

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

PATRICK WALLACE,
Appellant

v.

G1-07-162

BEVERLY POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

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294 Washington Street: Suite 654
Boston, MA 02108

Respondent's Attorney:

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191 Cabot Street
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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31 § 2(b), the Appellant Patrick Wallace (hereinafter "Wallace" or "Appellant") seeks review of the Personnel Administrator's (HRD) decision to accept the reasons of the Beverly Police Department (hereinafter "Appointing Authority" or "City"), bypassing him for original appointment to the position of police officer. A full hearing was held on July 11, 2008 at Beverly City Hall, and the testimony of one unavailable witness was taken via conference call on August 11, 2008. All of the witnesses, with the exception of

the Appellant, were sequestered. Three (3) tapes were made of the proceedings and are retained by the Civil Service Commission (hereinafter "Commission.")

FINDINGS OF FACT:

Seven (7) exhibits were entered into evidence at the hearing. Based on the exhibits submitted at the hearing and the testimony of the following witnesses:

For the Appointing Authority:

- John A. Cassola, retired Police Chief, City of Beverly;
- David Richardson, Detective, Beverly Police Department;
- John X. DiVincenzo, Captain, Beverly Police Department;
- Alan Peterson, Captain, Beverly Police Department;
- Pauline Teixeira, Human Resources Director, City of Beverly;
- William Page, Sergeant, Beverly Police Department;
- Timothy Hegarty, Lieutenant, Beverly Police Department; (testimony via conference call);

For the Appellant:

- Patrick Wallace, Appellant;

I make the following findings of fact:

1. The Appellant took and passed an open competitive civil service examination, conducted by HRD in 2005, for the position of permanent reserve police officer. (Stipulated Fact)
2. On or about December 8, 2005, the City made a requisition to HRD for a certified list of eligible candidates from that examination for the appointment of thirteen (13) positions of permanent reserve police officer. (Stipulated Fact)
3. On or about January 18, 2006, HRD issued the City Certification 251293 of named candidates, with an instruction to select thirteen (13) qualified candidates from the highest 27 willing to accept appointment (Stipulated Fact)

4. The City then conducted background investigations of the candidates named on the certification list. The City then disqualified five (5) candidates as a result of the background investigations. (Stipulated Fact)
5. In April 2006, the City conducted interviews of the twenty-two remaining candidates by an interview panel consisting of seven (7) members. Interviews of candidates for appointment are part of the City's routine hiring process. The Appellant was one of the twenty-two candidates interviewed by the panel. (Stipulated Fact)
6. Eleven (11) candidates of the twenty-two remaining were rejected by the City as unqualified due to their performance during the interviews. (Stipulated Fact)
7. The City has never taped any of their hiring interviews. (Stipulated Fact)
8. The City provided the Appellant with discovery. Specifically, the City provided an answer to his Propounded Interrogatories that included the reasons for bypass of the Appellant, the name and title of each of the seven members of the Interview Panel and the ten questions asked of each of the interviewed candidates by the Interview Panel. (Stipulated Fact)
9. Eleven (11) candidates were hired by the City. The City filed an Authorization of Employment Form (Form 14) with HRD for ten named candidates on June 22, 2006 and for one named candidate on March 27, 2007. (Stipulated Fact)
10. Five (5) of the appointed candidates appeared lower on the certification than the Appellant. Therefore, the Appellant was bypassed for appointment to the position of permanent reserve police officer. (Stipulated Fact)
11. The City made selections of eleven (11) candidates instead of thirteen (13) to fill the positions in its original requisition. (Stipulated Fact)

