

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

Docket No: G1-22-072

ZACHARY HURLEY,
Appellant

v.

CITY OF NEWTON,
Respondent

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, an administrative magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Then-administrative magistrate Angela C. McConney heard the matter on September 15, 2022. She was later appointed as a Commissioner to the Civil Service Commission in December 2022. Because this matter was heard when she was a DALA administrative magistrate, the Commission issued the October 18, 2023 decision as a Tentative Decision in accordance with 801 C.M.R. § 1.01(11)(c). The parties had the opportunity to file comments and objections to the Tentative Decision pursuant to 801 C.M.R. § 1.01(11)(c)1.

Pursuant to 801 CMR 1.01 (11) (c), the Commission issued the attached Tentative Decision and the parties had thirty days to provide written objections to the Commission. No objections or objections / replies were received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of Commissioner McConney, thus making this the Final Decision of the Commission.

The decision of the City of Newton is affirmed, and Zachary Hurley's appeal filed under Docket Nos.: G1-22-072, CS-22-0242 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chair; Dooley, Stein and Tivnan [McConney, abstain] Commissioners) on December 28, 2023.

Civil Service Commission

/s/ Christopher C. Bowman

Christopher C. Bowman

Chair

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:

James W. Gilden, Esq. (for Appellant)

Jaclyn R. Zawada, Esq. (for Respondent)

James Rooney, Acting Chief DALA Magistrate

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Appearance for Appellant:

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Sharon, MA 02067

Appearance for Respondent:

Jaelyn R. Zawada, Esq.
Assistant City Solicitor
City of Newton Law Department
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Commissioner:

Angela C. McConney¹

SUMMARY OF TENTATIVE DECISION

The City of Newton has proven by a preponderance of the evidence that it had reasonable justification to bypass the Appellant for original appointment to the position of permanent full-time police officer. based on the Appellant's negative professional references, untruthfulness and unsuitability.

¹ Angela C. McConney was appointed as a Commissioner in December 2022. Because this matter was heard when she was a Division of Administrative Law Appeals (DALA) administrative magistrate, this decision is a Tentative Decision in accordance with 801 C.M.R. § 1.01(11)(c). The parties may file comments and objections to the Tentative Decision pursuant to 801 C.M.R. § 1.01(11)(c)1.

The Commission also acknowledges the assistance of Law Clerk Daniel Taylor in the drafting of this decision.

TENTATIVE DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Zachary Hurley (Appellant), timely appealed the City of Newton's (City or Respondent) decision to bypass him for original appointment to the position of permanent full-time police officer. The Commission conducted a pre-hearing conference via the Webex platform on June 14, 2022, and assigned the matter to the Division of Administrative Law Appeals (DALA) for a full hearing.

I conducted the hearing at the Commission's offices then located at One Ashburton Place, Room 503, Boston, Massachusetts on September 15, 2022.² I was accompanied by Administrative Magistrate Eric Tennen. The hearing was recorded by video on the Webex platform, and copies were provided to the parties.³

I sequestered the witnesses. Mr. Hurley testified on his own behalf and called his stepfather, David Freeman. The City called Det. Kim Murray and Lt. Sean Healey of the Newton Police Department. Richard Bradley of the Special Operations Bureau was also present.

I marked the City's Pre-hearing Memorandum as "A" for identification, and admitted the City's four exhibits into evidence (Exhibits 1-4). I admitted the Stipulated Facts as Exhibit 5; Mr. Hurley's bypass appeal form as Exhibit 6; and a June 13, 2022 letter from the state's Human Resources Department (HRD) to the Commission as Exhibit 7. Mr. Hurley submitted his post

² The Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. § 1.01 (formal rules), apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ 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 he/it wishes 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.

hearing brief on November 30, 2022. The City submitted its post hearing brief on December 2, 2022, whereupon the administrative record closed.

