

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

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

**ADAM KATZ,**  
*Appellant*

v.

**MASSACHUSETTS  
ENVIRONMENTAL  
POLICE,**  
*Respondent*

**Case No.: G1-13-188**

**DECISION**

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a 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).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No written objections were received.

Here, the Magistrate ultimately concluded that the sole reason justifying the bypass of Mr. Katz for Environmental Police Officer was a poor reference received from a sergeant who is purportedly Mr. Katz's current supervisor. As part of the hearing, Mr. Katz testified that the sergeant in question rarely supervised him and then submitted positive references from other sergeants who, in some cases, stated that they had supervised Mr. Katz for several years.

Citing Kavaleski, the Magistrate concluded that, "Even if [the sergeant] had *no* supervisory capacity over Mr. Katz, rather than 'rarely' had such a capacity, the appointing authority learned about one unfavorable recommendation and one lukewarm recommendation and acted on them. It was reasonably justified in doing so." We disagree.

If the stated reason for bypass was a poor reference *from a supervisor*, it is highly relevant whether the reference in question actually came from Mr. Katz's supervisor, and, to what degree, if any, the sergeant actually supervised Mr. Katz. Nothing in Kavaleski relieves the Appointing Authority of substantiating the stated reasons for bypass by a preponderance of the evidence.

Further, as stated in Beverly v. Civ. Serv. Comm'n, 78 Mass. App. Ct 182, 189, 190-191 (2010), the Commission must determine whether the Appointing Authority conducted a "reasonably thorough review that confirmed that there appeared to be a credible basis for the allegations." Although not citing Beverly, this is the crux of Mr. Katz's argument, contesting what, if any, supervisory responsibility the sergeant had over him. The other references submitted by Mr. Katz strongly suggest that the Appointing Authority's review here may have fallen far short of the reasonably thorough review required.

Finally, as referenced throughout the Magistrate's decision, the Appointing Authority failed as part of the hearing process to put forth a cogent case, even leaving the Magistrate to guess what bypass reasons were actually used and/or conveyed to Mr. Katz. Remarkably, the Appointing Authority planned on presenting no witnesses and, only after being prodded by the Magistrate, called a witness whose involvement in this process is not decipherable. Here, particularly given the factual dispute presented, testimony from the background investigator would have been helpful in determining whether the Appointing Authority met its burden. If evidence of some of the more problematic behavior in Mr. Katz's record had been substantiated by properly admissible evidence, the outcome may well have been different.

If the Commission were to uphold this particular bypass decision, we would be lowering the bar to an unacceptable level inconsistent with civil service law and rules and years of precedent-setting judicial decisions.

### *Conclusion*

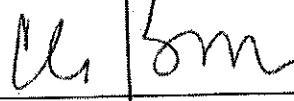
For all of the above reasons, we do not accept the recommendation of the Magistrate. The decision of the Massachusetts Environmental Police is overturned and Mr. Katz's appeal under Docket No. G1-13-188 is allowed.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

- The state's Human Resources Division (HRD) shall place the name of Adam Katz at the top of the current or next certification for the position of Environmental Police Officer at the Massachusetts Environmental Police until such time as he is appointed or bypassed.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on February 20, 2014.

A true record. Attest.

  
\_\_\_\_\_  
Christopher C. Bowman  
Chairman

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.

Notice to:

Adam Katz (Appellant)

Lt. Colonel Chris Baker (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals  
1 Congress Street, 11th Floor  
Boston, MA 02114  
www.mass.gov/dala


Adam Katz,  
Appellant

v.

CSC Docket No. G1-13-188  
DALA Docket No. CS-13-544

Massachusetts Environmental Police,  
Appointing Authority

**Appearance for Appellant:**

Adam Katz  


**Appearance for Appointing Authority:**

Lieutenant Colonel Chris Baker  
Executive Office of Energy and Environmental Affairs  
Office of Law Enforcement  
251 Causeway Street  
Boston, MA 02114

**Administrative Magistrate:**

Kenneth Bresler

**SUMMARY OF RECOMMENDED DECISION**

The appointing authority was reasonably justified in bypassing Mr. Katz for a police officer position because Mr. Katz received an unfavorable recommendation and a lukewarm recommendation during his background investigation.

