

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

DANIEL MOGA

Appellant

v.

TOWN OF WAKEFIELD,
Respondent

CASE NO: G1-09-260

Appellant's Attorney:

Howard Mark Fine, Esquire
218 Lewis Wharf
Boston, MA 02110

Town of Wakefield Attorney:

Thomas A. Mullen, Esquire
Meredith P. Freed, Esquire
Thomas A. Mullen, P.C.
545 Salem Street
Wakefield, MA 01880-1227

Commissioner:

Paul M. Stein

DECISION

The Appellant, Daniel Moga acting pursuant to G.L.c.31, §2(b), duly appealed to the Massachusetts Civil Service Commission (Commission) from a decision of the Massachusetts Human Resources Division (HRD) approving the reasons of the Town of Wakefield (Wakefield), the Appointing Authority, to bypass him for original appointment to the position of permanent full-time Police Officer in the Wakefield Police Department (WPD). A full hearing was held by the Commission on August 19, 2009 which was digitally recorded. Twenty-two exhibits were marked and one additional exhibit was received after the conclusion of the hearing. Witnesses were not sequestered. Wakefield called three witnesses and the Appellant called one witness and testified on his own behalf. The Commission received post-hearing submissions from the Appellant on September 15, 2009 and from Wakefield on September 17, 2009.

FINDINGS OF FACT

Giving appropriate weight to the exhibits and testimony of the witnesses (the Appellant; WPD Chief Richard Smith, Lieutenant John MacKay & Detective Sergeant Richard DiNanno; and Lillian Traub) and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Daniel Moga, is a Wakefield resident and graduate of Wakefield High School who aspires to become a Wakefield police officer. He attends Suffolk University where he is studying toward a bachelor's degree in criminal justice. He serves honorably as a member of the United States Marine Corps, including deployment overseas in Iraq (after this appeal), and has attained the rank of Sergeant (E-5). (*Exh. 1 [Stipulation of Facts]; Exhs. 12, 18 & 19: Testimony of Appellant & Mrs. Traub*)

2. Mr. Moga took and passed the civil service examination for entry level police officer in May 2007, and his name was placed on the eligible list established in November 2007. (*Exh. 1; Testimony of Appellant*)

3. The WPD utilizes a highly structured process for screening police officer candidates, which places a high degree of responsibility on the candidate, meant, in part, to test the candidate's ability to pay close attention to details, to follow instructions carefully and to be proactive in addressing any issues that arise in the application process. (*Exhs. 1, 10 & 11; Testimony of Chief Smith, Lt. Mackay & Det. Sgt. DiNanno*)

4. Initially, each candidate who signs the Certification as willing to accept appointment at that time is provided with an extensive application packet, including 26 pages of forms to be completed and a detailed instruction sheet describing how the forms should be completed as well as listing the documentation which the candidate must attach

with the application. According to Det. Sgt. DiNanno, he receives names of the candidates who are to be sent a packet from Chief Smith. He then delivers the application packet to candidates by mailing it to their residence or hand delivering it by dropping it in their mailboxes. Once the application packet is returned, he reviews it, fingerprints the candidate, conducts a basic criminal background check on the candidate, checks employment and community references and reports a summary of his findings to Chief Smith. He does not consider it his responsibility, and he does not typically follow-up with a candidate, to seek information missing from the packet. A candidate who has completed an application packet for a prior round of hiring within the past year is not required to submit another complete packet, although he or she would be expected to apprise the WPD of any changes from the prior application. (*Exhs. 1, 10 & 11; Testimony of Chief Smith, Lt. Mackay & Det. Sgt. DiNanno*)

5. A candidate who successfully completes this application process is then interviewed by a WPD Lieutenant, using standard questions developed in consultation with Chief Smith. The interviews are audio/video-taped, and each interview tape is forward to Chief Smith for review. Chief Smith makes the final decision on who to recommend for appointment to the Appointing Authority, which in Wakefield is the town's Board of Selectmen. Successful candidates are appointed to the position of "student" Police Officer, pending successful completion of formal training at the Police Academy. (*Exhs. 1, 10 & 11; Testimony of Chief Smith, Lt. Mackay & Det. Sgt. DiNanno*)

