

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

FRANCIS MCCUE,
Officer McCue

v.

CASE NO: G2-10-312

TOWN OF WEYMOUTH,
Respondent

Officer McCue's Attorney:

Francis X. McCue, *Pro se*

Appointing Authority's Attorney:

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

Commissioner:

Paul M. Stein¹

AMENDED DECISION

The Officer McCue, Francis McCue, acting pursuant to G.L. c.31, §2(b), duly appealed a decision of the Weymouth Police Department (WPD), the Appointing Authority, to bypass him for promotional appointment to the position of full-time Police Sergeant. A full hearing was held by the Civil Service Commission (Commission) on March 25, 2011. The WPD called one witness and the Officer McCue testified on his own behalf. Sixteen (16) exhibits were received in evidence. The hearing was digitally recorded. Neither party submitted a proposed decision.

¹ The Commission acknowledges the assistance of Law Clerk Emily Shumsky 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 findings of fact set forth below.

The Officer McCue's Background

1. The Appellant, Francis X. McCue, is a full-time tenured police officer 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. (*Exhibits 7 and 13*)
2. Officer McCue received a BA degree from Bridgewater State College in 1979. While a student at Bridgewater State, he completed an internship as a Congressional Aide. (*Exhibits 7 and 15*)
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. (*Exhibits 7 and 16*)
4. In 1989, Officer McCue received a Masters Degree in Criminal Justice from Anna Maria College. (*Exhibits 7 and 16*)
5. Officer McCue was an adjunct faculty member at Quincy College Criminal Justice from 1989-1994. He taught Intro to Criminal Justice - Criminal Evidence and Investigation - Probation, Parole and Community Corrections. (*Exhibit 7*)

6. Officer McCue was appointed as Deputy Sheriff of Norfolk County in 2007. (*Exhibit 14*)
7. The Officer McCue submitted a total of 18 letters of commendation received from 1985 through 2007 from members of the public, fellow officers, and the Chief of Police, at his hearing before the Commission. (*Exhibit 16*)

Disciplinary History

8. There are two Internal Affairs incidents on the Officer McCue's record. 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. (*Exhibits 2, 7, 13A, and 16*)
9. Officer McCue's personnel file notes two incidents regarding fitness for duty, nodding off during roll call on July 20, 2010 and July 29, 2010. The Officer McCue attributed this to a recent family loss and his Watch Commander offered him Employee Assistance Program. (*Exhibits 2, 7, and 13B*)
10. Officer McCue's personnel file revealed two disciplinary actions. On September 25, 2007, The Officer McCue responded to a scene without informing dispatch, and failed to secure a firearm on the scene. When the Department recommended remedial training the Officer McCue declined. He received a Formal Letter of Reprimand. (*Exhibits 2, 7, 13A, 13B, and 13C*)
11. On September 3, 2010, the 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 as D-10-264. (*Exhibits 2, 7, 13A, 13B, and 13C, Administrative Notice*)

Officer McCue's By-Pass For Appointment as a Weymouth Police Officer

12. Officer McCue's name appeared on Certification No. 202077 in August 2010 for the appointment of two (2) Sergeants. (*Exhibits 3 and 4*)
13. Officer McCue was tied with another candidate for first place and two (2) candidates tied for second place. (*Exhibits 3 and 4*)
14. The WPD conducted interviews of 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. Kevin Foley of the Milton Police Department, and Lt. Patricia Grigas of the Framingham Police Department. The interviews consisted of a series of twelve (12) standard questions, with candidates answers rated on a scale of 1 (poor) to 5 (excellent). The maximum score for each candidate was 40 points. (*Exhibits 6, 8A-8F*)
15. The interviews were not recorded. (*Testimony of Chief Grimes, Testimony of Lt. Charles Santoro, and Testimony of Officer McCue*)
16. In the interview, each candidate was asked the same twelve (12) questions and was evaluated based on the following skills: First Impression, Communication, Decision Making, Leadership, Knowledge, Commitment, Attitude and Self Initiative. (*Exhibits 6, 8A-8F*)
17. Each candidate was given the opportunity to provide a personal introduction to the panel. The candidate's order of appearance for interview was randomly selected. The panel then rotated through asking each candidate 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 a expand on their law enforcement experience. The interviewers were encouraged to make notes of the candidates

answers which they did. The interviewers were given evaluation sheets which would generate numerical scores in the areas of a) First Impression, b) Communication, c) Decision Making, d) Leadership, e) Knowledge, f) Commitment, g) Attitude and h) Self Initiative.

