

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

TIMOTHY RIVET,
Appellant,

v.

G1-14-206

CITY OF LAWRENCE,
Respondent,

and

HUMAN RESOURCE DIVISION
Respondent

Appearance for Appellant:

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Commissioner:

Cynthia Ittleman, Esq.¹

DECISION

On August 28, 2014, the Appellant, Timothy Rivet (“Mr. Rivet” or “Appellant”), pursuant to G.L.c. 31, §2(b), filed this appeal with the Civil Service Commission (“Commission”), contesting the decision of the City of Lawrence (“Lawrence” or “Appointing

¹ The Commission acknowledges the assistance of Law Clerk Chris Windle in the drafting of this decision.

Authority”) to bypass him for original appointment to the position of police officer. On October 3, 2014, the state’s Human Resource Division (“HRD”) was added as a party since Mr. Rivet also contested HRD’s decision to approve his bypass and remove him from the eligible list pursuant to Personnel Administrator Rule (“PAR”).09(2). A Prehearing conference was held at the Commission on September 23, 2014. A full hearing was held at the Commission on November 17, 2014.² The witnesses were sequestered, except the Appellant. The hearing was digitally recorded and the parties were provided with a CD of the hearing³. The parties submitted proposed decisions. For reasons set forth herein, the appeal is allowed.

FINDINGS OF FACT:

Twenty-five (25) exhibits were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Frank Bonet, Personnel Director, City of Lawrence

Called by the Appellant:

- James Fitzpatrick, Interim Chief of the Lawrence Police Department (“LPD”)
- Scott McNamara, Captain, LPD
- Timothy Rivet, Appellant

Called by HRD:

- Regina Caggiano, Deputy Director of the HRD Civil Service Unit.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with G.L.c. 31 or any Commission rules taking precedence.

³ 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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

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

1. At the time of the Commission hearing Mr. Rivet was living in Lawrence MA. He is a non-veteran who has been employed as a Traffic Control Officer since 2003.⁴ (Testimony of Rivet)
2. Mr. Rivet's supervisor at the Traffic Control Officer position, Mr. Rodriguez, describes Mr. Rivet as dependable: "Shows up every day" and "does his job and does it well." (Exh. 5)
3. Mr. Rivet has worked part-time as either a special or reserve police officer in two nearby towns. He worked as a reserve police officer in West Newbury from 2005 until 2014 and has been working as a special police officer in Salisbury from 2006 through the time of the Commission hearing. While at the Salisbury Police Department, Mr. Rivet has worked on certain assignments with the Amesbury Police Department. (Testimony of Rivet)
4. The town of Salisbury described him as having "good interaction with suspects as well as the public." (Exh. 5)
5. As a special police officer with the Salisbury Police Department, Mr. Rivet has performed the same duties that a full-time police officer normally performs. (Exh. 18)
6. The town of West Newbury declined to renew its contract with Mr. Rivet due to his unavailability. However, West Newbury said that he did his job and got along well with his coworkers when he was there. (Exh. 5)

⁴ This position is under the supervision of the Lawrence Department of Public Works currently. (Testimony of Captain McNamara)

7. Mr. Rivet has completed basic police officer training through the Police Academy. (Exh. 12)
8. On June 15, 2013, Mr. Rivet took and passed the civil service examination for the position of police officer. (Exh. 3)
9. On December 23, 2013, Lawrence requested a Certification from HRD for the appointment of twelve (12) full-time police officers. (Exh. 3)
10. Mr. Rivet was ranked thirteenth (13th) on Certification # 01451 from which Lawrence ultimately appointed eight (8) police officers, one (1) of whom was ranked below Mr. Rivet.⁵ (Exh. 3)
11. The person who bypassed Mr. Rivet was a veteran who apparently had no negative background information. (Testimony of Bonet)
12. Mr. Rivet signed the Certification indicating that he would accept employment if offered and filled out an application. At or about that time, Lawrence began conducting background investigations on the candidates. (Testimony of Interim Chief Fitzpatrick)
13. During this police officer hiring process, the head of the LPD was Interim Chief Fitzpatrick (“Chief Fitzpatrick”), who had been appointed in September 2013. Prior to this police officer hiring process, Chief Fitzpatrick had not been involved with the hiring of new police officers. The last time that the LPD had requested a Certification for the