The Present By-Pass Appeal

6. Mr. Moga's name appeared on Certification No. 281095, dated December 9, 2008, requisitioned from HRD by Wakefield for appointment of four permanent full-time

police officers. Based on his residency, veteran's status and test score, Mr. Moga ranked tied for first on the Certification among the candidates who indicated they were willing to accept appointment to one of the open positions. (*Exhs. 1 through 4, 20 & 21*)

7. The other candidates on the Certification, also Wakefield residents, willing to accept appointment, included Josiah Curry (also a veteran) tied with Mr. Moga, and seven other candidates with tie scores (all non-veterans) ranked below him, including Andrew Dornay, Robert Haladay and Amy Toothaker. (*Exhs. 2 & 3*)¹

8. According to Mr. Moga, he promptly went to Wakefield Town Hall and signed Certification No. 281095 as willing to accept appointment. His signature does appear on the Certification. He was then scheduled for military training out of town, and he said he immediately completed the application packet and left it for his mother, Lillian Taub, to deliver. (*Testimony of Appellant & Mrs. Traub*)

9. Mrs. Traub, who is an accountant, testified that she examined Mr. Moga's application packet and found it substantially complete (except for the credit report). On December 11, 2008 at approximately 6:30 pm, she said she went to the WPD, and left the packet, addressed to a person whose name she did not recall, at the "window" inside the station. She knows this to be the date because she made an entry in her diary of when Mr. Moga was scheduled to report for his monthly military training. Mr. Moga testified that he called the WPD from training the next day and confirmed that his application had been received, although he did not recall who he spoke to at that time. He did not follow-up upon his return from training the next week. (*Testimony of Appellant & Mrs. Traub*)

¹ HRD does not disclose examination scores of the candidates on the Certification, so there is no evidence whether the two veterans (Curry & Moga), who are ranked above all non-veterans by statute, scored higher or lower on the written examination than the non-veterans on the Certification. (*See Exhs. 3 & 20*)

10. Contemporaneously with the filing of his appeal to the Commission, the Appellant requested his personnel records from the WPD. At all times, the WPD has claimed that it has no record of ever having received Mr. Moga's December 2008 application packet, nor was a packet sent out to him at that time. The Appellant did not keep a copy of this application and produced no documentation that established WPD received it. (*Exh. 22; Testimony of Appellant & Det. Sgt. DiNanno; Representation of Counsel*)

11. This conflict prompted the Appellant, prior to hearing, to seek Summary Disposition in his favor and to serve a Motion in Limine seeking sanctions against Wakefield, in effect, that would preclude it from contesting the Appellant's claims, based on the alleged non-production and/or spoliation of documents, among other things. The Commission denied these motions, and the issue of spoliation was taken under advisement to be considered on the full record in deciding the merits of the appeal. I will return to this issue after setting forth the further findings of fact below germane to the case. (*See Oral Argument and Rulings on Motion in Limine*)

12. In January 2009, Chief Richard E. Smith made conditional offers of employment from Certification No. 281095 to Messrs. Curry, Dornay & Haladay and Ms. Toothaker, subject to their each passing physical and medical screening. (*Exhs. 1, 12 through 16; Testimony of Chief Smith*)

13. On February 17, 2009, Chief Smith submitted to the Wakefield Town Administrator, positive reasons for his recommendations of Ms. Toothaker and Messrs. Curry & Dornay, as well as negative reasons for recommending that Mr. Moga be

bypassed. Mr. Haladay was not recommended for hire at that time for reasons that are not disclosed in the record. (*Exhs. 1, 6 & 7; Testimony of Chief Smith*)

14. The reasons for bypassing Mr. Moga were stated as follows:

“Daniel Moga failed to completely follow the directions given to him in the beginning stages of the hiring process. His information packet was returned incomplete. He failed to provide a copy of his High School Diploma or equivalent, no birth certificate, no credit report, no resume. Additionally, there were a number of questions not answered by the candidate, i.e., place of birth, and date of entry in to the armed forces. He failed to provide notarized documents as requested, a list of neighbors to interview and lastly, he failed to identify his educational history, including the high school he attended.”

