

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

FRANCIS McCUE,
Appellant

v.

CASE NO: G2-11-171

TOWN OF WEYMOUTH,
Respondent

Appellant:

Francis X. McCue, *Pro se*

Respondent:

Richard Grimes
Chief of Police
Weymouth Police Department
140 Winter Street
Weymouth, MA 02188

Commissioner:

Paul M. Stein¹

DECISION

Weymouth Police Officer Francis McCue (Appellant or Officer McCue), acting pursuant to G.L. c.31, §2(b), duly appealed a decision of the Weymouth Police Department (WPD), to bypass him for promotional appointment to the position of full-time Police Sergeant. A pre-hearing was held by the Civil Service Commission (Commission) on June 14, 2011. At the pre-hearing, the Commission acknowledged the previous pending Bypass Appeal G2-10-312, initiated by Officer McCue, concerning a prior bypass for promotion to Sergeant. The Commission subsequently dismissed that appeal. McCue v. Town of Weymouth, 24 MCSR 396 (2011) [McCue I].

¹ The Commission acknowledges the assistance of Law Clerk Shawn Weiske in the drafting of this decision.

FINDINGS OF FACT

Based on the Exhibits, the testimony of WPD Officer Francis X. McCue, WPD Police Chief Richard Grimes, and WPD Lt. Richard Abbadessa, and inferences reasonably drawn from the evidence as I find credible, I make the following findings of facts as set out below.

Officer McCue's Background

1. The Appellant, Francis X. McCue, is a full-time tenured police officer who was appointed to the WPD in 1984. He is assigned to the day shift, 8 am- 4pm. His responsibilities include cruiser patrol, report writing, and acting as station officer. *(Stipulated Facts)*
2. Officer McCue received a Bachelors Degree in Political Science from Bridgewater State College in 1979. While a student at Bridgewater State, he completed an internship as a Congressional Aide. *(Stipulated Facts)*
3. In 1988, Officer McCue completed an FBI training program for collection and preservation of evidence. He also completed further studies in Crime Scene Search, a certification in Basic Police Photography, and an In-Service Training Program with classes in first response, state and local anti-terrorism training (SLATT), national incident management systems IS700 (NIMS), eyewitness identification, and other essential updates. As an officer with the WPD, Officer McCue has become an expert at latent/rolled fingerprint matching. *(Stipulated Facts)*
4. In 1989, Officer McCue received a Masters Degree in Criminal Justice from Anna Maria College. Among his other experience, Officer McCue was an adjunct faculty member at Quincy College, teaching courses in Criminal Justice from 1989-1994, and was appointed as Norfolk County Deputy Sheriff in 2007 *(Stipulated Facts)*
5. Officer McCue received a total of 18 letters of commendation between 1985 and 2007 from members of the public, fellow officers, and the Chief of Police. *(Stipulated Facts)*

Disciplinary History

6. Officer McCue has been involved in two incidents in which Internal Affairs has been involved. One incident dates from April 18, 1995, for which he received written and verbal counseling. The second incident dates from June 30, 1999, for which he received a formal letter of reprimand. (*Stipulated Facts*)
7. Officer McCue's personnel file notes two incidents regarding fitness for duty where Officer McCue had fallen asleep during roll call on July 20, 2010 and July 29, 2010. Officer McCue attributed this to a recent family loss and his Watch Commander offered him an Employee Assistance Program in response. (*Stipulated Facts*)
8. Additionally, Officer McCue's personnel file revealed two disciplinary actions. On September 25, 2007, Officer McCue responded to a crime scene without informing dispatch, and failed to secure a firearm on the scene. When the Department recommended remedial training, Officer McCue declined. He received a Formal Letter of Reprimand for this incident. On September 3, 2010, Officer McCue failed to obey an order for public and officer safety, although strict adherence to this order was critical. Officer McCue was given a one (1) day suspension, which was upheld on appeal to the Commission under CSC Docket No. D-10-264. (*Stipulated Facts; Administrative Notice [McCue v. Town of Weymouth, 24 MCSR 304 (2011)][McCue II]*)