(Exhibit 2)

18. Chief Grimes brought in outside interviewers because he wanted to make the process as unbiased as possible. *(Testimony of Chief Grimes)* The officers on the panel did not know the candidates well, if at all. *(Testimony of Lt. Charles Santoro)*
19. In the interview Officer McCue demonstrated a lack of leadership skills. Lt. Santoro testified that Officer McCue gave an unacceptable response to the question which asks interviewees to recall “a time that you felt it was necessary to compromise your own self-interests in order to be socially flexible and tolerant of your co-workers needs.” Officer McCue suggested he was a team player. Lt. Santoro believed a proper response would be a person who can do what is right even if it is not popular. *(Exhibit 11, and Testimony of Lt. Charles Santoro)*
20. In the fall of 2010, the WPD hired the two (2) sergeants. The successful candidates included the officer tied with Officer McCue in first place, as well as one of the candidates tied in second place. *(Exhibit 5 and Testimony of Chief Grimes)*
21. The appointing authorities gave the following negative reasons for bypass. (1) Officer McCue’s poor 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 of a possible aggregate 40 points from the interview panel. *(Exhibits 2, 10A-F, Testimony of Chief Grimes, and Testimony of Lt. Santoro)*

22. Officers Hayford and Regan, the selected candidates, interviewed extremely well and scored a composite 39 of 40 points in the interview panel. (*Exhibits 2, 10A-F, Testimony of Chief Grimes, Testimony of Lt. Santoro*)
23. Officer Hayford provided an outstanding interview. Raters comments included, confident individual, eye contact, and body language excellent, take charge person, proactive, candidate communicates well and listens before answering, leads by example, truthful in response, gets involved. (*Exhibits 3, 10A-10C*)
24. Officer Hayford's personnel file is indicative of outstanding prior work performance and includes documents of positive work related attributes; including eleven (11) letters from members of Weymouth Police Command Staff citing personal qualities of intelligence, good judgment, professionalism, diligence and attention to duty, and reliability. Officer Hayford also has letters of commendation from the FBI, as well as from private citizens and other law enforcement officials. Officer Hayford has no disciplinary actions or Internal Affairs on file. (*Exhibit 3*)
25. On November 16, 2010, Officer McCue duly filed an appeal with the Commission. (*Exhibit 1*)

CONCLUSION

Summary

The WPD has met its burden to establish that "sound and sufficient" reasons justify bypassing Mr. McCue for appointment as a WPD Police Sergeant, supported by substantial evidence in the record and application of correct principles of law. The WPD has reasonably satisfied their duty to bypass Officer McCue based on his performance in the interview process as well as his past disciplinary and internal affairs actions.

Applicable Standard of Review

This appeal involves a bypass for promotional appointment. This process is governed by G.L.c.31, Section 27, which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest.”

Rule PAR.08(3) of the Personnel Administration Rules, promulgated by HRD to implement this statutory requirement, provides:

“A bypass will not be permitted without a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed . . . shall later be admissible as reason for selection or bypass in any proceedings before . . . or the Civil Service Commission...”

Ordinarily, candidates are considered in the order of their place on the certification, which creates a ranking based on their scores on the competitive qualifying examination administered by HRD, along with certain statutory preferences. In order to deviate from this paradigm, an appointing authority must show specific reasons – either positive or negative, or both, consistent with basic merit principles, that affirmatively justify picking a lower ranked candidate. G.L.c. 31, §1, §27. See, e.g., Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928); Mayor of Revere v. Civil Serv. Comm’n, 31 Mass. App. Ct. 315, 321n.11, 326 (1991). See also, MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635(1995), rev.den., 423 Mass. 1106(1996) (personnel administrator [then DPA, now HRD] (and Commission oversight) in bypass means not only “formally to receive bypass reasons” but to evaluate them “in accordance with [all] basic merit principles”).

Candidates are entitled to be adequately, fairly and equivalently considered. Evidence of undue political influence is one relevant factor, but it is not the only measure of unjustified

decision-making by an appointing authority. The Commission has construed its obligation to prohibit the bypass of an Officer McCue where it finds that “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). See, Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (An Appointing Authority must proffer objectively legitimate reasons for the bypass)

The task of the Commission hearing a bypass appeal is “to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority. . . . Reasonable justification in this context means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’ ” E.g., Brackett v. Civil Serv. Comm’n, 447 Mass. 233, 543 (2006) and cases cited. In performing this function:

“[T]he commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after conducting] ‘a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer’ . . . For the commission, the question is . . . ‘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.’ ” (emphasis added)

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003) (affirming Commission’s decision to reject appointing authority’s proof of officer’s failed polygraph test and prior domestic abuse orders and crediting officer’s exculpatory testimony rebutting that evidence) cf. Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to find appointing authority’s justification unreasonable); Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (same). See generally, Villare v. North Reading, 8 MCSR 44, reconsid’d, 8 MCSR 53 (1995); Bielawski v.

Personnel Admin'r, 422 Mass. 459, 466 (1996) (discussing need for de novo fact finding before a “disinterested” Commissioner in context of procedural due process.)

