

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JASON WALKER,
Appellant

v.

Case No. G1-12-223

CITY OF LOWELL,
Respondent

Appearance for Appellant:

Kevin C. Merritt, Esq.
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Boston, MA 02109

Appearance for Respondent:

Kimberley A. McMahon, Esq.
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375 Merrimack St., 3rd Floor
Lowell, MA 01852

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Mr. Jason Walker (hereinafter “Appellant” or “Mr. Walker”), filed a timely appeal with the Civil Service Commission (hereinafter “Commission”) against the City of Lowell (hereinafter “City” or “Appointing Authority”) on August 1, 2012, contesting the City’s decision to bypass him for original appointment to the position of permanent full-time police officer with the Lowell Police Department (hereinafter “LPD” or “Department”). A pre-hearing conference was held on August 28, 2012 at the offices of the Commission. A full hearing was held on October 17, 2012 in the Mayor’s Reception Hall at Lowell City Hall. The witnesses were sequestered. The

¹ The Commission acknowledges the assistance of Law Clerk Beverly J. Carey, Esq., in the drafting of this decision.

hearing was digitally recorded and the parties were provided with copies of the recording. The parties submitted post-hearing memoranda on November 16, 2012. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Based on the thirteen (13) exhibits entered into evidence, the stipulations of the parties, the testimony of:

for the City:

- Detective Daniel Desmarais, LPD;
- Superintendent Kenneth Lavallee, LPD;

for the Appellant:

- Mr. Jason Walker, Appellant

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

1. At the time of the hearing, Mr. Walker was twenty-six (26) years old and a resident of Lowell. (Testimony of Appellant)
2. Mr. Walker is a veteran of the U.S. Armed Services. Mr. Walker was on active duty with the Army from 2005 until approximately February 6, 2010. At the time of the hearing, he was a reservist in the Army and served as an instructor. (Testimony of Appellant)
3. In September 2010, Mr. Walker took the Police Officer Civil Service Exam and achieved a score of ninety-two (92). (Stipulated Fact; Joint Submission)
4. Mr. Walker's name appeared on Certification Number 201374, dated February 22, 2012, to the City for the position of permanent full-time police officer for consideration in the 2012 hiring cycle. (Ex. 3)

5. In or about December 2010, prior to December 11, 2010, Mr. Walker met an individual named Mr. L in the vicinity of a basketball court in Lowell, MA. Mr. L informed Mr. Walker and others in the area that he sold marijuana. Mr. Walker and Mr. L exchanged phone numbers. (Testimony of the Appellant)
6. Shortly after the initial meeting between Mr. L and Mr. Walker took place, Mr. Walker called Mr. L to arrange to buy marijuana from him. Mr. L told Mr. Walker he could purchase marijuana from him at 275 Wilder Street, located near the intersection of Middlesex Street and Wilder Street. (Testimony of the Appellant)
7. On or about December 11, 2010, Mr. Walker was involved in an incident with two detectives from the LPD. (Stipulated Fact)
8. On or about December 11, 2010, LPD Detectives Daniel Desmarais and David Lavoie were working in the LPD Special Investigations Section (hereinafter "SIS"). Their primary focus was the enforcement of the Narcotics Law, G.L. c. 94C. The detectives worked in plain clothes and operated unmarked cruisers while they conducted surveillance in the Highlands section of the City. (Testimony of Det. Desmarais; Ex. 1)
9. At approximately 8:30 PM on or about December 11, 2010, while conducting surveillance in the Dover Square area, Det. Desmarais observed a Mitsubishi Lancer automobile making circular routes around Wilder Street and Dover Street. Detective Lavoie followed the car due to its suspicious driving pattern and observed the car stop in front of 275 Wilder Street. Shortly after the vehicle stopped, the driver met up with an individual, later identified as Mr. L, and engaged in behavior consistent with a drug transaction. Although Det. Lavoie attempted to follow the Lancer following the exchange, due to traffic conditions he was unable to do so. However, the Detectives decided to conduct surveillance on 275 Wilder

