

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JUSTIN J. MAILLET,
Appellant
v.

G1-13-250

CITY OF MEDFORD,
Respondent

Appearance for Appellant:

David I. Brody, Esq.
Law Office of Joseph L. Sulman
1001 Watertown Street, Third Floor
West Newton, MA 02465

Appearance for Respondent:

Kimberly M. Scanlon, Esq.
City of Medford, Law Department
85 George P. Hassett Drive
Medford, MA, 02155

Commissioner:

Paul Stein¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Justin Maillet (Mr. Maillet or Appellant), appealed to the Civil Service Commission (“Commission”), from the decision of the City of Medford (Medford), the Appointing Authority, to bypass him for appointment to the position of permanent reserve police officer with the Medford Police Department (“MPD”). A pre-hearing conference was held on December 17, 2013 and a full hearing was held on February 3, 2014 at the offices of the Commission. The hearing was digitally recorded. Both parties submitted post-hearing briefs in the form of proposed decisions on March 21, 2014.

¹ The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

FINDINGS OF FACT

Twenty-seven (27) exhibits were entered into evidence at the hearing. One (1) joint exhibit was submitted by the parties on February 4, 2014 and marked as Exhibit 28. Based on these exhibits and the testimony of the following witnesses:

For the City:

- Michael J. McGlynn, Mayor of the City of Medford;
- Leo A. Sacco Jr., Chief of the Medford Police Department;
- Vincent DiStefano, Lieutenant of the Medford Police Department;
- Jack Buckley, Sergeant of the Medford Police Department;

For the Appellant:

- Justin J. Maillet, Appellant;

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

1. Mr. Maillet is a thirty (30) year old resident of Medford, and, with the exception of his college years, has always resided in Medford. He graduated from Malden Catholic High School in 2002. He earned a Bachelor of Science Degree in Business Management with a concentration in finance in 2006 from the University of Massachusetts at Lowell. In 2009, he earned a Master of Liberal Arts degree in Business Management from Harvard University's Division of Continuing Education. (*Exh. 4, p. 11; Testimony of Maillet*)
2. When Mr. Maillet was a junior in high school, his mother was diagnosed with multiple sclerosis ("MS"), and lost vision in one eye. His mother also suffers from cerebral palsy. One year later, Mr. Maillet's father suffered a stroke. Due to Mr. Maillet's mother's bouts with MS and his father being unable to return to work, Mr. Maillet became the primary

care giver for his parents and was responsible for running the household at age 17. His father passed away in 2013. (*Testimony of Maillet; Exhibit 3; Exhibit 4, p. 9*)

3. As a teenager, Mr. Maillet was involved in seven separate motor vehicle incidents that included four speeding violations, several other driving infractions and one surchargeable accident for which he was found responsible.

June 2000 – Speeding

July 2000 – Speeding

May 2001 –Speeding

June 2001 – Lane Violation, Seat Belt Violation, Minor Traffic Violation

November 2001 – Improper Passing

March 2002 – Surchargeable Accident

July 2003 - Speeding

(*Exhibits 4 & 12*)

4. Mr. Maillet also had criminal charges brought against him, all while he was a teenager.
 - a. In March 2001, Mr. Maillet was caught by the MPD in the act of breaking and entering into a gas station and fled the scene but dropped his wallet which contained his driver's license. He was found at his place of residence with \$200 in cash, 20 cartons of cigarettes, 30 tins of chewing tobacco and about a half-dozen packs of batteries, and the videocassette from the store's surveillance system. Mr. Maillet was charged with Breaking and Entering in the Nighttime With Intent to Commit a Felony, Larceny and Receiving Stolen Property. The case also was continued without a finding or guilty plea in June 2003 and dismissed in June 2004.

- b. In June 2001, along with the motor vehicle infractions described above, Mr. Maillet was charged with Unlawful Possession of Drugs (marijuana) and Resisting Arrest in connection with that incident. The charges were continued without a finding or guilty plea in June 2003 and dismissed in June 2004.
- c. In April 2003, as a freshman at University of Massachusetts at Lowell, Mr. Maillet became intoxicated at a fraternity party and kicked the side-view mirrors off three cars after leaving the party. He was charged with three counts of Felony Destruction of Property, all of which were continued without a finding or guilty plea and dismissed upon payment of restitution.
- d. In connection with the July 2003 speeding violation described above, Mr. Maillet was also criminally charged with Reckless Operation and Failure to Stop for Police Officer, to which he pled guilty and received a sentence of one year probation.