As the WPD claims it never received Mr. Moga’s December 2008 application packet, these conclusions stem from Chief Smith’s review of two prior applications submitted by Mr. Moga and reports on those applications from Det. Sgt. DiNanno, to be discussed in further detail below. (*Exhs. 1, 7, 12; Testimony of Chief Smith & Det. Sgt. DiNanno*)

15. On February 27, 2009, the Wakefield Town Administrator appointed three of the recommended candidates and submitted the appointments, together with the reasons for their selection, along with the negative reasons for bypassing Mr. Moga to HRD. By letter dated May 1, 2009, HRD notified Mr. Moga that the bypass had been approved. This appeal duly ensued. (*Exhs. 1, 5, 7, 8 & 9; Claim of Appeal*)

The Prior Applications in December 2007 and July/August 2008

16. Certification No. 281095, which culminated in appointing Ms. Toothaker and Messrs. Dornay and Curry, was the third Certification requisitioned by the WPD from the November 2007 eligible list. (*Exh. 1; Testimony of Chief Smith & Det. Sgt. DiNanno*)

17. The first Certification (date and number unknown) from the November 2007 eligible list was requisitioned by WPD in December 2007. Mr. Moga was provided with an application packet for this appointment which he says he was ordered to return with a

deadline of three or four days, and which he submitted on December 13, 2008. (*Exhs. 1, 12; Testimony of Appellant, Chief Smith & Det. Sgt. DiNanno*)

18. Det. Chief DiNanno found Mr. Moga's initial December 2007 application deficient in numerous respects, including:

- Omission of his place of birth in the "Authority for Release of Information" form on Page 8 of the application.
- Omission of "Date of Entry" and other information on the "Authority for the Release of Military Records" form on page 10 of the application.
- Failure to obtain a notarized signature attesting to the accuracy of his application packet as required on page 11 of the application.
- Failure to list the name and address of a neighbor who could verify his residence as required on page 13 of the application.
- Omission of all information about his schooling as required by the "Education" section on page 20 of the application.
- Failure to attach required documentation, including a High School Diploma or equivalency certificate, a birth certificate, a credit report and a resume, or explain their omission.

I find Det. Sgt. DiNanno correctly identifies these discrepancies in Mr. Moga's initial application packet. (*Exh. 12; Testimony of Appellant & Det. Sgt. DiNanno*)

19. Ms. Toothaker also submitted an application packet on December 13, 2007. In contrast to Mr. Moga, she completed all questions fully and correctly, and her application packet included all required documentation, save for a resume, copy of her social security card, and a college transcript, which she submitted a week later with a transmittal letter of explanation to Det. Sgt. DiNanno dated December 19, 2007. This letter also corrected a mistake in one of her prior residential addresses, for which she apologized. (*Exhs. 1 & 15; Testimony of Det. Sgt. DiNanno*)

20. Ms. Toothaker's "Personal Reference" page does list five personal references. Although the page provided lines for four references, she wrote in the name of the fifth reference and contact information in a blank space at the bottom of the page. (*Exh. 15*)

21. The Appellant points out that Ms. Toothaker's notarization sheet was also deficient in that the notary erroneously entered his own name as that of the affiant, rather than Ms. Toothaker's, an error that Det. Sgt. DiNanno evidently did not pick up in his review of the application packet. (*Exh. 15; Testimony of Det. Sgt. DiNanno*)

22. The December 2007 hiring process resulted in selection of a candidate ranked above Mr. Moga and Ms. Toothaker. Although not required, since he was not officially bypassed, Chief Smith notified Mr. Moga by letter dated February 19, 2008, simply stating that that the WPD had chosen another candidate. Chief Smith's letter contained no information about any of the deficiencies that WPD had found in Mr. Moga's application packet. (*Exh. 12; Testimony of Appellant, Chief Smith & Det. Sgt. DiNanno*)

