

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Suffolk, ss.

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

RICHARD A. BUSA,
Appellant
v.

Case No.: G1-13-124

FALL RIVER POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Pro Se
Richard A. Busa

Appearance for Respondent:

Gary P. Howayeck, Esq.
Office of the Corporation Counsel
1 Government Center
Fall River, MA 02720
(508) 676-6666

Commissioner:

Paul M. Stein¹

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Richard Busa (“Mr. Busa”) appeals to the Civil Service Commission (“Commission”) from the decision of the Fall River Police Department (“FRPD”) to bypass him for an original appointment to the position of full-time Police Officer. Mr. Busa’s appeal was timely. A pre-hearing was held on June 14, 2013 and a full hearing was held on July 26, 2013. Both hearings were held at the University of Massachusetts School of Law in North Dartmouth. The hearing was digitally recorded, with copies provided to the parties. As explained below, the FRPD has met its burden to establish reasonable justification for bypassing Mr. Busa, whose appeal is therefore denied.

¹ The Commission acknowledges the assistance of Law Clerk Megan Bertino in the drafting of this decision.

FINDINGS OF FACT

Based on Exhibits one (1) through thirteen (13), the stipulations of the parties, the testimony of:

Called by the Appointing Authority:

- Daniel Racine, Chief of Police, FRPD
- Thomas Mauretti, Sergeant, FRPD
- Gary Lefleur, Lieutenant, FRPD

Called by the Appellant:

- Richard Busa, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences therefrom, I make the following findings of fact:

1. Mr. Busa is thirty-eight (38) years old and is a resident of Fall River, Massachusetts. He is currently employed as a firefighter with the Newton Fire Department. He graduated from Newton North High School and completed some college-level work at Massachusetts Bay Community College and Bristol Community College. He is married with one child.

(Testimony of Mr. Busa and Exhibit 11)

2. Mr. Busa was in the Army from November 1995 to November 1998 and was stationed at Fort Lewis in Washington State. From September 2001 to December 2005, Mr. Busa served in the Rhode Island National Guard. He was injured while serving a tour of duty in Iraq. From February 2008 to February 2010, Mr. Busa served in the Massachusetts National Guard at Camp Edwards. He received honorable discharges in November 1998 and December 2005.

(Exhibits 10 and 11)

Prior Bypass

3. In November 2011, Mr. Busa's name appeared on a certification issued to the FRPD by the Commonwealth's Human Resources Division. ("HRD"). (Testimony of Chief of Police Racine ("Chief Racine"))

4. After signing the certification, Mr. Busa received an application and questionnaire to fill out.
(Testimony of Chief Racine)
5. On his questionnaire, Mr. Busa indicated ‘yes’ on questions eighty-seven (87) and eighty-eight (88), certifying that every answer he gave was accurate. Mr. Busa also signed the questionnaire, thereby attesting that all answers supplied were truthful. (Exhibit 3)
6. Among the answers given by Mr. Busa on the Questionnaire:
 3. Have you ever fled the scene of an accident? NO
 35. Have you ever been arrested? YES
 36. Have you ever been detained by a law enforcement officer, game warden, animal control officer or military police officer? YES(Exhibit 3)
7. After Mr. Busa submitted his application and questionnaire, Sergeant Mauretti began the traditional background investigation on Mr. Busa. Sergeant Mauretti contacted past employers, neighbors, and other contacts listed on Mr. Busa’s application. (Testimonies of Chief Racine and Sergeant Mauretti)
8. Sergeant Mauretti’s background investigation involves running a Board of Probation (“BOP”) search, which revealed an incident report from the Newton Police Department.
(Testimony of Chief Racine and Exhibit 8)
9. On January 22, 2000, Sergeant Tempesta of the Newton Police Department pulled over a black motor vehicle on Walnut Street at Carthay Drive that appeared to have been in an accident. He was assisted by Officer Babcock. (Exhibit 8)
10. When asked, Mr. Busa identified himself as the driver, and informed Sergeant Tempesta that the motor vehicle hit a tree “somewhere on Lowell Ave[nue,]” but could not identify specifically where on the road the collision occurred. (Exhibit 8)

