

Decision mailed: 7/3/09
Civil Service Commission
OB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

RICHARD KRASINSKAS,
Appellant,

v.

G1-06-227

CITY OF WORCESTER,
Respondent.

Appellant's Attorney:

Pro Se
Richard Krasinskas
4 Sherer Trail
Worcester, MA 01603
508-736-1716

Respondent's Attorney:

Lisa M. Carmody
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Human Resources Office
City Hall Room 109
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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Richard Krasinskas, (hereinafter, "Krasinskas" or "Appellant") seeks review of the State's Human Resources Division's (HRD) decision to accept the reasons offered by of the City of Worcester (hereinafter "Appointing Authority" or "City"), for bypassing him for original appointment to the position of full-time police officer. A pre-hearing was held on December 14, 2006 and a full hearing was held on January 23, 2008 at the offices of the Civil Service Commission. One (1) tape was made of the hearing.

FINDINGS OF FACT:

Three (3) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Gerald Montiverdi, Patrolman, City of Worcester Police Department;
- Jeremiah O'Rourke, Lieutenant, City of Worcester Police Department;

For the Appellant:

- Richard G. Krasinskas, Appellant;
- Richard D. Krasinskas, Father of Appellant;

I make the following findings of fact:

- 1) On or about October 2005, the Department requested from HRD a Civil Service Certification List for the selection of 29 permanent full-time police officers. On November 4, 2005, HRD issued certified Civil Service List No. 251061 of eligible applicants for the position. (Ex. 1)
- 2) The Appellant's name appeared on this list as No. 45 of 57 candidates so considered. (Ex. 1)
- 3) After indicating by signing the list, his willingness to accept a position as a police officer for the Department, the Appellant underwent a background investigation. (Testimony Montiverdi)
- 4) After investigating the Appellant's background, the City determined that there was just cause, for the stated reasons to bypass the Appellant for appointment to the police officer position. (Ex. 1)

5) Seven of the candidates selected for the position were ranked lower on the Certification List than the Appellant. The Appellant was notified that he had been bypassed for selection by a letter from the HRD dated July 11, 2006. (Stipulated fact.)

6) The Appellant was rejected for appointment by the City, as stated in the bypass letter, due to his poor employment performance, poor attendance record and traffic violations. The specific reasons for bypass proffered by the City are as follows:

Poor attendance Record - issues concerning Appellant's employment history, including absenteeism, his abuse of sick leave while employed at Framingham State College (FSC), calling in sick for one employer while working for another (Rutland Police Dept.) and poor employment reference from Holy Cross College; the Appellant offered to his employer, "financial and personal matters" at home, as a excuse for his attendance problem.

Poor employment performance - Unacceptable driving history; Two at fault motor vehicle accidents while employed at FSC during the end of 2004, which resulted in a change in assignment or driver restricted, and receiving driver training. Poor employment review while employed at Holy Cross College as a police officer; citing sloppy, unprofessional appearance and poor work performance. On 5/24/01, missing an 8 hr. detail and 2 hrs. of a regular shift due to oversleeping. The Appellant was counseled for that incident.

Traffic violations – A list of 14 incidents, including bad check charges, revocations and three (3) surchargeable accidents all during the period of

03/26/95 through 07/22/03. Four bad check entries and a license revocation for bad checks which occurred on 06/23/03. (Ex. 1, 2, 3, Testimony Montiverdi, O'Rourke)

- 7) Police Officer Gerald Montiverdi was assigned to conduct the background investigation of the Appellant as a usual part of the application review process. (Testimony Montiverdi)
- 8) Officer Montiverdi conducted his background investigation from December 2005 through January 2006 – the same time the Appellant was involved in the application process with the Department. (Testimony Monteverdi)
- 9) As part of the background investigation, Officer Montiverdi obtained the Appellant's driving history from the Massachusetts Registry of Motor Vehicles. During a seven-year period from 1995 to 2002, the Appellant had three surchargeable motor vehicle accidents on his record. (Ex. 2, Testimony Montiverdi)
- 10) From 1995 to 1999, the Appellant was found responsible for three speeding violations. (Ex. 2, Testimony Montiverdi)
- 11) The Appellant's license to operate a motor vehicle was revoked on June 23, 2003 as a result of writing a bad check. (Exhibit 2, Testimony Monteverdi)
- 12) The majority of the traffic offenses occurred before the Appellant had turned 21 years old. (Ex. 2, Testimony Monteverdi, Appellant)
- 13) The Appellant was employed by Framingham State College as a patrol officer. (Ex. 3, Testimony Montiverdi, Appellant)

