

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

RAYMOND MODIG,
Appellant

v.

Docket No. G1-05-96

WORCESTER POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

Richard C. Hyman, Esq.
Yellin & Hyman, P.C.
1259 Hyde Park Avenue
Suite 128
Hyde Park, MA 02136

Respondent's Attorney:

Lisa M. Carmody, Esq.
Assistant City Solicitor
City of Worcester
City Hall, Room 109
455 Main Street
Worcester, MA 01608

Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Raymond Modig (hereinafter "Appellant"), filed this appeal with the Civil Service Commission (hereinafter "Commission") on February 3, 2005, appealing the decision by the Respondent, Worcester Police Department (hereinafter "Department") as Appointing Authority, to bypass him for original appointment as a permanent full-time Police Officer for the Department. The Appellant was notified of his bypass for appointment by the Human Resources Division (hereinafter "HRD") by letter dated December 8, 2004. The appeal

was timely filed. A full hearing was held in the Commission's offices on August 29, 2007. Witnesses offering sworn testimony were not ordered to be sequestered. One audiotape was made of the hearing. The parties submitted proposed decisions thereafter, as instructed.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Appellant's Exhibits 1 – 2 and Appointing Authority's Exhibits 1 - 3) and the testimony of the Appellant and Worcester Police Officer Edward Saucier, I make the following findings of fact:

1. On or about November 2003, the Department requested from the HRD a civil service certification list for the selection of 38 permanent full-time Police Officers. On December 30, 2003, the HRD certified civil service list number 31108 of eligible applicants for the positions. The Appellant's name appeared on this list as number 67 of 97 candidates so considered. (Appointing Authority's Opening Statement and Administrative Notice)
2. The Appellant was born on January 12, 1974 and has lived in Worcester since 1999 although he is a native of Millbury. He is married with one son. He earned a diploma from Blackstone Valley Regional Vocational Technical High School in Upton in May 1992. He earned an associate's degree in Criminal Justice at Quinsigamond Community College in May 1996. The Appellant successfully completed a Basic Firearm Safety Course on September 5, 2001 and the 120-Hour Reserve Intermittent Police Academy course at the Boylston Police Academy

from September 10, 2001 through December 10, 2001. (Testimony of Appellant, Appellant's (App's) Exhibit 1 and Appointing Authority's (AA's) Exhibit 3)

3. The Appellant presented to the Commission as a polite, respectful and neat of appearance. He answered questions during examination and cross-examination appropriately. He testified that he was not currently employed at the time of the Commission hearing but that he may have been starting employment with the Massachusetts Department of Youth Services as a group counselor the week after the hearing. (Testimony of Appellant)
4. After applying for the position, the Appellant completed a written personal information questionnaire and participated in an in-person interview with the Department in April 2004. Worcester Police Officer Edward Saucier (hereinafter "Officer Saucier") was assigned to conduct a background investigation of the Appellant as a usual part of the application process. (Testimony of Officer Saucier and AA's Exhibit 3)
5. Officer Saucier testified that he had been a member of the Department since 1994 and that the background investigations he conducted on candidates placed on certification list no. 31108 were the first such investigations that he had done. He stated that he had conducted approximately 40 interviews and 20 background investigations of candidates since. I found Officer Saucier to be a good witness offering clarity and detail in his answers to questions posed of him. He had a professional demeanor and was patient in his explanations of the selection process. Overall, I found him to be credible in his statements and investigative findings. (Testimony and Demeanor of Officer Saucier)

6. Ten of the candidates selected for the positions were ranked lower on the certification list than the Appellant. The Appellant was notified that he had been bypassed for selection by letter from the HRD dated December 8, 2004.

(Stipulated Facts)

7. The specific reasons for bypass proffered by the Department are as follows:

“67) **Raymond B. Modig:** This candidate was fired from a job he held from 1997-1999 after receiving seven (7) written warnings and five (5) suspensions for poor work performance and unexcused absences. When asked about this in his interview, he stated that most of his co-workers were ‘immigrants’ and that his supervisors treated him ‘like an immigrant’. He had seven motor vehicle violations in the period 1992-2003. He omitted on his application that he had been an applicant for the Uxbridge Police Department and that he had been rejected there. He previously attended the Police Academy in 2001, sponsored by the Oakham Police Department, even though he admitted in his interview he had no intention of working for that Department.”