**RECOMMENDED DECISION**

The petitioner, Adam Katz, appeals the decision of the Massachusetts Environmental Police to bypass him for hiring as a police officer.

I held a hearing on November 8, 2013, which I recorded digitally. Mr. Katz testified, and called no other witness. The appointing authority called one witness, Major Wilton Gray. I have accepted into evidence 14 exhibits.<sup>1</sup>

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<sup>1</sup> The hearing did not proceed seamlessly for a few reasons. The appointing authority originally planned to introduce only two exhibits, the stipulations reached at the prehearing conference and its investigative report. (Exs. 1 and 2). It planned to call no witnesses in its case in chief. And the parties had not exchanged and marked exhibits, as the Notice of Full Hearing / Required Hearing Preparation, ordered.

Mr. Katz had not seen the investigative report (Ex. 2) until the morning of the hearing. I asked if Mr. Katz wanted time to review the report and/or a continuance. He asked to proceed with the hearing.

I entered the bypass letter and Mr. Katz's appeal as exhibits. As the appointing authority's case proceeded, as argued by its representative, it became clear that it was in fact relying on documents that it had not introduced as exhibits, and I entered them. Mr. Katz introduced an exhibit after the hearing had started and proposed another exhibit – but he did not have copies to put into evidence or to give to the appointing authority. I left the record open for him to copy this exhibit and submit it to me and the appointing authority. Mr. Katz attached this exhibit to his post-hearing brief, and I mark it as Exhibit 14.

When the appointing authority rested without calling a witness, I said that I did not have enough facts to write a recommended decision, as I am required to. *See* G.L. c. 30A, § 11(8). It then called Major Wilton Gray as its witness, who was present as its potential rebuttal witness.

Because exhibits were entered piece-meal, because they were scattered throughout the file, and because they were stapled into at least one packet of documents that the appointing authority had submitted to the Civil Service Commission at the prehearing conference, I ended up assigning duplicate exhibit numbers. I now number the exhibits as following:

- 1: Bypass Stipulated Facts.
- 2: Background Investigations memorandum, dated December 3, 2012.
- 3: Bypass letter to Mr. Katz, dated July 18, 2013.
- 4: E-mail from Chris Baker to Nuwanda Evans, dated June 27, 2013, with attachment listing four successful candidates.
- 5: Letter from Nuwanda Evans to Mr. Katz, dated September 13, 2013.
- 6: E-mail from Chris Baker to Ms. Evans, dated July 19, 2013.
- 7: Bypass appeal form, dated August 26, 2013.
- 8: Four letters of recommendation to the Civil Service Commission on behalf of Mr. Katz, with various dates in September 2013.
- 9: Civil Service Requisition (Form 13).
- 10: Authorization of Employment Form (Form 14).
- 11: Letter to Ms. Evans from Aaron Gross, dated March 7, 2013.
- 12: E-mail from Lt. Col. Baker to Ms. Evans, dated June 4, 2013, and related e-mail messages.
- 13: E-mail from Mr. Katz to Dani Murnane, dated April 29, 2013, and related e-mail messages.

Both parties submitted post-hearing briefs. The Massachusetts Environmental Police submitted a one-and-one-half-page brief without citations to the record or law.

### **Findings of Fact**

1. Adam Katz, a Fall River police officer, applied for a position as an officer with the Massachusetts Environmental Police. (Ex. 1.)
2. On December 3, 2012, Major Len Roberts completed a background investigation report on Mr. Katz. (Ex. 2.)
3. Among other things, the investigative report alleged a discrepancy between Mr. Katz's application and his driving record. (Ex. 2, p. 1.)<sup>2</sup>
4. The investigative report discussed a restraining order under G.L. c. 209A against Mr. Katz, and a resulting suspension from his employment. (Ex. 2, p. 4.)<sup>3</sup>
5. The investigative report relied on interviews with Lieutenant Paul Gauvin, Lieutenant Roger Lafleur, Lieutenant Michael Tetrault, Sergeant Roger Lavoie, Officer Steve Roseberry, Officer Matthew Pacheco, and Officer Jason Staley. They were identified as "Supervisors / Co-Workers." (Ex. 2, p. 7.)<sup>4</sup>
6. The investigative report did not summarize interviews with Lieutenant Gauvin or Lieutenant Tetrault. (Ex. 2, pp. 7-8). If Major Roberts's interviews of these two lieutenants entered into his report, it does not specify how. (Ex. 2.)
7. According to the investigative report,

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14: Four letters of commendation with various dates.