FINDINGS OF FACT

From the testimony and the exhibits submitted into evidence, and taking administrative notice of all pleadings filed in the case, pertinent rules, statutes, regulations, case law and policies, and drawing reasonable inferences from the credible evidence, I make the following findings of fact:

1. Zachary Hurley is a resident of Newton, Massachusetts. (Exhibits 1 and 3; Testimony of the Appellant)

2. Mr. Hurley is a student in the Applied Legal Studies program at a local college. At the time of the hearing, he was fulfilling an undergraduate paralegal requirement by working at a real estate law firm. (Testimony of Appellant)

3. Mr. Hurley also works with his stepfather in the family auto customization business. (Testimony of Appellant, Testimony of Freeman)

4. On June 30, 2021, the Appellant passed the civil service examination for police officer with a score of 90. (Exhibit 5)

5. On September 15, 2021, the Massachusetts Human Resources Division (HRD) issued Certification #08167 and sent it to the City on October 5, 2021. Mr. Hurley's name appeared in a tie group ranked for 6th place on the certification. (Exhibits 5 and 7)

6. The Newton Police Department (Department) assigned Det. Kim Murray to conduct Mr. Hurley's background investigation. The background investigation included a review of the Appellant's educational history, work history, criminal history, driving history, family members, and his personal and professional references. (Exhibit 3; Testimony of Murray)

7. Det. Murray's investigation found that while Mr. Hurley's personal and some professional references were generally positive, several of his professional references were distinctly negative. (Exhibit 3; Testimony of Murray)

8. Employer A informed Det. Murray that Mr. Hurley was an "Assistant Paralegal," not a "Paralegal" as he stated in the Department's application. Employer A also stated that Mr. Hurley could not "keep up the pace of the office," "did not get along with his fellow co-workers at all," and she "did not think [the Appellant] would be a good fit for any police department." (Exhibit 3; Testimony of the Appellant)

9. Employer B, a lawyer, was a client of Mr. Hurley's family auto customization business. Through his friendship with Mr. Hurley's stepfather, Employer B hired Mr. Hurley. The friendship ended after a financial dispute between the stepfather and Employer B over auto customization work, and remains fractured. (Testimony of Murray)

10. When contacted by Det. Murray, Employer B alleged that Mr. Hurley had "outed" a previous employer's son and used homophobic language in the office, including referring to homosexual men as "the gays." Employer B opined that Mr. Hurley's behavior would lead to lawsuits being filed against the City, and that Mr. Hurley would be a "liability" if hired as a police officer. (Exhibit 3; Testimony of Murray.)

11. Mr. Hurley's Twitter account dates to 2014 and beyond. Through Twitter, Mr. Hurley gambled online with teammates from around the world for large sums of money. (Testimony of Appellant.)

12. Employer B was also a contact on Mr. Hurley's Twitter account. Employer B provided Detective Murray with screen shots and some of Mr. Hurley's tweets that were still on his cell phone. The tweets provided included the words, "indoctrination," the "liberal agenda,"

and a tweet that read “Aren’t you a foreigner? Hating from outside while you can’t even get in.”
(Exhibit 2; Testimony of Murray)

13. Further, in a December 22, 2021 email, Employer B advised Det. Murray that Mr. Hurley had deleted his posted comments. However, she would find a “trove” under his replies to other posted comments, which he had failed to delete. (Exhibit 2.)

14. In a second interview, Employer B informed Det. Murray that he knew Mr. Hurley because he used to be good friends with his stepfather. He said that they were no longer close, for reasons that he would not disclose, but that he and his wife loved Mr. Hurley and his brother and would do anything for them. (Exhibit 3)

15. Det. Murray asked to see Mr. Hurley’s social media accounts. Because they were private, he had to unlock them in order for her to access them. There were few tweets on the account. When Det. Murray questioned him about his Twitter account and whether he had deleted anything, Mr. Hurley said that he did not use Twitter frequently, only for communication with friends or to tweet about work. He stated explicitly that he “does not get involved in politics,” and did not share social media with past employers. When she brought up the specific tweets about “indoctrination” or the “liberal agenda,” Mr. Hurley said that they just “trash talk,” “busting chops,” “friendly banter,” typical of the online gaming communities he frequented. Mr. Hurley admitted making xenophobic statements such as, “Aren’t you a foreigner?” “Hating from the outside, can’t get in,” but said that they were addressed in jest to White people online.
(Exhibit 3; Testimony of Murray)

16. Mr. Hurley testified that he did not have a personal relationship with Employer B, and had not discussed the tweets with him. Mr. Hurley stated that he had looked up to Employer B since he was a kid. (Testimony of Hurley)

17. At the time of the DALA hearing, Mr. Hurley’s Twitter account contained approximately 5,500 tweets and replies. (Exhibit 2; Testimony of Appellant, Testimony of Murray.)

