

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place – Room 503
Boston, MA 02108
(617) 979-1900

ANTONY YAN,
Appellant

v.

G1-19-099

LOWELL POLICE DEPARTMENT
Respondent

Appearance for Appellant:

Antony Yan
Pro Se

Appearance for Respondent:

Stacie M. Moeser, Esq.
Assistant City Solicitor
City of Lowell Law Department
375 Merrimack Street, 3rd Floor
Lowell, MA 01852-5909

Commissioner:

Cynthia A. Ittleman

DECISION

The Appellant, Antony Yan, acting pursuant to G.L c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from the decision of the City of Lowell (Lowell), reviewed and approved by the Massachusetts Human Resources Division (HRD), to bypass him for appointment as a Police Officer with the Lowell Police Department (LPD). A pre-hearing conference was held on May 13, 2019 and a full hearing was held on June 24, 2019 at the Armand Mercier Community Center in Lowell.¹ The Respondent submitted six (6) exhibits (AA Ex. 1-6) and the Appellant submitted one (1) exhibit at hearing (App. Ex. 1). At my request,

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

Lowell submitted three (3) post-hearing exhibits (AA PH Ex. 1-3). The hearing was digitally recorded, with copies provided to the parties.² The witnesses were sequestered. Both parties submitted proposed decisions. For the reasons stated below, the appeal is denied.

FINDINGS OF FACT

Based on the exhibits entered into evidence, the testimony of the following witnesses:

Called by the Appointing Authority:

- Captain James Hodgdon, Commanding Officer of Professional Services Standards, LPD
- Lieutenant James Fay, Officer in Charge of Training, LPD;

Called by the Appellant:

- Antony Yan, Appellant;

taking administrative notice of all documents logged in the case file, considering pertinent law, and drawing reasonable inferences from the credible evidence, a preponderance of the credible evidence establishes the following facts:

1. The Appellant, Antony Yan (Appellant or Mr. Yan), served in the Marine Corps for three years and eight months. He and his wife have two young children. At the time of this appeal, he supported his family by staying at home with them while he attended college courses at Middlesex Community College. (Appellant Testimony).
2. In addition to English, the Appellant can speak and understand Khmer. (AA Ex. 6).
3. The Appellant took the Civil Service examination on March 25, 2015, and passed. He applied to be a police officer in the Lowell Police Department during the 2015-2016 hiring

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to use the copy of the recording to provide the court with a written 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.

cycle. (Stip. Facts; AA Ex. 1; Appellant Testimony; Fay Testimony).

4. The LPD conducted a background investigation of the Appellant during the 2015-2016 hiring process. The investigation included a background check, confirmation of employment, verification of educational background, confirmation of residency, military history and citizenship status. (Fay Testimony).
5. The Lowell Police Department conditionally hired the Appellant in 2016. Employment was conditional based on the Appellant's successful completion of the Police academy. (Fay Testimony).
6. The Municipal Police Training Committee (MPTC) governs the standards that police recruits must meet in order to become police officers and ensures training practices align with Massachusetts regulations. (AA PH Ex. 1; Fay Testimony).
7. The MPTC Student Officer Guide to the Police academy (Guide) includes Massachusetts regulations concerning the training of police officers. Within the Guide is the whole of 550 CMR 3.0, the Massachusetts Police Academy Training Requirements. These state, in relevant part, that student officers may be separated from the academy for non-disciplinary reasons, such as performance deficiency, which can be academic in nature. (AA Ex. 2; AA PH Ex. 2; Hodgdon Testimony; Fay Testimony)
8. Regulation 550 CMR 3.09 provides:

550 CMR 309 (4): Dismissal for Performance Reasons. Any student officer who fails to attain a passing score on a re-test, or any three tests, or who otherwise fails to successfully complete performance requirements prescribed by the committee, shall be dismissed for non-disciplinary reasons.
(AA PH Ex. 2).
9. The police academy training to which LPD recruits are sent is an intensive six (6) month program. Some of the courses taught at the police academy include:

Beat and Community Profile Development, Bias Crimes, Constitutional Law, Court Procedures, Crime Prevention and Fear Reduction, Crime Scenes, Criminal Justice System, Crisis Intervention and Conflict Resolution Defensive Tactics, Domestic Violence, Drug Identification and Investigation, Elder Abuse, Emergency Driving, Evolution of Community Policing, Eyewitness Identification, First Responder Gang Intervention, Highway Safety, Homeland Security, Human Trafficking, Investigative Techniques Juvenile, Motor Vehicle Law, Motor Vehicle Stops, report Writing, Traffic Control and Accident Investigation and Water Safety. (AA Ex. 5).

10. Academic performance tests are given approximately every three weeks during the academy. Student officers are allowed to re-take two failed exams, as permitted in the Guide. If a student fails a third exam, the academy will automatically dismiss, or separate, the student officer from the academy. (Hodgdon Testimony; Fay Testimony).
11. The Appellant failed three exams during the police academy. He re-took two exams and obtained passing scores on the make-up exams. Upon failing the third exam, he was separated from the academy in June 2016. (Hodgdon Testimony; Appellant Testimony).
12. The Appellant recognizes that he struggles academically. (Appellant Testimony).³
13. Lieutenant Fay, who has been employed by the LPD for 21 years and who has been the Director of the Lowell Police academy since 2016, issued a Municipal Police Training Committee Separation Notice form (Separation Notice) to the Appellant on July 21, 2016. This form stated that Student Officer Yan was being dismissed from the academy “for academic reasons having failed three written exams.” (AA Ex. 3).

³ During his time at the police academy, the Appellant suffered a knee injury, for which he provided medical documentation to academy officials, and yet he participated in the physical requirements of training to the best of his ability. (AA Ex. 3; AA PH 3; Appellant Testimony).

14. The Appellant completed his Associates Degree in Criminal Justice from Middlesex Community College in 2018. His transcripts show his GPA to be 2.63, with individual grades ranging from A to D and D-. (AA Ex. 5).
15. After successfully completing the Sheriff Department's three (3)-month training academy for correctional officers, he started working at the Sherriff's Department on December 10, 2018. (AA Ex. 6; Appellant Testimony).⁴
16. In December 2018, the Appellant re-applied for a position as a Lowell police officer as part of the hiring process of Certification 05955. (AA Ex. 6; Appellant Testimony).
17. In his 2018 application, the Appellant included more recent information about his educational status and new employment. (Ex. 6; Stip. Facts).
18. As a general matter, the LPD compares an applicant's previous applications to the most recent application to check for new information, such as new employment and new educational advances or other achievements. (AA Ex. 6; Hodgdon Testimony).
19. Detective Corey Erickson conducted the background investigation of the Appellant during the 2018-2019 hiring cycle. As part of the background investigation, Det. Erickson verified that the Appellant had completed his Associates Degree and that he had begun working at the Essex County Sherriff's Department on December 10, 2017, after completing the Sheriff's academy on December 7, 2017. (AA Ex. 6).
20. Det. Erickson prepared an investigation report when he completed his investigation. As indicated in the report, Det. Erickson met with the Appellant for a bureau interview and at the Appellant's residence. Det. Erickson noted that he had corresponded with the Appellant on a number of occasions and found him to be responsive and polite. The Appellant had positive

⁴ There is no information in the record indicating the courses taught at the Essex Sheriff's Department academy for correctional officers.

references. Detective Erickson also reviewed the Appellant's criminal history, employment history, driving history, property and excise tax status, and driving history. He found no criminal record for the Appellant and the most recent incident on the Appellant's driver history was in 2011. In addition, Det. Erickson learned that the Appellant was working on the night shift at the Sheriff's Department and he (Det. Erickson) spoke to the Appellant's superintendent and found that there no negative reports for the Appellant since he began working there recently. (AA Ex. 6). In speaking with the Essex Sheriff's academy staff instructors, Det. Erickson noted as follows:

I learned the Applicant had no academic issue with that curriculum, and performed physical training without difficulty. The applicant's history of academic struggle remains an unknown factor in determining whether he may be better prepared with educational concepts presented in the Lowell Police Academy. (AA Ex. 6)(emphasis added).