⁵ Appointments of entry level Police Officers in Lawrence are subject to the provisions of the Castro v. Beecher Federal Consent Decree as well as to the requirements of civil service law and rule. See Castro v. Beecher (Castro I), 334 F.Supp. 930 (D.Mass.1971); Castro v. Beecher (Castro II), 459 F.2d 725, 729 (1st Cir.1972); and Castro v. Beecher (Castro III), 365 F.Supp. 655, 660 (D.Mass.1973). As such, the Certification issued by HRD to Lawrence regarding police officer appointments is required to list a minority every fourth name. Mr. Rivet was bypassed by Ms. V, a veteran who was ranked higher in the original Certification but was moved *further down*, ironically, pursuant to the consent decree. Ms. V, who would have been in the 9th tie group, was therefore placed in the 14th position. As a consent decree community, Lawrence is required to submit its reasons for bypass of police officer candidates to HRD for approval prior to sending bypass notices to affected candidates. (Administrative Notice)

original appointment of police officers was over seven (7) years earlier.⁶ (Testimony of Chief Fitzpatrick)

14. In January 2014, Chief Fitzpatrick asked the Lawrence Personnel Department about the police hiring process. Because of the approaching deadlines for sending newly hired officers to the training academy, the Personnel Department told Chief Fitzpatrick to issue conditional offers of employment to candidates who passed a background check.

(Testimony of Chief Fitzpatrick)

15. After the Personnel Department told Chief Fitzpatrick to issue the conditional offers of employment, Chief Fitzpatrick asked the LPD background investigator if there were any major negative issues regarding any of the candidates who had applied. LPD needed to have prepared a list of the names of the selected recruits for the upcoming training academy by mid-February. Chief Fitzpatrick sent conditional offers of employment to applicants who had no glaring negative background issues, including Mr. Rivet, even though background investigations had not been completed. (Testimony of Chief Fitzpatrick)

16. Chief Fitzpatrick signed and sent Mr. Rivet a letter extending him a conditional offer of employment on February 7, 2014. However, the Appointing Authority in Lawrence is the Mayor, not the Chief of Police. (Testimony of Bonet; Exh. 4) Mr. Rivet took and passed the physical abilities test, the medical exam and the psychological evaluation.

(Testimony of Mr. Rivet and Mr. Bonet)

17. Mayor Rivera took office in early January 2014. It is unclear if Mayor Rivera or his predecessor, Mayor Lantigua, was in office when the Lawrence Personnel Department

⁶ Any Lawrence Police Officers hired after Chief Fitzpatrick was appointed but prior to the hiring process at issue here were lateral transfers. (Testimony of Chief Fitzpatrick)

told Chief Fitzpatrick to issue conditional offers to police officer candidates who passed their background checks. (Administrative Notice)

18. The background investigation reports were completed February 13, 2014. (Exh. 5)

19. Shortly after the conditional offers were sent, Frank Bonet (“Mr. Bonet”), the Lawrence Personnel Director at all pertinent times, informed newly elected Mayor Rivera that Chief Fitzpatrick had issued twelve (12) conditional offers. (Testimony of Bonet)

20. Chief Fitzpatrick went to speak with Mayor Rivera regarding the hiring process shortly after February 13, 2014. He spoke with the Mayor and members of his staff regarding the candidates. There were no questions regarding the conditional offers at this meeting. (Testimony of Chief Fitzpatrick)

