

**COMMONWEALTH OF MASSACHSETTS
CIVIL SERVICE COMMISSION**

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

BROCK KALINOWSKY,
Appellant

v.

CITY OF PITTSFIELD,
Respondent

Case No: G1-06-159

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on February 15, 2007 to acknowledge receipt of the report of the Administrative Law Magistrate dated January 3, 2007 and the comments received from the Appellant on January 10, 2007 and the Respondent on January 25, 2007. The Commission voted to adopt the findings of fact of the Magistrate. The Commission concurs with the Magistrate's conclusion that the City of Pittsfield "acted improperly in bypassing the Appellant". We reach that conclusion based on Findings of Fact and exhibits in the Magistrate's recommended decision, but not explicitly referenced in the Magistrate's conclusion. In light of the Findings of Fact and Exhibits, the Commission has concluded that a remedy other than that recommended by the Magistrate is warranted in this case.

Below are the reasons for the Commission's decision.

The role of the Civil Service 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." City of Cambridge v. Civil Service Commission, 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 Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, s. 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 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 Service Commission, 31 Mass. App. Ct. 315 (1991).

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, 334 (1983). See Commissioners of Civil Serv. 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 Civil Service Commission to act. City of Cambridge, 43 Mass. App. Ct. at 304.

In the instant appeal, the City of Pittsfield bypassed the Appellant for the position of police officer and selected five candidates who appeared lower on Certification No. 260098. These candidates are referred to here in regard to their respective ranks: Candidate 4; Candidate 5; Candidate 7; Candidate 8; and Candidate 11.

The Appellant's qualifications for the position are contained in Findings of Fact 1-3, including the fact that he is a high school graduate; received high marks in an auto mechanics

class; received a Presidential award for academic fitness; was a member of the county diving team; was certified in CPR and first aid; and currently holds a CDL license. As noted in Findings of Fact 48 and 49, the Appellant had the best credit score of all candidates and had no criminal or civil record. His wife is a police officer in the Pittsfield Police Department.

The Appellant's spotless record is in sharp contrast to that of some of the other candidates selected by the City of Pittsfield for the position of police officer, including Candidate 8. Exhibit 5 is the "Investigative Summary" prepared by the City of Pittsfield listing each candidate for the position. The following summary is listed next to Candidate 8's name in Exhibit 5: "Correctional officer at county jail. Some college. OUI alcohol in 03, as well as leaving the scene. Fair credit. Excellent references." (emphasis added) Curiously, the reference to the 2003 incident is not included in the information that the City provided to HRD in justifying why the Appellant should be bypassed by Candidate 8. Having raised the eyebrow of the Commission on this issue, the Commission further examined Exhibit 13, the more detailed background investigation of Candidate 8 which was completed by Detective Glen Decker of the Pittsfield Police Department as part of the application process. In a February 24, 2006 memo to the Police Chief, Detective Decker writes:

"I have interviewed [Candidate 8's] references as well as past and present employers. I have spoken to a total of seven individuals who all speak very highly of [Candidate 8]. Everyone agrees that [Candidate 8] will make a fantastic Police Officer for the City of Pittsfield. I personally know [Candidate 8] and his family and also feel that [Candidate 8] will make a great Police Officer. [Candidate 8's] father..is the Chief Probation Officer (Pittsfield District Court); his mother recently retired from the court system and his brother is a Connecticut Police Officer. [Candidate 8] was a great athlete at St. Joseph Central High School and he will bring that competitive drive, hard work and team effort to the Pittsfield Police Department. (emphasis added)

It is troubling to the Commission that a detective who personally knows one of the candidates, and evidently quite well, would be responsible for conducting his background investigation and making a recommendation regarding who is selected for appointment as a police officer in the City of Pittsfield. That may explain why the letter of recommendation above fails to

address the information contained on page 3 regarding [Candidate 8's] criminal record. On page 3 of Decker's own report, it states under Record, "On 06-12-03, [Candidate 8] was arraigned for OPER UND INFL OF LIQ and LEAVING SCENE: PROPERTY DAMAGE. Disposition on 08/28/03 was JT 11/4/03 CWO (continued without a finding) SP 11/4/04 VWF DISM.

[Candidate 8's] driving record, also contained as part of Exhibit 13, makes it painfully clear that the 2003 incident was part of a troubling pattern that shows a poor driving record and poor judgment. Among the entries included in [Candidate 8's] driving record, in addition to the above-referenced 2003 incident, are the following:

06/08/96	MASS PIKE SPEED BLANDFORD
06/07/97	MASS PIKE SPEED BLANDFORD
06/19/97	SPEEDING LENOX
07/12/99	SPEEDING STOCKBRIDGE
07/12/99	SEAT BELT VIOLATION STOCKBRIDGE
07/12/99	NO REG/LIC IN POSSESS STOCKBRIDGE
12/06/99	SPEEDING RICHMOND
12/06/99	SEAT BELT VIOLATION RICHMOND
01/13/02	NO INSPECTION STICKER PITTSFIELD
01/13/02	FAIL TO GIVE SIGNAL PITTSFIELD
01/13/02	IMPROPER EQUIPMENT PITTSFIELD
04/01/02	SUSPENSION 5 SURCHARGE EVENTS INDEFINITE

Further, as part of his police officer application, completed three years after being charged with Operating Under the Influence and Leaving the Scene of an Accident, Candidate 8 states, "On average, I drink about 12 beers a week. I generally drink while watching a sporting event at home with friends or family". (Exhibit 13)

The City also offered nothing but a glowing description of Candidate 5 to HRD as part of the reasons for bypassing the Appellant. The City's own investigative summary offers a more sobering assessment of Candidate 5 stating in part, "Speeding ticket in 02, license suspended in 03 for payment failure. Fair credit, defaulted on a Best Buy card in 04 and was 150 days

late on a Chase card. Put sports ahead of college and was placed on academic probation.”