23. On July 7, 2008, the WPD requisitioned Certification No. 280594 from HRD for appointment of one permanent full-time police officer. The initial list of four names produced only two candidates willing to accept (Mr. Curry and Mr. Moga), and the certification was supplemented with additional names on August 15, 2008. The additional names included Ms. Toothaker, but she did not sign this certification as willing to accept. (*Exhs. 1, 13, 15 & 18; Testimony of Chief Smith & Det. Sgt. DiNanno*)

24. Det. Sgt. DiNanno testified that WPD did not usually send a second application packet to a candidate who had completed one for an earlier hiring within the past year. However, he said he decided to make an exception in Mr. Moga's case, and give him another opportunity to submit a properly completed application packet. (*Testimony of Det. Sgt. DiNanno*)

25. Mr. Moga received the second packet with the standard instruction sheets. He received no special “heads up” about any of the specific deficiencies in his initial December 2007 packet. (*Exhs. 12 & 19: Testimony of Appellant & Det. Sgt. DiNanno*)

26. On July 25, 2008, Mr. Moga sent a copy of his second application packet to WPD by facsimile from his military duty site in Chicopee MA, and delivered the original to the WPD shortly thereafter. The second application packet was substantially more complete than the initial packet but Det. Sgt. DiNanno noted that there still were problems, including:

- He had listed a “cell” phone contact number in the space that requested a “work” contact phone number on pages 12 and 13 of the application.
- He listed only four personal references on page 14 of the application when the form requested five references (although the form actually provided space for only four names and addresses).
- He wrote the wrong telephone number for a former employer on page 16 of the application
- He failed to answer “Yes” or “No” to the Question; “Are you registered for the Selective service?” on page 21 of the application regarding his “Military Record”.
- The application packet failed to include a personal resume, credit report and college transcript for his attendance at Fisher College, or explain their omission.

(*Exh. 12; Testimony of Det. Sgt. DiNanno*)

27. I find that three of these noted deficiencies are not material errors or omissions on Mr. Moga’s part. As to the use of a “cell phone” contact number, rather than a “work” number, Det. Sgt. DiNanno stated this was “no big deal”. The application clearly disclosed the proper telephone number for his current employer – Walgreens – and for his military duty station as well. As he was frequently on military leave and was attending college classes during the day, I find nothing that WPD could fairly criticize about Mr. Moga’s election to provide his cell phone as an alternative to his home telephone contact number when the form clearly was requesting a personal contact number, not an

employment reference number, which he properly provided elsewhere and which Det. Sgt. DiNanno had no problem contacting. I also take note that the Wakefield Walgreen's store (572 Main Street) is approximately a half-mile from the Wakefield Police Station. (*Exh.12; Testimony of Appellant & Det. Sgt. DiNanno; Administrative Notice www.maps.google.com*)

28. As to the omission of a college transcript for Fisher College, Mr. Moga had attended Fisher College for one year and then transferred to Suffolk University where he was then currently pursuing a degree. Mr. Moga did provide a complete transcript from Suffolk University which also listed all of the courses he had taken at Fisher. Det. Sgt. DiNanno simply misread the transcript. Mr. Moga could have easily explained the point to the WPD if he had been asked, as he did in his testimony before the Commission. (*Exh. 12; Testimony of Appellant*)

29. Finally, as to providing only four personal references, I find this was not a critical error. As noted below, Mr. Curry, one of the other successful candidates did the same. Chief Smith testified this discrepancy on the "Personal References" page was not intentional and was a "formatting" error on the part of the WPD. (*Exh. 13; Testimony of Chief Smith*)

30. Det. Sgt. DiNanno is correct that the second application used a wrong telephone number for his prior employer at Tufts, and that Mr. Moga skipped over the Selective Service question. Neither of these "scrivener-type" mistakes are serious or material omissions or errors. Det. Sgt. DiNanno was able to make contact with the proper person at Tufts, despite that mistake. Mr. Moga's application was replete with information about

his military service, including the fact that the application was faxed from his military duty station. (*Exh. 12; Testimony of Det. Sgt. DiNanno*)

