

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

RONALD GUERIN,
Appellant

v.

Docket No. G2-07-385

CITY OF NEW BEDFORD,
Respondent

Appellant's Attorney:

Margaret A. Ishihara, Esq.
Law Office of Margaret Ishihara
86 Church Street
Mattapoisett, MA 02739

Respondent's Attorney:

Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
City of New Bedford
City Solicitor's Office
133 William Street
New Bedford, MA 02740

Hearing Officer:

John J. Guerin, Jr.¹

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Ronald Guerin (hereinafter "Appellant"), filed this appeal with the Civil Service Commission (hereinafter "Commission") on November 8, 2007, claiming that the Respondent, City of New Bedford (hereinafter

¹ John J. Guerin, Jr., (no relation to the Appellant) a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

“City”) as Appointing Authority, bypassed him for promotional appointment to the position of police sergeant for the New Bedford Police Department (hereinafter “Department”) without reasonable justification. The Appellant alleges that he was improperly bypassed on August 16, 2007, again on September 28, 2007, and was not notified of the reasons for his bypass for promotion by the Personnel Administrator in accordance with Personnel Administration Rule (PAR) .08(3). By a Delegation Agreement between the Human Resources Division (hereinafter “HRD”) and the City (Joint Exhibit 5),² the City’s Personnel Director/Labor Relations Director is the delegated civil service Personnel Administrator. This appeal was filed on November 8, 2007, and is considered timely filed for the September 28, 2007 bypass. Further discussion of the timeliness of the appeal on the August 16, 2007 bypass will ensue. A full hearing was held in the Commission’s offices on March 14, 2008. Witnesses offering sworn testimony were not ordered to be sequestered. Two (2) audiotapes were made of the hearing. The parties submitted proposed decisions thereafter, as instructed.

FINDINGS OF FACT

Based upon the documents entered into evidence (Joint Exhibits 1 – 5, Appointing Authority Exhibits 1 – 5, and Appellant Exhibits 1 - 3), the testimony of the Appellant, Department Police Chief Ronald E. Teachman (hereinafter “Chief Teachman”) and Department Sergeant Kristofer Winterson (hereinafter “Sgt. Winterson”), I make the following findings of fact:

1. The Appellant is employed by the City as a full-time, permanent Police Officer. He took a civil service promotional examination for the position of Police Sergeant and

² A copy of the Delegation Agreement was ordered by the hearing officer to be submitted by the City following the hearing of this matter. The document was received by the Commission on March 27, 2008, marked as Joint Exhibit 5 and entered into the record which is now closed.

received a grade point score of 76. His name appeared first of four (4) names on Certification List No. 07-11 dated July 20, 2007. The other three (3) candidates were tied for second position on the list with each having received a grade point score of 75. (Joint Exhibit 1)

2. The Appellant has a Bachelors Degree from the University of Massachusetts-Dartmouth and a Masters Degree in Criminal Justice from Western New England College. He had experienced no discipline prior to the bypasses. He received two citations for his response to a multiple shooting incident in December 2006 and a citation for his response to a firearm incident in June 2007. (Appellant Exhibits 1, 2 and 3)
3. The City filled one sergeant position from Certification List No. 07-11. Robert Holmes, Jr. (hereinafter “Mr. Holmes”), the person selected for promotion, was ranked below the Appellant on the Certification List. No reasons for the selection of Mr. Holmes were listed in the Authorization of Employment Form-Form 14 (hereinafter “Form 14”). The promotional appointment was approved on August 16, 2007 as being effective on August 12, 2007. (Joint Exhibit 1)
4. Chief Teachman sent a letter, dated August 15, 2007, to the Appointing Authority, Mayor Scott W. Lang (hereinafter “Mayor Lang”) recommending the promotion of Mr. Holmes. Also in that letter, the Chief described the reasons he recommended for bypassing the Appellant for promotion. Chief Teachman, who became Chief in June 2006, has been with the Department for approximately 31 years. He was credible and testified at the Commission hearing that this was his first bypass process. When asked why the selection/bypass reasons had not been submitted for approval to the

delegated Personnel Administrator, he state that he assumed that the Mayor's office would pass his recommendations along to Angela Natho (hereinafter Ms. Natho"), the City's delegated Personnel Administrator. I credit his testimony on this point. (Testimony of Chief Teachman and Appointing Authority Exhibit 5)