12. The City did file with HRD reasons for the selections made and the reasons for the bypass of certain candidates (including the Appellant), by candidates lower on Certification 251293. However, the Commission was not provided with the original statement of reasons proffered by the City as justification for bypassing the Appellant. (Stipulated Fact)
13. HRD sent an email message to the City on July 11, 2006 referencing the city's previous bypass reasons. That email listed the candidates' names, along with comments next to each name of the appointed and bypassed candidates. These comments reference the adequacy of the stated reasons contained in the original statement of reasons filed by the City. The comment next to the Appellant's name was, "expand bypass ... information used." (Stipulated Fact)
14. On December 21, 2006, HRD wrote a letter to the City in response to its November 21, 2006 letter. The letter stated in reference to the Appellant: "Patrick Wallace - bypass - the expanded information is not strong enough for bypass action". (Stipulated Fact)
15. Eleven (11) out of seventeen (17) candidates in 2003 and eleven (11) out of twenty-two (22) candidates in 2006 were bypassed by the city for appointment, due to their interview performance. (Stipulated Fact)
16. On January 10, 2007, the City sent a letter of clarification to HRD in response to HRD's December 21, 2006 letter providing additional information on three candidates other than the Appellant. (Stipulated Fact)
17. On January 10, 2007, the City sent a second letter of clarification to HRD providing additional information regarding the Appellant as reasons for his bypass. The reasons given for the Appellant's bypass were:

"Mr. Wallace's interview answers indicated a propensity for untruthfulness and unwillingness to explicitly perform the

functions of a police officer. Mr. Wallace indicated that he would lie and cover for other officers rather than report the truth. Therefore, it was determined he lacked the necessary character traits to be an effective police officer.” (Stipulated Fact)

18. At the time of the hearing, Chief John Cassola (hereinafter “Chief Cassola”) was retired from the Beverly Police Department. He had served the department for over thirty (30) years, beginning employment as a patrol officer and rising through the ranks to position of Chief in 2002. (Testimony of Chief Cassola)

19. Chief Cassola, as Appointing Authority, as had been regularly done by the department over the years, formed a panel to interview all the candidates from the certification list that had expressed an interest in appointment. (Testimony of Chief Cassola)

20. The Chief formed an interview panel consisting of the following:

- i. Captain Alan Petersen, Beverly Police Department, Patrol Division Commander;
- ii. Lieutenant Timothy Hegarty, Beverly Police Department, Shift Commander;
- iii. Sergeant William Page, Beverly Police Department, Training Officer;
- iv. Detective David Richardson, Beverly Police Department, Detective;
- v. Captain John X. DiVincenzo, Beverly Police Department, Chief of Detectives (observer to panel interviews; and
- vi. The Chief

(Testimony of Chief Cassola, Detective David Richardson, Captain John X. DiVincenzo, Captain Alan Peterson, Human Resources Director Pauline Teixeira, Sergeant William Page, and Lieutenant Timothy Hegarty)

)

21. A list of ten (10) questions was prepared by the panel and ultimately all interviewed candidates were asked these same ten questions. (Testimony of Chief Cassola, Detective David Richardson, Captain John X. DiVincenzo, Captain Alan Peterson, Human Resources Director Pauline Teixeira, Sergeant William Page and Lieutenant Timothy Hegarty)

22. Question No. 4, asked of all candidates, was the following:

“You are on patrol and sent with your partner to an alarm at the Richdale store. You arrive and go to check the rear of the store. Your partner finds an unsecured door in the front of the store and tells you this via his portable radio. He tells you to come into the store. As you enter the store you observe your partner, a twenty-five year veteran, behind the front counter. You then see him take two lottery tickets off the shelf and put them in his pocket. The rest of the store appears secure. You and your partner clear the call and resume patrol. He never mentions the tickets. What do you do?” (Exhibit 3)

23. Question No. 4 was designed to force prospective candidates to think on their feet before the panel and was additionally designed to place pressure on the candidate in the context of the interview. (Testimony of Chief Cassola, Testimony of Lt. Hegarty)
24. Although the question has no right and no wrong answer, a specific answer by a candidate might be cause for concern. (Testimony of Chief Cassola)
25. The Appellant was interviewed by the entire panel in the offices of the detective division of the Beverly Police Department on April 25, 2006. (Testimony)
26. All seven members of the interview panel and the Appellant testified before the Commission. Their testimony regarding their recollection of the Appellant’s answer to question #4, referenced above, is detailed below. (Testimony)

Testimony of Chief Cassola

27. In regard to the Appellant’s response to Question 4 during the interview, Chief Cassola testified before the Commission that: “he (the Appellant) stated that if his partner took...a lottery ticket he wouldn’t do anything about it; he wouldn’t report it; he indicated to us that he was not a rat.” Chief Cassola testified that he recalls the Appellant’s answer at the time being “so wrong”, “shocking” and “just not acceptable”. (Testimony of Chief Cassola)
28. Chief Cassola did not take any written notes during the interview. He did not speak to anyone in the police department in preparation for his testimony before the Commission. (Testimony of Chief Cassola)

