

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

DOUGLAS CRONIN,
Appellant

v.

G2-07-269 & G2-07-270

TOWN OF ARLINGTON,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Douglas Cronin (hereinafter "Cronin" or "Appellant") seeks review of the Personnel Administrator's (HRD) decision to accept the reasons of the Town of Arlington (hereinafter "Appointing Authority" or "Town"), bypassing him for promotional appointment to the position of sergeant in the Arlington Police Department (hereinafter "Department"). A pre-hearing was held on October 15, 2007 and a full hearing was held over three days on March 13th, May 15th and June 16th, 2008 at the offices of the Civil Service Commission (hereinafter "Commission"). Six (6) tapes were made of the hearing.

At the conclusion of the full hearing, the parties were encouraged to pursue settlement prior to submission of their respective Proposed Decisions. As no settlement was reached, it was agreed that the parties would submit their Proposed Decisions to the Commission by October 24, 2008.

FINDINGS OF FACT:

Forty-two (42) exhibits were entered into evidence at the hearing. Based on the exhibits submitted at the hearing and the testimony of the following witnesses:

For the Appointing Authority:

- Police Chief Frederick Ryan, Town of Arlington;
- Captain John Seron, Town of Arlington;
- Caryn Cove Malloy, Director of Personnel, Town of Arlington;

For the Appellant:

- Douglas Cronin, Appellant;
- Frank Bourgeois, retired Sergeant, Arlington Police Department;

I make the following findings of fact:

1. The Town of Arlington is a residential community of approximately 40,000 residents located less than 10 miles north of Boston. (Testimony of Chief Ryan)
2. The Arlington Police Department has approximately 63 police positions, which are broken down as follows: Chief of Police; 3 Captains; 7 Lieutenants; 10 Sergeants; and 43 police officers (Testimony of Chief Ryan)
3. The characteristics of the Town and the needs of its residents significantly impact the Department's policing philosophy. Given that many of the situations requiring police involvement with the public are non-criminal in nature, the Department has adopted and trained its officers in the concept of "community policing". The Department emphasizes

to its officers the importance of building productive partnerships and working pro-actively with the public in order to solve problems and reach solutions. (Testimony of Chief Ryan and Captain Serson)

4. Sergeants play a vital role in implementing the Department's policies and objectives, including the advancement of "community policing" concepts. Sergeants are the first level of supervision and authority between the Department's administration and the actual police officers who are out in the streets interacting with the public on a daily basis. Sergeants are expected to be good leaders and role models who are able to explain and encourage those police officers working under their supervision to carry out the Department's policies and objectives. (Exhibit 42; Testimony of Chief Ryan and Captain Serson)
5. The Appellant has been a patrolman in Arlington since 1998. He has a Bachelor of Science degree from the University of Arizona (Public Administration – 1996) and a Masters Degree in Criminal Justice Administration from Western New England College (2001). (Testimony of Appellant)
6. On February 7, 2007, the Town sought a certified list of promotional candidates from HRD seeking to promote two department patrol officers to the position of sergeant. (Stipulation and Exhibit 1)
7. The Town received Certification No. 270183 from HRD. The certification contained the names of five Department patrol officers. The Appellant's name appeared in the first position with a score of 94. The score of the second place officer, Sean Kiernan was 82 and the third ranked officer, Daniel Kelly, had a score of 80. (Testimony and Exhibit 2)

8. On April 3, 2007, the Town sent a 3-page letter to HRD listing negative reasons for its bypass of the Appellant for the position of Sergeant, instead selecting the second and third ranked candidates, Kiernan and Kelly. (Exhibit 3)
9. The negative reasons for not selecting the Appellant included: 1) lack of supervisory experience; 2) a response to a question during the interview process; and 3) past performance. (Exhibit 3)
10. On April 19, 2007, HRD notified the Town that additional information was needed regarding the positive reasons for selecting Officers Kiernan and Kelly. (Exhibit 4)
11. On May 10, 2007, the Town submitted the additional information requested by HRD summarizing the positive reasons for selecting Officers Kiernan and Kelly. (Exhibit 6)
12. On June 15, 2007, HRD approved the bypass reasons submitted by the Town. (Exhibit 8)