<sup>2</sup> Mr. Katz's application and actual driving record were not introduced as exhibits.

<sup>3</sup> The restraining order and documents related to any suspension were not introduced as exhibits.

<sup>4</sup> Because the appointing authority ultimately alleged that Mr. Katz's bypass was based on his supervisor's unfavorable recommendations (Ex. 11), this decision does not quote his coworkers' recommendations.

Lt. Lafleur did advise that when Katz first came to the department, he did not develop as quickly as typical officers and added that Katz was required to complete an extended Field Training period as his performance and interpretation of laws was slow to progress.

(Ex. 2, p. 7.)<sup>5</sup>

7. According to the investigative report, Sergeant Lavoie, who was described as Mr. Katz's "immediate supervisor," related that Mr. Katz "is punctual, takes direction, and has good intentions." (Ex. 2, p. 8.)

8. The investigative report continued to relate Sergeant Lavoie's comments as follows:

However...Katz treats everything black or white and shows little flexibility and diplomacy....Katz's problem solving skill and application of the law are not great and he typically needs more direction than other patrol officers that have been on ten years....Katz's "report writing skills are less than to be desired" and there are constant issues with chronology, grammar and detailed description.

(Ex. 2, p. 8.)<sup>6</sup>

9. The investigative report continued to relate Sergeant Lavoie's comments as follows:

Mr. Katz needs constant supervision and correction, and frequently uses arrest "as an end means."<sup>7</sup> Sergeant Lavoie did not think that Mr. Katz would do well as an Environmental Police office without constant supervision. (Ex. 2, p. 7.)

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<sup>5</sup> In all quotations from the investigative report (Ex. 2), "KATZ" has been changed to "Katz."

<sup>6</sup> To the extent that it matters, the appointing authority's investigator confirmed this unfavorable recommendation of Mr. Katz:

I did review two reports by Katz (enclosed in binders) and found them (in my opinion) to be below average to average considering that he has been a police officer for ten years. These two reports are said to be examples of his good reports.

(Ex. 2, p. 8.)

<sup>7</sup> It is unclear whether this quotation from the investigative report, which paraphrases Sergeant Lavoie's comments, means that Mr. Katz uses arrest as a means or as an end, and if "a means," then a means to what. Nonetheless, I take this as an unfavorable recommendation.

10. The investigative report continued:

Sgt. Lavoie closed with advising "I wish I could say good things about him in hopes that you would hire him and that he wouldn't be my problem anymore, but that wouldn't be right and I can't do that to you in good conscience."

(Ex. 2, p. 8)(underlining in original)(punctuation corrected).

11. On March 7, 2013, the appointing authority wrote a letter to Ms. Nuwanda Evans of the Human Resources Division, Civil Service Unit, informing her that it did not select Mr. Katz because he "did not receive favorable recommendations from current supervisors." (Ex. 11.)

12. Some time before April 29, 2013, Mr. Katz learned that he had been bypassed. (Ex. 13.)

13. On April 29, 2013, Mr. Katz e-mailed Dani Murnane, the information officer of the Human Resources Division, Civil Service Unit (Ex. 13), and asked for

information on why I was bypassed for the environmental police. I was number 10 on the list and I was bypassed and did not receive any letters to tell me why. I'm unable to contest or appeal [due] to not receiving a letter explaining why I was bypassed.

(Ex. 13.)

14. On May 23, 2013, Ms. Murnane e-mailed Mr. Katz, stating that the bypass letter has been reviewed and returned to the MEP [Massachusetts Environmental Police] a few times; the reasons they have provided were deemed insufficient, so it is now their responsibility to provide us with more detailed reasoning for bypass. Once we are granted acceptable reasoning for bypass, a letter will be provided to you.