Officer McCue's Interview and Bypass

9. Officer McCue's name appeared on Certification No. 202077 in August 2010 for the WPD's appointment of two (2) Sergeants. (*Stipulated Facts*)
10. Officer McCue was tied with Officer Regan for first on the Certification List, while Officers Hayford and Malloy were tied for second. (*Stipulated Facts*)

11. The WPD interviewed six (6) candidates, including Officer McCue, on September 10, 2010.

The interviews were conducted by a panel of three (3) knowledgeable and respected Police Lieutenants from outside departments, including Lt. Charles Santoro of the Quincy Police Department (Lt. Santoro), Lt. Kevin Foley (Lt. Foley) of the Milton Police Department, and Lt. Patricia Grigas of the Framingham Police Department (Lt. Grigas). The interviews consisted of a series of twelve (12) standard questions, with candidates answers rated on a scale of 1 (poor) to 5 (excellent) on a series of eight (8) skill factors. The maximum score for each candidate was 40 points. The interviews were not recorded. (*Stipulated Facts*)

12. In the interview, each candidate was asked the same questions and was evaluated based on the following eight skills: First Impression, Communication, Decision Making, Leadership, Knowledge, Commitment, Attitude and Self Initiative. (*Stipulated Facts*)

13. Each candidate was given the opportunity to provide a personal introduction to the panel.

The candidate's order of appearance for the interview was randomly selected. The panel then rotated through the candidates, asking each candidates the same twelve (12) questions. The questions were structured to allow the candidate an equal opportunity to demonstrate their individual ability, knowledge, and skills to perform as a Police Sergeant as well as expand on their law enforcement experience. The interviewers were encouraged to make notes of the candidates' answers, which they did. Evaluation sheets were used by the interviewers that would generate numerical scores based on their subjective observations of the candidates in the areas of a) First Impression, b) Communication, c) Decision Making, d) Leadership, e) Knowledge, f) Commitment, g) Attitude and h) Self Initiative. (*Stipulated Facts*)

14. Chief Grimes brought in outside interviewers because he wanted to make the process as unbiased as possible. The officers on the interview panel did not know the candidates well, if at all. (*Stipulated Facts*)
15. During the interview, Officer McCue was asked to describe a decision he made without a supervisor. Officer McCue described an incident where he disarmed a suspect armed with a knife, an incident which earned him a letter of commendation. Officer McCue used pepper spray while disarming the suspect, the use of which prompted Lt. Santoro to write “Spray was used/this raises question on decision making.” (*Appellant’s Brief*)
16. In another interview question, Officer McCue was asked about work place compromises, to which Officer McCue stated that he was a team player. Lt. Santoro testified that a better response would have been that a person does what is right even if it is not popular. (*Appellant’s Brief; Stipulated Facts*)
17. In the fall of 2010, the WPD promoted Officer Hayford and Officer Regan to the position of Sergeant, bypassing Officer McCue. (*Stipulated Facts; Testimony of Chief Grimes*)
18. The WPD gave the following negative reasons for bypass: (1) Officer McCue’s performance in the interview, which showed no command presence and a lack of familiarity with department protocol; (2) his past disciplinary actions; (3) his Internal Affairs file; and (4) the fact that he received a total of 24 out of a possible 40 points from the interview panel. (*Stipulated Facts*)
19. Officers Hayford and Regan, the selected candidates, interviewed extremely well and scored a composite 39 out of 40 points in the interview panel. (*Stipulated Facts*)
20. On November 16, 2010, Officer McCue duly filed an appeal (CSC Docketr No. G2-10-312) with the Commission in response to being bypassed in favor of Officer Hayford. The appeal

was dismissed by the Commission in July, 2011. (*Stipulated Facts; Administrative Notice [McCue I]*)

21. In April 2011, the WPD promoted the remaining second place candidate, Officer Malloy, to the position of Sergeant, bypassing Officer McCue. Officer Malloy was among the candidates interviewed along with Officer McCue in 2010. Officer Malloy scored a 30.67 on the oral interview and a 76 on the civil service exam, which placed him tied for second with Officer Hayford, who was previously promoted in 2010 and was the subject of bypass appeal G2-10-312. (*Stipulated Facts*)

