

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 979-1900

RODRIGO MONTEMOR,
Appellant

v.

CITY OF LAWRENCE,
Respondent

G1-17-195

Appearance for Appellant:

Rodrigo Montemor, *Pro se*

Appearance for Respondent:

Christopher S. Feudo, Esq.
Foley Hoag LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210

Commissioner:

Cynthia Ittleman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), Mr. Rodrigo Montemor (Appellant), appealed the decision of the City of Lawrence (City) to bypass him for original appointment to the position full-time police officer in Lawrence. The Appellant filed the instant appeal on September 28, 2017. The Civil Service Commission (Commission) held a prehearing conference in the case on October 23, 2017 at the Mercier Community Center in Lowell. The Commission conducted a

full hearing¹ in the case at the same location on January 22, 2018. The hearing was digitally recorded, and the parties received a CD of the proceeding.² The parties submitted post-hearing briefs on March 9, 2018. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

The Respondent entered ten (10) exhibits into the record (Ex. 1-10) at the hearing and as well as a Post-Hearing Exhibit (P.Hrg.Ex.) ordered at the hearing, including the affidavit of Frank Bonet, the City's Personnel Director, and the redacted driving records of the ten (10) candidates who bypassed the Appellant. The Appellant did not offer any exhibits at the hearing but I took administrative notice of the documents in the file, including the driver record (distinguished from a driver history³) that the Appellant submitted to the Commission with his appeal. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Frank Bonet, Personnel Director, Lawrence
- James Fitzpatrick, Chief, Lawrence Police Department (LPD)⁴
- Dean Murphy, Detective (Det.), LPD

Called by the Appellant:

- Rodrigo Montemor, Appellant

¹ The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

³ Det. Murphy credibly testified about the distinction between a driver's history as opposed to a driver's record.

⁴ Mr. Fitzpatrick was the LPD Police Chief during the pertinent hiring cycle.

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

1. The Appellant was born in Brazil and came to the U.S. when he was two (2) years old. He moved to Lawrence approximately ten (10) years prior to this appeal. After high school, the Appellant worked with his father in the moving business until age twenty-one (21), when he was old enough to drive out of state. At twenty-one (21), the Appellant bought his own truck and worked as an independent contractor as a mover until 2014, when he sold his truck. It was stressful driving the truck, being away from home, and having the many entries on his driving record dragged him down a lot. After selling his truck, he started a business in auto detailing with his wife. He and his wife have two (2) children. (Testimony of Appellant)
2. The Appellant took and passed the 2015 civil service examination for the position of fulltime Police Officer in the City. (Stipulation) He had taken the exam once prior to the exam involved in this case. (Testimony Appellant)
3. In June 2017, Mr. Frank Bonet, the City's Personnel Director, began the process of hiring Police Officers for the LPD by submitting a requisition to the state's Human Resources Division (HRD) for a Certification. The City sought to hire six (6) Police Officers. HRD sent Certification # 04714 (the "Certification") to the City on June 15, 2017 with approximately ninety-two (92) names on it. (Ex. 5; Testimony of Bonet)
4. On June 19, 2017, HRD added two (2) names to the Certification, bringing the total names on the Certification to approximately ninety-four (94). (Ex. 6; Testimony of Bonet)

5. Due to subsequent additional vacancies at the LPD, Mr. Bonet subsequently requested approval to hire four (4) additional Police Officers from the Certification, bringing the total of available positions to ten (10). (Exs. 7 and 8; Testimony of Bonet; P.Hrg.Ex.)
6. The Appellant was ranked tied for sixth on the unsigned Certification. Nineteen (19) candidates ranked ahead of him on the Certification. (Exs. 5 and 6)
7. The Appellant signed the Certification indicating that he would accept a position if it were offered to him. (Ex. 9; Testimony of Bonet)
8. Pursuant to its practice, the City conducted background investigations on candidates for Police Officer positions who had signed the Certification. Among other things, the background checks included a review of the candidates' criminal history and driving records. (Testimony of Bonet, Murphy and Fitzpatrick)
9. It is the City's position that having a record of safe and responsible driving is important when being considered for the position of Police Officer because Police Officers spend large portions of their workday driving. (Testimony of Murphy, Fitzpatrick and Bonet)
10. To assess a candidate's driving record, investigators review the candidates' entire driving history. It includes, for example, the candidates' history of moving violations, surchargeable accidents, suspensions and revocations. (Ex. 1; Testimony of Murphy, Fitzpatrick and Bonet)
11. Once the candidates submitted their completed application packets, Chief Fitzpatrick assigned Lieutenant (Lt.) Daniel Fleming to oversee the background investigation process. Lt. Fleming then assigned several Detectives or Police Officers, including