5. The Appellant's name appeared first of the three (3) names on Certification List No. 07-19, dated September 11, 2007. The City filled one sergeant position from this list. Paul M. Demers (hereinafter "Mr. Demers"), the person selected for promotion, was ranked below the Appellant on the Certification List. Reasons for the selection of Mr. Demers, as well as reasons for the bypass of the Appellant were attached to the Form 14 as a September 21, 2007 memorandum from Chief Teachman to Ms. Natho. The promotional appointment was approved on September 28, 2007 as being effective on September 16, 2007. (Joint Exhibit 2)
6. When asked if the reasons for bypassing the Appellant had changed for the purposes of this hearing, the Chief was credible in answering that they had not changed. A review of the Chief's August 15, 2007 letter to Mayor Lang and his September 21, 2007 memorandum to Ms. Natho substantiates his testimony regarding the consistency of the instant bypass reasons. (Testimony of Chief Teachman, Joint Exhibit 3 and Appointing Authority Exhibit 5)
7. The second paragraph of the Chief's September 21, 2007 memorandum specifies the reasons for the Appellant's non-selection and reads:

"The first candidate on the list is Ronald Guerin. Officer Guerin has been a police officer since May 2, 1999 and has spent his entire career in the Uniform Patrol Division. In fact, he has spent almost all of it working the midnight shift at the North End Station. More importantly, he has a serious disciplinary matter that has not been resolved."

Only the last sentence of the same paragraph in the Chief's August 15, 2007 letter differs from the above and, at that, only slightly:

“More importantly, he has a significant disciplinary matter that has not been resolved, which involves Officer Guerin's on and off duty conduct regarding a personal relationship.”

Joint Exhibit 3, Appointing Authority Exhibit 5)

8. Pursuant to G.L. c. 31, § 2(b), the Commission is empowered to “hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator . . . “For the purposes of this appeal, Ms. Natho is the “administrator.”

(Administrative Notice)

9. Section 2(b) also provides, in pertinent part, the following:

“No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and *said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status.*” (Emphasis added.)

10. PAR .08(3) provides, in pertinent part, the following:

“The Personnel Administrator shall, within fifteen days of receiving reasons for selection or bypass, review the reasons submitted and inform the appointing authority of approval or disapproval of the reasons for selection or bypass . . . If the Personnel Administrator accepts the reasons, he shall forthwith notify the appointing authority *and the bypassed candidate or candidates* who may then appeal the decision to the Civil Service Commission pursuant to M.G.L. Chapter 31, § 2, subsection (b).” (Emphasis added.)

11. The Appellant's appeal is twofold. On the merits of the matter, he is challenging the *decision* by the Personnel Administrator to approve the reasons for his promotional

bypass because he asserts that the Appointing Authority lacked reasonable justification for proffering those reasons. Procedurally, the Appellant contends that the Personnel Administrator's *failure to act* in not notifying him of the bypass reasons prejudiced his rights "in such a manner as to cause actual harm to [his] employment status."

12. Although the City should be admonished for not adhering to the basic notification requirements of PAR .08(3), I find that there is no evidence of sinister intent on the part of the City. However, its lack of attention to this important component of the promotional process fosters the perception of non-merit based motives.
13. Nonetheless I find that the Appellant is not aggrieved: his rights were not prejudiced in a such a way as to cause actual harm to his employment status. His appeal was deemed timely filed and he has now completed the *de novo* Commission hearing to which he is entitled, in accordance with his civil service rights. An Appellant has sixty (60) days to appeal a bypass pursuant to the Commission's October 2000 Rule of Limitations for filing. The Appellant testified that he did not receive notice of the bypasses. However, the facts indicate that he was aware of the outstanding disciplinary issue, and had met with the Chief after the first bypass in order to discuss the reasons why it had occurred. (Appointing Authority Exhibit 3). The Appellant filed his Appeal on November 8, 2007, which was eighty-four (84) days after the first bypass occurred and forty-one (41) days after the second bypass occurred. Since the Appellant was afforded time for filing his bypass appeal for the August 16, 2007 bypass beyond the sixty (60) day statute of limitations, his rights were not abridged as a result of any alleged late notice.

14. In December 2005, an ex-girlfriend of the Appellant contacted the Police Department, reporting that a rock had been thrown through her bedroom window. She believed that it had been thrown by the Appellant in this matter. (Testimony of Sgt. Winterson and Chief Teachman)
15. Sgt. Winterson, a member of the Department's Professional Standards Division, was assigned the task of investigating that complaint. During his investigation, Sgt. Winterson interviewed the Appellant's ex-girlfriend, the supervisors who spoke with the ex-girlfriend the night of the rock throwing incident, the her current boyfriend and several of her neighbors. The ex-girlfriend told Sgt. Winterson that when they began dating, the Appellant used the identity of another New Bedford Police Officer. He was able to use this identity for several months until the ex-girlfriend saw his truck in New Bedford after he had told her that he was out of town attending the State Police Academy. (Testimony of Sgt. Winterson and Appointing Authority Exhibit 1)
16. The ex-girlfriend also discovered that the Appellant was married. She broke up with him and began dating another man. After the Appellant got a divorce, they began dating again. The ex-girlfriend and the Appellant broke up a second time in October 2005 and she began dating the man she had dated after her first break up with the Appellant. After the second breakup, the Appellant allegedly began harassing the ex-girlfriend by calling her, driving by her house and appearing at her two jobs to discuss their relationship - after the ex-girlfriend told him to leave her and her son alone and after she had received a 209A restraining order. (Id.)
17. The ex-girlfriend said that the Appellant came to her place of business in December 2005 with a diamond ring. He threw the ring at her when she refused to accept it from

