

**THE COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

**MICHAEL J. KELLY,**  
Appellant

v.

G1-10-269

**TOWN OF WAKEFIELD,**  
Respondent

Attorney for the Appellant:

*Pro Se*

Attorney for the Respondent:

Meredith P. Freed, Esq.  
Thomas A. Mullen, P.C.  
545 Salem Street  
Wakefield, Massachusetts 01880

Hearing Officer:

Angela C. McConney, Esq.

**DECISION**

Pursuant to the provisions of G.L. c. 31 § 2(b), the appellant Michael J. Kelly (“Kelly” or the “Appellant”) seeks review of the Respondent Town of Wakefield (“Respondent”) decision to bypass him for original appointment to the position of permanent full-time police officer. A hearing was held on January 31, 2011 at the offices of the Civil Service Commission. The parties submitted proposed decisions on March 4, 2011.

The hearing was digitally recorded. CDs were forwarded to the parties, and a copy is retained by the Commission.

## FINDINGS OF FACT

Twenty-seven (27) exhibits were entered in evidence at the hearing. Based on those exhibits and the testimony of the following witnesses:

*For the Appointing Authority:*

- Chief Richard Smith
- Deputy Chief John MacKay
- Sergeant Richard DiNanno and

*For the Appellant:*

- Michael J. Kelly

I make the following findings of fact:

1. The Appellant took the civil service examination for the position of permanent full time police officer in the town of Wakefield in 2009. His score placed him second on Certification List #206701. (Exhibit 27)
2. The Appellant has a degree from Curry College, received an honorable discharge after serving in the U.S. Navy from 2007 to 2009, and is currently a member of the Naval Reserves. (Exhibits 20, 27 and 28)
3. On March 16, 2010, the Respondent requested the certification from HRD for four (4) positions. (Exhibits 1 and 27)
4. HRD forwarded the Certification to the Respondent on March 30, 2010. (Stipulated Fact)
5. Sergeant Richard DiNanno (hereinafter “DiNanno”) has been a police officer for twenty-eight (28) years. He was assigned to the Detective Bureau four (4) years ago. (Testimony of DiNanno)

6. Di Nanno was the first person to review the application packets of all candidates and was responsible for conducting the background investigations. (Testimony of DiNanno)
7. The background investigation consisted of a criminal offender registry information (CORI) check, a Federal Bureau of Investigation (FBI) check, a Registry of Motor Vehicles (RMV) check, military records, and employer records. DiNanno also interviewed the candidates' personal references and neighbors. (Testimony of DiNanno)
8. DiNanno's request for the Appellant's military records was returned to him because it was sent to an incorrect address. The military records, which also included the military driving record, eventually arrived at the Department after the candidates were selected. (Exhibit 16; Testimony of DiNanno, Testimony of Appellant)
9. The driving history considered in the Appellant's background check twenty-eight (28) entries, beginning on October 10, 2001 and ending on April 5, 2007. The driving history includes three (3) suspensions of his driver's license. (Exhibit 9, Testimony of Sgt. DiNanno)
10. The Appellant also submitted a driving history into evidence. That record begins on May 9, 2001 and ends on October 25, 2010. It also includes reference to three (3) suspensions. (Exhibit 18)
11. In the Wakefield Police Department's Recruit Police Officer Candidate Application Process Instructions to Candidates, it is noted that candidates with excessive moving violations, i.e. three (3) or more moving violations in a twelve (12) month period will not be considered for appointment. "This applies to the three (3) previous years of a candidate's application for employment." (Exhibit 11)
12. The driving history documents that the Appellant had three (3) moving violations in 2001 when he was eighteen (18) years old. (Exhibits 9 and 18)