11. Sergeant Tempesta asked Mr. Busa if he had been drinking that day, to which Mr. Busa responded that he had one (1) beer. Sergeant Tempesta noticed that Mr. Busa's eyes appeared red and glassy, and had somewhat slurred speech, thus prompting Sergeant Tempesta to request Mr. Busa to take a field sobriety test. Mr. Busa agreed. Sergeant Tempesta administered the test, and Mr. Busa failed parts three (3) and four (4). (Exhibit 8)

12. Mr. Busa's passenger was asked where Mr. Busa hit the tree that damaged his motor vehicle. The passenger replied "somewhere near Newton North High School by Lowell Ave[nue]." Sergeant Tempesta's co-worker, Officer Conneely, took the passenger home while "retracting the supposed route of Mr. Busa". (Exhibit 8)

13. Officer Conneely reported that

"[He] was able to follow the tire marks [of Mr. Busa's motor vehicle] all the way back to 83 Walker [Street]. [He] retraced the skid marks[,] which were continuous[,] back to Carthay Cir[cle].. . [The passenger] told [Officer Conneely] they had struck a tree. When [they] got to 83 Walker [Street, the passenger] said to [him] 'oh, this is the tree we hit'. [Officer Conneely] observed tire marks up on the lawn of 83 Walker St[reet] that continued back down towards the st[reet]. The tire marks indicate that the [motor vehicle] struck the tree at an angle. [He] also observed a broken yellow lens that matched [Mr.] Busa's [motor vehicle]. [He] then observed skid marks heading north on Walker [Street,] turn right on to Proctor & Brooks Ave[nue]. [He] observed that the tire marks went up on to the sidewalk three [(3)] separate times: once on Proctor, twice on Brookes Ave[nue].. . The tire marks then continue left onto Washington St[reet] to Lowell Ave[nue], where they turn right. At the turn, the skid marks indicate that the curb on the far side of the bridge was struck. [He] followed the skid marks up Lowell Ave[nue]. [He] counted at least five [(5)] times when the marks showed the [motor vehicle] crossed over the center line & continued southbound in the northbound lane of Lowell Ave[nue] for various distances before crossing back.. . [He] then followed the skid marks over Commonwealth Ave[nue] onto Homer St[reet] then right onto Walker St[reet] up to Carthay Cir[cle]."

(Exhibit 8)

14. Subsequently, Mr. Busa was brought in to the police station and booked by Sergeant Tempesta. Mr. Busa was advised of his rights regarding a breathalyzer, and elected to take

- the test. Mr. Busa failed the breathalyzer test. His offenses were listed as “O.U.I alcohol; leaving the scene after causing property damage; [and] operating to endanger.” (Exhibit 8)
15. Mr. Busa’s arrest by the Newton police was the only arrest that turned up on Mr. Busa’s BOP. (Exhibit 13)
16. As a result of the incident involving his arrest by the Newton Police Department, Sergeant Mauretti received a report indicating all incidents involving Mr. Busa. This report indicated that Mr. Busa was in an incident involving an unwanted person on a school bus. (Exhibit 13)
17. According to the report, while at a stoplight, a child threw a chap stick out of the window of his or her school bus, hitting Mr. Busa’s motor vehicle. Mr. Busa then followed the bus. Mr. Busa intended to inform the child that throwing things off of the bus is wrong, and to ask for an apology. Before attempting to board the bus, the bus driver told Mr. Busa not to board. After Mr. Busa did board, the bus driver locked the door, leaving no means of egress. No charges were filed against Mr. Busa. (Exhibits 7 and 12(1)(D))
18. Through conversations with the references provided by Mr. Busa on his application, Sergeant Mauretti’s background investigation revealed an incident at the Newton Fire Department, involving Mr. Busa’s painted fire helmet. (Testimonies of Chief Racine and Sergeant Mauretti, Exhibit 13)
19. Sergeant Mauretti ran an internet search, and discovered that the incident was reported by local news outlets. (Exhibit 13)
20. After returning from Iraq in 2005, Mr. Busa spray-painted his helmet with a patriotic design. (Exhibit 13)