29. Prior to serving as Police Chief, Chief Cassola was a long-time member of the local police union. Chief Cassola testified that he knew the Appellant's father, now deceased, as a friend and union leader in the Beverly Fire Department for at least 30 years. He testified that the fact that the Appellant's father was a former union leader in Beverly played no role in the decision to bypass the Appellant for appointment as a reserve police officer. (Testimony of Chief Cassola)

30. Chief Cassola was a good witness and I found his testimony to be credible. He is the consummate professional with a quiet and unassuming demeanor. He had a good recall of the interview in general and specifically to the Appellant's answer to Question 4. I found his comments regarding his friendship with the Appellant's father to be sincere, thus contradicting any suggestion that he had an ulterior motive for bypassing the Appellant or misrepresenting the Appellant's answer to Question 4. (Testimony, demeanor of Chief Cassola)

Testimony of Detective David Richardson

31. David. Richardson (hereinafter "Det. Richardson") has been a police officer with the Beverly Police Department for thirteen (13) years and has served as a detective for seven (7) years. (Testimony of Det. Richardson)

32. In regard to the Appellant's response to Question 4 during the interview, Detective Richardson testified before the Commission that: "he (the Appellant) stated he would take no action against his partner". Det. Richardson took this to mean that the Appellant would be "going along with his partner" and not taking any corrective action. (Testimony of Det. Richardson)

33. Det. Richardson does not recall taking any written notes during the interview. He did not speak to anyone in the police department in preparation for his testimony before the Commission. (Testimony of Det. Richardson)

34. As a police officer, Detective Richardson is a member of the local police union. He was not asked if he had ever known the Appellant's father. (Testimony of Det. Richardson)

35. Detective Richardson was a good witness and I found his testimony to be credible. He is a "no-nonsense, all-business" professional who offered straightforward answers to the questions posed to him both during his direct testimony and cross-examination. He had a good recall of the interview in question and his answers had all the indicia of reliability. (Testimony, demeanor of Det. Richardson)

Testimony of Captain John DiVincenzo

36. Captain John DiVincenzo (hereinafter "Capt. DiVincenzo") has been the Captain in charge of criminal investigations in the Beverly Police Department for the past seven years and has been employed by the Beverly Police Department for more than twenty-six years. (Testimony of Capt. DiVincenzo)

37. In regard to the Appellant's response to Question 4 during the interview, Capt. DiVincenzo testified before the Commission that: "he (the Appellant) said....he wouldn't rat his partner out". (Testimony of Capt. DiVincenzo)

38. Capt. DiVincenzo did not take any written notes during the interview. He did not speak to anyone in the police department in preparation for his testimony before the Commission. (Testimony of Chief Cassola)

39. Capt. DiVincenzo has been a member of the local police union for twenty-six years. He testified that he knew the Appellant's father as "a hard-fighting union member...who I

respected very much ...”. When asked if he thought the fact that the Appellant’s father was an active union leader played any role in the selection process, Capt. DiVincenzo, looking directly at the Appellant, stated, “absolutely not, I think everyone thought the world of your Dad.” (Testimony of Capt. DiVincenzo)

40. Capt. DiVincenzo was a good witness and I found his testimony before the Commission to be credible. He has a personable demeanor and I found his comments regarding the Appellant’s late father to be sincere and heartfelt. There was nothing in his testimony suggesting that he had any ulterior motive for testifying against the Appellant. (Testimony, demeanor of Capt. DiVincenzo)

Testimony of Captain Alan Peterson

41. Captain Alan Peterson (hereinafter “Capt. Peterson”) has been a police officer in the City of Beverly for over 30 years and has served as a Captain / Assistant to the Chief for the past eight years. (Testimony of Capt. Peterson)

42. In regard to the Appellant’s response to Question 4 during the interview, Capt. Peterson testified before the Commission that: “his (the Appellant’s) response was that ‘I would not report the theft of lottery tickets to a superior’; he would not ‘rat out’ a partner...or bring it to a supervisor’s attention.” (Testimony of Capt. Peterson)