21. The Mayor was upset because, after reviewing the budget, there were only sufficient funds to fill seven (7) positions. The Mayor was also upset that candidate X, a disabled veteran on the Certification, had not been given a conditional offer of employment⁷. The Mayor felt that not all of the candidates were being given equal treatment and that background investigation reports on candidates did not use a consistent format. (Testimony of Bonet)

22. The Mayor asked Mr. Bonet to inform candidate X that he (candidate X) should report for a physical exam, a medical test and a psychological screening. However, Lawrence did not produce documentation of a conditional offer of employment from the Mayor to candidate X or to anyone else.⁸ (Testimony of Bonet and Administrative notice)

⁷ Candidate X’s background indicated that he was involved in a recent criminal matter. (Testimony of Mr. Bonet)

⁸ Lawrence was unable to produce a copy of a written conditional offer documenting such an offer to candidate X, or to any other candidates to whom the Mayor may have issued conditional offers, prior to undergoing the physical examination.

23. The Mayor requested and reviewed each candidate's background investigation report.

(Testimony of Mr. Bonet)

24. In reviewing the candidates' background investigation reports, the Mayor discovered that

Mr. Rivet's personnel file (as a current Lawrence employee) was not included in Mr.

Rivet's background investigation report. The Mayor asked Mr. Bonet for Mr. Rivet's

personnel file. Within Mr. Rivet's personnel file, the Mayor discovered that there were

two warnings that were not mentioned in Mr. Rivet's background investigation report.

The Mayor asked Mr. Bonet to look into the warnings. (Testimony of Mr. Bonet)

25. Mr. Bonet then spoke with Mr. Rivet's supervisor at Traffic Control, Mr. Rodriguez, to

ask him about the complaint made to Traffic Control about the Appellant. Mr. Rodriguez

told Mr. Bonet that the incident involved a person who complained that Mr. Rivet used

foul language when issuing a parking citation in 2012 but that he did not have any more

information.⁹ Mr. Bonet conveyed this information to the Mayor. (Testimony of Mr.

Bonet)

26. Subsequently, Mr. Bonet told the Mayor that he agreed with Chief Fitzpatrick that hiring

Mr. Rivet was a good choice and that appointing Mr. Rivet would also save money since

Mr. Rivet had already completed police academy training. (Testimony of Mr. Bonet)

27. At some point after the Mayor received Mr. Rivet's personnel file, Mr. Bonet spoke with

Mr. Rivet. Mr. Rivet informed Mr. Bonet that he had been in a motorcycle accident in

April 2012 and that he had been out on leave to recover from his injuries, although Mr.

Bonet had not specifically asked him about this matter. (Testimonies of Bonet and Rivet)

⁹ In its July 22, 2014 letter to HRD, Lawrence wrote, regarding the parking ticket complaint against Mr. Rivet, that Mr. Rodriguez "investigated the situation and determined a verbal warning was needed." (Exh. 8) However, since Mr. Rivet credibly testified that he was unaware of any such investigation and there is no other evidence supporting Lawrence's statement in this regard, I find that Lawrence did not establish by a preponderance of the evidence that it conducted an investigation of the complaint against Mr. Rivet.

28. There is no evidence that Mr. Rivet was interviewed for the position of police officer at LPD in 2014. (Testimonies of Rivet and Bonet)

29. In a letter dated May 7, 2014 and signed by the Mayor, Lawrence informed Mr. Rivet as follows,

The purpose of this letter is to notify you that you have been bypassed for appointment to the position of Police Officer for the City of Lawrence. The reason for the bypass is your current employment performance as a Traffic Control Officer with the City of Lawrence. There are a couple of disciplinary letters in your current personnel file associated with an infractions (sic) of failing to reporter an incident with citizen (sic) regarding hostile confrontation; abusive language and, another discipline of abuse of allotted sick, vacation and personal leave.

You have a right to appeal this determination by filing your appeal , in writing, within sixty (60) calendar days of receipt of this notice, with the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108.

