

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

MATTHEW R. KIRCHNER,
Appellant

v.

G2-16-095

CITY OF PITTSFIELD,
Respondent

Appearance for Appellant:

Pro Se
Matthew R. Kirchner

Appearance for Respondent:

Fernand J. Dupere, Esq.
Dupere Law Offices
94 North Elm Street, Suite 307
Westfield, MA 01085

Commissioner:

Christopher C. Bowman

DECISION

On May 9, 2016, Matthew R. Kirchner (Mr. Kirchner), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Pittsfield (City) to bypass him for promotional appointment to the position of police lieutenant in the City's Police Department. On June 8, 2016, I held a pre-hearing conference at the Springfield State Building in Springfield, MA. On August 2, 2016, I held a full hearing at Pittsfield City Hall in Pittsfield, MA.¹ The full hearing was digitally recorded and both parties

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

received a CD of the proceeding.² On September 15 and 16, 2016, the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT:

Seventeen (17) exhibits were entered into evidence at the full hearing. (City Exhibits 1-9 and Appellant Exhibits 1-8). Based on the documents submitted and the testimony of the following witnesses:

For the City:

- Michael J. Wynn, Police Chief, City of Pittsfield;
- Linda M. Tyer, Mayor, City of Pittsfield;
- Michael Taylor, Personnel Director, City of Pittsfield; X

For Mr. Kirchner:

- Matthew R. Kirchner, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences from the evidence, a preponderance of evidence establishes the following findings of fact:

1. The City of Pittsfield has a population of 45,000. The Police Department's command structure consists of a Police Chief, three (3) Captains; five (5) lieutenants; and ten (10) sergeants. (Testimony of Chief Wynn)
2. On October 17, 2015, Mr. Kirchner, who has been a Pittsfield police officer since 2007, took the civil service promotional examination for police lieutenant and received a score of 79.³

(Stipulated Fact)

² 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/she 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, this CD should be used to transcribe the hearing.

3. Mr. Kirchner also took and passed the promotional examination for police sergeant.
4. On March 1, 2016, the state's Human Resources Division (HRD) established an eligible list of candidates for police lieutenant in Pittsfield. Two (2) names appeared on the eligible list: Mr. Kirchner, who was ranked first, and the second ranked candidate, who received a score of 78 on the promotional examination. The City ultimately selected the second-ranked candidate (Selected Candidate) for promotion to lieutenant. (Stipulated Facts)
5. Shortly before the establishment of the eligible list, Chief Wynn promoted the Selected Candidate to *provisional* police lieutenant. (Testimony of Chief Wynn and Mr. Kirchner)
6. On March 29, 2016, pursuant to its delegated authority from HRD, the City created Certification No. 16P-007 from which it would make one (1) permanent promotion to police lieutenant. Consistent with their rankings on the eligible list, Mr. Kirchner was ranked first on the Certification and the Selected Candidate was ranked second. (Stipulated Facts)

Background and Qualifications of the Selected Candidate

7. The Selected Candidate began working as a Pittsfield police officer in 1998 and served as a patrol officer until 2002. From 2003 to 2014, he served as a school resource officer. During his tenure with the Pittsfield Police Department, the Selected Candidate has also served as the operator and/or team leader of the Berkshire County Special Response Team (SRT). (City Exhibit 3)
8. In April 2014, the Selected Candidate was promoted to the position of provisional police sergeant and was then promoted permanently to that position in August 2014. He served in that capacity for approximately two (2) years, until he was promoted to police lieutenant. In

³ If an insufficient number of employees in the next lower title sign up for a promotional examination, the civil service law states that individuals in the next lower title (i.e. – police officer in this case) shall be eligible to sit for the promotional examination.

that capacity, he served as the front-line supervisor of 7-10 patrol officers and 4 school resource officers. (City Exhibit 3 and Testimony of Chief Wynn)

9. The Selected Candidate has various certifications. (City Exhibit 3)
10. The Selected Candidate has a bachelors degree in criminal justice and a masters degree in criminal justice. (City Exhibit 3)

Background and Qualifications of Mr. Kirchner

11. Mr. Kirchner began working as a Pittsfield police officer in 2007. Prior to his appointment as a Pittsfield police officer, he was employed as a manager at a retail store for two (2) years and then as a police officer in nearby Lanesborough for three (3) years. (City Exhibit 2)
12. During his tenure as a Pittsfield police officer, Mr. Kirchner has served as a patrol officer. He has also worked with the administrative services division of the Police Department to assist with the procurement of equipment and supplies and provides support to the Dispatch Communications Center and field operations in regard to radio equipment. (City Exhibit 2)
13. Mr. Kirchner has also served as a tactical team leader and instructor for the Berkshire County SRT. He has been designated by the Pittsfield Police Department as a field training officer and background investigator. (City Exhibit 2)
14. Mr. Kirchner served as vice president of the local police union from 2013 to 2015 and president from July 2015 to November 2015. (City Exhibit 2)
15. Mr. Kirchner has various certifications. (City Exhibit 2)
16. Mr. Kirchner has an associates degree in criminal justice. (City Exhibit 2)