Det. Murphy, to conduct background investigations on the candidates. (Testimony of Murphy and Fitzpatrick)

12. Lt. Fleming assigned Det. Murphy to conduct the Appellant's background check.

Det. Murphy had prior experience conducting background checks for the City's Police Officer candidates. (Testimony of Murphy and Fitzpatrick)

13. In the course of his investigation, Det. Murphy pulled and reviewed the Appellant's driver history. The driver history indicated that the Appellant has a significant adverse driving record. The Appellant's driving history began in 2001, when he was eighteen (18) years old. From 2001 to 2003, the Appellant's record shows:

- he was found responsible for speeding
- he was found responsible for a seat belt violation but a nolle prosequi was entered for speeding (on another occasion)
- he defaulted for failure to timely pay for the citations he received
- he was found responsible for speeding
- he was found responsible for improper passing. (Ex. 1)

From 2004, when the Appellant was twenty-one (21) years old and obtained his CDL to drive a moving truck, until 2014, when he stopped driving a truck, the Appellant's driver record shows:

- he was found not responsible for speeding in 2004 and an improper equipment charge was found not applicable
- he was found not responsible for speeding in 2006
- he was found responsible for speeding in 2007

- he was found not responsible for speeding out of state in 2008 (at which he was represented by an attorney)
- he was found responsible for speeding a few months later in 2008 and he defaulted for failure to timely pay the assessed fines
- his CDL was revoked for sixty (60) days in 2008 although his CDL was subsequently reinstated
- he was found responsible for a highway violation (in his personal car) in 2011
- he was found responsible for speeding out of state later in 2011
- he was found responsible for speeding later in 2011, for which he was defaulted for failure to timely pay the assessed fines
- he had a surchargeable accident in late 2014. (Ex. 1)

From 2015, when the Appellant stopped driving a truck, to 2017, when the Appellant applied to the LPD for employment as a Police Officer, the Appellant's driver record shows:

- he was found not responsible for using a cellphone while driving in another state where such use was prohibited in April 2015
- he was required to complete a National Safety Council (NSC) driver's education class in August 2015 for having three (3) surcharge events in two (2) years
- he was found responsible for both a lane violation and failure to stop in September 2015
- he was found responsible for speeding later in September 2015
- he was found responsible for both having an unregistered vehicle and improper equipment in December 2015

- he was required to complete another NSC driver's education class in March 2016 for having three (3) surcharge events in two (2) years
- he was found responsible for using a cell phone while driving out of state where prohibited in August 2016
- he was required to complete another NSC driver's education class in May 2017. (Ex. 1)

14. To Det. Murphy, the Appellant's driver history was notable because it contained so many entries and was four (4) pages long. In his experience, a candidate's driver history typically will only contain a few entries and rarely exceeds two (2) pages. The frequency of infractions, which occurred over many years, also raised a red flag for Det. Murphy. Det. Murphy also noted the numerous surchargeable events in the Appellant's driving history that would have led to the suspension of his license if he did not complete the NSC class on multiple occasions. Det. Murphy did not draw a negative inference from the large number of entries in the Appellant's driver history indicating that a third party had requested a copy of the Appellant's driver history. (Ex. 1; Testimony of Murphy)

15. Based on his review of the Appellant's driver history, Det. Murphy concluded that the Appellant had demonstrated a "level of irresponsibility while driving" and that the Appellant did not take the privilege of driving seriously. (Testimony of Murphy)

16. Det. Murphy reviewed the Appellant's driver history with Lt. Fleming. Lt. Fleming advised Det. Murphy that he should halt his background investigation of the Appellant because the Mayor, who is the appointing authority for the City, would likely bypass him due in light of his poor driving record. (Testimony of Murphy)