You can visit the Commission's website at www.mass.gov/csc to download an appeal form and receive information regarding filing fees. Please file a copy of this correspondence and all enclosures with your appeal to the Commission.

(Exh. 6)

However, Lawrence had not yet submitted its bypass reasons to HRD for approval. A copy of the May 7, 2014 letter to Mr. Rivet was sent to HRD. (Exhs. 6 and 9; Administrative Notice)

30. In a letter dated May 23, 2014 from HRD to Lawrence, HRD asked Lawrence to provide the dates of the matters upon which the bypass of Mr. Rivet was based and to describe how those matters relate to the job of police officer. (Exh. 23)

31. By letter dated June 17, 2014, Lawrence responded to HRD stating that it intended to bypass Mr. Rivet based on the warnings against Mr. Rivet concerning the parking ticket complaint and the alleged leave abuse.¹⁰ (Exh. 7) Also in this June 17, 2014 letter from Lawrence to HRD, Lawrence wrote,

¹⁰ The June 17, 2014 letter from Lawrence to HRD asserts, regarding the written warning to the Appellant concerning his purported leave abuse, that Mr. Rivet was previously verbally warned about his absences in May

... the City of Lawrence has not only bypassed these individuals for Police Officer, but is requesting that they be removed for (sic) any selection list of the City of Lawrence. ...

(Id.)

32. On July 3, 2014, HRD wrote back to Lawrence, requesting additional information about the warnings cited by Lawrence in its June 17, 2014 letter and stating that the information Lawrence had provided “did not relate to the position”. (Exh. 24)

33. On July 22, 2014, Lawrence responded to HRD, stating the reasons that Mr. Rivet was bypassed adding, with respect to the alleged leave abuse, that “showing up for work is an essential function of the job[]” (Exh. 8); and with respect to the parking ticket complaint, “past behavior indicates future behavior.” (Exh. 8) Also in this July 22, 2014 letter from Lawrence to HRD, Lawrence wrote, in part,

As stated in my previous letter, the appointing authority has requested that the bypass (sic) individuals be removed from the Lawrence Civil Service Police entry list or any future certifications.

(Id.)

34. On August 7, 2014, HRD sent Mr. Rivet a letter stating, in part,

Enclosed please find copies of the letters from the Appointing Authority for the Lawrence Police Department stating your bypass reasons associated with the above certification for the position of Police Officer.

The Human Resources Division has determined that these reasons are acceptable for bypass.

You have a right to appeal this determination by filing your appeal, in writing, within sixty calendar days of receipt of this notice, with the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108. You can visit the Commission’s website at www.mass.gov/csc to download an appeal form and receive information regarding filing fees. Please file a copy of this correspondence and all enclosures with your appeal to the Commission. ...

(Exh. 9)

2012 but there is no supporting evidence of such verbal warning. (Exh. 7) Therefore, Lawrence failed to establish by a preponderance of the evidence that it issued Mr. Rivet a verbal warning regarding his leave use prior to the writing warning in this regard.

The enclosures referenced in the August 7, 2014 letter from HRD to Mr. Rivet were two letters that Lawrence had sent to HRD on June 17, 2014 and July 22, 2014. (Exhs. 7 and 8)