13. The Appellant counters that his driving record contained two (2) rather than three (3) license suspensions, that all of violations occurred when he was in his late teens, and that the Respondent didn't take the staleness of the violations into account. (Exhibit 18, Testimony of the Appellant)
14. The Appellant further testified that his military driving record would have rehabilitated his entire driving history if it had been part of the background check. He testified that on active duty he often chosen to drive military vehicles. The military driving record was not submitted into evidence. (Exhibit 20; Testimony of the Appellant)
15. The Appellant testified before the Commission that he had not driven in Massachusetts in the two (2) years previous to his application. He also testified that the Recruit Police Officer Candidate Application Process Instructions to Candidates stated that only negative records from the immediate three (3) years before the application process would be a hindrance. (Testimony of the Appellant)
16. All of the approved candidates had better driving records than the Appellant. (Testimony of Chief Smith) However, at the time of the bypass, the Appellant had not driven for two (2) years in Massachusetts. (Testimony of Appellant)
17. Deputy Chief John MacKay ("hereinafter Deputy Chief McKay") has been a police officer since 1976. He has been deputy chief since July 2010. (Testimony of McKay)
18. He conducted the first interview of the Appellant. During the interview, the Appellant said that he had always wanted to be a "cop." McKay testified that he had never heard a candidate use that term before, and was dismayed to hear it.
19. He testified that the Appellant answered all the questions, but in a casual way. He was not as sharp as the other candidates that McKay interviewed. (Testimony of McKay)

20. In their testimony before the Commission, the Appellant, McKay and Chief Smith all acknowledged that the term “cop” is an acronym for constable on patrol. (Testimony of Deputy Chief MacKay, Testimony of Chief Smith, Testimony of Appellant)
21. McKay found that the Appellant interviewed poorly, gave the impression of entitlement, and was neither articulate nor energetic. He testified that it was possible that the Appellant thought he had a leg up because he was a veteran, and thus was not serious. (Testimony of Deputy Chief MacKay, Testimony of Chief Smith, Exhibits 4 and 24)
22. The DVD of the Appellant’s interview was admitted into evidence and played during the Commission hearing. (Exhibit 24)
23. The Appellant is videotaped saying that he always wanted to be “cop” because he wanted to uphold the law. He also said that he was in the U.S. Navy from 2007-2009, and his service included time in Afghanistan. He stated that some of the strengths were the ability to take orders and follow through, in addition to the ability to delegate the appropriate tasks. When asked his overall career objective, he said that he wanted to stay in Wakefield. When asked of his five (5) year plan, he said that he aspired to go as far as he could go. (Exhibit 24)
24. When questioned as to qualities of the ideal supervisor, the Appellant said that would be someone who could offer positive reinforcement, someone who was trustworthy, make him a better police officer, and help him with his career. (Exhibit 24)
25. McKay testified that selected candidate Halladay gave an average interview, and appeared more professional than the Appellant in tone and manner. (Testimony of McKay)
26. McKay testified that selected candidate Shillings was extremely professional. He found him to be a “family man” in his thirties, with the objective of becoming a police officer. (Testimony of McKay)

27. McKay testified that he had had reservations before interviewing selected candidate Flynn, but found him more mature than his years. He was impressed that Flynn was heavily involved in charity work between his employer and the community. (Testimony of McKay)
28. McKay testified that he had also had reservations about selected candidate Malm, who was a firefighter. Malm already had a good schedule as a firefighter, but Malm reassured him that he wanted the “adrenalin rush” of doing police work. (Testimony of McKay)
29. DiNanno gave copies of the interviews to the Chief. (Testimony of McKay)
30. McKay then discussed the candidates with Chief Smith. (Testimony of McKay)
31. Chief Smith has been the chief for eight (8) years. He was a police officer in Oak Bluffs for four (4) years. He was then a police officer in Melrose for twenty-five (25) years, serving as chief for the last five (5) years of his tenure. (Testimony of Chief Smith)
32. The Chief testified that after DiNanno conducted his background investigation and the candidates were interviewed, he made recommendations to the Town Administrator. (Testimony of Chief Smith)
33. Chief Smith testified that he instructed all candidates to address any inquiries regarding the hiring process to MacKay. The chief testified he believed that this would prevent inconsistency and confusion. (Testimony of Chief Smith)
34. Of the five (5) candidates selected for appointment, four (4) of ranked below the Appellant. They were Robert W. Halladay (hereinafter “Halladay”), Jason C. Skillings (hereinafter “Skillings”), Kevin M. Flynn (hereinafter “Flynn”) and Kristopher R. Malm (hereinafter “Malm”). (Exhibits 4, 5, 6, 7, 8, 9, and 12)
35. Chief Smith submitted the following reasons for the Appellant’s bypass to HRD:
- [O]ther candidates with better qualifications; also bypassed due to information obtained during the CORI / background investigation process, which revealed that the candidate has multiple issues with his driver history including three license suspensions. The candidate interviewed very poorly and