Street to further corroborate their belief that Mr. L was engaging in drug-related activity from this residence. (Testimony of Det. Desmarais; Ex. 1)

10. Shortly after, the officers observed a red Chevy Cavalier, later discovered to be operated by Mr. Walker, slow down in front of 275 Wilder Street and then pull into a parking lot near 281 Wilder Street. (Testimony of Det. Desmarais; Ex. 1)

11. After Mr. Walker parked, Det. Desmarais observed Mr. L walk to the car and enter it. Approximately thirty (30) seconds later, Mr. L exited the vehicle and Mr. Walker drove away. (Testimony of Det. Desmarais)

12. Detective Desmarais followed the Cavalier towards an intersection and observed that it slowed but did not stop at a stop sign before turning at the four-way stop at the intersection of Wilder Street and Middlesex Street. Mr. Walker took a quick right turn onto Middlesex Street, followed by another right onto Branch Street. Detective Desmarais decided to make traffic stop of the Cavalier and further investigate. (Testimony of Det. Desmarais; Ex. 1)

13. When Det. Desmarais activated the lights and siren of his unmarked cruiser, he noticed the upper torso of the Cavalier's driver bending down in a manner consistent with putting something under the driver's seat. This raised Det. Desmarais' suspicions. (Testimony of Det. Desmarais; Ex. 1)

14. Detective Desmarais stopped the Cavalier driven by Mr. Walker at approximately 220 Branch Street. (Exs. A & 1; Testimony of Det. Desmarais)

15. Detective Desmarais approached the Cavalier and asked Mr. Walker for his license and registration, which Mr. Walker provided. Detective Desmarais also asked Mr. Walker where he was coming from, to which Mr. Walker responded that he was going to visit his friend but did not end up meeting him. (Testimony of Det. Desmarais)

16. Detective Desmarais then confronted Mr. Walker with his observations of Mr. Walker's meeting with Mr. L, an individual Det. Desmarais and his partner had under surveillance for drug related activity. At this point, Mr. Walker became cooperative and admitted that he did meet up with an individual he knew only as Lou and did indeed purchase a small bag of marijuana. Mr. Walker acknowledged that he placed it under the seat when he was pulled over. (Testimony of Det. Desmarais)
17. Detective Desmarais retrieved the small bag of marijuana from under Mr. Walker's seat. The amount of marijuana was much less than one (1) ounce. Detective Desmarais estimated its weight to be between one half (1/2) to one (1) gram. (Testimony of Det. Desmarais)
18. During this time, Det. Desmarais and Det. Lavoie had a conversation with Mr. Walker, who informed him that he was trying to become a police officer in Lowell. One of the officers told Mr. Walker he should make better decisions and allowed him to leave the scene. Mr. Walker was not arrested, nor was he issued a citation. (Testimony of Det. Desmarais; Ex. 1)
19. Shortly thereafter, the officers returned to the vicinity of 275 Wilder Street to continue conducting surveillance. (Testimony of Det. Desmarais; Ex. 1)
20. At some point between approximately five (5) and twenty (20) minutes following the officers' return to the vicinity of 275 Wilder Street, Det. Lavoie observed Mr. L exit from 275 Wilder Street and began to walk on foot towards Middlesex Street. At the same time, Det. Desmarais noticed that Mr. Walker had returned and was driving towards Mr. L. Mr. Walker pulled into a driveway at 259 Wilder Street and Mr. L immediately began to walk towards the Cavalier. Both Detectives expressed disappointment to each other that Mr. Walker had returned. Before Mr. L could reach Mr. Walker, Det. Lavoie placed Mr. L

under arrest for the distribution of a Class D substance (marijuana) and the distribution of a Class D substance in a school zone. (Exs. 1 & 8; Testimony of Det. Desmarais)

