

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

Decision mailed: 8/21/09  
Civil Service Commission  
CB

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

**JOSEPH W. PAOLILLI,  
Jr.,**

*Appellant*

v.

**DEPARTMENT OF  
CONSERVATION AND  
RECREATION,**

*Respondent*

**Case No.: G2-06-108**

**DECISION**

After careful review and consideration, the Civil Service Commission voted at an executive session on August 20, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated June 6, 2009. The Commission received comments from the Appointing Authority on July 7, 2009, and comments from the Appellant on July 20, 2009. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *allowed*.

Pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of 1993, the Civil Service Commission orders the Human Resources Division (HRD) to take the following action:


The Commission directs that HRD to place the name of Joseph W. Paolilli at the top of the current and future certifications for the position of Environmental Police Officer D/Lieutenant within the Massachusetts Environmental Police for as long as it takes the Environmental Police to hire at least one Lieutenant.

Further, if the Appellant is selected for appointment, he shall receive a retroactive seniority date for civil service purposes only of April 20, 2006.

This retroactive seniority date is not intended to provide the Appellant with any additional and/or retroactive compensation and should not be used to determine time served in the position of police officer in regard to eligibility for any future civil service promotional examinations.

By vote of the Civil Service Commission (Bowman, Chairman -yes; Henderson - yes, Marquis - yes, Stein – yes and Taylor - no, Commissioners) on August 20, 2009.

A true record. Attest.



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Christopher C. Bowman  
Chairman

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:

Victor M. Asop, Esq. (for the Appellant)  
Frank E. Hartig, Esq. (for the Appointing Authority)  
John M. Marra, Esq. (HRD)  
Shelly L. Taylor, Esq. (DALA)

CORRECTED COPY

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

**Division of Administrative Law Appeals**

Appeal of:

**Joseph W. Paolilli, Jr.**  
Appellant

Docket Nos. G2-06-108  
DALA No. CS-08-87

**Department of Conservation and Recreation,**  
Appointing Authority

Appearance for Appellant:

**Victor M. Anop, Esq.**  
103 Bridle Path Road  
Chicopee, MA 01013

Appearance for Appointing Authority:

**Frank E. Hartig, Esq.**  
Assistant General Counsel  
Department of Conservation and Recreation

Administrative Magistrate:

**Shelly Taylor**

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CIVIL SERVICE COMMISSION

**SUMMARY OF RECOMMENDED DECISION**

Appointing authority failed to substantiate reasons – poor leadership ability and unacceptable past performance – given for bypassing applicant for Environmental Police Lieutenant position.

**RECOMMENDED DECISION**

Joseph W. Paolilli, Jr. ("Paolilli") filed this appeal pursuant to G.L. c.31, § 2(b) to contest an April 6, 2006 decision of the Executive Office of Energy and Environmental

Affairs, Office of Law Enforcement, bypassing him on Certified Civil Service List 2600002 to fill the position of Environmental Police Officer D/Lieutenant. I conducted a hearing on January 24, 2008 at the office of the Division of Administrative Law Appeals. James Hanlon, Massachusetts Environmental Police ("MEP") Director, and Roger Arduini, MEP Deputy Director, testified on behalf of the Appointing Authority. Paolilli, Officer Steven McAndrew and Lieutenant John Pasak, both of the Environmental Police, testified on behalf of the appellant. Twenty-nine exhibits were admitted into evidence. Both parties submitted post-hearing memoranda. There are three cassette tapes of the hearing.

#### **FINDINGS OF FACT**

1. The position sought by the applicant is entitled Environmental Police Officer D (Lieutenant) for the C6 Region in the Executive Office of Energy and Environmental Affairs Office of Law Enforcement. The Office of Law Enforcement is known as the Massachusetts Environmental Police. (Ex. 3; Hanlon Testimony)

2. The Environmental Police are responsible for enforcement of all the laws of the Commonwealth. The organization's primary focus is on those laws relating to natural resource management. (Paolilli testimony)

3. The position at issue was known on the job as the 'Charlie Six Zero Lt.'s position, and is the senior post in the C6 region. Following a reorganization of the agency, eight geographic regions were consolidated into four, with each region staffed with a Lieutenant at the top, a sergeant, and four to six line environmental police officers. The Charlie Six Zero Lieutenant job was one of the four Lieutenant spots. (Hanlon testimony)

