reference #1's wife that he was unavailable as he had "a lot of creditors looking for him". The Salem Police Department was never able to make contact with Reference #1. (Exhibit 2)

28. When the Salem Police Department contacted Reference #2, a retired state police sergeant, he was unable to provide any information about the Appellant's current employment, marital status, the number of children the Appellant had or if the Appellant drank alcohol. When asked by this Commissioner why he listed Reference #2 as a reference, the Appellant testified that he had known Reference #2 all his life, but "since I'm busy, he wouldn't know my current status." (Exhibit 2 & testimony of Appellant)

29. Despite several attempts, the Salem Police Department was also unable to make contact with Reference #3, a retired State Police lieutenant, listed on the Appellant's application for employment. On the application for employment, the Appellant was unable to provide Reference #3's current address, despite indicating that he had

known Reference #3 for 15 years. During his testimony before the Commission, the Appellant testified that he had met Reference #3 at the gym. (Exhibit 2 and testimony of Appellant)

30. During his testimony before the Commission, the Appellant questioned why the Salem Police Department did not contact the individuals listed under the section in which he was asked to list any member of law enforcement that he is acquainted with. Further, the Appellant presented an undated affidavit from a sergeant in the Revere Police Department which stated in part, “I have known Walter Geary for approximately 30 years. I am aware that Mr. Geary is the owner of the Caravan Lounge. I would highly recommend Mr. Geary to be a police officer in Salem. I have always found Mr. Geary to be honest and law abiding. He runs a well organized, safe and compliant bar. He is very opposed to any kind of drug use, dealing or activity.” (Testimony of Appellant and Exhibit 8)
31. In its letter to the Appellant explaining why he was bypassed, the Salem Police Department stated in part, “you told both an investigator and me that you are in the company of friends who smoke marijuana after playing a game of basketball. You also stated that you frequently need to wipe illegal drugs from surfaces in the bathroom at Club Caravan...”. (Exhibit 2)
32. During this testimony before the Commission, the Appellant explained that his reference to marijuana during his interview related to certain times when he is walking across the parking lot after basketball practice and has noticed others, not himself, smoking marijuana. In regard to drug use at Club Caravan, the Appellant testified before the Commission that he has several controls in place to prevent such

activity including the use of security cameras. The Appellant testified that he can not use security cameras in the bathrooms, but still tries to take certain steps to prevent any illegal activity from occurring in the bathrooms. (Testimony of Appellant)

Poor Driving History

33. The Salem Police Department expressed concern that the Appellant had four surchargeable motor vehicle accidents between 1986 and 2000, including a 2000 incident in Lynn in which the Appellant crossed a double line and crashed into a telephone pole at approximately 5:00 A.M. (Exhibit 2)
34. In regard to the 2000 accident, the Appellant testified before the Commission that he had just closed up the bar, was driving at least 40 mph and dropped a bank deposit bag. When he reached down to pick up the bag, he lost control of the truck he was driving and crashed into a telephone pole. The Appellant testified that he was not charged with any violation as a result of the accident. (Testimony of Appellant)
35. The Lynn Police Department accident report regarding the above-referenced accident states in part, “Operator...was cited for speeding and going over the marked lane...@ least 50 mph...truck was totaled...crossed centerlane @ least 100 yards down from accident.” (Exhibit 13)

Other Allegation

36. On his application for employment, the Appellant stated that in 1988, he was charged with not having his gun permit in his possession in addition to possession of a knife. The Appellant testified before the Commission that both charges were dismissed the day after he was charged. (Exhibit 10 and Testimony of Appellant)

CONCLUSION:

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." City of Cambridge v. Civil Service Commission, 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, s. 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 the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The issue for the commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). However, personnel decisions that are marked by

political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. City of Cambridge, 43 Mass. App. Ct. at 304.

Having served as a senior state manager for several years, this Commissioner has interviewed literally hundreds of candidates for various positions across state government. It is not uncommon for personal references, supplied by the applicant, to offer overly positive descriptions of the applicant, requiring the interviewer to ask several follow-up questions to obtain a more candid assessment that provides more insight into the candidate's strengths and weaknesses. In this case, the Salem Police Department was only able to reach one of the personal references provided by the Appellant and that reference wasn't able to offer even the most basic information regarding the Appellant's current occupation or marital status, despite indicating on his application that he knew the reference for 25 years. In regard to the other two references provided by the Appellant, the Salem Police Department, while trying unsuccessfully to reach one of them, was told by family members that he was hiding from creditors. The final reference also couldn't be located and the Appellant was unable to provide a current address for him, despite indicating on his application that he had known him for 15 years. As a hiring manager in state government, my consideration of the candidate would have ended there.

The City, however, also interviewed the Appellant's supervisors at his place of employment, reviewed his driving record and conducted an interview with the Appellant. On all three fronts, the Appellant did not fare well. First, the City received negative feedback from two of the Appellant's supervisors. Second, his driving record revealed four surchargeable accidents including an accident in Lynn that occurred one year prior

to this interview in which the responding police officer indicated that the Appellant must have been traveling at least 50 mph when he crossed a double line and hit a telephone pole with such intensity that the truck he was driving was totaled. Finally, during the interview, the Appellant did not leave a positive impression with the two superior officers that conducted the interview, who eventually contributed to a 5 ½ page letter outlining detailed reasons why the Appellant should not be selected.

While the Commission has the authority to pass judgment on bypass appeals filed by unsuccessful candidates for civil service positions, it is the Appointing Authority, in this case, the Salem Police Department, that is ultimately responsible for the actions of candidates selected for appointment. Nowhere is that responsibility more important than those cases involving the appointment of police officers who are issued a badge and gun and entrusted to “serve and protect” the community. It is in that light that the Commission renders its decision in this case. While the Appellant, who has a commanding presence and friendly demeanor, demonstrated that he is sincerely committed to his family, friends and community during the Commission hearing, the Salem Police Department bypassed Mr. Geary with just cause, providing sound, rationale reasons for its decision. Further, there is no evidence of inappropriate motivations or objectives on the part of the Appointing Authority that would warrant the Commission’s intervention.

For all of the above reasons, the appeal under Docket No. G-01-634 is hereby
dismissed.

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Bowman, Guerin, Marquis and Taylor, Commissioners) on December 14, 2006.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Kevin G. Powers, Esq.

Daniel B. Kulak, Esq.

John Marra, Esq. (HRD)

Christopher Connolly, Esq. (DALA)