Lack of Supervisory Experience

13. Chief Ryan testified that none of the candidates had supervisory experience and that including that as a reason for bypass was a mistake. (Testimony of Chief Ryan and Exhibit 3)

Appellant's Response to Interview Question

14. The Town established a panel to interview five candidates, including the Appellant and the two officers ultimately selected. The panel consisted of Chief Ryan, Captain Serson and Caryn Cove Malloy, the Town's Director of Personnel. (Testimony of Chief Ryan)
15. The panel was responsible for conducting the interviews and making a recommendation to the Town Manager as to which two candidates should be promoted to the Sergeant position. (Testimony of Chief Ryan)

16. Chief Ryan has been a police officer since 1984. Prior to becoming Chief of the Arlington Police Department in 1999, he served as a police officer, sergeant, lieutenant and deputy chief in the Concord Police Department. Captain Serson has been a police officer since 1977. He worked his way up the ranks of the Arlington Police Department and has held the position of Captain for several years. Ms. Malloy has been the Town's Personnel Director since 2001 and is involved in the hiring process for employees in all of the Town's departments, including the police and fire departments. (Testimony of Chief Ryan, Captain Serson and Ms. Malloy)
17. Although the interviews were not recorded, each of the panelists took detailed notes regarding the candidates' responses. (Exhibits 9 – 11)
18. The format of the panel interviews was the same for each of the five candidates. The panel asked each candidate the same set of predetermined questions and then, depending on each candidate's answers, the panel asked relevant follow-up questions. (See Exhibits 9 - 11 and Testimony of Chief Ryan, Captain Serson and Ms. Malloy)
19. No formal scoring system was established regarding the interview process. Rather, following each candidate's interview, the panel discussed and reached a consensus on the candidate's interview performance. The panel then discussed and reached a consensus on each candidate's overall qualifications for promotion and the recommendation it should make to the Town Manager. (Testimony of Chief Ryan, Capt. Serson and Ms. Malloy)
20. Once the panel completed the interview and review process, it made a recommendation to the Town Manager as to which candidates it thought should be promoted to the two vacant Sergeant positions. (Testimony of Chief Ryan)

21. According to the bypass reasons submitted to HRD by the Town , the Appellant’s reply to the panel’s questions regarding use of police discretion and sound common sense while enforcing the law “highlighted his lack of skill in this area and led the panel to conclude that he would have difficulty transitioning from the position of police officer to the supervisory position of police sergeant. For example, he was asked whether he considered the spirit and intent of the law when enforcing the law and was given a hypothetical example of a grandmother in a public park after hours. He stated that he would remove the grandmother and if ‘they’ wanted to allow grandmothers in the park after hours ‘they’ could change the law. [According to the panel] [t]his response illustrates good knowledge of the law but a concerning lack of common sense and recognition of the spirit and intent of the law that is reflected in the performance of his duties.” (Exhibit 3)
22. In contrast, the panel noted that the individuals ultimately selected to fill the sergeant position mentioned that “all is not ‘black & white’ when enforcing the law and Officer Kelly stated that in fact 80% of the time matters fall in the “grey area”. (Exhibit 3)
23. Chief Ryan, Captain Serson and Ms. Malloy all testified before the Commission that the Appellant performed poorly during the panel interview. Specifically, the panel felt that the Appellant’s answers to their questions raised serious concerns about his ability to be an effective Sergeant. (Testimony of Chief Ryan, Captain Serson and Ms. Malloy)
24. The Appellant testified before the Commission that he felt it would not be fair to enforce the trespassing law against teenagers while allowing others to stay. The Appellant stated that the intent of the law presumably would not be to discriminate, and that the officer’s job was “enforcement, not policy making”. (Testimony of Appellant)

Past Performance

25. As part of the negative bypass reasons submitted by the Town to HRD, they included the following concerns about the Appellant's past performance as a police officer:

- January 5, 1999 – Officer Cronin was reprimanded for unsafe operation of police vehicles following an on-duty crash and sent to training;
- June 16, 2004 – Officer Cronin was removed from NEMLEC Regional Response Team for insubordination. Removal followed a written complaint from Lt. McKenzie of the Andover Police Department who described Officer Cronin's conduct as being "confrontational" toward a superior officer in violation of department rules and regulations.
- September 7, 2005 – Officer Cronin was reprimanded for unsafe operation of police vehicles following a series of six (6) on-duty crashes and reassigned by his supervisor from operating of a police vehicle to a walking beat for six (6) months.
- August 15, 2005 – Officer Cronin was insubordinate over the two-way radio by shouting at his supervisor. Officer Cronin was verbally reprimanded by the Sergeant.
- March 29, 2006 – Officer Cronin was reprimanded and counseled by Capt. McLaughlin for improper use of police discretion that resulted in five independent complaints to the department relating to over aggressive enforcement of parking violations;
- As of March 21, 2007 there were three open/active internal investigations into complaints made by citizens against Officer Cronin for allegations related to lack of professionalism and conduct unbecoming of a police officer;

- March 22, 2007 – Officer Cronin was reprimanded for conduct unbecoming a police officer relating to a matter where Officer Cronin transported an arrestee from his home in only his underwear and failing to take affirmative action to provide the detainee with suitable clothing. (Exhibit 2)
26. In regard to the 1999 letter of reprimand for unsafe driving, Chief Ryan stated that his letter was somewhat mistaken as he believed the reprimand occurred in 2000. There was also testimony that the reprimand was reduced by agreement to some form of verbal counseling. The Appellant testified that the agreement was that the reprimand would be rescinded and would not be used in the future. (Testimony of Chief Ryan and Appellant).
27. The Appellant testified that most of the accidents were investigated by the Department and he was cleared of fault. (Testimony of Chief Ryan and Appellant).
28. In regard to the alleged insubordination related to the Regional Response Team, the Appellant testified that the incident, which involved a labor dispute between the Boston Police Patrolmens' Association ("BPPA") and the City of Boston, surrounding the 2004 National Democratic Party Convention in Boston. Further, the Appellant testified that he was never disciplined or reprimanded by anyone in the Arlington Police Department, and that the first time he was ever told that he was so disciplined was in connection with this appeal. (Testimony of Appellant).
29. In regard to improperly exercising his own discretion in issuing too many parking tickets to vehicles in Arlington Center, the Appellant testified that the Town had no rule which did or could regulate an officer's discretion in giving citations, and that he was following specific instructions by his supervisors in writing citations. (Testimony of Chief Ryan and Appellant).

30. In regard to being verbally reprimanded for being insubordinate over the radio, the Appellant denied such discipline ever took place, and had no knowledge of the incident. (Testimony of Appellant) The Town produced no evidence of the discipline.
31. In regard to the three open/active internal investigations in to citizen complaints against Officer Cronin, Chief Ryan testified that the first complaint was resolved in the Appellant's favor on March 29, 2007. With regard to the second open investigation referenced in the bypass letter, Chief Ryan testified that the complaint was found to be "unsustained" on March 15, 2007. (Testimony of Chief Ryan) Regarding the third open matter referenced in the letter, the Town exonerated the Appellant regarding this complaint on June 7, 2007. (Exhibit 37)
32. In regard to the arrest of a citizen while in his underwear, an investigation by a then-Captain McLaughlin, the citizen's complaint against the Appellant was unfounded, and the Appellant acted in accordance with the law and the circumstances. (Exhibit 36)
33. Officer Kiernan (one of the selected candidates) has no record of discipline.
34. In 1998, Officer Kelly (the other selected candidate) and another officer were terminated after they were called to the scene of a disturbance and allegedly aided an off-duty officer who had engaged in wrongdoing. The termination of Officer Kelly and the other officer was a highly charged political issue in the Town. Chief Ryan was not the Chief at the time of these terminations. After Chief Ryan became Chief, he agreed to bring Officer Kelly and the other officer back to work and their time off was considered as a long-term suspension. When Officer Kelly returned to the Department after his suspension, Chief Ryan was extremely impressed by his positive attitude and the fact that he did not hold a grudge or have a "chip on his shoulder" over the 1998 incident. Instead, according to