4. There are inland geographical regions and coastal geographical regions within the agency. The C6 region is an inland region which includes metropolitan Boston and towns west and north, exclusive of any town touching coastal waters. There is no water in the C6 region. (Hanlon testimony; Paolilli testimony; Ex. 15)

5. The C6 Lieutenant position is based at Topsfield Regional Headquarters and the incumbent reports to Bruce Bennett, the Inland Bureau Chief. (Hanlon testimony; Ex. 15)

6. The incumbent of the Lieutenant position for all regions, including C6, is expected to reach out to stakeholders in the area such as sportsman councils, state agencies, landowner groups, snowmobiling and ATB clubs and the like. (Hanlon testimony)

7. James J. Hanlon led a selection panel to select a candidate from the Civil Service List. Hanlon testified as follows about what qualities he sought and why in filing the Lieutenant position at issue, testimony I credit. The C6 region includes areas which are very expensive to live in, and as a result of the high cost of living, there is a high turnover among officers in the region. This results in a constant influx of young, impressionable new officers. Because of these circumstances, leadership skills were a high priority for Hanlon in filling the lead job in the region. Hanlon felt it was important to have a Lieutenant with very strong leadership abilities, strong regard for the agency and its mission, as well as for the new officers, and that it was very important for the incoming Lieutenant to be able to instill a positive attitude in the young, often impressionable officers who would be coming into the region. (Hanlon testimony)

8. The C6 post is a supervisory position in which the incumbent is required to supervise the activities and enforcement efforts of junior positions, *i.e.* those in the position of Environmental Police Officer I and Environmental Police Officer II, assigned to the designated geographical region. (Ex. 3)

9. The duties of all Environmental Police Officers (“EPOs”) include patrolling an assigned area and enforcing laws pertaining to fish, game and natural resource conservation and protection. In addition to having all the knowledge, skills and abilities required of EPO I and EPO II positions, the incumbent of the EPO III Lieutenant position must have (1) ability to lead and coordinate the efforts of others in accomplishing assigned work objectives and (2) ability to plan subordinate training or instruction. (Ex. 3)

10. The March 1, 2006 Certified Civil Service List No. 2600002 for this post ranked the top three candidates as follows:

Anthony E. Wolski, Rank 94.00;

Joseph W. Paolilli, Jr., Rank 93.00; and

David R. Brouillette, 92.00

Ex. 1.

11. As the official responsible for filing the position, Hanlon designed a process that was intended to be fair and to treat each candidate consistently, presumably to ensure that each applicant received a fair shake. Hanlon convened a selection panel comprised of Roger Arduini, Deputy Director of the Office of Environmental Law Enforcement, Major Bruce Bennett, and Hanlon himself. The three officers developed interview questions and interviewed each of the top three on the civil service list, asking each the same set of questions. (Hanlon testimony; Exs. 4, 10, 11A, 13, 14)

12. The Panel interviewed the candidates on March 22, 2006, and in connection therewith Director Hanlon and Deputy Director Arduini filled out a form entitled "Personality Oral – Factor of Consideration" including the categories "Appearance and Poise," "Self-Expression," "Attitudes," "Responsiveness," "Quickness & Clearness of Comprehension," and an overall category entitled "Fitness for the Position." Hanlon and Arduini scored Brouillette higher than Paolilli. (Exs. 10, 11A, 13, and 14)

13. Bennett also prepared similar forms for each candidate but he reportedly lost them. (Arduini testimony)

14. In addition to their performance during the interview, the candidates were evaluated based on their personnel records, as well as the personal knowledge of the three members of the selection panel. Hanlon testified that each of the selection panel members was "familiar" with at least one of the applicants. (Hanlon testimony)

15. Hanlon has known Brouillette since before Brouillette became an environmental police officer. (Hanlon testimony)

16. According to records of performance evaluations for 2004, Paolilli received a total score of 28 in his 2004 performance evaluation (Ex. 20), and Brouillette received a total score of 21. (Ex. 16)