17. On August 2, 2017, Det. Murphy drafted a memorandum to Chief Fitzpatrick outlining the issues that arose in his investigation of the Appellant's background check, highlighting, in particular, the Appellant's extensive history of poor driving. In one sentence of the memo, Det. Murphy inadvertently referred to the Appellant using the last name of someone else. This was a typographical error resulting from Det. Murphy's use of a previous memorandum concerning another candidate as a template for drafting the memo regarding the Appellant. This typographical error is the only inaccuracy contained in the memo written by Det. Murphy. (Ex. 2; Testimony of Appellant and Murphy)
18. Chief Fitzpatrick received Det. Murphy's memo, along with the background check file concerning the Appellant. Upon his review of the memo and the file, Chief Fitzpatrick concluded that the pattern of infractions and unsafe driving in the Appellant's driving history made him an unsuitable candidate for the position of Police Officer in the City since safe operation of a motor vehicle, often in stressful or emergency situations, is a key responsibility of the position. Chief Fitzpatrick was also concerned that the Appellant's license could have been suspended as recently as June 2017, so close in time to the Appellant's application for employment at the LPD. (Testimony of Fitzpatrick)
19. Sometime between August 2 and 7, 2017, Chief Fitzpatrick and Lt. Fleming met with the Mayor and Mr. Bonet. At the meeting, the Appellant's candidacy was discussed, the entries on his driver history were reviewed, and Chief Fitzpatrick recommended that the Mayor bypass the Appellant because of his poor driving record. The Mayor accepted Chief Fitzpatrick's recommendation and charged Mr. Bonet with drafting a

- letter to the state's Human Resources Division (HRD), requesting permission to bypass the Appellant (as a consent decree community). (Testimony of Fitzpatrick and Bonet)
20. Mr. Bonet drafted the letter to HRD, the Mayor signed it and it was sent to HRD on August 7, 2017. HRD accepted the City's reason for bypassing the Appellant. (Testimony of Bonet)
21. Ultimately, the City appointed ten (10) Police Officers pursuant to the Certification who ranked below Montemor and bypassed him. (P.Hrg.Ex.)
22. Of the ten (10) appointees who bypassed the Appellant, none had driving records as problematic as the Appellant's. Three of the ten had no citations or accidents in their driver history. One candidate had one surchargeable accident in his driver history but no citations. Three of the ten candidates had three citations (of which 2015 was the most recent) and they were found responsible for two of the three citations they received. One candidate had seven incidents, the most recent of which was in April 2017, for which the candidate was found responsible on four occasions. One candidate had three surchargeable accidents in 2003, 2012 and 2014, one citation for improper equipment in 2009, one citation for a missing inspection sticker in 2013, and he was required to attend an NSC safe driver course in 2014 as a result of the incidents between 2012 and 2014. (Ex. 1; P.Hrg.Ex.)
23. The Appellant filed the instant appeal. (Administrative Notice)

Applicable Law

Pursuant to G.L. c. 31, § 27, a bypass occurs,

“... [i]f an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears

highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator. The administrator shall make such statement available for public inspection at the office of the department.
(Id.)

Upon an appeal of a bypass by a candidate for employment, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Comm'rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971)(quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. *See* City of Beverly v. Civil Serv. Comm'n, 78 Mass.App.Ct. 182, 189 (2010). In its review, the commission is to “find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). However, the Commission’s work “is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). Further, the commission does not ignore the previous decision of the appointing authority, but rather “decides whether 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.” Id. at 824 (quoting Watertown v. Arria, 16

Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)). Therefore, in deciding an appeal, the commission “owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” for the bypass. Beverly, 78 Mass.App.Ct. at 188. The Commission should not substitute its own judgment for that of an appointing authority. Id. (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965)); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Boston v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)). Rather, the Commission is charged with ensuring that the system operates on “basic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001).

The deference that the Commission owes to the appointing authority is “especially appropriate” in respect to the hiring of police officers. Beverly, 78 Mass.App.Ct. at 188. The Commission is mindful of the standard of conduct expected of officers of the law. *See* Dumeus v. Boston Police Dep’t, 24 MCSR 124 (2014) (finding that a police officer must be a model of good citizenship). An officer of the law “carries the burden of being expected to comport himself or herself in an exemplary fashion.” Mclsaac v. Civil Serv. Comm’n, 38 Mass. App. Ct. 473, 474 (1995). Police officers “voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

Analysis

The Respondent has established by a preponderance of the evidence that it had reasonable justification for bypassing the Appellant. The Respondent bypassed the Appellant based on his poor driving history. The City’s reasoning was sound – Police Officers regularly drive police department vehicles and, not unusually, do so under urgent circumstances and they must do so responsibly to ensure the public safety. A poor driving record alone can provide

reasonable justification for bypassing a Police Officer candidate. Olsen v. Town of Marshfield, 28 MCSR 447 (2015)(citing City of Beverly, 78 Mass.App.Ct. at 188).