Chief Ryan, Officer Kelly was a model police officer, was elected Union president, and became a leader who had the respect of the other police officers. Despite Officer Kelley's positive attitude and performance upon his return, Chief Ryan and the Town decided to bypass him for promotion to Sergeant in 2003 because his discipline, although nearly five years old at that point, was still too recent to consider promoting him. Based on the aforementioned, the panel concluded that Officer Kelly's prior discipline stemming from the 1998 incident should not be a prohibition to promoting him to Sergeant in 2007. (Testimony of Chief Ryan)

35. The panel did not consider the differing civil service scores of the candidates when making its promotional decisions. (Testimony of Chief Ryan)

CONCLUSION

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, § 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 Commission, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

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, 332 (1983). See Commissioners of Civil Service 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 this case, the Town proffered three reasons to the state’s Human Resources Division for bypassing the Appellant: 1) lack of supervisory experience; 2) a response to a question during the interview process; and 3) past performance as well as the positive reasons of the candidates selected.

In regard to the lack of supervisory experience, the Town has acknowledged that this reason was erroneous as the selected candidates did not have any supervisory experience, leaving only two negative reasons related to the Appellant and the positive reasons of the selected candidates.

In regard to the past performance of the Appellant, I am troubled by the Town’s decision to include certain incidents (all involving citizen complaints) in which the Appellant was ultimately found not to be at fault. In one case, the Appellant was found not to be at fault prior to the Town

actually forwarding the negative reasons, including this incident, to HRD. In another case, the Appellant was found not to be at fault while HRD's review was still pending, yet the Town failed, in both cases, to notify HRD of these outcomes. In regard to a third incident involving a citizen complaint, the Appellant was found by the Captain investigating the complaint to be "exonerated".

Further, the Town was unable to substantiate a claim that the Appellant was verbally reprimanded for insubordination for an incident over a two-way radio. In regard to the alleged insubordination related to the Regional Response Team, the Town's hearsay evidence on this issue is not sufficiently reliable when compared against the live testimony of the Appellant who alleges that the incident in question was related to a union issue that involved the Boston Police Patrolmens' Association. In regard to failing to exercise proper discretion regarding the issuance of parking tickets in Arlington Center, this is more related to the Town's final negative reason for not selecting the Appellant: his purported inability, as displayed in his interview, to exercise discretion instead of viewing all things as "black and white", discussed in more detail below.

An applicant's poor performance during the interview process is a relevant factor an appointing authority can use to judge an applicant. See Frost v. Town of Amesbury, 7 MCSR 137 (1994) (Commission upholds bypass where applicant's answers to situational questions were unsatisfactory); LaRoche v. Department of Correction, 13 MCSR 159 (2000) (Commission upholds bypass where applicant's answers to situational scenarios did not comply with department policies and procedures and failed to demonstrate an ability to lead); McMahon v. Town of Brookline, 20 MCSR 24 (2007) (poor interview performance can stand alone as the sole basis for bypass where there is no evidence of any inappropriate motivations on the part of the Appointing Authority).

As referenced above, the Town chose to conduct interviews of the respective candidates. The authority to interview candidates is inherent in G.L. c. 31 § 25. Flynn v. Civ. Serv. Comm'n, 15 Mass. App. Ct. 206, 208 (1983). While all parties would have been better served if the panel included representation from outside the Town and the interviews had been recorded, these deficiencies do not prevent the Town from giving proper weight to the performance of the candidates during the interview process. Further, the Appellant's argument that the interview process was not based on objective criteria is misguided. Subjectivity is inherent in the evaluation of interviews. Flynn, supra. It is an error to introduce...a requirement of adequate indicia of objectivity for the statutorily authorized interviews. Neither the statute authorizing interviews, nor the Flynn case, nor any other authority...imposes such (a) requirement on appointing authorities." City of Westfield v. Civil Service Commission & another., No. 98-601, Hampden Superior Court (1999).

The panel asked each candidate the same set of predetermined questions. Chief Ryan, Captain Serson and Ms. Malloy all testified that the Appellant performed poorly during the panel interview. Specifically, the panel felt that the Appellant's answers to their questions raised serious concerns about his ability to be an effective Sergeant. The Appellant's answers to the panel's questions regarding use of police discretion and sound common sense while enforcing the law raised concern among the panel members regarding the Appellant's ability to effectively transition from the position of police officer to the supervisory position of Sergeant. Chief Ryan testified that the Appellant's inability to exercise proper discretion was also evidenced by his rigid enforcement of parking regulations in the Town's Center when he was assigned a walking beat in that area.