21. While Mr. L was being taken into custody, Det. Desmarais approached Mr. Walker and asked him what he was doing back in the area. Mr. Walker claimed that he believed Det. Desmarais had his driver's license. Detective Desmarais said that he did not have Mr. Walker's license and that he was not supposed to be there. Mr. Walker did a brief search around his vehicle and then left the area. (Testimony of Det. Desmarais)
22. Mr. Walker eventually found his driver's license in his vehicle, between the driver's seat and the door. (Testimony of the Appellant; Ex. 12)
23. Based on Det. Demarais' observations of Mr. Walker returning and parking in the vicinity of 275 Wilder Street and Mr. L heading towards Mr. Walker's vehicle, it is more likely than not that there was going to be another transaction between Mr. Walker and Mr. L before the officers intervened. (Testimony of Det. Desmarais)
24. Detective Lavoie filed a police report regarding Mr. L's arrest. The report includes some of the information concerning Mr. Walker's involvement in Mr. L's arrest, however Mr. Walker was not the subject of the arrest report, nor was Mr. Walker arrested or charged. (Testimony of Det. Desmarais; Ex. 1)
25. While conducting a background check of Mr. Walker for the 2011 hiring cycle, a detective with the LPD discovered Det. Lavoie's police report concerning the December 11, 2010 incident. (Joint Submission)
26. In or about early 2011, during the 2011 hiring cycle, Mr. Walker was selected to interview with the Superintendent² of the LPD, Kenneth Lavallee, as a candidate for the position of police officer. Superintendent Lavallee is involved in the LPD's hiring process and is the

² The terms Superintendent and Chief are used interchangeably in the LPD.

City's final decision-maker as to which candidates are selected. (Testimony of Superintendent Lavallee)

27. During this interview, which took place in or about May 2011, during the 2011 hiring cycle, Superintendent Lavallee wanted to speak with Mr. Walker directly to determine whether he should be appointed. Superintendent Lavallee asked Mr. Walker questions about the December 2010 incident. Superintendent Lavallee believed that Mr. Walker was candid about the purchase of marijuana but Superintendent Lavallee found Mr. Walker not credible when he claimed that he returned to Wilder Street to find his missing license. (Testimony of Superintendent Lavallee)

28. During the interview with Superintendent Lavallee, Mr. Walker had the opportunity to give his side of the story regarding the December 11, 2010 incident and explain himself. (Testimony of the Appellant)

29. Superintendent Lavallee also met with Det. Desmarais and Det. Lavoie to discuss the December 11, 2010 incident and subsequent police report during the 2011 hiring cycle. (Testimony of Superintendent Lavallee)

30. After interviewing Mr. Walker, speaking with Det. Desmarais and Det. Lavoie, and reviewing the relevant documents during the 2011 hiring cycle, Superintendent Lavallee determined that Mr. Walker was not a suitable candidate with the LPD. (Testimony of Superintendent Lavallee)

31. On or about May 7, 2011³, Superintendent Lavallee requested, via letter, that the Massachusetts Human Resources Division (hereinafter "HRD") approve the bypass of Mr.

³ Although the letter, submitted as Exhibit 6, is dated May 7, 2010, both Mr. Walker and Superintendent Lavallee testified that that date was likely a typographical error and that the letter had in fact been issued on or about May 7, 2011.

Walker. The letter described the December 2010 incident involving Mr. Walker in significant detail and states, in pertinent part:

The background investigation conducted by my staff has shown a pattern of conduct, which indicates Mr. Walker, is unsuitable for a job as a police officer. My staff and I are of the collective opinion that Mr. Walker has not demonstrated the level of responsibility and character that is required as a police officer in the City of Lowell.

(Exhibit 6)

32. In a letter dated June 3, 2011, Superintendent Lavalley notified Mr. Walker that he was not selected for appointment for the 2011 hiring round. The letter to HRD (Ex. 6) was enclosed.

(Ex. 7)

33. Mr. Walker did not appeal the 2011 bypass because he did not have the funds for a lawyer and did not feel that he would be successful on his own. (Testimony of the Appellant)

34. Mr. Walker was not selected to interview with the LPD during the 2012 hiring cycle. (Testimony of the Appellant)

35. On or about May 21, 2012, Superintendent Lavalley sent a written request to HRD to approve the bypass of Mr. Walker during the 2012 hiring round. (Ex. 8). This letter followed the same format and its content was nearly identical, other than the Certification Number and date, to the letter that was sent regarding Mr. Walker's bypass during the 2011 hiring cycle. (Ex. 6)

36. In a letter dated on or about June 4, 2012, Superintendent Lavalley notified Mr. Walker that he was not selected for appointment to the LPD in the 2012 hiring round. The letter to HRD (Ex. 8) was enclosed. (Ex. 9).