31. There is conflicting evidence as to whether Mr. Moga submitted a personal resume with his second packet. No resume is contained in his application files produced by the WPD, but Mr. Moga produced a copy of a post-2007 resume that he testified was included. I conclude that the preponderance of the evidence suggests that the WPD did not receive his resume, but even if it had, that fact would not change the ultimate conclusions I reach about the disqualifying nature of Mr. Moga's second application packet. (*Exhs. 12, 18 7 19; Testimony of Appellant & Det. Sgt. DiNanno*)

32. There is no dispute that Mr. Moga did fail to include a credit report with his second application packet. He excused this omission by stating that he so informed Det. Sgt. DiNanno when he delivered the packet and was told he could submit it at a later date. Mr. Moga's explanation for never providing a credit report is that he had never been required to provide one before, and didn't know how to go about doing so. (*Testimony of Appellant & Det. Sgt. DiNanno*)

33. Mr. Curry also submitted an application packet for the July/August 2008 hiring process – his first and only application packet submitted – on July 18, 2008. His application was also substantially complete, save some of the required documentation and authorization forms. He wrote to Det. Sgt. DiNanno explaining that he was then deployed overseas (he was a Captain in the U. S. Army Reserve) and would supply the missing documentation as soon as possible. Within a week, he submitted all of the missing documents, save for a copy of his High School Diploma and College Transcript,

which do not appear in his application file. (*Exhs. 13 & 17; Testimony of Det. Sgt. DiNanno*)

34. Chief Smith testified that Mr. Curry's omission of his High School Diploma and College Transcript was not critical to him, as the information about his educational background could be "gleaned" from the other information in his application packet and his current status as a law school graduate who was currently serving as a Judge Advocate in the U.S. Army Reserve.. (*Testimony of Chief Smith*)

35. I also note that the inconsistency in the application which requested five personal references, while but only providing space on the page for four also tripped up Mr. Curry, who, as did Mr. Moga, only supplied four names on the "Personal References" page. (*Exh. 13*)

36. The WPD hiring was put on hold until November 2008, when Wakefield requested the third Certification from HRD, which, and noted above, was issued on December 9, 2008 (No. 281095). (*Exhs. 2 thru 4*)

37. In addition to Messrs. Moga & Curry and Ms. Toothaker, Mr. Dornay signed the December 9, 2008 Certification No. 281095 as willing to accept appointment. He submitted his application packet – the first application he had submitted to the WPD – on December 16, 2008. Det. Sgt. DiNanno found his application packet to be nearly "perfect" and complete, except for his college diploma, which he explained he would be receiving upon graduation from Boston University in May 2009. I note that Mr. Dornay also provided five names on the "Personal References" page, writing in the fifth name at the bottom of the page as did Ms. Toothaker. (*Exhs. 14; Testimony of Det. Sgt. DiNanno*)

38. The Appellant presented evidence to Det. Sgt. DiNanno to suggest that the Credit Report that Mr. Dornay submitted with his application packet showed a comment that reflected a negative credit score, which was not reflected in Det. Sgt. DiNanno's report to Chief Smith on Mr. Dornay's application packet. Det. Sgt. DiNanno testified that he was not qualified to evaluate a credit report. The evidence is not sufficient to permit me to draw any inference as to the credit standing of Mr. Dornay, generally, and, specifically, whether or not the referenced comment in question rose to the level of significance that it should have led Det. Sgt. DiNanno to have noted that fact in his summary report to Chief Smith. (*Exh. 14: Testimony of Det. Sgt. DiNanno*)

39. The Appellant correctly pointed out that Mr. Dornay did not fill in any response to the question on page 25 of the application "List any other nicknames or aliases that you have been known by or that you have used in the past", but left blank the answer space provided for that question. I note that Mr. Moga also failed to fill in any answer to this same question, either in his initial December 2007 application or his second July 2008 application. (*Exhs. 12 & 14; Testimony of Det. Sgt. DiNanno*)