City's review process

17. Both candidates were interviewed by an interview panel consisting of the City's Mayor (Mayor Tyer); the City's Police Chief (Chief Wynn) and the City's Personnel Director (Mr. Taylor). (Testimony of Mayor Tyer, Chief Wynn and Mr. Taylor)
18. Each candidate was asked the same ten (10) questions and the panelists took written notes. (Testimony of Mayor Tyer, Chief Wynn and Mr. Taylor & Appellant Exhibit 4)
19. Chief Wynn has been employed by the Pittsfield Police Department for approximately twenty-one (21) years and has served as the City's Police Chief for over eight (8) years.
20. Chief Wynn found that both candidates did well during their respective interviews, but he felt that the Selected Candidate was more able to speak about the command / supervisory role of the position given his recent experience as a sergeant. Chief Wynn ultimately recommended to Mayor Tyer, who serves as the appointing authority, that she promote the selected candidate primarily based on this command / supervisory experience. (Testimony of Chief Wynn)
21. Mayor Tyer also felt that both candidates performed well during the interview. She remembers that the Selected Candidate spoke about his experience as a sergeant overseeing 7-10 patrol officers; and that he had a masters degree in criminal justice. While Mayor Tyer thought that Mr. Kirchner had an "excellent interview", she ultimately accepted a recommendation from Chief Wynn to promote the Selected Candidate. Mayor Tyer's decision was primarily guided by the fact that the Selected Candidate had almost two (2) years of day-to-day supervisory experience as a sergeant; and that he had a masters degree. (Testimony of Mayor Tyer)

22. Mr. Taylor, the City's Personnel Director, felt that Mr. Kirchner had a stronger interview and made a better presentation. Ultimately, however, Mr. Taylor agreed with Chief Wynn that the Selected Candidate would be a "better fit" given his supervisory experience. (Testimony of Mr. Taylor)
23. Chief Wynn prepared a bypass letter for the Mayor's signature. The primary reasons contained in the bypass letter were that: 1) the Selected Candidate had broader experience; 2) the Selected Candidate had more "specialized service"; 3) the Selected Candidate had supervisory and command experience; and 4) the Selected Candidate has a masters degree and that Mr. Kirchner purportedly had no advanced degree. (Appellant Exhibit 2)
24. The City subsequently sent a revised bypass letter clarifying that Mr. Kirchner has an Associates degree in criminal justice. The City also clarified in the letter that both candidates have no disciplinary history. (Undisputed Fact)

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1.

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 at 304. Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions (City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 824-826 (2006) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. Beverly. The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates. Beverly citing Cambridge at 305, and cases cited.

Analysis

Mr. Kirchner’s appeal is based largely on his allegation that the process used here was not fair and impartial. Rather, he alleges that Chief Wynn was pre-disposed to choosing the Selected Candidate, who was ranked second on the Certification, and, just prior to the establishment of the most recent eligible list, had been provisionally promoted to the position of lieutenant. According to Mr. Kirchner, the decision was effectively made prior to the establishment of the

eligible list via a provisional promotion process in which there was no traditional review, such as interviews.

The City disputes that allegation, with all three interview panelists stating that they were not predisposed to either candidate. Further, while some panelists diverged on who performed better during the interview, and while the Mayor considered the candidates' educational backgrounds and Chief Wynn did not, the City argues that all three of the panelists ultimately reached the reasonable conclusion that the candidate with command and supervisory experience was a better fit for the position.

After reviewing all of the testimony and exhibits, including an email exchange between the Mayor and the Police Chief regarding the prior, provisional promotion, I do not believe the Mayor, who is the appointing authority here, was predisposed to promoting the Selected Candidate. That email exchange shows, to me, that Chief Wynn was eager to make an immediate, provisional promotion to lieutenant because of legitimate staffing issues, including that a recently-promoted Captain was doing "double duty."

Chief Wynn, apparently knowing that Mr. Kirchner and the Selected Candidate would appear on a soon-to-be-established eligible list, did suggest to the Mayor that they undertake a formal interview process for the provisional promotion. It does appear that the Chief was hoping that, based on the formal interview process, the Mayor could select someone for the provisional promotion keeping in mind that the permanent promotion would be occurring shortly. Due to scheduling issues, however, the Mayor was unable to participate in interviews for the provisional promotions. Therefore, a formal interview and review process did not take place until weeks later, after the eligible list was established, allowing for a permanent promotional appointment. Based on the Mayor's credible testimony, I do not believe she was predisposed to choosing

someone based on the fact that he had recently received a provisional promotional appointment. Although the interview process here certainly has room for improvement (i.e. – there was no formal rating or scoring system), the overall review process did appear to be substantive and free of any personal bias or predisposition.

That turns to whether the City provided valid reasons for bypassing Mr. Kirchner. First, it is noteworthy that the two (2) candidates here were separated by only one (1) point. Second, the Commission must uphold the City's decision if even one (1) of the reasons is shown to be a valid reason for bypass. (See Town of Arlington v. Civ. Serv. Comm'n & Cronin, Middlesex Sup. Ct. No. 09-0476-H (2009)). All three (3) of the panelists, including the person statutorily charged with making the promotion (the Mayor), concluded that the Selected Candidate's command and supervisory experiences as a sergeant made him a better candidate for promotion to lieutenant than Mr. Kirchner, who was serving as a patrol officer (two titles lower than lieutenant) at the time of the promotion. When made free of any personal or political considerations, as I have concluded here, that is a valid reason for bypass.

While I did consider that Mr. Kirchner, to a degree, has, in some form, served in a supervisory capacity, it is not comparable to the two (2) years of day-to-day supervisory experience that the Selected Candidate gained as a police sergeant in the Pittsfield Police Department. Rather than reaching two titles down (to police officer), the Mayor simply chose to promote someone in the next lower title who had proven experience. That is a valid reason for bypass and, based on the evidence presented here, there is no reason for the Commission to intervene or disturb the "substantial deference" due to the City in making that decision.

Conclusion

Mr. Kirchner's appeal under Docket No. G2-16-095 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on December 22, 2016.

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:
Matthew R. Kirchner (Appellant)
Fernand Dupere, Esq. (for Respondent)
John Marra, Esq. (HRD)