(Exhibits 4, p.3, 6, 8, 11, 12)

- 5. Since 2003, Mr. Maillet has had a clean driving history and no criminal record. He was cited for speeding in 2006 and was involved in a motor vehicle accident in 2013, but found not responsible in both matters. *(Exhibit 12)*
- 6. Since earning his undergraduate degree, Mr. Maillet has worked full time for Harvard University. Mr. Maillet first worked at Harvard University as a lifeguard, and was later promoted to the position of Aquatics Coordinator overseeing forty-five (45) employees. Next, Mr. Maillet was transitioned to a position in the Financial Administration Department, and now works for Harvard's Campus Service Center after internal reorganization. Mr. Maillet performs essentially the same functions in the Campus

Service Center that performed for the Financial Administration Department. In conducting the background check, MPD Sgt. Buckley spoke to Mr. Maillet's Harvard University supervisor who gave Mr. Maillet very positive reviews, stating she "is amazed at Justin's work performance despite what he has went through with his parents," and that he was "instrumental in helping merge the three [different departments]" that was under her control. Mr. Maillet's supervisor stated that Mr. Maillet was mature and trustworthy. She credits his personality and work ethic. (*Testimony of Maillet; Exhibit 4, p. 8*)

7. Sgt. Buckley also spoke to the Aquatics Coordinator for Harvard University. He stated, "I cannot recommend Justin more highly, he would be an asset to the Medford Police Department," calling Mr. Maillet level headed, confident, and mature. (*Exhibit 4, p. 9*)
8. From January 2010 to January 2011, Mr. Maillet used eight (8) sick days. All of these sick days were used to care for his sick parents, with doctors' notes regarding those dates. From January 2012, to January 2013, Mr. Maillet used twelve (12) sick days. Ten (10) of these were used to care for his parents, with doctor's notes regarding these dates. (*Testimony of Maillet; Exhibit 4, p. 8*)
9. In April 2011 Mr. Maillet took and passed the civil service exam scoring a 98. (*Testimony of Maillet*)
10. On October 15, 2012, the City received Certification No. 00301 from the Massachusetts Human Resources Division (HRD) to fill vacancies for the position of permanent full time MPD police officer. (*Exhibit 2*). Mr. Maillet appeared twenty-third (23rd) on the Certification. In November 2012, Mr. Maillet received a letter in the mail informing him that a vacancy existed for the position of permanent police officer, and instructing him to appear at City Hall and sign to indicate his willingness to accept appointment. He did so.

Sgt. Buckley conducted a background investigation of Mr. Maillet, and a panel of five (5) Medford police officers interviewed him. However, Mr. Maillet's name was not reached in that hiring cycle (*Testimony of Maillet and Buckley; Exhibit 26*)

11. On August 20, 2013, HRD created Certification No. 01112 for the position of Medford Reserve Police Officer. Mr. Maillet was listed as twenty-second (22nd), tied with nine (9) other applicants. (*Exhibit 26*)
12. In August 2013, Mr. Maillet received another letter in the mail about the Department, position of permanent reserve police officer. He signed Certification No. 01112 indicating his willingness to accept appointment. (*Testimony of Maillet*)
13. Mr. Maillet attached a letter to his application explaining much of his past as a teenager including being a caregiver to his parents. This letter did not attempt to make excuses for his actions, but to add context to his younger years when he was in trouble with the law and explain how he believed he had learned from his mistakes and matured. (*Exhibit 3; Testimony of Maillet*)
14. Sgt. Buckley relied heavily upon the 2012 background investigation for Mr. Maillet in conducting an updated one for the 2013 hiring process. (*Testimony of Buckley*)
15. By letter dated November 7, 2013, Mr. Maillet was notified that he had been bypassed. He received an envelope containing five (5) letters. The first was from Medford Personnel Director Burke advising Mr. Maillet about his right to appeal the bypass; the second was a letter dated October 8, 2013 from Lt. DiStefano to HRD that listed negative reasons for why Mr. Maillet was bypassed; and the other three were letters from Lt. DisStephano to HRD stating affirmative reasons why each of the lower ranked candidates were appointed. (*Exhibit 15; Exhibit 16; Exhibit 27*)