37. Mr. Walker filed a timely appeal with the Commission on or about August 1, 2012. (Administrative Notice)

38. In his affidavit, signed on or about July 15, 2012, Mr. Walker states that he “immediately and candidly admitted” to having purchased marijuana. (Ex. 12) While Mr. Walker did eventually admit to the purchase of marijuana, he was not initially truthful with Det. Desmarais when asked where he had been and if he had met with anyone. At the hearing before the Commission, Mr. Walker admitted that he had initially denied purchasing marijuana. (Testimony of Det. Desmarais; Testimony of the Appellant)
39. In accordance with the City’s Drug/Alcohol Policy, the “unlawful use, possession, distribution, dispensation, cultivation or manufacture of a Controlled Substance (drugs and/or alcohol), while on the job . . . is prohibited.” (Ex. 11)
40. While there is some discrepancy as to whether Mr. Walker returned to the vicinity of Wilder Street after five (5) minutes, as stated in Superintendent Lavallee’s letter to HRD (Ex. 8), or twenty (20) minutes, as noted in the arrest report (Ex. 1), it does not change Superintendent Lavallee’s reasons for bypassing Mr. Walker. (Testimony of Superintendent Lavallee)

DISCUSSION

Applicable Law

The role of the Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Comm’rs of Civil Serv. v. Municipal Ct. of Bos., 349 Mass. 214 (1971). Pursuant to G.L. c. 31, § 2(b), bypass appeals must be determined by a

preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Serv. Comm’n, 31 Mass. App. Ct. 315 (1991); G.L. c. 31, § 43.

Appointing authorities are rightfully granted wide discretion when choosing individuals from eligible candidates on a certified civil service list. The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but 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.” Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983); see Comm’rs of Civil Serv. v. Municipal Ct. of Bos., 369 Mass. 84, 86 (1975); see Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003). However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Commission to act. Cambridge, 43 Mass. App. Ct. at 304.

The Commission is also mindful of the standard of conduct expected of officers of the law. “An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Serv. Comm’n, 38 Mass.App.Ct. 473, 474 (1995). Further, “[p]olice 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).

The Respondent's Argument

It is the City's position that there was reasonable justification to bypass Mr. Walker for appointment to the LPD based on his conduct on or about December 11, 2010, when he admittedly purchased marijuana from a dealer, was stopped by detectives with the LPD, and later returned to the scene of the purchase, which he had been told was under surveillance. The City argues that Mr. Walker's behavior demonstrated a pattern of conduct involving poor judgment, disrespect for law enforcement, questionable character, and lack of candor.

The Appellant's Argument

Mr. Walker claims that the 2012 bypass violated G.L. c. 94C, § 32L⁴ because it amounted to a "penalty, sanction, or disqualification" for the possession of less than one ounce of marijuana. Mr. Walker also points to limited differences between the arrest report and the Superintendent's letter to HRD to suggest that the documents do not support his bypass. In addition, Mr. Walker suggests that there are procedural flaws relating to his bypass because he received the City's bypass letter before HRD approved his bypass.

Analysis

A preponderance of the evidence indicates that the City had reasonable justification to bypass Mr. Walker for appointment to the position of police officer.