- 14) The Appellant testified that he brought to the attention of his immediate supervisor FSC Lieutenant Pam Curtis his use of sick leave during the period of time from July 22, 2005 through January 18, 2006 during which he utilized 14 sick days. (Testimony Montiverdi)
- 15) FSC Lieutenant Pam Curtis did not testify at this hearing. There is an e-mail memo from Lt. Curtis to Chief Medeiros, dated January 11, 2006 in which Lt. Curtis relays that the Appellant came to her that day and disclosed his financial and personal problems at home as the reason for his taking an excessive number of sick days during the prior six months. However, this notice by the Appellant regarding the sick days taken, is after the fact and an indication of the Appellant's poor judgment. (Exhibit 3)
- 16) The Appellant admitted to the use of sick leave while working at FSC but stated that he was staying home in order to care for his wife who had been suffering from a chronic illness. He was also under financial pressure at that time. He did not have health insurance, his wife was unemployed for a year, and he had two car payments and two house payments to make. (Testimony Appellant)
- 17) For a six month period between July, 2005 and January, 2006 he alternated with friends and family to stay home and take care of his wife. He would usually take Tuesday and Wednesday off from work to stay home with his wife. However he did not inform his employer FSC of his situation at home and resulting need to take time off on occasion or adjust his schedule. This was a mistake of judgment on the Appellant's part. (Testimony Appellant)

- 18) For a six month period between July, 2005 and January, 2006 the Appellant was cited by FSC Police Chief Brad Medeiros for excessive sick leave (14 days) and a pattern of taking Tuesdays and Wednesday as sick days. This notice was sent by e-mail to the Appellant on January 18, 2006 together with notice that he must provide a Doctor's note or other documentation for the sick day of January 18, 2006 and any days taken thereafter, within seven days. (Exhibit 3, Testimony Montiverdi)
- 19) The Appellant did not discuss with his employer (FSC), his need or reason for taking the time off and he did not request any formal leave of absence to address his problems at home. (Exhibit 3, Testimony Appellant)
- 20) In reviewing the Appellant's sick leave record at Framingham State College and his attendance record at a second part-time job at the Rutland Police Department, there were two separate occasions (October 23, 2005 and October 30, 2005) when the Appellant called in sick at Framingham State College and worked the same day for the Rutland Police Department. (Exhibit 3, Testimony Montiverdi)
- 21) This was further corroborated by the Appellant's spreadsheet entitled "hours for Richard Krasinskis at the Rutland Police Department" which documents that the Appellant had in fact worked on the two occasions testified to by Officer Montiverdi when he had called in sick to work at the Framingham State College. (Ex. 3)
- 22) After further review, the shift that the Appellant missed at Framingham State College and the 8 hour shift he had worked for the Rutland Police

Department were at different 8 hour shift, so technically, the Appellant did not call in sick at Framingham State College to work an identical 8 hour shift at the Rutland Police Department. However, the Appellant is also paid for a sick day and therefore received a benefit and exhaustion associated with a 16 hour work day plus commuting time instead of illness could have been the cause of him taking a sick day.(Testimony Appellant, reasonable inference)

23) At Framingham State College, the Appellant was found at fault for two on duty motor vehicle accidents while on duty at Framingham State College; as a result his driving privileges were revoked and he was assigned to a foot beat. (Ex. 3, Testimony Montiverdi)

24) In addition to having his driving privilege revoked, the Appellant was required to undergo an Emergency Vehicle Operations Class also known as EVOC in accordance with department procedure. (Ex. 3, Testimony Montiverdi)

25) Prior to his employment with Framingham State College, the Appellant was employed at Holy Cross College from February 2001 until December 2001 as a campus patrolperson. (Ex. 3)

26) Captain Carmody was the Operations Supervisor for the Campus Police at Holy Cross College and was one of the Appellant's supervising officers. (Testimony Montiverdi)

27) Captain Carmody filled out two evaluations or performance reviews for the Appellant, one March 14, 2001 and one May 14, 2001, in which he was

rated good and fair in the first evaluation and excellent and good in the second evaluation. There is no indication in the record of any negative written performance reviews of the Appellant from Holy Cross College.(Ex. 3)

28) There is insufficient substantiation of any poor employment review for the Appellant from the Holy Cross College Police Department. Therefore that claim as a factor or reason for bypass is not found to be established by the reliable and credible evidence in the record. Captain Carmody, the alleged source of such information did not appear as a witness here and be subjected to cross-examination. (Testimony and Exhibits)

29) The Appellant was a member of Worcester's Auxiliary Police Force for the past seven years. As a member, he had the power of arrest with annual requalification exams, could carry a firearm, was required to work two shifts per month, could respond to calls if there were not enough regular officers, and patrolled mostly schools and parks; however, he did not get paid for his services. (Testimony Appellant)

30) The Appellant attained the rank of Sergeant in the Auxiliary Police Force on July 24, 2005 and had supervisory duties. (Testimony Appellant)

31) All police officers for the City of Worcester are required to operate a motor vehicle and are responsible for issuing citations enforcing the laws regarding the operation of motor vehicles, thus an acceptable candidate must demonstrate the ability to safely operate a motor vehicle and demonstrate

the ability to uphold the laws regarding the operation of a motor vehicle.