gave the distinct impression of entitlement. He referred to police officers as “cops”, showing a complete disregard for the profession as a whole. He also failed to follow direction. On Friday June 11, in complete disregard for the very specific directions given him from Chief Smith, we [sic] went to town [sic] hall [sic] to inquire about a rumor he heard. He had been directed to address all inquiries to Lieut Mackay. He intentionally went around Lieut Mackay directly to Town Hall. Later in the day he came to the Police Station, dressed in jeans and t-shirt, wanting to speak with the Chief about why he had not been selected yet. Again, he displayed an air of entitlement. I strongly recommend that he be bypassed at this time.” (Exhibit 4)

36. On August 12, 2010, the Respondent notified the Appellant of its reasons for bypass.

(Exhibit 15)

37. The other bypassed candidates were Richard J. Sawyer, Toni M. Botticelli, John T. Jouvelis and Christopher R. Thibodeau. (Exhibit 4)

38. The Chief testified that selected candidate Haladay had previously turned down an offer from the Department. This time he again made a “great impression,” showing energy and a positive attitude. As a court officer, he understood the court system, had great people skills, and was skilled in dealing with young people. He understood the mission of the Department, and understood where the Department wanted to go. (Testimony of Chief Smith, Exhibit 4)

39. The Chief testified that selected candidate Skillings showed great energy and maturity, and had good people skills from his background in customer service. (Testimony of Chief Smith, Exhibit 4)

40. Though younger than other candidates, approved candidate Flynn struck Chief Smith as “wise in his years.” Flynn had worked for the State Police and for the Peabody Police. Chief Smith found him focused and was impressed with his work as a mentor in a program for at-risk children. (Testimony of Chief Smith, Exhibits 4 and 7)

41. Approved candidate Malm proved to be the “best interviewee” Chief Smith has ever encountered in his years as Chief. Mature and experienced, Malm was trained in operating emergency vehicles, was certified as a pilot of airplanes and helicopters, licensed as an

emergency medical technician, and experienced as a first-responder with both federal and local agencies. Though the lowest ranked candidate among those hired, in the chief's estimation, Malm was driven, a true professional, whose professionalism was evident throughout the hiring process. (Testimony of Chief Smith, Exhibits 4 and 8)

42. The Chief testified that the Appellant was not a bad candidate, but was not as good as those selected. (Testimony of Chief Smith)

43. The Chief testified that the Appellant's driving history could have been rehabilitated by his reportedly better military driving record, but that said military record did not arrive in time to be of consideration. (Testimony of Chief Smith)

44. At the time of his bypass, the Appellant had an excellent rating on his driving insurance. (Testimony of Appellant)

45. The Appellant testified that he didn't think that the selection was made on merit: that his military record was not taken into account, and that two of the selected candidates had no college degrees. (Testimony of Appellant)

46. The Chief testified that during his interview with the Appellant, he appeared entitled and thought he had a "lock" on the position because of his place on the list. The Chief did not like the way the Appellant answered questions, thought that he acted familiar and showed a lack of respect. (Testimony of Chief Smith)

47. On June 2, the Appellant contacted McKay to check on his status. (Exhibit 23; Testimony of Appellant)

48. Through Facebook, the social networking website, on June 2, 2010 the Appellant discovered that the Respondent had made a conditional offer to Haladay, who ranked below him.