20. Lieutenant Fay, a Sergeant at the time of the Appellant's 2018 application, in response to an inquiry from the Appellant during this hiring process, informed the Appellant via email that the Appellant had a good chance of being hired. Lt. Fay wrote this because he believed at the time that the LPD automatically hired student officers who had previously been separated from the Academy. However, this was Lt. Fay's first involvement in the hiring process and he did not know, and was subsequently informed, that it was not LPD procedure to automatically hire those who have been separated from the LPD Academy for academic reasons, as Lt. Fay thought. (App. Ex. 1; Fay Testimony).
21. Lt. Fay met with LPD leadership about the Appellant's application and background investigation report. After this discussion, the consensus opinion was that because the Appellant's recent employment history was too short to be of value in assessing the Appellant's employability, and because his academic performance at Middlesex Community

College did not show significant improvement in academic performance since he had previously failed the LPD academy, that the Appellant would be bypassed. (Fay Testimony; Hodgdon Testimony).

22. The LPD was primarily concerned about the Appellant's limited employment and poor academic performance, specifically that the Appellant had failed three exams at the Academy and had not performed well in courses for his Associates degree and because the employment history that the Appellant provided indicated that he had not worked outside the home since his service in the Marines ended, that he received unemployment for a year (April 2016 to April 2017) and that he had only been recently hired by the Essex Sheriff's Department. The only other job the Appellant indicated that he had was at a dry cleaner, although there is no indication when he worked there and for how long. (AA Ex. 6).

23. Fifteen (15) applicants who ranked below the Appellant on Certification 05955 were selected to move forward in the application process. (Stip. Facts).

24. On January 29, 2018, the LPD sent an email message to the state's Human Resources Division (HRD) indicating that it would bypass the Appellant.⁵ This email explained that the LPD had concerns about the Appellant's work ethic and ability to achieve academic success based on his average and below average grades at Middlesex Community College.

Specifically, LPD wrote:

Mr. Yan failed out of the 2016 Lowell Police Academy class due to academic failure. Mr. Yan failed three written exams in the first month and half of a six month academy. This failure was before many of the complex skills are taught at the academy. Mr. Yan subsequently enrolled in Middlesex Community College. In doing this Mr. Yan did not seek any full time or part time employment and has been unemployed since leaving the academy. Mr. Yan's

⁵ I note that Lowell is not required to obtain HRD advance approval of a bypass because it is not a consent decree community.

grades at MCC are below average despite the fact this is his full time endeavor. Mr. Yan has managed 6 Cs and 2 DS ...

Mr. Yan's inability to perform better than average in school is even more concerning given the fact that he is not working. He is not working despite the fact that he is married with two children. His wife is working ... Mr. Yan advised that he does, however, have the time to go to the gym ...

... As Mr. Yan has already failed out of the police academy this ... does not instill confidence that Mr. Yan would be able to perform much better a second time. Mr. Yan's failure at the police academy led to a police officer position going unfilled. Mr. Yan has not demonstrated that he has the academic capacity to be afforded a second chance where the result may very well be the same outcome.
(AA Ex. 5).

25. Among the candidates who received conditional offers and who ranked lower than the Appellant on the certification, five (5) were related to members of the LPD although two (2) of the five (5) did not complete the hiring process:

- 1) one candidate's brother is an LPD employee,
- 2) one candidate had been a member of the Animal Control unit and his wife is a member of the LPD,
- 3) one candidate's mother is a member of the LPD,
- 4) one candidate had been an LPD Detention Attendant and his father and brother were members of the department, but the candidate did not complete the process, and
- 5) one candidate's father is a member of the LPD but the candidate did not complete the process.