(Exhibit 5)

Incredibly, despite the fact that the Candidate 5 was once placed on academic probation, the City cites Candidate 5’s “specialized training, experience, and education that relates specifically to the knowledge, skills, abilities and requirements of a police officer..” as the reason for justifying his selection over the Appellant. To bolster its argument in favor of Candidate 5’s academic prowess, the City cites the work of a Berkshire Community College student who analyzed each application for spelling errors and found no spelling errors in Candidate 5’s application. The Commission must take note of the irony regarding the City’s somewhat sanctimonious reliance on this “spelling analysis”, which was used against the Appellant in the instant case. The analysis itself is riddled with horrendous spelling errors. Six separate pages of the City’s analysis have the heading “MISS SPELLINGS” (sic) and the analysis routinely refers to words that were “spelt” (sic) wrong. (Exhibit 6)

HRD was also offered nothing but positive information from the City regarding Candidate 11, and again the City failed to convey the more accurate description contained in Exhibit 5, the City’s Investigative Summary”, which states in part, “5 traffic citations between 96 and 00. Discharged from Navy in 91 after one month.” Similarly, Candidate 7 had “3 speeding tickets from 00-04; a surchargeable accident in 02” and was “arrested in 04 for disorderly at MIT College. Said he was trying break up the fight. This was verified by the investigator.” (Exhibit 5)

In view of all of the above-referenced information, the Commission draws the troubling conclusion that something is terribly amiss here. While we disagree with the Magistrate, and unanimously believe that Appointing Authorities may indeed consider prior training and experience when deciding upon the best candidate, it can not use those reasons as a pretext to bypass a candidate for appointment, as it has in this case. Further confirming the

Commission's suspicion in this regard is the City's somewhat misleading representation to HRD that the Appellant was advised to obtain training, experience or education that relates specifically to the knowledge, skills, abilities and requirements of a police officer position – and that he failed to do so. The Magistrate's Findings of Fact 11 and 12 provide a somewhat more illuminating version of events stating in relevant part, "Captain Barry told Mr. Kalinowsky that he could increase his chances of becoming a police officer if he became an auxiliary police officer or went to college. As noted in Finding of Fact 12, shortly after this conversation, the Pittsfield auxiliary police force was disbanded.

The appellate courts have provided guidance for determining when an action of an Appointing Authority is not reasonably justified and therefore, should be reversed or modified by the Commission:

In making that analysis, the commission must focus on the fundamental purposes of the civil service system -- to guard against political considerations, favoritism, and bias in governmental employment decisions . . . When there are, in connection with personnel decisions, 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. 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.

Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004), quoting City of Cambridge, 43 Mass. App. Ct. at 304.

As noted by the DALA Administrative Magistrate, the City has failed to show by a preponderance of the evidence that it had reasonable justification for bypassing the Appellant in favor of the five selected candidates. On the contrary, the evidence, when viewed objectively and guided by common sense, shows that at least one candidate never should have been selected to serve as a police officer. The only conclusion the Commission can logically reach is that his selection, rather than being based on merit standards, was tainted with bias and favoritism. In such cases, it is the Commission's responsibility to intervene and provide

relief to individuals such as the Appellant who have been harmed through no fault of their own.

Traditionally, the relief provided by the Commission to Appellants such as Mr. Kalinowsky who are unfairly bypassed, is the placement at the top of the next list to be used by the Appointing Authority in filling appointments, ensuring them consideration in the next hiring cycle. In the instant case, the Commission has been informed by counsel for the Appellant, in correspondence copied to the Appointing Authority, that the City is already involved in the process of filling nine police officer positions. As the Appellant's name is not on the list being used to fill these vacancies, he is not being considered. Moreover, the Commission concurs with counsel for the Appellant that the City, which bypassed the Appellant in the past, is predisposed to permanently bypass the Appellant, as opposed to giving him serious consideration for appointment.

For all of the above reasons, the Commission hereby orders the following pursuant to its powers inherent in the Chapter 310 of the Acts of 1993:

1. HRD is hereby ordered to place the name of Brock Kalinowsky at the top of the existing civil service appointment list being used to fill nine current vacancies in the Pittsfield Police Department;
2. The City of Pittsfield is hereby ordered to consider the Appellant for appointment for one of the nine existing police officer vacancies and is prohibited from using the same reasons for bypass submitted to HRD as part of Certification Number 260098 on March 20, 2006;
3. Until such time as Mr. Kalinowsky is selected or appropriately bypassed for the position of police officer in the City of Pittsfield, all bypass reasons submitted to HRD for the position of police officer shall be sent to HRD prior to hiring the selected candidates and the bypass reasons shall be simultaneously sent to the Commission.

By a 3-0 vote of the Civil Service Commission (Goldblatt, Chairman; Bowman, Guerin, Commissioners [Taylor, Marquis – Absent]) on February 15, 2007.

A true record. Attest.

Lydia Goldblatt
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL c. 30A S. 14(1) for the purpose of tolling the time for appeal.

Under the provisions of MGL c. 31 S. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice to:

Kimberly Fletcher, Esq.
Michael J. McCarthy, Esq.
Fernand J. Dupere, Esq.
John Marra, Esq.