16. Three (3) of the candidates appointed were ranked below Mr. Maillet. (*Exhibit 27*)
17. The letters regarding why each of the lower ranked selected candidates were selected were nearly identical. They each stated that each candidate had an excellent writing sample, and displayed “great communication skills and problem solving ability” during their interviews. (*Exhibit 27*)
18. Chief Sacco did not recommend to Mayor McGlynn that he bypass Mr. Maillet due to compelling positive reasons that favored lower ranked candidates. Chief Sacco did not believe that any of the lower ranked candidates had noticeably better writing samples or interviews than Mr. Maillet. (*Testimony of Sacco and McGlynn*)
19. Mr. Maillet noted quickly that the negative reasons listed for his bypass in the October 2013 letter were erroneous. Mr. Maillet was erroneously listed as having been convicted of a felony “under Massachusetts General Laws or . . . in another jurisdiction outside of the Commonwealth of Massachusetts”; having been “convicted of a crime that is a violation of the domestic abuse provisions, named in an active restraining order, no contact order, stay away, and refrain from abuse or similar order in violation of domestic abuse provisions”; having been “convicted of operating under the influence of intoxicating liquor and/or drugs” and having been “assigned to an alcohol treatment program within five (5) years prior” and “knowingly misrepresented or falsified information submitted on the application” and “knowingly made false statements to the background investigator” (*Exhibit 15*)
20. Mr. Maillet immediately called Sgt. Buckley about the erroneous reasons listed in his bypass letter. Sgt. Buckley promised to look into the matter and get back to Mr. Maillet. (*Testimony of Maillet and Buckley*)

21. This bypass letter was drafted by Lt. DiStefano. In drafting the initial bypass letter, Lt. DiStefano opened up Mr. Maillet's investigative file and found in it a document titled "Matters of Concern." This document serves as a guide in helping investigators. It lists the types of issues to look out for during the investigative process. Lt. DiStefano mistook this document to mean these issues were found during Mr. Maillet's background investigation and drafted the bypass letter to reflect what he read in the "Matters of Concern" document. (*Testimony of DiStefano; Exhibit 28*)
22. It is now undisputed that the negative reasons stated in the October 8, 2013 letter as the grounds for bypassing Mr. Maillet were patently mistaken. (*Exh.4; Testimony of Sacco, DiStefano, Buckley*)
23. On November 20, 2013, Lt. DiStefano drafted an amended bypass letter and sent it to Mr. Maillet. The amended bypass letter cited a "past criminal history as well as a significant driving record", specifically, the 2001 breaking and entering incident, the 2003 incident at UMass Lowell and the 2001 and 2003 motor vehicle infractions. (*Testimony of Lt. DiStefano; Exhibit 17*)
24. Chief Sacco recommended to Mayor McGlynn, and Mayor McGlynn approved the bypass of Mr. Maillet prior to the drafting of the October 8, 2013 letter. Mayor McGlynn and Chief Sacco discussed Mr. Maillet's prior criminal history, particularly the 2001 breaking and entering incident, as the basis for the bypass at that time. Mayor McGlynn did not see the October 8, 2013 letter, and was not further consulted after the errors in that letter were discovered. (*Testimony of McGlynn & Sacco*)
25. Of the eight (8) candidates selected, six (6) had negative driving records. These records ranged from speeding, citations for failure to stop, and surchargeable accidents. One

candidate selected who was ranked above Mr. Maillet had a series of revocations, suspensions, and failure to appear entries between 2005 and 2008. Another candidate ranked above Mr. Maillet had his license suspended twice for payment default in 2003 and 2007, and was involved in a surchargeable accident in 2009. Two (2) candidates selected who did not have driving records were ranked below Mr. Maillet. (*Exhibits 18-25*)

26. None of the candidates selected had criminal records. (*Testimony of Sacco*)

27. Chief Sacco believed that Mr. Maillet had come a long way, had matured and was a more responsible individual than he was at seventeen. (*Testimony of Sacco*)

28. Mr. Maillet duly filed this appeal on November 22, 2013. (*Claim of Appeal*)

LEGAL STANDARD

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.” Cambridge v. Civil Service 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 Civil Service 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. Civil Service Comm’n, 31 Mass.App.Ct. 315 (1991). G.L. c. 31, § 43.