40. Det. Sgt. DiNanno saw no problem with Mr. Dornay's leaving the alias question blank. A lack of an answer does leave it ambiguous as to whether he failed to list known aliases, or whether he had no aliases to list, and I am able to draw no inference about that one way or the other. Based on the extremely meticulous review that Det. Sgt. DiNanno gives to the candidates' application packages, however, the omission does appear to be one that I would have expected him to flag in his summary report to Chief Smith. This omission fits in the same category as Mr. Moga's failure to check whether or not he was registered for the Selective Service, when he was then clearly serving in the Marine

Corps. Yet the fact remains that no candidate, including Mr. Moga, was criticized for this omission. (*Exhs 12 thru 15; Testimony of Det. Sgt. DiNanno*)

41. Overall, Chief Smith put more weight on Mr. Moga's failure to provide important documentation, particularly a credit report and resume, more problematic than technical omissions or mistakes in answering any of the application questions. I infer that, had the latter been the only problems with Mr. Moga's application package, Chief Smith would not have disqualified him from proceeding to the next stage. (*Testimony of Chief Smith*)

The Candidates' Qualifications for Appointment

42. The Appellant proffered evidence to suggest that Mr. Moga's qualifications surpassed those of the selected candidates and that improper favoritism toward them and bias against him because of his military status contributed to their selection over him. In particular, he pointed to Mr. Dornay's allegedly poor credit history and to alleged undue influence of one of his references who was a well-known "prominent local businessman"; to Mr. Curry's termination from a job he held at Walgreen's as a teenager (the same employer where Mr. Moga currently worked and was well-regarded) and allegedly special treatment given to Mr. Curry while he was deployed overseas; as well as bias toward hiring Ms. Toothaker because of her gender (there being only one female police officer among the 43 current members of the WPD officer force) and to her involvement in an incident at her home involving under-age drinking that she said "got out of control". (*Exhs. 12 thru 15; Testimony of Appellant, Chief Smith, Lt. Mackay & Det. Sgt. DiNanno*)

43. With respect to Mr. Curry's employment termination, Chief Smith indicated he was satisfied that the episode was an isolated incident that occurred during Mr. Curry's youth, which he had fully disclosed in his application and for which he took full

responsibility for his mistake. As to Ms. Toothaker's involvement in a house party that "got out of control", Chief Smith noted that she was the one who had called the police to the scene for assistance. As to the contacts with Mr. Curry, the WPD explained they did so in order to be sure that they complied with their obligations, as they understood them, to allow candidates who were deployed on active duty to be fully considered for a position when they returned. (*Exhs. 13 & 15; Testimony of Chief Smith & Det.Sgt. DiNanno*)

The Spoliation Issue

44. After considering all of the evidence in the record, I find that the preponderance of the credible evidence does not support the Appellant's contention that the WPD destroyed any records that are material to the issues in this case. I find it more probable than not that Det. Sgt. DiNanno never sent out a third application package to Mr. Moga and that, even if such a packet was left at the police station, to his knowledge, it never made its way to him. In arriving at this conclusion, I have taken into account the following evidence:

- HRD mailed notice to candidates whose names appeared on the December 2008 certification on Tuesday December 9, 2008 meaning that, at the earliest, Mr. Moga would have received such notice on Wednesday, December 10, 2008. Thus, Mr. Moga had essentially one day to present himself to sign the Certification, somehow get a blank application packet from the WPD, go to Town Hall to have his signature notarized (he testified that the only place locally that he ever went to get anything notarized), and then bring the application home and leave it with all the attachments for his mother to take back to the WPD.