22. Officer Malloy has an excellent personnel file, which includes: a military background with three tours of deployment, multiple military awards (Airman of the Year, Letter of Appreciation from a Colonel, and three (3) Letters of Appreciation from a Brigadier General), a police department commendation, extensive specialized training/assignments (Special Operations Division, COBWEB Training, Bicycle Patrol, Train the Trainer, Hazardous Material Response Courses, Law Enforcement Response to Terrorism, WMD Awareness Level TTT, Numerous Computer Software Certifications, Career Development Courses, and volunteer community service events), and no disciplinary actions. Sergeant Malloy is also deemed to have the knowledge, skills, and ability to perform the job, has an understanding of teamwork and a willingness to share his abilities with his coworkers. (*Respondent's Brief; Appellant's Brief*)

23. The same facts were used in evaluating the potential candidates for promotion to Sergeant as were used in McCue I. (*Respondent's Brief*)

24. In response to the promotion of Officer Malloy, Officer McCue filed the instant appeal. In the bypass letter, the WPD cited the same issues they identified in McCue I as the reason for

again bypassing Officer McCue. These included: poor interview performance, past disciplinary actions, Officer McCue's internal affairs file, and his score on the interview, 24 out of 40 possible points. (*Respondent's Brief; Stipulated Facts*)

25. The brief submitted by Officer McCue outlined some of the aforementioned facts that he considered to be pertinent to his case. These facts included his experience, his letters of commendation, his responses during the interview, and his prior disciplinary issues. Officer McCue also elaborated on comments made by Lieutenant Abbadessa of the Weymouth Police Department, including calling Officer McCue a "tactical disaster" and that he had "serious reservations about [Officer McCue's] ability to properly and tactically execute the position of police officer." Additionally, Officer McCue stated that interview panelist Lt. Santoro noted that Officer McCue had "no command presents (sic)" and "overall I have difficulty putting faith in this individual ability to make decisions (sic)." Officer McCue highlights that although Lt. Abbadessa called Officer McCue a tactical disaster, he initiated a letter of commendation in 2002 for Officer McCue. (*Stipulated Facts; Appellant's Brief*)

CONCLUSION

Applicable Legal Standard

The role of the Commission is to determine whether the WPD has sustained its burden of proof through a preponderance of evidence that there was reasonable justification for the action taken by the WPD. G.L. c.31 §2(b); Mass Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 260 (2001); Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); A "preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the WPD has established that the reasons assigned for the bypass of an appellant were more probably than not sound and

sufficient.” Mayor of Revere v. Civ. Serv. Comm’n, 31 Mass. App. Ct. 315 (1991); G.L. c. 31, § 43. Reasonable justification means the WPD's actions were based on "...adequate reasons sufficiently 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); Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 305, rev.den., 426 Mass. 1102 (1997). Situations that are appropriate for the Commission to intervene involve personnel decisions that are marked by political bias, objectives unrelated to merit standards or neutrally applied public policy. Id. 43 Mass.App.Ct. at 304.

WPD possesses reasonable discretion in selecting candidates from a certified list, especially when the position involves a police officer. Beverly v. Civ. Serv. Comm’n, 78 Mass. App. Ct. 182, 188 (2010). Thus, “the Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the WPD's actions.” Id., 78 Mass. App. Ct at 187 citing Falmouth v. Civ. Serv. Comm’n, 447 Mass. 814, 824-26 (2006). The Commission is to decide "not whether the city relied on improper considerations, but on whether the city put forward a sufficient quantum of evidence to substantiate its legitimate concerns.” Id. 78 Mass. App. Ct at 188. In reviewing, the Commission must also observe its fundamental principal of guarding against political considerations, favoritism, and bias in public employment decisions. Cambridge, at 304.. Furthermore, the WPD has the discretion to take factors, such as experience, into consideration even though experience is computed into the score for certification rank purposes. See Condez v. Town of Dartmouth, 17 MCSR 40 (2004) (commission held bypass reasonably justified because respondent has discretion to consider nature, manner, or simply length of experience even though it was previously computed into candidates’ score).

Based on the totality of the circumstances and the relevant evidence and testimony, the WPD proved, by a preponderance of the evidence, that sound and sufficient reasons existed to justify bypassing Officer McCue for the position of sergeant with the WPD. In Officer McCue's prior appeal, the Commission found that the WPD met its burden of establishing sound and sufficient reasons to justify bypassing Officer McCue. McCue I. Since the facts remain virtually unchanged regarding the criteria from which the WPD made its decision, the Commission again finds the WPD has met its burden.