(Testimony O'Rourke)

32) An applicant's driving history is an important criterion used to evaluate whether or not to select a particular candidate and based upon the review of the Appellant's driving history, he was not found to be an acceptable candidate. (Testimony O'Rourke)

33) The Appellant's driving history demonstrated a disregard for the laws regarding the operation of a motor vehicle and maintaining a good driving record. The Appellant was considered to be a liability behind the wheel of a police cruiser. (Testimony O'Rourke)

34) The two on duty accidents the Appellant had while working for Framingham State College were taken into consideration when the decision was made to bypass him. (Testimony O'Rourke)

35) The Appellant's history of accidents and his driving record demonstrated a propensity towards irresponsible operation of a motor vehicle and the propensity for causing motor vehicle accidents. (Testimony O'Rourke)

36) The Appellant completed both a Special State Police Academy and a Reserve Police Academy. Both academies require a substantial commitment of time and money and can be very stressful on the candidate's family. The Reserve Police Academy is part-time and requires a 120 hour commitment from all candidates. The Special State Police Academy is similar to a regular Police Academy, but requires 550 hours – 200 fewer hours than the regular academy – from the candidates. (Testimony Appellant)

37) The Appellant has given a great deal of service to the City of Worcester, including restoring veterans' monuments, coaching a children's football team, and serving as a member of Worcester's Auxiliary Police Force. (Testimony of Appellant)

38) All of the witnesses who testified at this hearing presented themselves as honest and straight-forward. None tried to exaggerate or embellish. They were willing to admit a lack of knowledge or memory when appropriate. I find their testimony to be credible and reliable. (Testimony and demeanor of witnesses)

CONCLUSION

In a bypass appeal, the Commission 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. E.g., City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, rev.den., 428 Mass. 1102, 687 N.E.2d 642 (1997) (Commission may not substitute its judgment for a "valid" exercise of appointing authority discretion, but the Civil Service Law "gives the Commission some scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground."). See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001) ("The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to

insure decision-making in accordance with basic merit principles the commission acted well within its discretion.”); MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action”). See also, Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission “sufficient to satisfy due process”)

It is well settled that reasonable justification requires that Appointing Authority actions be based on “sound and sufficient” reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. See Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214, 268 N.E.2d 346, 348 (1971), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 451 N.E.2d 443, 430 (1928). All candidates must be adequately and fairly considered. The Commission has been clear that a bypass is not justified where “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).

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 Comm’n, 31 Mass. App. Ct. 315, 321, 577 N.E.2d 325, 329 (1991).

The greater amount of credible evidence must . . . be to the effect that such action ‘was justified’ . . . {I}f [the factfinder’s] mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined. The present statute is different . . . from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, ‘unless it shall appear that it was made without proper cause or in bad faith.’

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*)

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001).

“Abuse of discretion occurs . . . when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and improper factors are assessed but the [fact-finder] makes a serious mistake in weighing them.” E.g., I.P.Lund Trading ApS v. Kohler Co., 163 F.3d 27, 33 (1st Cir.1998).

Appointing Authorities are charged with the responsibility of exercising sound discretion and good faith when choosing individuals from a certified list of eligible candidates on a civil service list. “On a further issue we may now usefully state our views. The appointing authority, in circumstances such as those before us, may not be required to appoint any person to a vacant post. He may select, in the exercise of a sound discretion, among persons eligible for promotion or may decline to make any

appointment. See Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv. 348 Mass. 184, 187-193 (1964). See also Corliss v. Civil Serv. Commrs. 242 Mass. 61, 65; (1922) Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431 (1969). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572 (1940). A judicial judgment should "not be substituted for that of . . . [a] public officer" who acts in good faith in the performance of a duty. See M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272." Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971)

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 Civil Service 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. City of Cambridge, 43 Mass. App. Ct. at 304. There is no finding of political influence or other impermissible consideration in this present case.