21. In November, 2008, Deputy Fire Chief Chagnon ordered Mr. Busa to remove the paint because it did not conform to department regulations. Although some decoration of a helmet is tolerated, Mr. Busa's painting was considered unacceptable. (Exhibit 13)
22. In December, 2008, Fire Chief LaCroix ordered Mr. Busa to remove the paint. Chief LaCroix had to threaten disciplinary action before Mr. Busa complied with the order. (Exhibit 13)
23. After completing his investigation, Sergeant Mauretti wrote a summary of his findings for Chief Racine. (Exhibit 13)
24. Mr. Busa was asked to appear before the Board of Inquiry ("BOI"), which is a meeting wherein issues that have been raised on the application and questionnaire or as a result of the background investigation are discussed with applicants. The BOI occurs before the oral interview process, and consists of the Chief of Police, two (2) deputy chiefs, two (2) captains, and internal affairs investigators. The BOI serves as an interview to gather more information on events that the background investigation or application and questionnaire raise.
(Testimony of Chief Racine)
25. The issue involving leaving the scene of an accident was not raised at the BOI. (Testimony of Mr. Busa & Chief Racine)
26. After the BOI interviews are concluded, the Chief and his staff review the results of the BOI, and determine who moves on to the oral interview stage. (Testimony of Chief Racine)
27. The bottom of the questionnaire asks candidates to assert that all answers given are truthful, with the consequence of disqualification from further consideration for untruthful responses.
(Exhibit 3)
28. In a letter dated January 20, 2012, Chief Racine informed Mr. Busa that he was bypassed for:
"lest [sic] than truthful when . . . answer[ing] Question #3 regarding leaving the scene of an accident.. . . With respect to the fire helmet controversy, refus[ing]"

direct, lawful orders from [his] current employer. . . [T]his incident, along with the school bus incident is a direct indication of some immaturity, irresponsibility[,] and poor judgment in ways, which would relate to the candidates' suitability for the position of Police Officer."

(Exhibit 5)

29. Mr. Busa failed to appeal the prior bypass. (Testimony of Mr. Busa)

Present Bypass

30. On November 11, 2012, HRD issued certification number 00337 to the FRPD to appoint 8 full time Police Officers. Mr. Busa's name appeared fourth (4th) on the certification.

(Stipulated Facts and Exhibit 1)

31. After signing the certification, Mr. Busa received an application and questionnaire to fill out.

(Testimony of Chief Racine)

32. A statement regarding truthfulness was issued to every applicant. This statement was signed by Mr. Busa. (Testimony of Chief Racine and Exhibit 2)

33. In answering the Questionnaire in 2012, Mr. Busa changed his prior response to Question 3 in 2011 ("Have you ever fled the scene of an accident?") and answered the question: "YES"

(Exhibit 4)

34. Mr. Busa was not brought in for a BOI or the oral interview stage of the hiring process after the present application. (Testimony of Mr. Busa)

35. Mr. Busa received a letter from Chief Racine, on April 29, 2013, stating that "[w]ithin the last year [Mr. Busa] received notice that [he was] being bypassed for the position of Police Officer in the City of Fall River. The [FRPD] has determined that there has been no change to reverse its' opinion. Therefore [Mr. Busa is] not being selected as a candidate for employment." (Exhibit 6).

LEGAL STANDARD

In a bypass appeal, 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. Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971); Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). 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.

ANALYSIS

The FRPD was justified in bypassing Mr. Busa for appointment as a Police Officer. The FRPD performed a reasonably thorough investigation of Mr. Busa, and provided sound and sufficient reasons for bypassing him. Mr. Busa was bypassed for being less than truthful on his application, immaturity, irresponsibility, and poor judgment, and disobeying lawful orders while at work. Both Chief Racine and Sergeant Mauretti gave credible testimony that supported their honest, good faith conclusions in this regard, free of any indication of bias, unlawful taint or ulterior motive.