(App’s Exhibit 2)

8. The Appellant was employed by Ken’s Foods, Inc. from 1997 to 1999 and he indicated on the personal information questionnaire, which was completed during the background investigation process, that he left his employer because he “could not get along with some management.” The Appellant was 24 years old at the time he worked for Ken’s Foods. The personnel records from Ken’s Foods indicate that during the two years the Appellant was employed there he received one verbal warning, five (5) written warnings (with three (3) of these warnings due to unexcused absences), three (3) two-day suspensions for failing to report to work or call that he would be absent and two (2) five-day suspensions for

unexcused absences. The personnel records from Ken's Foods indicated that the Appellant was not eligible for rehire. (AA's Exhibit 2)

9. The Appellant testified at the Commission hearing that his position at Ken's Food involved assembly line work and that because he had issues with his supervisor he was often assigned to work "out front." The Appellant testified that this "out front" position was a hard and demanding assembly line position. The Appellant testified that when he first came to work at Ken's Food, he was assigned to this job and that because he "did my dues" he did not feel he should have been reassigned to this job. The Appellant testified that because he did not get along with his supervisor, his supervisor "stuck me out there where all the undocumented employees were assigned" and "where you work your butt off". The Appellant testified that because he had problems getting along with his supervisor, his supervisor would assign him to the "crap" jobs. The Appellant specifically testified that because he did not like this assignment, he would occasionally not report for work. The Appellant testified that he did in fact sign each of the disciplinary action forms where his signature is indicated and he did not make any attempts to challenge the disciplinary action. (Testimony of Appellant)
10. Officer Saucier testified that he met with the Appellant for a face-to-face interview and gave the Appellant the opportunity to discuss his poor work history with Ken's Food. Officer Saucier testified that during this interview, the Appellant did admit that the various disciplinary actions

were taken and explained his poor work attendance on the fact that his grandfather was ill and he had trouble getting to work, but he also admitted that he had trouble getting along with his supervisor at the time. Officer Saucier testified that the Appellant saw himself as being treated like one of the many immigrants that were also working for this employer. During this interview, the Appellant again acknowledged that he was having problems with his supervisor and was given the worst jobs and therefore at times he didn't feel like coming in to work and would fail to show up for work without calling or would call in at the last minute. Officer Saucier testified that during this interview, the only explanation the Appellant gave for his behavior was the fact that the company employed a lot of immigrants and his supervisor did not like him. (Testimony of Officer Saucier)

11. During his testimony before the Commission, the Appellant acknowledged that he did have some unexcused absences which resulted in warnings and suspensions. According to the Appellant, several of these absences were the result of problems that he was having with his supervisor and his belief that he was not being treated fairly. The Appellant testified that he believed that many of his co-workers were non-documented aliens and were therefore easily taken advantage of by their supervisor without any recourse. At his interview, the Appellant, in trying to explain how he felt he was being mistreated by his supervisor, compared himself to how he viewed the way his supervisor treated these non-documented employees. During his

testimony before this Commission, the Appellant admitted that he used a poor choice of words in explaining himself and further stated that he has gotten along well with friends and co-workers who come from other countries and holds no prejudices toward immigrants. (Testimony of Appellant)

12. Officer Saucier testified that he did not feel that the Appellant showed any responsibility towards his job at Ken's Foods and that he described the job as being one that was more suitable for immigrants. Officer Saucier testified that he was troubled by the fact that the only reason given by the Appellant as to why he disliked his job at Ken's Foods was because he felt he was being treated like an immigrant. Officer Saucier testified that the Appellant's reference to the fact that he felt like he was being treated like an immigrant, gave him the impression that the Appellant considered immigrants to be "second class citizens" and therefore not deserving of being treated the same as other classes of people. Officer Saucier testified that, based on his conversation with the Appellant, he thought that the Appellant thought his job at Ken's Foods was a job for immigrants and therefore, since he was not an immigrant, the job was beneath him. Officer Saucier testified that he was very concerned by the attitude the Appellant displayed during this interview towards immigrant due to the fact that he felt the Appellant would not be capable of treating people the same and that as a police officer, each person is entitled to be treated equally and you can not have a police officer seeing different individuals

as two different classes of people and deserving of different consideration and treatment. Officer Saucier testified that a person's immigration status does not play a factor in police work and that all citizens should be treated the same in the eyes of the law. (Testimony of Officer Saucier)

13. I credit Officer Saucier's testimony in regards to the Appellant's explanations as to his poor work history at Ken's Foods. The Appellant's testimony and previous interview comments appeared to be more of a rationalization than a straightforward account of why he performed poorly. While I did not find the Appellant to be mean-spirited or overtly prejudiced in his views, his attitude and use of "poorly chosen words" do not promote confidence in his ability to serve the public as a police officer.