Another four (4) of the fifteen (15) candidates who were given conditional offers and ranked below the Appellant were not related to members of the LPD but were related to law enforcement personnel in other cities or towns. Two (2) of those four (4) did not successfully complete the hiring process. One of the candidates was the grandchild of a deceased member of the LPD and appears to have been hired. (AA PH Ex. 1).

26. The LPD estimates it costs \$14,000 to send student officers to the Police academy.

(Hodgdon Testimony).

Applicable Civil Service Law

This appeal involves a bypass for original appointment to a permanent civil service position of police officer. This process is governed by G.L. c. 31, Section 27, which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest.”

Pursuant to the Personnel Administration Rules (PAR) promulgated by HRD, the statement of reasons must be specific and complete:

“Upon determining that any candidate on a certification is to be bypassed . . . an appointing authority shall, immediately upon making such determination, send . . . a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked. . . . Such statement shall indicate all . . . reasons for bypass on which the appointing authority intends to rely or might, in the future, rely to justify the bypass. . . . No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed . . . shall later be admissible as reasons for selection or bypass in any proceeding before the . . . Civil Service Commission.” PAR.08(4)

When a candidate appeals from a bypass, the Commission's role is not to determine whether that candidate should have been bypassed. Rather, the Commission determines whether, by a preponderance of the evidence, the decision to bypass the candidate was made after an “impartial and reasonably thorough review” and that there was “reasonable justification” for the decision.

Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Brackett v. Civil Service Comm'n, 447 Mass. 233, 241 (2006), citing G.L. c. 31, § 2(b); City of Beverly v. Civil Service Comm'n, 78 Mass. App. Ct. 182, 187 (2010). See also Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321 (1991) (appointing authority must establish, by a

preponderance of evidence, that the reasons assigned to justify the bypass were “more probably than not sound and sufficient”); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

“Reasonable justification in this context means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited; Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

In selecting public employees of skill and integrity, appointing authorities are vested with a certain degree of discretion. City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, *rev. den.*, 428 Mass. 1102 (1997). In deciding “whether there was reasonable justification” shown for an appointing authority’s exercise of discretion, the Commission’s primary concern is to ensure that the action comports with “[b]asic merit principles,” as defined in G.L. c. 31, § 1. See Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); City of Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182, 188 (2010); City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, *rev. den.*, 428 Mass. 1102 (1997); MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635 (1995), *rev. den.*, 423 Mass. 1106 (1996); Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321 n.11, 326 (1991). “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration.” G.L. c. 31, § 1.

The Commission, however, is not required to find that the appointing authority acted “arbitrarily and capriciously.” Rather, the governing statute, G.L. c. 31, § 2(b), gives the

Commission broad “scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground.” City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). Although it is not within the authority of the Commission “to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority”, when there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission.” Id.

Analysis

Lowell has shown by a preponderance of evidence that there was reasonable justification to bypass the Appellant for appointment to the position of police officer with the Lowell Police Department based on his academic weaknesses, as exhibited by his failure at the prior LPD academy and some of his grades while obtaining his Associates degree, but not based on the Appellant’s employment history.

The LPD’s primary reason for bypassing the Appellant is concern about the Appellant’s academic performance and capabilities. This concern is justified based on the record. The organization that governs police training, the Municipal Police Training Committee (MPTC), has determined that academic success is essential in the training of well-rounded and effective police officers and that certain academic criteria must be met in order to graduate from the Academy. Student officers are provided notice of these requirements through a Student Officer Training Guide. In accordance with MPTC training protocols, the LPD separated the Appellant from the academy after he failed three examinations at the 2015 academy.