17. In 2005, Brouillette outscored Paolilli 28 to 18. (Ex. 17; Ex. 21). Comments in Brouillette's 2005 evaluation focused on such items as his effectiveness keeping the boats and equipment running, working the docks, his knowledge of marine fisheries and his training and expertise with navigation. (Ex. 17)

18. Paolilli served as a firearms instructor for the agency for over five years. He was Brouillette's firearms instructor. (Paolilli testimony)

19. In July, 2005, Paolilli received a written reprimand for failing to complete two employment background checks according to the MEP's standards. (Ex. 23; Hanlon testimony)

20. Hanlon explained that the background checks were part of a push to assist in the necessary pre-employment checks for the incoming class of Boston Police Academy Recruits, a task the MEP performed to assist another agency or agencies involved in the employment check process. (Hanlon testimony; Ex. 23)

21. Sergeant Steven McAndrew and Lieutenant John Pasak, both of whom had extensive experience working with Sergeant Paolilli, testified credibly that Paolilli had expertise in fish and game laws and demonstrated leadership of his subordinate officers. (McAndrew testimony; Pasak testimony)

22. Pasak testified that Paolilli had done an excellent job of managing the district when Pasak was away on extended absences. (Pasak testimony)

23. McAndrew testified that he and other officers looked to Paolilli for guidance and expertise in inland game and fishing laws. (McAndrew testimony)

24. The selection panel, and ultimately Hanlon himself, recommended Brouillette for the open post. Hanlon testified that this recommendation was unanimous and was based on the applicants' respective performance in the interviews, the personnel histories, and the panelists' own experience with the applicants. Regarding the interview, Hanlon testified that Paolilli did not come across as having the leadership qualities the panel was looking for – a positive attitude, energy and excitement about the new position;



based on his demeanor, the panel felt that Paolilli would be a very negative influence. Brouillette, in contrast to Paolilli, came across as extremely positive. In addition, the panel found nothing untoward in Brouillette's personnel file, whereas Paolilli had been reprimanded. Hanlon also noted, but did not articulate, that his own opinion of Brouillette, which was presumably positive given that he recommended Brouillette's appointment, was also a factor in the selection. (Hanlon testimony)

25. Hanlon testified that Wolski, the other applicant, also came off well in the interview process. Hanlon did not recommend him, however, because while the selection process was underway, a lawsuit against Wolski and the Commonwealth was also under way in which there was an allegation of sexual harassment of a subordinate officer. (Hanlon testimony; Ex. 2)

26. Hanlon's April 3, 2006 "Candidate Recommendation Memo" to Mary K. Sharkey, Assistant Secretary of Human Resources, Executive Office of Environmental Affairs, summarized his recommendation as follows.

a. Under the heading "Brief Reason," Hanlon wrote with respect to Wolski, "Not the most desirable candidate at this time due to [his] involvement in pending civil litigation." (Ex. 15)

b. With respect to Paolilli, Hanlon wrote under "Brief Reason," "Not the most desirable candidate due to the individual's past performance record."

c. In the section "Justification for the candidate selected," Hanlon wrote "Sgt. David Brouillette is the most desirable candidate at this time due to his past performance record and high score on the Civil Service examination for an Environmental Police Officer D/Lieutenant." (Ex. 15)

27. In an April 20, 2006 memo to John O'Leary, Chief Human Resources Officer, Hanlon wrote:

I am bypassing Anthony E. Wolski due to pending legal action against the Commonwealth in which Sergeant Wolski is named. I am bypassing Joseph W. Paolilli due to unacceptable past performance with the environmental police and the poor leadership ability he has displayed as a Sergeant.

Ex. 2.