him. At approximately 3:00 a.m. on December 27, 2005, a rock was thrown through the ex-girlfriend's bedroom window. She believed that the Appellant had thrown it because she had not picked up the phone when he had called her the day before. Her new boyfriend found feces on his door, also on December 27, 2005. In his interviewed, the new boyfriend stated he had seen a Police Officer climb over his rear fence, step on to his porch and open the back door about one month earlier. When he went out to see what was going on, the man was gone. The new boyfriend identified the Appellant as the officer he had seen in his yard from photos. (Id.)

18. Various neighbors of the ex-girlfriend indicated that from December 2005 to February 2006, they saw a cruiser parked near the ex-girlfriend's house, saw a man with a dark blue convertible hanging around the ex-girlfriend's car, and even saw the Appellant throwing rocks at her window. Upon completing his investigation, Sgt. Winterson prepared a report filed it report with his superior officer, Lt. Eugene Hebert (hereinafter Lt. Hebert). (Id.)

19. Shortly after being appointment to Chief June 2006, Chief Teachman reviewed that report and considered what, if any, disciplinary action should be taken against the Appellant. (Testimony of Chief Teachman)

20. Instead of suspending the Appellant, which would permanently blemish his employment record and preclude him from promotions in the future, the Chief and the attorney for the Police Union discussed a proposed settlement that would include a counseling program. The Chief testified that he did not want this situation to "mar [the Appellant's] career." I found the Chief to be credible on this point. (Testimony of Chief Teachman)

21. Chief Teachman credibly testified at the Commission hearing that he has had a wealth of experience and training in the area of domestic violence and stalking issues. He is certified in domestic violence training and has taught law enforcement, as well as civilians, in domestic violence programs since the 1980's. The Chief also testified that he is very familiar with rehabilitation programs in this area and that his hope was to see the Appellant engage in rehabilitative programming. However, the Chief insisted that he could not recommend promoting the Appellant until he had completed such a rehabilitative program and there was evidence that his behavior had changed for the better. (Id.)
22. The Union attorney asked if the Chief would allow the Appellant some time to resolve an undisclosed medical issue that the Appellant was facing and Chief Teachman agreed to the request. (Id.)
23. The Appellant asserted that Sgt. Winterson's report, dated December 27, 2006, could not be used as a basis for the Appellant's bypass because it was not included in his personnel file pursuant to G.L. c. 149, § 52C. Chief Teachman testified that Division of Professional Standards reports are internal affairs reports and are kept separate from individual personnel files. I find that reasons for non-selection to a civil service position need not be found exclusively in an individual's personnel file and that the custodial method of internal affairs reports is an inherent management prerogative. (Appellant's Request for Rulings of Law and Testimony of Chief Teachman)
24. At some time prior to June 25, 2007, the Union attorney was replaced by another. Based upon conversations between him and the Union, the Chief believed a settlement in the disciplinary matter had been reached in principle. However, the

Appellant continued to delay enrollment in the counseling program. (Testimony of Chief Teachman and Appointing Authority Exhibit 2)

25. After the August 16, 2007 bypass, the Appellant met with Chief Teachman to discuss the Appellant's outstanding disciplinary issue and the need for the Appellant to resolve the outstanding disciplinary issue before the Appellant would be recommended by for promotion. The Chief credibly testified that he believed that the Appellant's "sole motivating factor" to finally begin counseling was to be eligible for promotion within the Department and that attitude was "somewhat troubling." (Testimony of Chief Teachman and Appointing Authority Exhibit 4)

26. On August 24, 2007, the successor Union attorney provided documentation to Chief Teachman that the Appellant had registered for the RESPECT Batterer's Intervention Program. The new Union attorney also requested a meeting with the Mayor prior to the next promotion slot "in order to discuss Officer Guerin's proposal." (Testimony of Chief Teachman and Appointing Authority Exhibit 3)

27. On August 30, 2007 the Appellant submitted a letter regarding his enrollment in the RESPECT program to Chief Teachman stating, "Nothing like sharing the next 40 weeks of my life with a class of convicted felons and batterers. However, this is what you desired in order to have my complaint no longer be 'open or pending' so attend and complete the course, I shall." The Appellant's letter further stated, "I want you to understand the commitment, I am making to this program. The financial cost of the class is \$1,925.00. My enrollment and attendance may also preclude me from obtaining a VISA for my fiancé while I am attending classes. The class time has been changed from 17:30 – 19:30 to 19:30 – 21:30, so on the days class falls on my day off,