43. Capt. Peterson did take written notes during the interview and those notes were entered as Exhibit 4. Part of those hand-written notes state, “Quest. #4 – Bad answer would not “rat out partner”. Capt. Peterson testified that he wrote those comments during the interview. (Exhibit 4)

44. During cross-examination, Capt. Peterson took umbrage at the suggestion that he may have added the above-referenced hand-written comments sometime after the interview to buttress

his testimony before the Commission. He testified that he was never asked to produce his notes prior to being requested to testify before the Commission. (Testimony of Capt. Peterson)

45. Capt. Peterson testified that he has been a member of the local police union for over 30 years.

He never knew the Appellant's father. (Testimony of Capt. Peterson)

46. Capt. Peterson was a good witness and I found his testimony before the Commission to be credible. He struck me as a sincere, deliberative gentleman and I was not surprised to see him shake the Appellant's hand prior to exiting the hearing room. I find that his handwritten notes, entered as Exhibit 4, were taken contemporaneously with the interview and the comments regarding the Appellant's answer to Question 4 were not added by Capt. Peterson at a later date. (Testimony, demeanor of Capt. Peterson)

Testimony of Lieutenant Hegarty

47. Timothy Hegarty (hereinafter "Lt. Hegarty") has been a police officer in the City of Beverly for approximately twenty-two (22) years and has been the lieutenant in charge of the evening shift for the past seven (7) years. (Testimony of Lt. Hegarty)

48. In regard to the Appellant's response to Question 4 during the interview, Lt. Hegarty testified before the Commission that: "Mr. Wallace responded that he would not do anything or not tell anyone...not tell his supervisor." Lt. Hegarty said the Appellant's response was "kind of shocking" to him and that the Appellant was the only candidate interviewed who stated that he would do absolutely nothing. (Testimony of Lt. Hegarty)

49. Lt. Hegarty testified that he did take written notes during the interview and that he gave those notes to Sergeant Page. (Testimony of Lt. Hegarty)

50. Lt. Hegarty testified that he has been a member of the local police union for the past 22 years. He “knew of” the Appellant’s father, but did not know him personally. (Testimony of Capt. Peterson)
51. Although Lt. Hegarty’s testimony was taken via telephone conference call, as opposed to in-person, I found his answers to be straightforward, plausible and consistent with the majority of prior witnesses for the Appointing Authority. (Testimony of Lt. Hegarty)

Testimony of Sergeant Page

52. William Page (hereinafter “Sgt. Page”) has been a sergeant for the Beverly Police Department since 2002 and he is currently the patrol supervisor two days per week and the officer-in-charge two days per week. (Testimony of Sgt. Page)
53. In 2005, Sgt. Page was the “training sergeant”, responsible for coordinating all training for the police department and assisting with hiring of reserve police officers. (Testimony of Sgt. Page)
54. Sergeant Page was unable to recall any aspect of the 2006 interview with the Appellant and did not recognize the Appellant, who was sitting at the same table at the hearing before the Commission. He does not remember what the Appellant’s answers were to any of the questions, including Question 4. (Testimony of Appellant)
55. Sgt. Page testified that he recalls taking notes on a yellow writing pad, but does not know what he did with those notes. (Testimony of Sgt. Page)

Testimony of Pauline Teixeira

56. Pauline Teixeira (hereinafter “Ms. Teixeira”) has been the Human Resources Director for the City of Beverly for the past four (4) years. (Testimony of Ms. Teixeira)

57. Ms. Teixeira testified that she has no independent memory of the Appellant's interview, attributing this to a two-year time span between the time of the interview and her testimony before the Commission. (Testimony of Ms. Teixeira)
58. Although Ms. Teixeira did take notes during the interview, she took no notes regarding the Appellant's answer to the interview question that is the subject of this bypass appeal. In regard to many other candidates' responses to this question, she did take notes indicating the candidates' responses such as: "would report it"; "talk to superior"; "not sure of his answer"; "confront – go to his superior"; "tell supervisor"; "won't work for him"; "not a clear answer"; "would pay for ticket". In regard to her notes regarding Mr. Wallace and three other candidates, however, Ms. Teixeira did not take any notes regarding the candidates' responses. (Testimony of Ms. Teixeira and Exhibit 5)