The Appellant is a lifelong resident of Worcester who has worked as an Auxiliary Police Officer for the last seven years and provided other volunteer services to the City.. Although I don't doubt his sincere desire to serve as a Police Officer for the City of

Worcester, the City has provided reasonable justification for bypassing him for appointment. The Appellant has a very poor driving record which includes 3 surchargeable accidents, numerous speeding violations and several revocations due to bad checks. The Appellant offered financial and personal problems at home as an excuse for these events, yet the events occurred over an eight year period from 1995 to 2003 and included 14 entries on his driving record.

There is insufficient substantiation of any poor employment review for the Appellant from the Holy Cross College Police Department. Therefore, that claim as a factor or reason for bypass is not found to be established by the reliable and credible evidence in the record. Captain Carmody, the alleged source of such information did not appear as a witness here and be subjected to cross-examination.

The City of Worcester established a legitimate concern about the Appellant's use of sick leave, his driving history, including the two on duty accidents while employed by Framingham State College, despite the excuse of the instability in his personal life. The City provided explanations for why these concerns would affect his ability to be a competent police officer if he were appointed to the position. Specifically, the City of Worcester would be burdened by an officer's excessive and inappropriate use of sick leave because of scheduling problems that would inevitably arise. An applicant for a position of police officer is rightfully subjected to a heightened scrutiny. The position of a police officer is a position of "special public trust" and responsibility. Police officers are expected to act in a way that engenders respect and confidence from the public. In seeking or accepting employment by the public, "... they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their

official responsibilities.”, *See Police Commr. of Boston v. Civil Serv. Commn.*, 22 Mass. App. Ct. 364, 370-371 (1986).

Although the Commission understands that the Appellant was facing a difficult situation, he should have informed his superiors of the circumstances at the beginning, rather than just taking days off without explanation until the end. This shows very poor judgment on the part of the Appellant, who knew that he was being investigated, at that time, for the City police officer position.

Directly related to that is the uncertainty of the City that the Appellant could handle the greater duties and responsibilities he would have as a full-time City police officer when he was struggling to maintain his current responsibilities. Officer Montiverdi testified as to the rigors of the Police Academy even when a candidate had a supportive home environment and the Appellant attested to that in his own testimony about his experience in the Special State Police Academy and the Reserve Police Academy.

Finally, the City of Worcester is responsible for its officers and the actions of these officers reflect on the Department. The City was rightfully concerned about the driving record of the Appellant, especially given the two accidents that occurred almost within two months of each other while the Appellant was on duty. If the Appellant were to be involved in an accident while on duty, the City of Worcester would be liable for any damages or injuries the Appellant caused. While the accidents the Appellant was involved in did not cause any damage, they are evidence of carelessness. Forgetting to put the car in park is evidence that the Appellant is distracted while working and the City

has a legitimate concern that if the Appellant is not completely focused on his duties, he could endanger himself or others while on duty.

Although the Appellant may have subsequently improved his performance at work, was allowed to resume his cruiser patrol, and may have resolved his situation at home, the City of Worcester justifiably relied on the totality of the information it had gathered from its investigation regarding the Appellant's ability to be a competent police officer.

It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Here, there is no evidence of any inappropriate motivations on the part of the City. All of the witnesses for the City, including Officer Montiverdi, Lieutenant O'Rourke, were credible witnesses whose only interest appeared to be selecting the best candidates for the position of Police Officer.

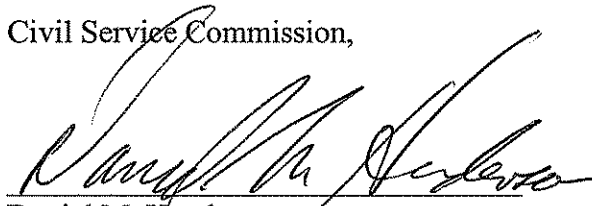
Although the Appellant displayed poor judgment prior to and while the City of Worcester was investigating him for the position, he may have improved his employment performance and attendance since then. The Appellant and his father were also credible

and sincere witnesses. The Appellant is still able to apply in the future, for the position of police officer in the City of Worcester.

Upon consideration of all the credible and reliable evidence in the record, I conclude that the City of Worcester did have sound and sufficient reasons for bypassing the Appellant, Richard Krasinskas, for selection as a police officer.

For all of the above reasons, the appeal under Docket No. G1-06-227 is hereby *dismissed*.


Civil Service Commission,



Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein, and Taylor, Commissioners on July 2, 2009)

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. 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:

Richard Krasinskas (Appellant)
Lisa Carmody, Atty. (City of Worcester)
John Marra, Atty, HRD