35. Also on August 7, 2014, Mayor Rivera sent an email message to Regina Caggiano (“Ms. Caggiano”), the Deputy Director of HRD’s Civil Service Unit, requesting an opportunity to speak with her. Thereafter, the Mayor and Ms. Caggiano had a phone conversation during which Ms. Caggiano informed the Mayor that, based on the reported severity of the bypass reasons, removal of candidates from the eligible list may be an option. Ms. Caggiano sent the Mayor an email message confirming their phone conversation. (Administrative Notice) Thereafter, the Mayor continued communication, both written and over the phone, with Ms. Caggiano regarding removal of the bypassed candidates from the eligible list, including Mr. Rivet. (Caggiano Affidavit; Administrative Notice)
36. Mr. Rivet duly appealed his bypass to the Commission on August 28, 2014. (Exh. 3)
37. Sometime in mid-September, HRD removed the bypassed candidates, including Mr. Rivet, from the eligible list and the Mayor was so informed via a phone conversation with Ms. Caggiano. There was no written correspondence from HRD to the Mayor confirming removal of the bypassed candidates, including Mr. Rivet, from the eligible list. (Caggiano Affidavit)
38. Lawrence asked HRD for a Certification for the hiring of four (4) additional police officers on September 19, 2014. Mr. Rivet’s name did not appear on the Certification that HRD issued to Lawrence in response to this request, indicating that Mr. Rivet’s name had been removed from the Certification. (Exh. 10)

39. Mr. Rivet was not informed that his name had been removed from the Certification until October 1, 2014, which was after he filed the instant appeal. (Exh. 11)

Verbal Warning regarding Complaint

40. On February 1, 2012, Mr. Rivet was given a verbal warning slip by his Traffic Control supervisor, Mr. Rodriguez, for failing to report an encounter with a complainant during which he had allegedly used abusive language. This is the only complaint against Mr. Rivet in the nine (9) years he had been working as a Traffic Control Officer up until that point in time. (Exh. 1)

41. Mr. Rivet denies using abusive language when he spoke to the complainant. He believes that the incident happened near a school sometime about the time students were being dismissed for the day. The incident involved a woman whom Mr. Rivet had asked to move her parked car away from a fire hydrant three times before eventually issuing her a parking ticket. After being issued the ticket, the woman yelled at Mr. Rivet, claiming that she knew the Mayor and she used “colorful words.” (Testimony of Rivet)

42. Mr. Rivet refused to sign the verbal warning slip issued by Mr. Rodriguez and he grieved it under the pertinent collective bargaining agreement.¹¹ As a result of Mr. Rivet’s conversation with the city attorney and union representative regarding this matter, and based on Mr. Rivet’s understanding that the complaint had not been investigated¹², Mr. Rivet believed that the City did not take any disciplinary action against him. (Testimony of Rivet)

¹¹ There is no information in the record about the result of the grievance.

¹² See Fact 25 and n. 9.

Sick Leave Warning

43. On April 14, 2012, Mr. Rivet was in a motorcycle accident and he was out of work for the following eleven (11) weeks, not returning to work until sometime in June.

(Testimony of Rivet)

44. Mr. Rivet informed his supervisor, Mr. Rodriguez, of the accident shortly after it occurred. Mr. Rodriguez told him to do what he needed to do to get better. While he was out of work due to this injury, Mr. Rivet used all of his allotted sick, vacation and personal leave time. After he ran out of paid time off (“PTO”) and was still recovering, Mr. Rivet was unpaid for any work days he was absent. Lawrence did not inform Mr. Rivet about the Family and Medical Leave Act (“FMLA”)¹³ within five (5) days of the day he reported his injury to his employer, or any time thereafter, which may have afforded Mr. Rivet additional leave time, albeit unpaid. (Testimony of Mr. Rivet; Exh. 19; FMLA).

45. Mr. Rivet’s personnel file also contained a September 24, 2012 written warning regarding his alleged abuse of sick time for having taken more than ten (10) unpaid days off over his yearly allotted paid time off. (Exh. 2)

46. Mr. Rivet was unaware of the written warning regarding sick time until April 2014. Therefore, he did not sign it. There is no indication that Mr. Rivet saw the warning and refused to sign it. Mr. Rivet only became aware of the warning when Mr. Bonet showed it to him, saying that it was one of the reasons for his bypass. Having been unaware of the