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. *See* City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 189 (2010). “In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” *Id.* at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). Further, “[t]he commission does not act without regard to the previous decision of the appointing authority, but rather decides whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” *Id.* at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. Beverly at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone ... than in disciplining an existing tenured one.” *See* City of Attleboro v. Mass. Civil Serv. Comm’n, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly at 191. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an

appointing authority.” Id. (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)). While these principles afford an appointing authority reasonable discretion to screen out questionable candidates in favor of those more suitable, this discretion is not absolute or unreviewable. The essential issue being evaluated in a bypass appeal to the Commission remains whether or not the appointing authority has reasonable justification, under basic merit principles, to prefer a candidate whose performance on the civil service qualifying examination placed him lower than the bypassed candidate, thus skipping over the more highly ranked candidate for some valid reason.

Opinion of the Minority (Commissioner Stein)

Mr. Maillet’s background reports identified numerous reasons to recommend him. Mr. Maillet presented as a sincere young man who made no excuses for his misconduct as a teenager. He has had no brushes with the law since 2003, and has had an equally clean driving record since that time. Mr. Maillet has since gotten a degree in Business Management, and a graduate degree in Business Management. He has worked at a full time job and achieved a strong work history, having earned the unanimous respect of his supervisors co-workers. He has been a caregiver to both of his parents, all while satisfactorily holding down a full time job and obtaining a high level of education.

Save for his teenage years, Mr. Maillet’s background and interview performance contain no negative characteristics. Indeed, when compared with the background of the selected candidates who bypassed him, some of whom had more recent driving infractions, Mr. Maillet’s clean record puts him ahead. Similarly, the selected candidates’ alleged “excellent writing samples” and “great communication skills,” and there is no evidence put forth that Mr. Maillet

did not have either. Chief Sacco testified that none of the selected candidates who bypassed Mr. Maillet had noticeably better writing samples or noticeably better interviews. The Commission has been clear that it will not uphold the bypass of an Appellant where it finds that “the reasons offered by the appointing authority ... apply equally to the higher ranking, bypassed candidate.” Borelli v. MBTA, 1 MCSR 6 (1988).

The Respondent avers, incorrectly, that, because some of the candidates who had driving records were either tied with Mr. Maillet or were ranked above him, their driving records are not relevant in determining whether the bypass was justified. It is proper to look at the driving records of other candidates, even those who did not bypass the Appellant, in order to determine whether the process was fair and the standards uniformly applied, and to see how the appointing authority looked at each candidate’s driving record in making their selection of viable candidates. Here, only two candidates, both ranked below Mr. Maillet, did not have a driving record of some sort with citations for which they were found responsible. Many of the selected candidates ranked above Mr. Maillet had driving records in recent years, including revocations and suspensions. Mr. Maillet on the other hand, has only had two incidents on his driving record since 2003, both of which he was found not responsible.

The reasons Medford gave for bypassing Mr. Maillet involve his actions during a narrow two year period from 2001 to 2003, for which he has taken full responsibility. Mr. Maillet has not been involved in any significant negative events since his teenage years. This is not a case in which something more recent has occurred to suggest that a pattern of irresponsible behavior still exists which could justify derailing his opportunity to serve as a police officer. See, e.g., Gleba v. Department of Correction, 26 MCSR 251 (2013) (marijuana arrest as a teenager did not justify bypass although a poor driving record within recent five year period did); Monagle v. City of

Medford, 23 MCSR 275 (2010) and cases cited (discussing parameters that distinguish justified reliance on a pattern of continuing misconduct evidenced by a recent incident, from unjustified reliance on “past indiscretions” that are outweighed by “redeeming factors [that] must be given added weight”); Genduso v. City of Worcester, 22 MCSR 407 (2009) (pattern of continuing to associate with unsavory individuals and engaging in repetitive violent behavior recent enough to call into question current judgment and maturity but “[a]s time goes on, the current reasons . . . will lose their weight [a]ssuming the Appellant continues to abstain from acts of bad behavior or judgment and poor attitude/”) cf. Buckley v. Boston Police Dep’t, 26 MCSR 281 (2013) (dissenting opinion of Comm’r Stein) (questioning the justification for relying on a 10 year old criminal infraction that had been dismissed after a CWOFF)

Mr. Maillet’s actions here are not repetitive in nature: Mr. Maillet was 16 when he received his first three speeding citations. He just turned 17 when he committed the March 2001 breaking and entering and 19 when he was last charged with any criminal or motor vehicle offense. Other selected applicants had more recent motor vehicle infractions on their records. For these reasons, I conclude that Mr. Maillet’s teenage driving and criminal behavior, being the evidence relied upon, is too stale to be a sufficient reason to have bypassed this thirty-year old candidate.