Superintendent Lavalley's May 21, 2012 letter to HRD requested approval for Mr. Walker to be bypassed as a result of the December 11, 2010 incident, in which Mr. Walker admitted to purchasing marijuana from a drug dealer. (Ex. 8) In the letter, Superintendent Lavalley states that when Mr. Walker returned to the location where he purchased marijuana, his

⁴ Pursuant to G.L. c. 94C, § 32L, the possession of less than one ounce of marijuana shall only be a civil offense and is not subject to "any other form of criminal or civil punishment or disqualification." In addition, "neither the Commonwealth nor any of its political subdivisions or their respective agencies . . . may impose any form of penalty, sanction, or disqualification" for an individual possessing one ounce or less of marijuana. G.L. c. 94C, § 32L.

claim that he had returned for dropped paperwork (more specifically, his driver's license) was not credible and the LPD detectives believed that Mr. Walker had returned in an attempt to purchase more marijuana. As a result of the information the LPD obtained about Mr. Walker during the 2011 hiring cycle, Superintendent Lavallee concludes that Mr. Walker is "unsuitable for a job as a police officer" and "has not demonstrated the level of responsibility and character that is required as a police officer" in the City.

Despite Mr. Walker's argument to the contrary, the bypass did not constitute punishment for the mere possession of marijuana. Rather, Mr. Walker's involvement in the incident demonstrated, *inter alia*, poor judgment, a lack of candor, and disrespect for law enforcement, all of which the City was allowed to consider in deciding whether to hire Mr. Walker, especially in view of the higher standard to which police officers are held. Moreover, the December 2010 incident occurred the first time Mr. Walker was seeking employment as a police officer with the City during the 2011 hiring cycle. As a result, he knew or should have known that purchasing marijuana and ignoring police instruction to leave the area of the marijuana purchase, which was under active surveillance, would not bode well for his application to become a police officer. In addition, Mr. Walker was not immediately truthful with Det. Desmarais when he was initially asked where he had been and if he had met with anyone. It was not until Det. Desmarais shared his observations of Mr. Walker and Mr. L that Mr. Walker became candid and admitted to purchasing marijuana. Furthermore, when Mr. Walker returned to the location where he had purchased the marijuana, five (5) to twenty (20) minutes after he was stopped by the LPD officers, Mr. Walker's explanation for the reason he returned did not appear to be truthful to the LPD officers. Given that Mr. Walker had been pulled over on Branch Street and that Det. Desmarais credibly testified that he had returned Mr. Walker's license to him, Det. Desmarais

knew that Mr. Walker's license was not at the Wilder Street location. As Mr. L turned to approach Mr. Walker's vehicle, it appeared likely that another drug transaction between Mr. Walker and Mr. L was about to occur. In addition, Mr. Walker had already been informed by the detectives that they were conducting surveillance in the area and was told to leave after he had been stopped.

Integrity, credibility, and the ability to follow rules and regulations are essential characteristics of police officers. Based upon the LPD's policies regarding drug use, Superintendent Lavallee had reasonable concerns about Mr. Walker's possession of marijuana. In addition, Mr. Walker's failure to be immediately forthcoming with Det. Desmarais and the reason he provided for returning the vicinity of Wilder Street were cause for concern with respect to Mr. Walker's credibility. Mr. Walker's return to the location where he knew the LPD officers were conducting surveillance was irresponsible and demonstrated a lack of respect for law enforcement and poor judgment. Mr. Walker's presence disrupted the officers and because drug transactions can be violent, potentially placed Mr. Walker and the officers at increased risk. Mr. Walker's involvement in the December 2010 incident demonstrated a pattern of behavior that is unsuitable for the position of police officer and provides reasonable justification for the bypass here.

Mr. Walker's claims that there were inconsistencies between the arrest report and Superintendent Lavallee's letter to HRD are unpersuasive, as is the argument that the bypass was inappropriate on procedural grounds.

CONCLUSION

For the foregoing reasons, Mr. Walker's appeal under Docket Number G1-12-223 is hereby *denied*.

Civil Service Commission

Cynthia A. Ittleman, Esq.
Commissioner

By vote of the Civil Service Commission by a 4-0 vote (Bowman, Chairman; Ittleman, McDowell, and Stein, [Marquis – absent] Commissioners) on February 20, 2014.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in 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.

Notice:

Kevin C. Merritt, Esq. (for Appellant)
Kimberley A. McMahon, Esq. (for Respondent)
John Marra, Esq. (HRD)