Relying on the same fair and unbiased interview conducted in 2010, as well as the same disciplinary records, the WPD decided to bypass Officer McCue for a promotion to Sergeant, concluding that Sergeant Malloy was the more qualified candidate for the promotion. Taking into consideration all aspects of the application process, when comparing the interview performance, disciplinary record, and interview score of Officer McCue with that of Sergeant Malloy, the WPD has sound and sufficient reasons for bypassing Officer McCue. While Officer McCue may have more experience than Sergeant Malloy, Sergeant Malloy provided a superior interview performance, scoring 6.67 points (out of 40) higher than Officer McCue.

Additionally, the personnel record of Sergeant Malloy is indicative of excellent prior work performance, including a letter of commendation from the WPD, a strong military background, no prior disciplinary actions, and extensive volunteer experience in the community. On the other hand, Officer McCue's past disciplinary records and internal affairs file, interview performance, and interview score remains unchanged in the relatively brief interval from McCue I.

Officer McCue asserts three points that he contends support a finding that his bypass was not reasonably justified: (1) his considerable experience compared to the successful candidate; (2) the use of an unduly subjective interview process that employed an interview panel of personnel

outside the WPD and (3) citation to the Commission's decision in Turthat he contends establish a that it was not reasonable to place undue influence on his prior disciplinary history in disregard of his higher test scores. Each of these points is addressed below.

First, Officer McCue maintains that the WPD should have taken his experience into greater consideration when evaluating his qualifications for the promotion. In support of his assertion, he refers to Wilcinski v. Belmont Fire Department, 22 MCSR 565 (2009), vacated in Belmont Fire Dep't v. Massachusetts Civ. Serv. Comm'n, No.MICV2009-04468 (Mass.Super.Ct.2010), in which the Commission stated, "In addition to discounting work performance, [the Belmont Fire Department] further failed to consider that, at the time of the bypass; [Lt. Wilcinski] had more than double the experience than the appointee (sic)." Id. Relying on this language in Wilcinski, Officer McCue claims that the WPD wrongfully omitted consideration of his work experience outside of the examination score. However, Officer McCue's argument fails to consider other relevant case law. Experience and education are already computed into the score by HRD, and the WPD is not obliged to use experience as the key determining factor, as Officer McCue seems to contend. See Condez v. Town of Dartmouth, 17 MCSR 40 (2004). Additionally, the decision in Wilcinski was vacated by the Superior Court.

Second, Officer McCue disputes that his answers to the interview questions were unsatisfactory, and his low interview score of 24 out of 40 unwarranted. Officer McCue claims that his answers were appropriate based on the questions posed and the low score on the interview resulted from manipulation of the interview toward the desired candidates. Essentially, Officer McCue argues that the interviewing process was improper and biased in favor of the other candidates.

In formulating an interview process, the WPD must take sufficient care to preserve a “level playing field” and “protect candidates from arbitrary action and undue subjectivity on the part of the interviewers.” Flynn v. Civ. Serv. Comm’n, 15 Mass. App. Ct., 206, 208, rev.den., 388 Mass. 1105 (1983). See also McCue I, 24 MCSR at 399 and cases cited.

The Commission carefully reviewed the WPD’s interview process in considering Officer McCue’s prior appeal and found the process met the requirements of a “level playing field” and showed no indicia of favoritism or bias. McCue I. The Commission finds no new evidence to change this conclusion. Indeed, the use of a panel comprised entirely of outside police departments, as well as a numerically scored interview record, a standard set of questions to be asked of each candidate and a uniform set of evaluation criteria, all manifest Chief Grimes effort to level the playing field for the candidates. There is no evidence of any collusion between Chief Grimes and the interview panel, nor any evidence of bias against Officer McCue. None of the interviewers personally knew the candidates and each interviewer made an independent assessment of the candidates based on clearly defined guidelines.