- Det. Sgt. DiNanno was responsible for providing application packets to candidates, as Mr. Moga surely knew. The form letters that went out to candidates who signed the December 9, 2008 certification are dated December 12, 2008. Whether Det. Sgt. DiNanno mailed or delivered the application packets, which he claims he didn't do, Mr. Moga could not have received it in due course until after he had left for his military duty. Thus, if Mr. Moga obtained a third application packet, it would likely have to have been personally obtained ahead of time directly from Det. Sgt. DiNanno. Mr. Moga, however, gave no testimony to that effect.
- I have no doubt that Mr. Moga went to military training on or about December 11, 2008, and that Mrs. Traub noted that in her diary. I infer, however, that her notation had to do with the dates of his training, not the fact that she had delivered a package to WPD. The diary entry itself was not presented into evidence.
- The Wakefield Walgreen's where Mr. Moga worked is located at 572 Main Street, which is about a half-mile from the WPD Police Station. I find it improbable that, at no time, did Mr. Moga seek to call or visit the WPD and speak to Det. Sgt. DiNanno (or anyone else) about his alleged third application packet until he learned that he had been bypassed, especially when he had to know that the packet as submitted, was deficient in that it lacked a credit report.

(Exhs. 1, 12 thru 15, 18; Testimony of Appellant, Chief Smith, Lt. Mackay, Det. Sgt. DiNanno & Mrs. Traub)

CONCLUSION

This appeal involves a bypass for original appointment to a permanent civil service position. 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 with the administrator [HRD] 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 unless HRD had received a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed to [HRD] shall later be admissible as reason for selection or bypass in any proceedings before [HRD] or the Civil Service Commission. The certification process will not proceed, and no appointments or promotions will be approved, unless and until [HRD] approves reasons for selection or bypass.”

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, 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 Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991). See also MacHenry v. Civil Service 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 appellant 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 Service 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.’ ”

Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission’s decision to reject appointing authority’s proof of appellant’s failed polygraph test and prior domestic abuse orders and crediting appellant’s exculpatory testimony rebutting that

evidence) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to find appointing authority's justification unreasonable); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (same). See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding before a "disinterested" Commissioner in context of procedural due process); Bielawski v. Personnel Admin'r, 422 Mass. 459, 466 (1996) (same)

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 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); 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 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)

An appointing authority may rely on information it has obtained through an impartial and reasonably thorough independent review, including allegations of misconduct obtained from third-party sources, as the basis for bypassing a candidate. See City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189 (2010). There must be a "credible basis for the allegations" that represents a "legitimate doubt" about a

candidate's suitability, but the appointing authority is not required "to prove to the commission's satisfaction that the applicant in fact engaged in the serious alleged misconduct. . . ." Id., 78 Mass.App.Ct. at 189-90. Especially when it comes to hiring 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 Town of Reading v. Civil Service Comm'n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914, (2004) (rescript opinion); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305 (1997); Massachusetts Dep't of Corrections v. Anderson, Suffolk Sup. Ct. No. 2009SUCV0290 (Memorandum of Decision dated 2/10/10), reversing Anderson v. Department of Correction, 21 MCSR 647, 688 (2008).

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)

Applying these principles to the facts of the present appeal, Wakefield proved by a preponderance of the evidence that it had reasonable justification to bypass Mr. Moga for the position of WPD Police Officer for failure to demonstrate the care and attention expected of an applicant for such a position and for his failure to submit the information reasonably required and necessary to consider his application properly.

The Appellant correctly identifies many of the alleged deficiencies in his application packet as trivial, inconsequential errors, comparable (and, in some cases, identical) to mistakes found in the application packets of one or more of the successful candidates. For example, Mr. Moga was not the only candidate who failed to list five personal references. Similarly, the Appellant established by a preponderance of the evidence that many of the deficiencies noted in Mr. Moga's original application had been rectified by the time he submitted his second application, and that, some of the alleged deficiencies in the second application were not true.

It remains essentially undisputed, however, that at no time did Mr. Moga present the WPD with a credit report. None of the successful candidates' application packets contained this deficiency. I do not accept Mr. Moga's excuse that he was unfamiliar with how to get a credit report. He certainly had multiple resources that could advise him on this score, including his mother, a senior accountant, his college professors and/or his employer. It speaks volumes that Mr. Moga apparently took no steps to procure a credit report from December 2007, when he submitted his first application to the WPD, through the date he learned that he had been bypassed in early 2009. Although he (and his

mother) profess he had nothing to hide, that conclusion is mere speculation on this record, as no credit report was ever produced. It was certainly reasonable for the WPD to refuse to move Mr. Moga's application forward when he had so consistently failed to supply, at least twice (and by his count three times) what he clearly knew WPD considered an essential part of his application packet.