14. Officer Saucier also testified that the Appellant was bypassed due to a poor driving history. The Appellant's driving record indicated that he had received three (3) speeding violations, one surchargable accident, one instance of a non-renewal of a license, one seatbelt violation, and one no inspection sticker violation. Officer Saucier testified that during his interview with the Appellant, they discussed his driving history and that the Appellant did acknowledge the fact that his license was non-renewable in 1996 due to his failure to pay a parking ticket. At the time of the interview, the records of the City of Worcester indicated that the Appellant had paid a late fee, but had failed to pay the underlying fine. (Testimony of Officer Saucier and AA's Exhibit 1)

15. The record of the Appellant's driving history indicates that he had three (3) moving violations for speeding between 1992 and 1996, one violation for not wearing a seat belt (1997) and another violation for not having an inspection sticker (2003), a surchargeable accident in 1993 and a nonrenewable offense in 1996. The Appellant testified that the surchargeable accident was from a rear end collision when he incorrectly anticipated the car in front of him moving forward and when it did not resulted in a slow speed accident. He also testified that the violation for not wearing a seatbelt occurred when he was pulled over for not having his headlights on. The Appellant testified that he has not received any traffic citations since 1996 and has not been found responsible for any motor vehicle accidents since 1993. (Testimony of Appellant and AA's Exhibit 1)
16. Officer Saucier testified that during his interview of the Appellant, the Appellant admitted that he had applied for a position with the Town of Uxbridge Police Department and was not hired. Question No. 44 on the candidates' personal information questionnaire specifically asks whether, "Have you ever been interviewed by or submitted an employment application to any other federal, state, municipal, college/university or other police agency?" The response provided by the Appellant was no. Officer Saucier further testified that during the interview he asked the Appellant to explain why he provided a negative response to this question when in fact he had applied for a position with the Town of Uxbridge. Officer Saucier testified that the Appellant first explained that he provided

his erroneous response because he had misunderstood the question. Officer Saucier testified that when he indicated to the Appellant that he felt the question was straight forward and not ambiguous, the Appellant's explanation then became that he did not disclose his application because he did not think his application with the Town of Uxbridge was important. Officer Saucier testified that he felt that the employee's erroneous response and the change of explanation was problematic because the Appellant was told that the information supplied in the questionnaire must be complete and accurate. Therefore, Officer Saucier believed the Appellant was attempting to be deceptive. In addition, Officer Saucier testified that the Appellant's attitude about the question not being important was perceived as being indicative of the fact that the Appellant didn't consider his application to the Worcester Police Department as important enough to ensure that his responses were truthful and accurate. Officer Saucier testified that this erroneous response also demonstrated that the Appellant lacked some attention to detail. (Testimony of Officer Saucier and AA's Exhibit 3)

17. The Appellant testified at the Commission hearing that he inadvertently omitted the fact that he had been an applicant with the Uxbridge Police Department. The Appellant, during both his interview and his testimony before the Commission, explained that he was never selected for appointment by the Uxbridge Police Department as all candidates selected ahead of him were more qualified. (Testimony of Appellant)

18. I credit Officer Saucier's viewpoints as to the Appellant's omission of his candidacy to the Uxbridge Police Department and do not credit the Appellant's testimony that he basically forgot about that candidacy. Again, the Appellant engages in rationalizing an action he took in order to show himself in a better light.
19. Officer Saucier testified that during his interview with the Appellant, they discussed the fact that the Appellant had attended the Massachusetts Criminal Justice Training Council Part-time Academy in 2001. Officer Saucier testified that in order to attend this academy, you must be sponsored by a police department. Officer Saucier testified that when someone is sponsored by a particular police department, it is with some expectation that the individual has an interest in working for the department who is sponsoring him or her. The Appellant admitted that he attended this academy under the sponsorship of the Oakham Police Department. When Officer Saucier interviewed the Appellant concerning whether or not he had any intentions of ever working for the Oakham Police Department, the Appellant indicated that he did not and that he considered members of the Oakham Police Department as officers who did nothing but walk around in camouflage and were not considered to be "real police officers." Officer Saucier testified that he found the Appellant's opinion of the members of the Oakham Police Department troubling in that it was disrespectful towards other members of the profession. (Testimony of Officer Saucier)

20. The Appellant testified that he attended the Police Academy in 2001 through sponsorship of the Oakham Police Department. He testified that he was able to secure the sponsorship through an Oakham Detective who was an acquaintance of his (the Appellant's) father. Although the Appellant did not intend to work for the Oakham Police Department, this was because there were so few and infrequent openings for the position with that department. Further, it was the understanding of the Oakham Police Department that its sponsorship would most likely not result in the Appellant being offered the position of police officer with that department. The Appellant related that the Oakham Police Chief told him that he'd "be in camouflage with binoculars" and doing all aspects of police work with little opportunity for advancement since Oakham had limited staffing availabilities. (Testimony of Appellant)
21. Here, I do credit the testimony of the Appellant in regards to his comments and viewpoints relative to the Oakham Police Department. I find that he meant nothing disrespectful by his statements regarding the duties of Oakham's officers and further find that he was credible in explaining that his sponsorship to the Intermittent Academy was a mutual agreed arrangement. I believe that Officer Saucier's conclusions were rooted in some miscommunication with the Appellant.
22. Based on the foregoing reasons, the Appellant filed this appeal with the Commission on February 3, 2005. (Stipulated Fact)