Haladay informed the Appellant that his physical was scheduled for the next day. (Testimony of Appellant; Exhibit 22)

49. On June 2, 2010, the Appellant faxed a request to the state's Human Resources Division, inquiring why he had been bypassed. He noted that two (2) of the selected candidates, Flynn and Haladay, ranked below him. (Exhibit 10)

50. On June 3, 2010, the Appellant contacted McKay again. He informed McKay that his address had changed, and that he was wondering if anything had sent in case it was forwarded to the wrong address. McKay told the Appellant that the Respondent was still conducting interviews, and that nothing had been sent out yet. (Exhibit 23; Testimony of Appellant)

51. Since McKay's and Haladay's statements were inconsistent, the Appellant believed that he had been bypassed. He went to Town Hall check on his status on June 11, 2010. (Testimony of McKay, Testimony of Appellant)

52. At Town Hall, the Appellant went to Town Administrator Stephen Maio's (hereinafter "Maio") office. He had no appointment, and was wearing blue jeans and a tee shirt. (Testimony of Chief Smith, Testimony of the Appellant)

53. Maio was unavailable, but one of his staff suggested that the Appellant go to the Police Department. (Testimony of the Appellant)

54. The Appellant then went to the Police Department, still dressed in the jeans and tee shirt. He asked to speak to the Chief. (Testimony of the Appellant)

55. The Appellant apologized to the Chief for coming over without an appointment. The Chief replied that he had heard the Appellant's name too often that day. (Testimony of the Appellant)

56. In the Chief's office, the Appellant informed the Chief that he knew that conditional offers had been extended, including at least one candidate ranking below him. The Chief asked the Appellant how he knew that. The Chief said he had wanted two "definites" for the Academy, and that if it would make the Appellant feel better, he ought to know that selected candidate Haladay had passed up the job last time. (Exhibit 5; Testimony of the Appellant)
57. The Chief testified that he believed that the Appellant has intentionally disregarded the instructions to only contact Deputy Chief McKay. He believed that the Appellant had gone over his head by going to the Town Administrator, and that his attire showed little respect for his potential employers. (Exhibit 11; Testimony of Chief Smith)
58. The Chief testified that this behavior, in conjunction with his use of the term "cop" during the interviewed, showed that the Appellant thought that he was entitled to the position. (Testimony of Chief Smith)
59. On June 17, 2010, the Chief wrote the Appellant to inform him that he had been bypassed. The bypass reasons were not addressed in the letter. (Exhibit 25)

## 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." Cambridge v. Civil Serv. Comm'n, 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 Civ. Serv. v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 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 a 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 Serv. Comm’n, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

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, 332 (1983). See Commissioners of Civ. 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. Cambridge, 43 Mass. App. Ct. at 304.

The Respondent’s reasons for the bypass were the Appellant’s (1) driving history, (2) his poor interview which gave the impression of entitlement, (3) that the Appellant referred to police officers as “cops” which showed a disrespect for the profession as a whole, (4) that the Appellant failed to follow directions by going to Town Hall on June 11, 2010 to inquire on his status rather than contacting McKay, (5) that the Appellant wore jeans and a tee shirt on said visit, (6) that the Appellant wore the same jeans and a tee shirt on the later visit to the Police Department and (7) that the Appellant questioned the Chief as to why he was not selected.

I do not find that there is enough evidence to show that the Appellant failed to follow directions, showed a general lack of respect, showed a lack of respect due to his attire, or that he showed an air of entitlement. The use of these reasons is disingenuous. At the time that the Appellant went to Town Hall, he had already been bypassed.

However, the appointing authority did establish by substantial, credible evidence that it was justified in the bypass of the Appellant based on other reasons: his bad driving history and poor performance in the interview.

#### *Driving Record*

The Commission has found that a poor driving record is reasonable justification for a bypass of a candidate. See McGrath v. Lowell, 22 MCSR 560 (2009); Torres v. Lowell, 22 MCSR 558 (2009); Campbell v. Boston Fire Dep't, 22 MCSR 489 (2009); Jones v. Boston Police Dep't, 22 MCSR (2008). Since police officers operate cruisers as part of their duties, an appointing authority is entitled to weigh the driving records of applicants when making appointments.