18. Mr. Hurley worked at Employer C, a Boston-area department store, as a sales supervisor. Within his employment application, Mr. Hurley revealed that Employer C terminated him after a coworker accused him of homophobia and bullying. (Exhibit 1; Testimony of the Appellant)

19. When Det. Murray asked Mr. Hurley to elaborate, he said that he had been terminated based on the lies of a disgruntled coworker, and that people are “envious” and “jealous” of him. (Resp. Exhibits 1 and 3; Testimony of Murray)

20. When Det. Murray contacted Employer C, they verified Mr. Hurley’s employment, but could provide no details of the termination. (Testimony of Murray)

21. The City informed Mr. Hurley of his bypass in a letter dated March 23, 2022, which included his appeal rights. In the letter, the City noted that misrepresentation or omission of a material fact on the application during the background investigation or any phase of the application process was reason for disqualification. As reasons for bypass, the City cited that:

1. On the employment application, Mr. Hurley denied that he had ever been charged with violation of a criminal statute, but had been charged with OUI drugs (and administered Narcan), child endangerment while OUI, junior operator with passenger under 18 after a motor vehicle incident on June 16, 2014;⁴
2. Mr. Hurley denied having a social media presence, but the background investigation revealed that his Twitter account had over 5,479 tweets with most of the public tweets deleted;
3. Mr. Hurley indicated the incorrect job title at one past employer; and
4. Mr. Hurley’s previous employers gave negative feedback, and his past employment revealed allegations of homophobia, bullying and discriminatory social media postings.

⁴ This bypass reason was not disputed before the Commission.

(Exhibit 4)

22. Mr. Hurley filed a timely appeal on May 10, 2022. (Exhibit 6)

Applicable 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). *See also Brookline v. Alston*, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

Original appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn 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.

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 Serv. Comm’n*, 483 Mass. 461, 474-78 (2019); *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

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 Serv. Comm'n.*, 61 Mass. App. Ct. 796, 801 (2004), citing *Cambridge v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997); *Police Comm'r v. Civil Serv. Comm'n.*, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986).

Analysis

By a preponderance of the evidence, I find that the Department had reasonable justification to bypass Mr. Hurley. It is undisputed that Mr. Hurley was not forthcoming and truthful on his application. An appointing authority relies heavily on the information candidates provide in their applications to perform a thorough background check into whether they are both qualified and suitable to serve as a police officer.

Det. Murray's investigation was reasonably thorough and detailed, and she provided the Appellant with multiple opportunities to provide information and explain his statements on the application. I find that she conducted a fair investigation.

As cited earlier, Mr. Hurley's criminal history was not in dispute. I now address the remaining issues for bypass.

The City cited that Mr. Hurley denied having a social media presence, but investigation of his Twitter account revealed over 5,479 tweets, with most of the public tweets deleted.

The Commission has consistently recognized that "a police officer must be truthful at all times," and "failure to do so constitutes conduct unbecoming an officer." *MacHenry v. Wakefield*, 7 MCSR 94 (1994). Indeed, there is a "strong public policy against employing police officers who are untruthful." *Royston v. Billerica*, 19 MCSR 124, 128 (2006). To that end, the Commission has stated that "it is well settled that police officers voluntarily undertake to adhere

to a higher standard of conduct than that imposed on ordinary citizens.” *Garrett v. Haverhill*, 18 MCSR 281, 285 (2005). As such, allegations of untruthfulness ought to be made with an appropriate degree of seriousness, and investigated with sufficient diligence. *See, e.g., Morley v. Boston Police Dep’t*, 29 MCSR 456 (2016).