Testimony of Appellant

59. Patrick Wallace testified that his father was a firefighter in Beverly until 1995 and that his father served as a local union president for over twenty years. According to the Appellant, his father "didn't get along with the current mayor" as a result of various issues relating to collective bargaining negotiations. (Testimony of Appellant)
60. In regard to his recollection of the answer he gave to Question 4 during the interview, the Appellant's testimony was strikingly divergent from those Appointing Authority witnesses that had a memory of the interview. (Testimony of Appellant)
61. The Appellant testified before the Commission that, in response to Question 4, he told the interview panel that, "either my partner had the choice of turning himself in or I would turn him in." According to the Appellant, a member of the interview panel then asked him if his response would be different if he knew his partner was two weeks shy of retirement, to which

the Appellant testified that he answered “no” to the interview panel. Also according to the Appellant, a member of the interview panel then asked him if his response would be different if his partner scratched the lottery ticket in question, won \$50,000 and offered to split it with the Appellant. The Appellant testified that, in response to this second follow-up question, he told the panel that he would still turn his partner in. The Appellant testified that “not ratting out an officer” is not something that is “in my vocabulary.” (Testimony of Appellant)

62. The Appellant testified that he has no personal knowledge that any of the panelists, including the Police Chief, who is the Appointing Authority, had a personal animus against him or his late father. (Testimony of Appellant)

63. Viewed independently from the testimony of five of the Appointing Authority witnesses who had a recollection of the interviews, the Appellant’s testimony before this Commissioner appeared plausible and had a ring of truth to it. Given the huge divergence in their testimony, however, either the Appellant is being untruthful in his testimony before the Commission or *five* Appointing Authority witnesses, including a former Police Chief, a Captain, a Lieutenant, a Sergeant and a Detective are being untruthful. Even after a careful review of the Appellant’s testimony, my finding regarding the high credibility of these five Appointing Authority witnesses has not changed. Further, in order for the testimony of these five sequestered witnesses, who offered consistent testimony before the Commission, to be untruthful, I would need to find that there was collusion among all five of them and, in one case, the altering of a document (Capt. Peterson’s interview notes). I make no such finding. (Testimony, Credibility Assessments)

CONCLUSION

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. Civ. 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 by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civ. Serv. v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31 § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a 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. Civ. 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 a certified list of eligible candidates on a 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 Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (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 at 304.

This appeal rests almost entirely on the credibility of the Appellant and five Appointing Authority witnesses who had a recollection of the interview process¹. It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

For the reasons stated in the findings of fact, I accept the testimony of the five Appointing Authority witnesses who had a recollection of the interview process as truthful. Therefore, I conclude that, in response to a question designed to gauge the ethical standards of the candidates, the Appellant failed by stating that he would not report a fellow officer if he observed him steal two lottery scratch tickets from a convenience store while on patrol.

The Appellant’s answer was unacceptable and inconsistent with the high standards required of police officers. “Police work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer.” See Falmouth v. Civ. Serv. Comm’n, 61 Mass. App. Ct. 796, 801 (2004); citing Cambridge, *supra* at 303.

¹While Ms. Teixeira had no recollection of the interview with the Appellant, I did review her interview notes regarding the Appellant and several other applicants. The absence of any specific notes in regard to the Appellant’s (and three other candidates’) responses to the question that is the subject of this bypass appeal, did not lead me to the conclusion that the Appellant did not make the statements attributed to him by five other Appointing Authority witnesses.

Having concluded that the Appellant did answer the interview question in a manner that calls into questions his ethical standards, the Beverly Police Department made a valid exercise in discretion based on sound policy considerations to bypass him. Further, despite the Appellant's suspicion that the bypass was related to alleged animosity between the Mayor of Beverly and his late father, I found no evidence that the decision of the Police Chief was based on political or personal bias or objectives unrelated to basic merit principles. Since the Police Chief, not the Commission, bears the responsibility for how his or her police officers conduct themselves on the job, the Commission should not overrule the Police Chief's hiring decisions if they are supported by reasonable justification. Boston Police Dep't v. Monroe and the Massachusetts Civ. Serv. Comm'n, Suff. Sup. Ct., No. 01-0725 (March 19, 2002)

For all of the above reasons, the Appellant's appeal filed under Docket No. G1-07-162 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on November 6, 2008.

A true record. Attest:

Commissioner

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:

Galen Gilbert, Esq. (for Appellant)

Robert Munroe, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)