The Appellant argues that his record for the three (3) years immediately before the application process should be considered, per the Respondent's Recruit Police Officer Candidate Application Process Instructions to Candidates (Finding of Fact 11). However, I find that that is not the correct interpretation of the language. If a candidate were to display a horrific driving record, with the immediate three (3) years preceding the application process blemish free, that would not make him an ideal candidate for police officer. The language instead places an emphasis on the fact that the immediate three (3) years must not contain three (3) or more moving violation in a twelve (12) month period.

The military driving record was not part of the Respondent's background check; any argument that it may have been rehabilitative is speculative.

### *The Interview*

Exhibit 24, the DVD of the Appellant's interview, was played during the Full Hearing on January 31, 2011. Although I did not view the videotaped interviews of the other candidates, the recording was not the Appellant's finest hour. The Appellant appears to lack self confidence instead of possessing the air of entitlement as alleged by the Town. He was nervous, hesitated in many of his answers and didn't elaborate in response to the questions posed to him. I agree with the Respondent that he didn't interview well.

### *The Appellant's Visit to Town Hall*

When the Appellant went to Town Hall to inquire about his status, he went as a member of the general public and not as a member of the Department. He had heard inconsistent statements, and wanted to know what was going on. When the Town Administrator's office was unable to assist him, he was advised to go to the Department. I do not find that the Appellant's decision to go to the Town Administrator constituted going over the Chief's head or failure to follow directions. As a private citizen, he has the right to go to his town government to inquire about matters concerning him. At the time the Appellant went to the Town Administrator's office, he had already been bypassed. I find that this bypass reason would have been without merit, even if the Appellant had not already been bypassed.

The Appellant went to the Department wearing the same clothes in which he left Town Hall: blue jeans and a tee shirt. This was not the first time that police officers have seen someone so attired. After all, the Appellant was not attending a job interview. He was a private citizen making an inquiry in his town police department. I find that the claims of disrespect due to his attire to a police station are superfluous and overblown. Again, I find that this bypass reason would have been without merit, even if the Appellant had not already been bypassed.

Since going to Town Hall and wearing jeans and a tee shirt were not true bypass reasons, and are not a sign of disrespect given the facts of this case, I look at the other reasons for the Respondent's allegation of the Appellant's so-called air of entitlement: (1) the chief testified that the Appellant thought that he had a leg up on the job because he was a veteran; (2) the chief also testified that the Appellant use of the term "cop" was disrespectful; (3) the chief didn't like the way the Appellant answered the questions during the interview; (4) and the chief thought that the Appellant acted familiar during the interview.

The Appellant would not be the first person to benefit from a veteran's preference in Wakefield, and that preference is indeed a leg up for many public safety candidates in the Commonwealth. I saw nothing in the Appellant's demeanor on the DVD nor in his appearance at the Commission hearing to suggest that he was disrespectful or dismissive of authority. Rather, I saw a pro se appellant who was very respectful at all times, and appeared stung and hurt by the bypass. I do not find the Respondent's allegations of entitlement to be credible.

Although some of the Respondent's bypass reasons do not pass muster, the bypass reasons of the driving record and interview performance constitute sufficient reasons to bypass the Appellant.

WHEREFOR the Appointing Authority has demonstrated by a preponderance of the evidence that there was reasonable justification for the bypass of the Appellant, solely based on his driving history and his performance during the interview. The appeal filed under Docket No. G1-10-269 is hereby *dismissed*.

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Angela C. McConney, Esq.  
General Counsel

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein Commissioners) on June 2, 2011.

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 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:  
Appellant (*pro se*)

Meredith P. Freed, Esq. (*for Respondent*)  
Thomas A. Mullen, P.C.  
545 Salem Street  
Wakefield, MA 01880