I will not be able to have custody of my son on that day. He is six years old and his bedtime during the school year is 20:00.” (Testimony of Chief Teachman and Appointing Authority Exhibit 4)

28. The September 28, 2007 bypass of the Appellant for promotion occurred for the same reasons as the previous bypass. The Appellant testified at the Commission hearing that he was advised of the bypass by his supervisor, but he did not receive notice of the reasons did not see the relevant documentation until some time later. (Testimony of Appellant)

29. The Appellant testified at the Commission hearing that he did not throw a rock through his ex-girlfriend’s window and that he never admitted to Sgt. Rita Ribeiro that he had been on the ex-girlfriend’s street the night of the incident, as indicated in Sgt. Winterson’s report. He said that on that night he was on duty and assigned to another area of the City. I found Appellant’s testimony unconvincing. The report was prepared by a disinterested party (Sgt. Winterson) who had no reason to embellish his findings, and was found to be a credible witness by this hearing officer. Further, there was no evidence presented that Sergeant Rita Ribeiro, or anyone else interviewed by Sgt. Winterson, had any motive to harm the Appellant. Conversely, the Appellant had every reason to try to extract himself from his downward spiral, away from professional advancement. (Testimony of Appellant and Appointing Authority Exhibit 1)

30. I found the Appellant to be polite and respectful. He was even-toned and exhibited no change of expression or temperament when asked pointed questions about the sensitive subject of domestic abuse. He maintained a professional demeanor and

articulated his testimony in a way that was indicative of law enforcement training. Despite this demeanor, I found that his answers practiced and crafted to display himself in the best light - rather than providing a straightforward account of the events in question. His testimony did not corroborate with Sergeant Rita Ribeiro's account of that night. His account of his activities that night was fraught with generalities such as his service calls "taking a while," and the unsubstantiated claim that the Department computer system logging calls crashed on that particular shift. (Testimony and Demeanor of Appellant)

31. The Appellant did admit that his ex-girlfriend had obtained a 209A restraining order against him and that the judge then extended the restraining order for an additional 30 days. The Appellant testified that the ex-girlfriend never stated to the Court that she was in fear of the Appellant. However, the Appellant also acknowledged that the standard for obtaining a 209A restraining order from the Court is "fear for personal safety". (Testimony of Appellant)

32. As of the Commission hearing, there was no evidence presented that the Appellant had completed the RESPECT program. (Testimony of Chief Teachman)

CONCLUSION

The Civil Service Commission grants wide latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion. Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987). In a bypass appeal, the CSC must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. City of Cambridge v. Civil Service

Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and 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).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, the Commission must consider the fundamental purpose of the Civil Service System which is "to protect against overtones of political control, objectives unrelated to merit standards and assure neutrally applied public policy." If the Commission finds that there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy", then it should intervene. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. City of Cambridge at 304.

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). All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988).

The Respondent did show, by a preponderance of the credible evidence presented at hearing, that the Appellant's rights have not been abridged by the City in that the City sustained its burden of proving reasonable justification to bypass the Appellant for promotion to the rank of sergeant with the New Bedford Police Department.

When procedural matters are not found to be a fatal flaw in the City's promotional process, only the reasons for bypass remain. The City has a duty to the public to hire and promote individuals who possess the necessary skills and abilities, especially in the performance of public safety positions. In the present case, the Appellant's conduct, with respect to his former girlfriend, raised legitimate concerns with respect to the Appellant's character and judgment. The Appellant's pattern of harassing behavior resulted in the City's lack of confidence in the Appellant's ability to lead a platoon of officers within the New Bedford Police Department.

After hearing by this Commission, it is found that the Appellant is now, and was, well aware of the hurdle he has to overcome to be promoted to the position of Police Sergeant. It is hoped that the Appellant follows the prescribed path toward that professional advancement. Certainly, no "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy" exist here. The Chief credibly testified that he is trying to handle the Appellant's situation in a way that would avoid an adverse disciplinary mark on the Appellant's service record. In doing so, he cannot yet recommend the Appellant's professional advancement until the Appellant has demonstrated that he is free and clear of the issues that have reasonably precluded that advancement.

For all of the findings of fact and conclusions stated herein, the Commission determines, by a preponderance of the credible evidence, that the City has sustained its burden of proving reasonable justification to bypass the Appellant for promotion to the rank of Sergeant in the New Bedford Police Department. Therefore, the appeal on Docket No. G2-07-385 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on July 17, 2008.

A true record. Attest:

Commissioner

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)(1), 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:

Margaret A. Ishihara, Esq. (for Appellant)

Jane Medeiros Friedman, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)