By any account, the Appellant's driving history is sufficiently troublesome to be a valid cause for bypassing him. The Appellant asserts that much of his lengthy record involves the time that he was driving a moving truck, saying that he was targeted by police because he was driving a truck and that police set up speed traps to catch drivers where the speed limit drops. The Commission has ruled that the driver history of a Police Officer candidate should be considered in context, giving appropriate consideration when the candidate was driving for a living, as the Appellant did here for a number of years. *See, e.g., Stylien v Boston Police Department*, 31 MCSR 154 (2018); 31 MCSR 209 (2018). The Commission has further held that when a candidate's distant past includes negative attributes, such as poor driver histories or criminal records, the Commission may factor into its decision whether there is a nexus between a candidate's prior poor conduct and the job for which the appellant has applied as well as the candidate's current abilities. Morgan v Boston Police Department, 33 MCSR 131 (2020). However, the facts here indicate that the Appellant's poor driving record was not limited to the time he was driving a moving truck.

As shown above, the Appellant's poor record includes offenses throughout his driving career. During the period 2001, when the Appellant was eighteen (18) years old, to 2003, prior to obtaining his CDL and driving a truck for a living, the Appellant was found responsible for speeding twice, a seat belt violation and improper passing, and he was defaulted for having failed to timely pay the fines associated with these violations. The Appellant obtained a CDL and drove a moving truck from 2004 to 2014. In that period of time, the Appellant received nine (9) charges and was found responsible for six (6) of the charges: three (3) speeding tickets, one

highway violation (while driving his personal car) and his CDL was temporarily revoked. In the same time period, the Appellant was also defaulted on two (2) different occasions for failing to timely pay the fines associated with the violations he incurred, and he was in a surchargeable accident. After he gave up his CDL in 2014 and left the moving business, up until he applied to the LPD for employment as a Police Officer in 2017, the Appellant was charged with seven (7) violations and he was found responsible for six (6) of the charges: a lane violation, failing to stop, speeding, driving an unregistered vehicle, improper equipment and using a cell phone while driving out of state. In addition, between 2014 and 2017, the Appellant was required to attend the safety driving course on three (3) separate occasions for excessive driving violations and/or events to prevent the suspension of his license. Thus, the Appellant's poor driving record while driving the truck was preceded and followed by poor driving, establishing a long and continuing pattern of poor driving.

The Appellant makes other arguments in support of his appeal. First, he asserts that the memo written by Det. Murphy reporting the Appellant's driver history refers to someone else. However, Det. Murphy credibly explained in his testimony that he used a template to draft the memo regarding the Appellant and made one (1) typographical error, once referring in the memo to a previous candidate's name. In addition, both the Appellant and Det. Murphy testified that that was the only error in the memo and the driver history referenced in the memo is the Appellant's driver history. Next the Appellant argues that the out of state violations may have been dropped if he had appealed them but it was too costly to cancel work and fly to the state where the violation occurred. However, only three (3) of the Appellant's many violations took place in another state (one each in 2008, 2015 and 2016). Further, the Appellant argues that candidates who bypassed him had worse driver histories than him. However, as noted above,

eight (8) of the ten (10) candidates who bypassed the Appellant had few, or no violations in their driver histories. One (1) of the ten (10) candidates had eight charges since 2008 and he was found responsible for half of them. While that one candidate's driver history is not stellar, the Respondent could and did find that the Appellant's overall driver history was worse and warranted a bypass. One other candidate who bypassed the Appellant had eight charges since 2003 in his driver history and he was found responsible for half of them but he was also involved in three surchargeable accidents (in 2003, 2012 and 2014) and attended the national safe driving course once for excessive violations. While that candidate's driver history is questionable, the Respondent could and did find that the Appellant's overall driver history was worse and warranted a bypass. Thus, the Appellant's arguments lack merit. The Appellant did not argue, and there is no indication in the record, that there was any discriminatory bias against him or that any of the candidates who bypassed him and had problematic driving records benefitted from improper favoritism.

Conclusion

For all of the foregoing reasons, the Appellant's appeal, docketed G1-17-195, is hereby ***denied***.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on October 22, 2020.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:

Rodrigo Montemor (Appellant)

Christopher S. Feudo, Esq. (for Respondent)

Michele Heffernan, Esq. (HRD)