Mr. Busa was less than truthful on his 2011 application regarding leaving the scene of an accident in 2000. Question number three (3) on the questionnaire asks “have you ever fled the scene of an accident” and Mr. Busa answered ‘NO’. The FPRD ran a BOP search on Mr. Busa, and the incident where he was pulled over on a different street from the tree he collided with, was returned in the search. Although the incident was over a decade old, Mr. Busa clearly remembered it, as he answered “YES” to the question about having an arrest record. Whether he forgot that one of the offenses with which he was charge was leaving the scene, or just failed to give careful attention to the Questionnaire, Mr. Busa’s less than truthful response on the application, although possibly more careless than evasive, regarding his serious past brush with the law, is a sound and sufficient reason for the FRPS to bypass Mr. Busa. See generally, Robichau v. Town of Middleboro, 24 MCSR 352 (2011)

The FRPD also cites immaturity, irresponsibility and poor judgment on the part of Mr. Busa regarding the incident with the school bus. Although he boarded the bus to get an apology from the child, the decision made by Mr. Busa to board a bus with school children on it shows a lack of maturity and good judgment. Despite not being charged with anything, Mr. Busa failed to

take responsibility for the action, trying to justify it by saying that there were only three children on the bus when he boarded it. This incident also was found as a result of a reasonably thorough review, and constitutes sound and sufficient reasons for bypassing Mr. Busa.

The background investigation also revealed that Mr. Busa had an incident at his current place of employment regarding obeying lawfully given orders while at work. This issue is a closer call. Mr. Busa had been told by the Deputy Fire Chief and Fire Chief to remove the paint from his helmet and refused. As this order was lawful, it should have been obeyed by Mr. Busa. I would expect that the Newton Fire Department (and the FRPD) would members reasonable slack when it comes to actions that are clearly motivated to be an expression of patriotic pride in their service as combat veterans. Here, the evidence tends to suggest that Mr. Busa's display was unusual, and possibly could have been something that would have been problematic at a fire scene, where helmets provide a means of distinguishing firefighters and officers. Had this display been the only problem in Mr. Busa's background that prevented him from appointment to the FRPD, I would doubt that it served as reasonable justification to bypass him. However, that was not the only issue standing in his way. The incident also mirrors being less than truthful on his application. Question numbers eleven (11) and twelve (12) asked if the applicant had ever received a reprimand at work, and Mr. Busa answer 'no', when the answer should have been 'yes'. As Mr. Busa disobeyed direct, lawful orders and was less than truthful on the application regarding this issue, this too is a sound and sufficient reason for bypass by the FRPD.

After receiving Mr. Busa's application and questionnaire for the present issue, the FRPD sent notice that since so little time had passed between the submissions of the two applications he would not be reconsidered by the FRPD at that time. I do have some concern that the FRPD chose to make a summary decision the second time around, in view of the fact that, in 2012, Mr.

Busa acknowledged his 2000 arrest record and it appears he was never given an opportunity to explain to a BOI why he had not done so in 2011. It would have prudent to have raised this issue with him as part of the BOI process, in 2011 and 2012, and I would recommend that, if Mr. Busa comes up for consideration in the future, that the FRFD reconsider that incident in light of these facts and the considerable passage of time since the incident. However, since both the original answer to the arrest issue and the school bus incident both contributed to the decision, I cannot conclude that the FRFD did not have reasonable justification to bypass Mr. Busa.

CONCLUSION

For all of the above reasons, the bypass appeal of Mr. Richard Busa, under Docket No. G1-13-124, is hereby *dismissed*.

Civil Service Commission
Paul M. Stein

/s/ Paul M. Stein

Commissioner

By vote of the Civil Service Commission on (Bowman, Chairman; Ittleman, McDowell & Stein, Commissioners) on October 16, 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:

Richard Busa (Appellant)

Gary P. Howayeck, Esq. (Respondent)