This behavior, alone, justifies his bypass. A person who has said that becoming a police officer in Wakefield would be his "dream" job can be expected to pay more attention to this issue, and to follow-through as required. The Commission cannot second-guess the WPD for concluding that his failure to do so warranted bypassing him for other candidates who demonstrated a more responsive and proactive approach to problem solving and attention to detail during the application process.²

I find no merit to the Appellant's contentions of favoritism or bias. I am persuaded that Chief Smith selected Messrs. Curry and Dornay, and Ms. Toothaker, because, after the full application process, they presented as the most qualified candidates. To suggest bias due to Mr. Moga's military status is belied by the WPD's careful attention to the rights of military personnel in the case of Mr. Curry, a Captain in the Army Reserve (serving as a Judge Advocate), whom WPD hired. Any suggestion that Ms. Toothaker was preferred because of her gender is mere speculation on this record.³ Similarly, I find

² The same can be said of Mr. Moga's curiously "hands-off" approach to following up on the status of his "third" application. Having presumably been informed by his mother that she had left the packet at the police station entrance area with no one present, he took no steps other than to speak to an unknown person the next day to confirm its receipt. While this behavior was not one of the reasons used for bypassing him, it does demonstrate the proclivity for sloppiness that the WPD's demand for attention to detail in the application process was meant to test.

³ I note that, if WPD had intended to address the alleged gender disparity in their ranks, civil service law clearly permits them to call for a "special" certification containing only female candidates. See HRD Personal Administration Rules, PAR.10.

no merit to the argument that because Mr. Dornay received a personal reference from a “prominent businessman” in Wakefield, that such a reference gave him an unfair advantage based on something other than merit. This is not a situation, such Fairbanks v. Town of Oxford, 18 MCSR 167 (2005), cited by the Appellant, in which the “prominent” figure was the mother of one of the successful, lower-ranked candidates.

I summarily dispose of the Appellant’s two other contentions. First, the alleged delay by HRD in notifying Mr. Moga of his bypass (February 27, 2009 notice from Wakefield to HRD and May 1, 2009 notice to Mr. Moga from HRD) does not give rise to a violation of Mr. Moga’s civil service rights, as to which he has been prejudiced or aggrieved. Second, the contention that Mr. Moga was a better qualified candidate is simply not for the Commission to assay on this record, especially as to Mr. Curry, with whom Mr. Moga was tied (and, therefore, was not bypassed for a “lower-ranked” candidate.

While WPD has justified its bypass of Mr. Moga here, I do hope neither the WPD nor Mr. Moga fail to take notice of lessons to be learned from this matter. While, in general, the WPD’s method for selecting police officer candidates is a model process, leaving application packets in a candidate’s mailbox with no record does seem problematic. WPD might consider keeping a ledger or other paper trail showing to whom and when it issues and receives applications. It might also consider whether it would be appropriate, in some cases, to advance a candidate despite some deficiencies, especially technical ones, and see if and how the applicant is able to address those issues at the interview stage. Finally, the Commission would encourage the WPD to revisit its practice of relying on prior application packets for as long as year, without incorporating a formal process for so informing applicants of that practice and providing, at least, an opportunity (and the

obligation) to update important and potentially stale information, such as education, job and residence changes, military status, credit history, etc.

On Mr. Moga's part, should he truly aspire to become a sworn police officer in Wakefield or any other community, he is encouraged to continue to take the competitive examinations and, should he submit another application, and to respect fully and pay heed to the municipality's application requirements, be proactive and leave nothing to chance that lies within his ability reasonably to control.

Accordingly, for the reasons stated above, the appeal of the Appellant, Daniel Moga shall be and hereby is **dismissed**.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on March 24, 2011.

A True Record. Attest:


Commissioner

**Commissioner Marquis was
absent on March 24, 2011**

Either party may file a motion for reconsideration within ten days of the receipt of a 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 shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:
Howard Mark Fine, Esq. (for Appellant)
Meredith P. Freed, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)