¹³ I take Administrative Notice of FMLA, 29 U.S.C. §2601, *et seq.* The statute provides up to twelve (12) weeks of unpaid leave to employees who are employed by an employer with fifty or more employees and when an employee has a serious health condition rendering the employee unable to perform one or more essential functions of the job. <http://www.fed-law.com/articles/fmla.htm>. Covered employers are required to provide FMLA information to eligible employees within five (5) days of the date that an employee notifies the employer of the need for FMLA leave. <http://www.dol.gov/whd/regs/compliance/whdfs28d.pdf>.

warning which, by then, was approximately two years old, Mr. Rivet was unable to grieve it. (Testimony of Rivet)

47. In April 2014, upon hearing about the warning for alleged sick leave abuse, Mr. Rivet spoke to his union representative, who told him that if he had no further infractions the warning regarding sick leave should have been removed one year after it was issued. The warning was not removed from Mr. Rivet's file until July 17, 2014, or approximately two years after the warning was supposedly put in Mr. Rivet's file. (Testimony of Rivet; Exh. 27)

Applicable Civil Service Law

"Basic merit principles" is a tenet of civil service law. It is defined in G.L. c. 31, § 1, in part, as,

(a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.

(Id.)

G. L. c. 31, §2(b) authorizes the commission "[t]o hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations...." Id.

PAR.09(1) addresses the manner in which candidates are to be selected from a Certification. It provides, in part,

[w]hen names have been certified to an appointing authority ... and the number of appointments or promotional appointments actually to be made is n , the appointing authority may appoint only from among the first $2n+1$ persons named in the certification willing to accept appointment. ...

(Id.)

The authority to bypass a candidate for original appointment to a permanent civil service position is set forth in G.L. c. 31, § 27, which states, in pertinent part,

If 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.

(Id.)

Upon a bypass appeal, 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)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). Further, “[t]he commission does not act without regard to 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)).

An appointing authority may also ask the HRD Administrator to remove a candidate’s name from a Certification, thereby precluding consideration of a candidate from any Certifications issued based on the eligible list. Specifically, PAR.09(2) provides, in part,

[i]f an appointing authority concludes the appointment of a person whose name has been certified to it would be detrimental to the public interest, it may submit to the administrator a written statement giving in detail the specific reasons substantiating such a conclusion. The administrator shall review each such statement, and if he agrees, he shall remove the name of such person from the certification and shall not again certify the name of such person to such appointing authority for appointment to such position. ...
(Id.)(emphasis added)

This requires the Appointing Authority to establish that the person could only bring harm to the public by being hired. See Radochia v City of Somerville, 25 MCSR 559 (2012) (PAR.09(2) removal should not be used as a routine substitute for bypassing an individual). This action should be reserved for exceptional circumstances, situations that are on their face disqualifying, i.e. felony convictions, “significantly adverse driving histories, extremely poor employment histories, etc.” Connelly v Boston Police Dep’t, 21 MCSR 111, 113 (2008).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. Beverly, at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone as a new... [employee] than in disciplining an existing tenured one.” See City of Attleboro v. Mass. Civil Serv. Comm’n, C.A. BRCV2011-00734 (MacDonald, J.)(citing Beverly at 191). The Commission is charged with ensuring that the

system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by 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’n of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)).

Police officers are held to a higher standard warranting particular consideration of police officer candidates by appointing authorities. Indeed, relevant case law imposes special obligations upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion. See, e.g., Attorney General v. McHatton, 428 Mass. 790, 793-74 (1999) and cases cited; Falmouth v. Civil Service Comm’n., 61 Mass.App.Ct. 796, 801-802 (2004); and Police Commissioner v. Civil Service Comm’n., 22 Mass.App.Ct. 364, 371 (1986).