The “preponderance of the evidence test” requires the Commission to conclude that an appointing authority established, through substantial, credible evidence presented to the Commission, that the reasons assigned for the bypass of an Officer McCue were “more probably than not sound and sufficient.” Mayor of Revere v. Civil Serv. Comm’n, 31 Mass. App. Ct. 315, 321, (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, (1928) (*emphasis added*) The Commission must take account of all credible evidence in the 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, (2001)

It is the purview of the hearing officer to determine the credibility of the testimony presented through the witnesses who appear before the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003) 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)

Especially when it comes to an applicant for a sensitive public safety position, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown . . . Absent proof that the

[appointing authority] acted unreasonably . . . the commission is bound to defer to the [appointing authority's] exercise of its judgment” that “it was unwilling to bear the risk” of hiring the candidate for such a sensitive position. Id., 78 Mass. App. Ct. at 190-91. See also, Reading v. Civil Serv. Comm’n, 78 Mass. App. Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass. App. Ct. 914,(2004) (rescript opinion); Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 303-305 (1997); Massachusetts Dep’t of Corrections v. Anderson, Suffolk Sup. Ct., No. 2009-0290 (Memorandum of Decision dated February 10, 2010), reversing Anderson v. Department of Correction, 21 MCSR 647, 688 (2008). This principle is particularly apt when the applicant is under consideration for a promotion to a superior position.

Applying these principles to the facts of the present appeal, Weymouth proved by a preponderance of the evidence that it had reasonable justification to bypass Officer McCue for the position of WPD Police Sergeant in favor of another candidate found more qualified and suitable for promotion to the position.

Chief Grimes clearly gave considerable attention to the organization of the interview process. He prepared twelve (12) questions to be asked by an outside panel of officers. Interviewers took independent notes throughout the process. Each member of the interview panel was provided a rating sheet to record each candidate’s score (from a low of 1 to a high of 5). The candidate could achieve a composite high score of 40 points. The two selected candidate received nearly perfect composite scores of 39, whereas Officer McCue’s composite score was 24.

Subjectivity is inherent and permissible in any interview procedure, so long as care is taken to preserve a “level playing field” and “protect candidates from arbitrary action and undue subjectivity on the part of the interviewers,” which is the lynch-pin to the basic merit principle of

the Civil Service Law. E.g. Flynn v. Civil Serv. Comm'n, 15 Mass. App. Ct. 206, rev. den., 388 Mass. 1105 (1983). The Commission's decisions have commented on a wide range of interview plans, some which are mostly acceptable and some more seriously problematic. Examples of the former: Monagle v. City of Medford, 23 MCSR 269 (2010); Anthony v. Springfield, 32 MCSR 201 (2010); Gagnon v. Springfield, 23 MCSR 128 (2010); Boardman v. Beverly Fire Dep't., 11 MCSR 179 (1998). Examples of the latter: Mainini v. Whitman, 20 MCSR 647, 651 (2007); Belanger v. Ludlow, 20 MCSR 285 (2007); Horvath v. Pembroke, 18 MCSR 212 (2005); Fairbanks v. Oxford, 18 MCSR 167 (2005); Saborin v. Natick, 18 MCSR 79 (2005); Sihpol v. Beverly Fire Dep't., 12 MCSR 72 (1999); Bannish v. Westfield Fire Dep't., 11 MCSR 157 (1998); Roberts v. Lynn Fire Dep't., 10 MCSR 133 (1997).

The Commission is satisfied that the evidence demonstrates that the WPD used an interview process that was appropriate to the selection of a class of candidates for appointment to the position of police sergeant, established in good faith and without any intent or effect to tip the scales in advance in favor of or against any of the candidates.

Indeed, here, the interview process used in this instance is exemplary. Chief Grimes made every effort to create a level playing field for the candidates including the use of a panel comprised from outside police departments, and a numerically-rated interview record. Chief Grimes was not involved in the interview process itself. Instead he had three (3) lieutenants from outside Police Departments conduct the interviews. The interviewers did not know the candidates. Each panelist made an independent numerical assessment of the candidates based on clearly defined guidelines, and the three sets of scores were combined to create the composite.

There is certainly evidence that Officer McCue has given many years of productive and loyal service to the citizens of Weymouth. Nevertheless, the Commission does not have the discretion

to override a properly made decision about his qualifications for promotion when Weymouth's decision has been justified with sound and sufficient reasons that showed it had selected a better qualified candidate using an appropriate method that met the Civil Service requirements for a fair and impartial process.

Thus, having established by a preponderance of the evidence that the Appointing Authority's reasons for bypass were justified, the appeal of the Appellant, Officer Francis McCue, filed under Docket No. G2-10-312 is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis [Absent], McDowell, and Stein, Commissioners) on July 28, 2011.

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)(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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

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:
Francis McCue (Officer McCue)
Richard Grimes (for Appointing Authority)
John Marra, Esq. (HRD)