CONCLUSION:

The Civil Service Commission grants wide latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion. Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987). In a bypass appeal, the CSC must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was “reasonable justification” for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority’s actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and 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).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, the Commission must consider the fundamental purpose of the Civil Service System which is “to protect against overtones of political control, objectives unrelated to merit standards and assure neutrally applied public policy.” If the Commission finds that there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy”, then it should intervene. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. City of Cambridge at 304.

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). All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.” Borelli v. MBTA, 1 MCSR 6 (1988).

Pursuant to G.L. c. 31, § 27, the Town was required to appoint ten (10) of the highest twenty-one (21) names (the “2n+1” formula) on the certification list who were willing to accept the position. Section 27 also requires that an Appointing Authority file with the Personnel Administrator a statement of reasons each time it appoints a candidate ranked lower on the “eligibility list” over a candidate ranked higher on such list. In the instant matter, the Town submitted its statement of reasons for bypassing the Appellant and those reasons were approved by the HRD.

The Town’s decision to bypass the Appellant was reasonably justified. The Respondent presented, by a preponderance of evidence, that the Appellant had an unfavorable employment history with his prior employer, Ken’s Foods. Based on the credible testimony of Officer Saucier and the documentary evidence presented, the reasons given for non-selection of the Appellant were proper, unbiased and the results of

a fair and impartial investigation. The Appellant admitted that while employed at Ken's Foods, he would not report as expected simply because he did not get along with one of his supervisors and the fact that this supervisor would assign him a job that he did not like or thought was beneath him. Based on Officer Saucier's credible testimony, the Town's concern about the Appellant's ability to treat all citizens equally in the eyes of the law was a reasonable and rational conclusion based upon the Appellant's continued reference to his co-workers as immigrants and his references to being treated as an immigrant and assigned job tasks typically assigned to undocumented workers.

The Appellant's behavior while employed at Ken's Foods also demonstrated a level of irresponsibility which is unacceptable for a person seeking a position as a police officer. A candidate for a position of police officer should be able to demonstrate through his or her past employment history an understanding that an employee has a responsibility to his employer and job to report for work when scheduled even though he or she may not like the particular assignment or other conditions not to their liking. Following his interview with the Appellant, Officer Saucier was not left with a positive impression with respect to the Appellant's work ethic and attitude towards the immigrant population. Based upon the evidence presented, Officer Saucier's impression was supported by sound and sufficient reasons.

A candidate for the position for police officer should also demonstrate an ability to uphold the laws and requirements regarding the operation of a motor vehicle. A review of the Appellant's driving history reasonably calls into question whether or not the

Appellant possesses this quality. The Town was therefore justified in its decision to bypass the Appellant based upon his driving record.

With respect to the Appellant's failure to accurately respond to Question No. 44 on the personal history questionnaire, the testimony of both the Appellant himself and Officer Saucier demonstrated that the Appellant failed to answer this question accurately. The Appellant's failure to provide an immediate explanation for the inaccuracy during his interview with Officer Saucier was reasonable justification for questioning whether or not the Appellant was being deceptive. Officer Saucier testified that the Appellant was clearly warned prior to completing the questionnaire that any misrepresentation would be deemed to be intentional and deceptive. The Appellant's inaccurate response and insufficient explanation reasonably and rationally supported the Town's belief and concern regarding the Appellant's ability to pay attention to detail and tendency to be deceptive.

The issue concerning the Town of Oakham Police Department sponsorship of the Appellant at the Massachusetts Criminal Justice Training Council Part-Time Academy and the Appellant's reference to the job of members of that department as simply requiring them to walk "around in camouflage" is disregarded here as a miscommunication between Officer Saucier and the Appellant and does not stand as a sustainable reason for bypass. Further, there is no evidence of inappropriate motive or objective on the part of the appointing authority that would warrant the Commission's intervention.

Based upon a preponderance of the credible evidence presented at hearing, the Commission finds that the Town has sustained its burden of proving reasonable justification for bypassing the Appellant. Therefore, the appeal on Docket No. G1-05-96 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Taylor, Henderson, Marquis and Guerin, Commissioners) on February 14, 2008.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

Richard C. Hyman, Esq.
Lisa M. Carmody, Esq.