28. As of the time of selection in 2006, Paolilli had served as an Environmental Police Officer since 1980 and had reached the rank of Sergeant by 1992. He was named Chief Armorer/Instructor from April, 1999 until November, 1994 and in this role, trained firearms instructors and officers, including Brouillette. (Paolilli testimony; Ex. 15; Ex. 26)

29. In July of 2000, Inland Bureau Chief Major Thomas Ricardi thanked Paolilli and two others on behalf of the officers in the inland bureau for his work training officers for firearms qualifications, writing "Your knowledge and training skills are a credit to yourselves and this Division." (Ex. 26)

30. Paolilli had more experience as a field officer than Brouillette. (Ex. 15)

31. Unlike Paolilli who worked primarily if not exclusively in inland regions, Brouillette's experience as an environmental police officer was exclusively in boating programs in marine regions. (Ex. 15)

32. Paolilli received a written reprimand in July, 2005 concerning an alleged failure to perform an assigned task of completing the investigation of candidates for the

Environmental Police. The reprimand was delivered by then Inland Bureau Chief Roger L. Arduini. (Ex. 23)

33. Sergeant Paolilli had performed the background checks in the past without objection and satisfactorily. (Hanlon testimony; Arduini testimony)

34. The selected applicant, David R. Brouillette joined the Department in 1992. From 1979 to 1992, he was a police officer in the Town of Ipswich. From 1992 to 1999, he was a District Officer in the North Coastal Bureau, M1 Region. From 1999 to 2000, he was an Officer in the Offshore Board Program. In 2000, he became Sergeant in the Offshore Boat Program. (Ex. 12)

## CONCLUSION

The Civil Service Commission must determine whether the appointing authority has sustained its burden of showing by a preponderance of evidence that there was reasonable justification for the decision at issue. *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 303 (1977). *Mayor of Revere v. Civil Ser. Comm'n*, 31 Mass. App. Ct. 315, 320 n.10, 321 n.11, 322 n.12 (1991). Reasonable justification 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." *Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928). *Commissioners of Civil Service v. Municipal Ct. of City of Boston*, 359 Mass. 214 (1971).

Under G.L. c. 31, § 2 (b), the preponderance of the evidence test requires a determination based on the evidence before the Commission of whether the reasons assigned for the bypass were more probably than not sound and sufficient. *Mayor of*

*Revere*, supra, 31 Mass. App. Ct. at 321. *City of Cambridge*, 43 Mass. App. Ct. at 304.

The Commission will not uphold a decision to bypass 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).

Guided by these standards, I conclude that the appointing authority has failed to meet its burden in this case. Although I credit the testimony of the MEP witnesses that there were good reasons for selecting Brouillette over Paolilli, the proffered reasons are not adequately supported by the evidence. The predominant rationale for choosing Brouillette is that his leadership skills were superior. There is virtually no evidence in the record, however, to test this assertion. All there is on this point are the recitals regarding observations of the interview panelists that Brouillette’s leadership ability and Paolilli’s lack thereof were self evident in their interview demeanor. While these observations may be relevant and accurately reported, they are so slimly articulated as to defy proof. That might be enough, if not for the fact there is as much or more evidence suggesting that Paolilli’s leadership qualities matched or exceeded Brouillette’s, including the testimony of their colleagues and the record of Paolilli’s professional expertise and achievements. In addition, there is considerable objective evidence that Paolilli’s other qualifications were equal to or better than Brouillette’s: he had significant experience working inland whereas Brouillette had none; and Paolilli had firearms expertise as well as professional experience as an instructor. On its face, this experience could be objectively viewed as evidence of leadership ability as well as other qualities relevant to the decision.

The reprimand of Paolilli for not fully completing two background checks is the other reason the MEP proffered for not selecting him. It is clear that Hanlon and others considered completion of the Boston Police Academy background checks critically important. What the record does not show, however, is whether Paolilli's failures were pertinent to his fitness for the Lieutenant position. It is undisputed that Paolilli is capable of properly completing a background check. The fact that he failed to do so during the push to assist in the Boston Police Academy recruitment, may be evidence of a crucial breach of duty, or it may be evidence that a minor breach caused significant embarrassment to the MEP. One cannot determine if these or other factors make the background check issue truly significant or pretextual.

Where, as here, the scales are at least evenly balanced with evidence of the two candidates' qualifications, the Appointing Authority cannot prevail. I therefore recommend that the Commission reverse the decision to bypass Sergeant Paolilli.

#### DIVISION OF ADMINISTRATIVE LAW APPEALS

Shelly Taylor  
Chief Administrative Magistrate

Dated:

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DIVISION OF ADMINISTRATIVE LAW APPEALS



Shelly Taylor  
Chief Administrative Magistrate

Dated:

**JUN 06 2009**