(Ex. 13.)

15. On June 4, 2013, Lieutenant Colonel Baker responded to an e-mail of Ms. Evans. He apologized for the "hold up" in providing information; made a reference to her May 8, 2013 e-

mail<sup>8</sup>; and forwarded to Ms. Evans an e-mail dated May 21, 2013 from Major Gray to Lieutenant Colonel Baker. (Ex. 12.)

16. The May 21, 2013 e-mail from Major Gray to Lieutenant Colonel Baker reads in part: "Here are the answers to Ms. Evans' questions." (Ex. 12.)<sup>9</sup>

17. The substance of the May 21, 2013 e-mail follows:

(Ex. 12.)

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<sup>8</sup> This e-mail was not introduced as an exhibit.

<sup>9</sup> Again, Ms. Evans's questions are not part of any exhibit.

<sup>10</sup> This reference was to Sergeant Lavoie.

<sup>11</sup> Again, documents related to any suspension were not introduced as exhibits.

<sup>12</sup> This allegation was not the subject of exhibits or testimony.

<sup>13</sup> His employment file. *See* Ex. 2, p. 4.

<sup>14</sup> Any documents related to these allegations were not introduced as exhibits. Mr. Katz testified about the last allegation.



18. The substance of the e-mail quoted above begins with "2." It is preceded by a three-quarter-inch gap, where "1" was redacted. It is followed by a four-and-one-half-inch gap before the signature line. (Ex. 13.)<sup>15</sup>

19. When a bypass letter was sent to Mr. Katz (Ex. 3), it did not cover the allegations after the first two sentences quoted above from the May 21, 2013 e-mail. (Ex. 12.)

20. The May 21, 2013 e-mail (Ex. 12) was not attached to the bypass letter.

21. There is no evidence about when Mr. Katz first received a copy of the May 21, 2013 e-mail.

22. On June 27, 2013, Lieutenant Colonel Baker sent to Ms. Nuwanda Evans of the Human Resources Division, Civil Service Unit, an e-mail stating:

Attached are the selection reasons for the last round of EPO A/B hires. Previously sent to you were reasons for non-selection of bypassed applicants.

(Ex. 4.)<sup>16</sup>

23. The document attached to the June 27, 2013 e-mail listed four selected candidates, number 6 through 10. Half the page, four-and-one-half inches, is blank. (Ex. 4.)<sup>17</sup>

24. On July 18, 2013, Ms. Evans sent Mr. Katz a letter stating that it was enclosing "a letter from...the Environmental Police Agency stating your bypass reasons....Selection reasons have also been enclosed." (Ex. 3.)

25. The enclosures to the July 18, 2013 letter (Ex. 3) were the March 7, 2013 letter to Ms. Evans stating, "Adam J. Katz did not receive favorable recommendations from current supervisors" (Ex. 11) and the incomplete list of successful candidates. (Ex. 4.)<sup>18</sup>

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<sup>15</sup> The obvious redaction and apparent redaction were not explained.

<sup>16</sup> "EPO" presumably stands for "environmental police officer." No evidence was offered for the meaning of "A/B."

<sup>17</sup> The obvious redaction was not explained.

26. On August 26, 2013, Mr. Katz timely appealed. He wrote that the appointing authority advised him that he "did not receive favorable recommendations from current supervisors." (Ex. 7.)

27. In September 2013, Mr. Katz solicited letters of recommendation from two supervisors and two coworkers for this appeal. They are addressed "To whom it may concern" at the Civil Service Commission. (Ex. 8.)<sup>19</sup>

28. On September 13, 2013, Sergeant Richard Costa wrote a letter of recommendation to the Civil Service Commission. He reported that he had served as Mr. Katz's immediate supervisor "several times a week over the past year and a half." (Ex. 8.) He further wrote:

[H]e is a responsible Police Officer who is not afraid to make decisions. He is also receptive to direction and very respectful to his supervisors and co-workers.

...[H]e would make a seamless transition to the State Environmental Police.

(Ex. 8).