The Appellant claimed to Det. Murray that that he used Twitter only sporadically, for communication with his friends and postings related to work. However, by the date of the DALA hearing, the Appellant had tweeted approximately 5,500 times. Even if the Appellant’s use of the platform was relatively infrequent, this amounts to an average of one tweet a day for more than a decade, far more than the claimed occasional use. This is precisely the sort of willingness to “fudge the truth” that the Commission has expressed disapproval of in the past, and the courts have concurred. *See, e.g., Cambridge*, 43 Mass. App. Ct. at 303.

Likewise, the Appellant strenuously denied that he had ever used Twitter to discuss politics or other controversial subjects, and claimed that he never shared his social media with employers. However, Employer B was well aware of not only the existence of the Appellant’s Twitter account, but also its contents. The tweets that Employer B provided to Det. Murray included at least one statement mocking a “foreigner,” “hating from the outside while you can’t even get in.”⁵ Det. Murray asked the Appellant directly whether he had used Twitter to discuss politics or “anything discriminating,” and the Appellant was “adamant” that he did not communicate using Twitter, and “does not get involved in politics.” These statements are clearly contradicted by the record, and I find that the Appellant was untruthful regarding the nature and frequency of his social media use.

⁵ I did not find compelling the Appellant’s explanation that this statement was “trash talk,” “busting chops,” or “friendly banter.” (Testimony of the Appellant)

As a reason for bypass, the City cited that Mr. Hurley submitted the wrong job title for a position at a former employer. It is a fact that Mr. Hurley wrote on his application that he worked as a paralegal for Employer A. However, when Det. Murray contacted her, Employer A said that Mr. Hurley's title was that of assistant paralegal.

I find that Mr. Hurley was untruthful about the nature of his true position while in the employ of Employer A.

The City cited the negative feedback from Mr. Hurley's previous employers, revealing allegations of homophobia, bullying and discriminatory social media postings.

The Appellant has also been the subject of separate allegations of homophobia. Namely, the Appellant was fired from Employer C — a Boston-area department store — based on allegations of homophobia and bullying, was accused of “outing” a previous employer's son, and using discriminatory language in the workplace. When Det. Murray asked the Appellant for further clarification on these events, the Appellant stated more than once that any problems related to his previous employment “stem from jealousy,” and the fact that others are “envious and jealous of him.” While the preponderance of the evidence does not support these serious allegations, the Appellant's dismissive and egotistical response to them is troubling and calls into question whether he has the judgment and temperament to serve as a police officer.

It is also notable that two former employers specifically recommended that the Appellant not be hired as a police officer. The first, Employer A, stated that in their opinion, the Appellant would not be “a good fit for any police department,” and that his coworkers in his previous position “did not like him.” Similarly, Employer B expressed his belief that hiring the Appellant would inevitably lead to a lawsuit for the Department. The Commission has held that sufficiently negative professional references constitute reasonable justification for a bypass, even standing

alone. *See, e.g., Joseph M. v. Department of Correction*, 35 MCSR 87 (2022).

Mr. Hurley asserted that Employer B was not a credible reporter of facts, did not know him as well as he claimed, and had limited knowledge of his activities. Further, Mr. Hurley asserts that Employer B cannot be deemed credible due to his financial dispute with the family business. I am not persuaded. Employer B's opinion did not stand on its own, but was considered in conjunction with Mr. Hurley's conduct and other references and Employer B's comments were similar to those from other references and fit Mr. Hurley's pattern of behavior.

Mr. Hurley's behavior and testimony demonstrated immaturity and a lack of readiness to serve as a police officer. He did not seem to understand the seriousness of the application process and that failure to be forthcoming would be fatal to his candidacy. For this reason, and the reasons discussed above, I recommend that the Civil Service Commission deny the appeal of Zachary Hurley and affirm the decision of the City of Newton.

/s/ Angela C. McConney
Angela C. McConney
Commissioner

DATED: October 18, 2023

Notice to:
James W. Gilden, Esq. (for Appellant)
Jaclyn R. Zawada, Esq. (for Respondent)