Officer McCue argues that the interviewing panel, composed of outside members of the force, was inappropriate for the interviewing process. Officer McCue cites Turowski v. City of Quincy, 23 MCSR 483 (2010), where a police Sergeant had appealed a bypass. The Commission wrote, “...reliance on an interview panel of outside members is of little value in a promotional setting like this.”. However, Officer McCue fails to take the Commission’s statement in its full context. In Turowski, the evidence strongly indicated an ulterior or pretextual motive in bypassing Sgt. Turowski. In particular, evidence was presented that suggested the interviewing panel was unfairly biased due to the Mayor’s relatives being on the certification and that the panel had been improperly influenced by the Police Chief regarding the appellant’s past sick

leave usage and disciplinary record. In the instant appeal, Officer McCue has presented no evidence of an ulterior or pretextual motive on the part of Chief Grimes or any evidence of undue influence on the interviewing panel's decisions.

Third, Officer McCue also argues that too much emphasis was placed on the prior disciplinary actions against Officer McCue, both in his Internal Affairs file and his personnel file, again citing Turowski to suggest that the Commission has allowed prior bypass appeals involving officers with adverse disciplinary records. This contention, however, is not well taken. The interviewing panel examined every candidate's disciplinary record. Officer Malloy's disciplinary record was evaluated in the same fashion as Officer McCue's. There is no indication that, unlike in Turowski, the WPD relied upon considerations unrelated to merit. The WPD's reliance on Officer McCue's disciplinary records in this instance as one of the grounds for the bypass decision was sound and sufficient.

While Officer McCue may have had a higher ranking on the certification, and his score is clearly a relevant factor, a candidate's ranking on a civil service list does not create any cognizable "vested right" or "property interest" to a position or guarantee a promotion. See Callanan v. Personnel Admin'r, 400 Mass. 597, 601 (1987); Burns v. Sullivan, 619 F.2d 99 (1980). The WPD has the discretion to consider other factors, in combination with the test scores, that are reasonably and fairly considered in the application process so long as all candidates receive fair and equal treatment, and are protected from arbitrary or capricious decisions and are not used as a subterfuge for stacking the deck in favor or against any particular candidate. See Valliere v. City of Westfield, 24 MCSR 424, 431 (2011); Condez v. Town of Dartmouth, 17 MCSR 40, 41 (2004). The consideration of other factors is particularly apt when the scores are as close as they were in this instance. Compare Moses v. Town of Winthrop, 21

MSCR 420 (2008) (11 point differential an “unusually large spread”); Sabourin v. Town of Natick, 18 MCSR 79, 82 (2005) (seven point differential “significant”; by-pass appeal allowed) with Radford v. Andover Police Dep’t, 17 MCSR 93 (2004) (1 point differential considered; bypass appeal denied) and Sullivan v. North Andover Fire Dep’t, 7 MCSR 175 (1994) (5 point difference in scores not “significant”) See also Bradley v. City of Lynn, 443 F.Supp.2d 145, 173-74 (D.Mass.2006) and cases cited (experts consider from three to eight points on exam “statistically significant” for purposes of establishing Title VII discrimination)

Officer McCue again puts misplaced reliance on the language in Turowski where the Commission stated that “...the civil service test scores should have been the primary determining factor...” to argue that other factors should have been of little consequence. Id., 23 MCSR at 22. In Turowski, the appellant presented sufficient evidence that demonstrated that the appointing authority was unfairly biased in its use of factors unrelated to merit, which led the Commission to determine that the primary factor in its decision should have been the test scores, not the other tainted factors. Here, no evidence exists that the WPD considered factors that were unrelated to merit, motivated by political bias, or pretextual. On the evidence presented, the Commission cannot find any instance of unfair or biased treatment on the part of the WPD.

Officer McCue has certainly demonstrated his commitment to the citizens of Weymouth over his many years of service, and the Commission commends him for his service. Nevertheless, the Commission may not substitute its judgment for that of the WPD when its decision to bypass a candidate is supported by sound and sufficient reasons. Therefore, having established by a preponderance of the evidence that the WPD’s reasons for bypass were sound and sufficient, the appeal of Officer Francis McCue, under Docket No. G2-11-171, is hereby *dismissed*.

Civil Service Commissio

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on April 19, 2012

A True Record. Attest:

Commissioner

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)(1), 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:
Francis McCue (Appellant)
Chief Richard Grimes (for WPD)