29. On September 14, 2013, Sergeant Jay D. Huard wrote a letter of recommendation to the Civil Service Commission. He reported that he had directly supervised Mr. Katz for the last two-and-one-half years in numerous environments. He further wrote:

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<sup>18</sup> Exhibit 3 did not have enclosures or attachments. No witness identified the enclosures or attachments. In response to my question, Lieutenant Colonel Baker, as the appointing authority's representative at the hearing, said that he believed that Exhibit 11 was an enclosure to the July 19, 2013 letter – but he was not sure, and he was not a sworn witness. Despite the absence of evidence about the enclosures to Exhibit 3, I find by reasonable inference that the enclosures were Exhibits 11 and 4. Nonetheless, "this is not the way the process should work." *Knight v. Aiken*, 2006 WL 539007, 3 (N.D. Ga. 2006)(unpublished). A party should present evidence that demonstrates important facts, such as the reasons for a candidate's bypass, not merely enough evidence to allow me to draw reasonable inferences. A party "should not expect a judge to do the work" for it. *Id.*

<sup>19</sup> Time stamps on the letters indicate that they were sent directly to the Civil Service Commission. Because the appointing authority ultimately alleged that Mr. Katz's bypass was based on his supervisor's unfavorable recommendations (Ex. 11), this decision does not quote his coworkers' recommendations.

Officer Katz is a conscientious worker who works well with fellow officers. Officer Katz takes orders well and makes every attempt to complete his assignments. I would describe Officer Katz'[s] tenacity as being "dog on bone." I believe that this is Officer Katz'[s] strongest attribute.

....I firmly believe that Officer Katz will thrive in this position and will be an asset to the MSEP [Massachusetts State Environmental Police].

(Ex. 8.)

30. Mr. Katz received four letters of commendation, including three from the chief of police. (Ex. 14.)

### Discussion

When a candidate for appointment appeals from a bypass, the commission's role is not to determine whether that candidate should have been bypassed. Rather, the commission determines, "on the basis of the evidence before it, whether the appointing authority [has] sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification" for the decision to bypass the candidate. [citations omitted.] "Reasonable justification in this context 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.'"

*Police Department of Boston v. Kavaleski*, 463 Mass. 680, 688 (2012) (citations omitted).

The appointing authority has proved by a preponderance of the evidence that it was reasonably justified in bypassing Mr. Katz. Despite the many allegations in the investigative report, the appointing authority ultimately cited Mr. Katz's not having "receive[d] favorable recommendations from current supervisors" as the reason for the bypass. (Ex. 11.)

Mr. Katz's major position is twofold: Sergeant Lavoie "rarely has had supervisory oversight" over him, and a handful of supervisors have recommended him favorably. (Katz brief, Exs. 8, 14.) To discount the bypass letter because Sergeant Lavoie was not a close supervisor or a current supervisor would parse the letter's words more than would be appropriate here. The appointing authority had an unfavorable recommendation from a person whom it believed was a

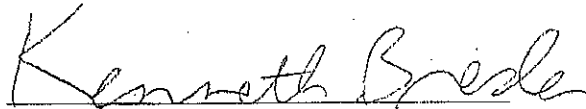
current supervisor. Even if Sergeant Lavoie had *no* supervisory capacity over Mr. Katz, rather than "rarely" having had such a capacity, the appointing authority learned about one unfavorable recommendation and one lukewarm recommendation and acted on them. It was reasonably justified in doing so.

If I were to make a recommended decision that the appointing authority should not have considered Sergeant Lavoie's report in bypassing Mr. Katz, I would be determining "whether that candidate should have been bypassed," which *Kavaleski* bars me from doing. If I were to make a recommended decision that the appointing authority should have relied on favorable recommendations and commendations from a handful of supervisors, which more than overcome one unfavorable recommendation and one lukewarm recommendation, I would also be determining whether Mr. Katz should have been bypassed.

#### **Conclusion and Order**

The appointing authority had reasonable justification for bypassing Mr. Katz. I recommend that his appeal be dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kenneth Bresler  
Administrative Magistrate

Dated: **JAN - 6 2014**