Following his separation, and approximately two years later, the Appellant re-applied to the LPD, which conducted a second, thorough look at his credentials by conducting another detailed

background investigation and reviewing what the Appellant had accomplished during the short time in between his applications. The LPD was justifiably concerned that the Appellant would not be able to pass his academic classes based on two past indicators: the Appellant's three failed exams at the academy and the Appellant's average and below average grades for classes at Middlesex Community College. The Appellant's second application to the LPD occurred shortly after he completed his Associates degree. Because his grades did not reflect the kind of academic prowess that would indicate future academic successes, such as D's and a D-, the LPD had a valid reason based on evidence that the Appellant was not a strong candidate for the position of police officer because of his academic weaknesses. While it is accurate that the Appellant has since successfully completed the Essex County Sheriff's Department academy since he failed the LPD police academy, the trainings are different. Beyond the fact that one academy is for police recruits and the other is for correctional officers, the police academy is six months long whereas the county correctional officer training is only three months long. Further, although there is no indication in the record what courses are covered in the correctional officers training in the record, the roster of the police academy course load developed by the state Municipal Police Training Committee for the municipalities is long and substantive and includes everything from Bias Crimes and Constitutional Law to Motor Vehicle Stops and Patrol Response Procedures, a number of which are unlikely to be covered in correctional officer training. Thus, the LPD was justified in bypassing the Appellant based on the Appellant's past course performance at the LPD academy and the lack of sufficient improvement in his grades while he obtained his Associates degree.

The LPD's second reason for bypassing the Appellant is the Appellant's employment history. The city has not established by a preponderance of the evidence that lack of work

history is a justifiable reason for bypass. I find it unacceptable that the Lowell bypass letter described as a “character flaw” the Appellant’s family decision to take care of his children and pursue higher education while his wife works outside the home. As the Appellant explained, in the four years that he was in the Marines, he supported his wife and their young family and his wife remained at home with their children. Like many young families, the Appellant and his wife were faced with the high cost of childcare if both of them worked outside the home. By taking care of the children and taking courses to obtain an Associates degree, the Appellant avoided the high cost of childcare and enabled the Appellant to avail himself of veteran education benefits. As a result, the Appellant was able to earn an Associates degree and had just been hired by the Essex County Sheriff’s Department as a correctional officer a couple of weeks before the LPD hiring process began. Unfortunately, the Appellant’s brief tenure at the Sheriff’s Department was an inadequate amount of time for the LPD to re-assess his candidacy. While some police candidates work and go to school concurrently, the LPD should not have counted it against him that the Appellant and his family made a different choice that best suits them. Therefore, the LPD did not establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant based on his employment history.

I reviewed the LPD records to determine whether there was bias in the selection of certain candidates. As noted above, five of the fifteen candidates who were ranked below the Appellant on the certification and were given conditional offers had relatives with a history of employment with the LPD although two of those five candidates with relatives on the force did not complete the hiring process. There is no indication in the record that the successful candidates’ relatives had any involvement in the hiring process. Another four candidates who received conditional offers and were ranked below the Appellant were related to law

enforcement personnel employed outside of Lowell but, again, two of those four candidates did not complete the hiring process. There is no indication in the record that the relatives of those four candidates took any inappropriate actions to affect the LPD hiring recommendations.

The Appellant was provided the opportunity to re-apply to the LPD in 2018 after he failed the 2015 police academy. The LPD conducted a reasonably thorough review of the Appellant that included a detailed background investigation and an interview. The decision to bypass the Appellant was based on a genuine concern that the Appellant would not be a success as a student officer and thus would not be a successful police officer at the LPD at this time.⁶

Conclusion

For the above reasons, the Appellant's appeal under Docket No. G1-19-099 is hereby ***denied.***

Civil Service Commission

/s/ Cynthia Ittleman

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on August 12, 2021.

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

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

⁶ If the Appellant reapplies to the LPD in the future and has a post-2018 positive work history and otherwise clean record, his academic difficulty should no longer, by itself, be reasonable justification to bypass him.

Notice:
Antony Yan (Appellant)
Stacie M. Moeser, Esq. (Respondent)