I have not overlooked the fact that a police officer, who is empowered with a badge and a gun, is held to a high standard of conduct, and an appointing authority is not obliged to hire a candidate who cannot demonstrate that he or she cannot live up to that standard if appointed. See, e.g., Attorney General v. McHatton, 428 Mass. 790, 793-94 (199) and cases cited. In this case, however, Mr. Maillet’s teenage driving record and criminal history, in the absences of any other more recent indicia of negative behavior for more than a decade, do not prove by a

preponderance of evidence that Mr. Maillet's current character and fitness disqualify him to be chosen for appointment as a reserve police officer. Indeed, even Chief Sacco all but acknowledged that Mr. Maillet had shown that he was someone who could now be trusted.

Finally, the MPD's confusing and erroneous initial explanation for bypassing Mr. Maillet, for purportedly committing serious felonies, domestic abuse and untruthfulness on his application, cannot be discounted as a mere scrivener's error. The evidence does not support a finding that either Chief Sacco or Mayor McGlynn actually relied on the erroneous reasons. Nevertheless, I have grave concern that, the mistake having been made, the MPD may have succumbed to the temptation to choose a path of least resistance and crafted the best post-hoc rationale available, and that appointing authority (Mayor McGlynn) was never fully apprised of all the pros and cons in Mr. Maillet's case and never had the opportunity to give all the facts a truly fresh and objective review. While this concern, standing alone, would not warrant overturning an otherwise justified bypass, when coupled with the problematic reliance on a criminal and driving history more than ten years old – the only available rationale – I conclude that Mr. Maillet was not given as fair and objective consideration of his record by the appointing authority as he deserved, and, therefore, that his civil service rights were violated through no fault of his own. He is entitled to be reconsidered for appointment free of these missteps and legal errors.

Opinion of the Majority (Chairman Bowman; Commissioners Ittleman and McDowell)

We adopt the hearing officer's findings of fact, but respectfully reach a different conclusion.

The instant appeal involves an original appointment to the position of permanent reserve police officer in the City of Medford. The City bypassed Mr. Maillet, in part, because of his criminal conduct in 2001. Mr. Maillet does not dispute that he broke into a local gas station in

the nighttime, stole several items, including many cartons of cigarettes, tins of chewing tobacco, \$200 in cash, packs of batteries *and* the video cassette from the store's surveillance system.

When a Medford police officer attempted to detain Mr. Maillet, he fled on foot. When he was finally apprehended, Mr. Maillet acknowledged breaking into the gas station, but was untruthful about the amount of property he stole.

The City did not simply rely on Mr. Maillet's CORI or the police incident report when making their decision. Rather, they conducted a reasonably thorough review that included giving Mr. Maillet the opportunity to address his criminal behavior. Ultimately, the City decided to appoint candidates ranked lower than him, none of whom had a record of engaging in criminal behavior.

While we respect the hearing officer's position that the City should have given more weight to the (many) positive aspects of Mr. Maillet's life since these events occurred, we respectfully conclude that *requiring* the City to do so, based on the facts presented here, would represent an impermissible substitution of judgment.

Finally, there is nothing in the record that concludes or suggests political overtones or personal bias on the part of the City. Rather, the decision to bypass Mr. Maillet was a valid exercise of judgment, reached after a reasonably thorough background investigation.

Conclusion

For all the reasons stated in the Opinion of the Majority, the City's decision to bypass Mr. Maillet is affirmed and Mr. Maillet's appeal under Docket No. G1-13-250 is ***denied***.

For the Majority:

Christopher C. Bowman
Chairman

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman – Yes; Ittleman, Commissioner – Yes; McDowell, Commissioner – Yes; Stein, Commissioner - No) on June 26, 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:

David I. Brody, Esq. (Appellant)

Kimberly M. Scanlon (Respondent)

John Marra (HRD)