Analysis

Two questions are presented in this case. The first is whether, by a preponderance of the evidence, Lawrence has established that it had reasonable justification to bypass Mr. Rivet and seek his removal from the Certification. The second issue is whether HRD should have approved the Appellant’s bypass and request to remove Mr. Rivet from the Certification. Mr. Rivet contends that, because he had received an offer of employment, the only barrier to his employment at LPD was if he failed the physical abilities test, the medical exam or the psychological evaluation; since he passed each of those examinations, he avers, he should have been hired. Failing that argument, Mr. Rivet contends that the Appointing Authority did not

conduct a reasonably thorough review of the two warnings purportedly issued to Mr. Rivet, on which it relied to bypass him. Further, Mr. Rivet contends that HRD erred in approving the Appointing Authority's request to remove him from the Certification because the standard for removing a candidate pursuant to PAR.09(2) is higher than the standard for bypassing a candidate and that neither of those standards was met here. Lawrence argues that it relied on the two warnings appropriately in that they showed that Mr. Rivet abused sick leave and he had poor interactions with the public, both of which would reflect negatively upon the LPD. HRD states that in making PAR.09(2) determinations, it " ... heavily relies on the Appointing Authority to provide truthful and accurate reasons in support of their (sic) claim that the Candidate's appointment would be detrimental to the public interest (Caggiano Testimony)." HRD's Proposed Decision, p. 6.

Mr. Rivet's Bypass

There can be little question that the police officer hiring cycle at issue here was flawed and that it occurred during a transition in the Mayor's office. Sometime during the mayoral transition, Chief Fitzpatrick wanted to hire a number of police officers. This was his first opportunity to hire from an examination since he was appointed interim Chief of Police in 2013. Chief Fitzpatrick began the process by accepting applications and beginning the background investigation process. In January 2014, Chief Fitzpatrick contacted the Lawrence Personnel Department to inquire about the next step in the process, explaining that the next police training academy would take place soon. The Lawrence Personnel Department gave the Police Chief the go-ahead to make conditional offers to candidates whose investigations had been completed. Instead, the Chief made conditional offers, including one to Mr. Rivet, before the investigations were completed, asking the LPD investigator only if he or she had found any negative

background information up to that point in time. Soon thereafter, Mayor Rivera was informed of the conditional offers issued by the Police Chief. He expressed concerns about the police officer hiring process, stating that there was inadequate funding to hire as many police officers as were being considered, that not all candidates were being treated fairly (e.g. candidate X), that different background investigation forms were being used, and that there were no personnel files for the police officer candidates who were otherwise employed by Lawrence. Upon obtaining the personnel file of Mr. Rivet, the Mayor found two warnings. The background investigation of Mr. Rivet did not mention these warnings. Chief Fitzpatrick supported Mr. Rivet's candidacy, adding that his appointment would save Lawrence the cost of training since Mr. Rivet had already received police training through other employment.

Lawrence did not conduct a reasonably thorough review of the reasons for Mr. Rivet's bypass. First, it never interviewed Mr. Rivet, depriving him of the opportunity to address the warnings. Lawrence did ask the Appellant's Parking Ticket Supervisor, Mr. Rodriguez, about the complaint by someone whom the Appellant ticketed. However, Mr. Rodriguez could provide no additional information about the incident. Mr. Rivet recalled the incident, credibly denying being hostile or verbally abusive to the complainant. Mr. Rivet believes that the complaint was from a woman he ticketed after repeatedly asking her to move her car away from a fire hydrant. Mr. Rivet further credibly testified that he specifically consulted the Appointing Authority's attorney and his union representative at the time of the complaint and he never heard anything further from them indicating that discipline would be issued. Mr. Rivet has worked part-time with three (3) different local police departments near Lawrence and he has been described as having good interactions with the public as well as with suspects. This is one incident in a long history of work without a single other complaint issued against him, or disciplinary matter,

whether at Lawrence or his part-time positions at other police departments. A single warning in a long work history is not sufficient to support a bypass. Shackford v. Boston Police Dep't., 27 MCSR 466 (2014)(a single unrefuted incident in which a dispatcher with eight years of experience used profanity on a 911 call, which resulted in a one-day suspension is not sufficient to bypass a police officer candidate). The Appointing Authority has the burden to show by a preponderance of the evidence that there was reasonable justification to bypass the Appellant. The single complaint against Mr. Rivet involving a parking ticket, about which Lawrence obtained no further information from Mr. Rivet's supervisor and about which it did not even question Mr. Rivet, does not establish by a preponderance of the evidence that Lawrence had reasonable justification to bypass Mr. Rivet, nor to remove his name from the Certification based on the parking complaint and HRD should not have approved both the bypass and removal on this basis.

The second matter on which the Appointing Authority relied to bypass the Appellant was the warning stating that the Appellant had abused sick leave. Lawrence complains that the Appellant used his annual ten (10) days of leave within the first six (6) months of the year. There is no dispute that Mr. Rivet ran out of paid leave time in 2012. The time period during which the Appointing Authority alleges that the Appellant abused his leave followed an April 2012 motorcycle accident. Shortly after the accident, the Appellant notified Mr. Rodriguez, his supervisor, about it and about his considerable injuries. Mr. Rodriguez told Mr. Rivet to take the time he needed to get better. In fact, the Appellant was out of work for eleven (11) weeks from his injuries; whatever time he took after his paid leave ran out was unpaid. While Mr. Rodriguez certainly could not authorize the Appellant to take unending leave, the Appellant may well have been eligible for leave under the federal Family Medical Leave Act at that time. Unfortunately,

the Appointing Authority never informed the Appellant of the opportunity to apply for it. In addition, the sick leave warning did not even come to the Appellant's attention until this hiring process, whereupon Lawrence agreed that it would be removed from his personnel file since more than one year had passed since it was issued and there were no new allegations against him. Further, there is no evidence that the Appointing Authority conducted a reasonably thorough review of this matter. There is no indication that Mr. Rivet had been accused of abuse sick leave prior to his motorcycle accident. In fact, his supervisor, Mr. Rodriguez, had reported that the Appellant is a great worker and always on time. For these reasons, Lawrence has failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant and to remove his name from the Certification for sick leave abuse and HRD should not have approved both the bypass and removal on this basis.

Removal of Mr. Rivet from Certification

The Appointing Authority based its request to remove the Appellant from the Certification on the same reasons it relied on to bypass him. A request for removal of a candidate from a Certification requires the Appointing Authority to establish that maintaining a candidate's name on the Certification would be detrimental to the public interest. Such requests are reserved for exceptional circumstances, such as matters that are disqualifying on their own, such as felony convictions and extremely poor employment histories. Lawrence's request to remove the Appellant from the Certification is simply based on the fatally flawed reasons for bypassing him. As noted above, the two (2) warnings here, Lawrence's failure to conduct a reasonably thorough review of the warnings and failure to provide the Appellant an opportunity to respond to these matters, as well as the lack of any other complaints against Mr. Rivet over a considerable history of public employment including employment as a par-time police officer in

two (2) other Police Departments in the area, do not constitute reasonable justification of the bypass. In addition, the two (2) warnings on which the removal request is based do not qualify as facially disqualifying or an extremely poor employment history warranting removal. While HRD has considerable discretion in making such determinations under G.L. c. 31, § 5, the findings here indicate that allowing Mr. Rivet's name to remain on the Certification was not "detrimental to the public interest" and that the removal of his name from the Certification was erroneous, reflecting the highly questionable manner in which these events occurred.

Conclusion

Accordingly, for the reasons stated above, the appeal under Docket No. G1-14-206 is hereby ***allowed***. Pursuant to the Commission's authority under Chapter 310 of the Acts of 1993, HRD shall:

- Place the name of Timothy Rivet at the top of any current or future Certifications for the position of Lawrence Police Officer until he is appointed or bypassed.
- If Mr. Rivet is appointed as a Lawrence Police Officer, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 01451. This retroactive civil service date is not intended to provide Mr. Rivet with any additional pay or benefits, including creditable service towards retirement.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on August 20, 2015.

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 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:

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