I listened carefully to the Appellant's testimony before the Commission in regard to his ability to exercise discretion as opposed to seeing all things as "black and white" as alleged by the Town. Specifically, I considered the Appellant's testimony before the Commission in regard to the "hypothetical grandmother walking in the park after hours" scenario as well as his strict enforcement of the parking regulations in the Town's Center while he was assigned to a walking beat in that area.

While the Appellant attempted to soften his answers regarding the hypothetical grandmother in the park scenario, he continued to maintain a rigid, "by the book" mentality during his testimony in which he seemed to relish ensuring compliance with the letter of local bylaws and challenging local officials to change these bylaws if they didn't want them strictly enforced. In short, the interview panel's concerns about the Appellant's rigidity were not fabricated in an attempt to justify a decision to bypass the Appellant. In fact, during the three days of hearing, the Appellant at no time introduced any evidence, or even suggested, that the Town's decision to bypass him for promotion was politically motivated, either against the Appellant or in the favor of the candidates that were promoted. Rather, based on the Appellant's own testimony before the Commission, I could understand how the Appellant's answers before the panel caused them to have concern about his ability to effectively serve in a leadership position in the Arlington Police Department.

In contrast, the two selected candidates did not show the rigidity displayed by the Appellant and one of the selected candidates talked about the need to be able to manage the vast "gray areas" that police officers confront on a daily basis.

It appears to be undisputed, that the panel, and the Town, failed to consider, in any way, the wide disparity in civil service scores between the Appellant and the two selected candidates with the Appellant scoring a 94 and the selected candidates scoring an 82 and 80 respectively.

The fact that the Appellant scored higher on a civil service examination does not demonstrate that he was the most qualified candidate for the position of sergeant. (See Francis E. Murphy, III v. Cambridge and Mass. Civ. Serv. Comm'n, No. 03-0815, Middlesex Super. Court (2004). (City was not required to give any particular weight to the 8-point score differential on the civil service exam for two candidates competing for the position of Fire Chief.) However, given the 12 and 14-point differential in scores in this case, the Town can not summarily dismiss the scores as irrelevant as they appear to have done in this case.

The Town acknowledged that one of the three reasons proffered to HRD for bypassing the Appellant (lack of supervisory experience) was an error. In regard to the second reason, the Appellant's disciplinary record and past performance, the Town, in some instances, failed to substantiate that certain discipline ever occurred and, in other cases, provided HRD with incomplete information, including information regarding the Appellant being "exonerated" regarding one citizen complaint lodged against the Appellant. Thus, these two reasons are insufficient to justify the bypass of the Appellant.

As referenced above, however, the Town has shown that the Appellant, through his answers to an interview panel and his past performance, has shown a rigid, "black and white" mentality that are a legitimate concern for any Town considering who to appoint to a leadership position in their police department.

In summary, the Town failed to substantiate 2 of the 3 reasons offered for bypassing the Appellant and disregarded the substantial difference in civil service scores between the Appellant

and the selected candidates. The Town did, however, substantiate their concern that the Appellant had a rigidity that gave them cause for concern.

For all of the above reasons, the Appellant's appeals under Docket Nos. G2-07-269 and G2-07-270 are ***allowed in part***. While the traditional relief granted to an Appellant in a successful bypass appeal is to place the candidate's name at the top of the *next* certification to be issued to the Town to ensure at least one additional consideration for promotion, I have concluded that an alternative form of relief is warranted given the circumstances in this particular appeal.

Therefore, pursuant to Chapter 310 of the Acts of 1993, the Civil Service Commission directs the state's Human Resources Division to:

- Place the Appellant at the top of the first list of eligible candidates for the position of sergeant issued to the Town of Arlington after January 1, 2010 to allow the Appellant to be given at least one additional consideration for a sergeant position in the Town of Arlington.

This relief is intended to recognize the Town's failure to substantiate two of the three reasons proffered for bypassing the Appellant and their failure to consider, at all, the difference in civil service scores between the Appellant and the selected candidates, while also recognizing the very real, palpable, rigidity of the Appellant that has given the Town such concern. Hopefully, the one calendar year that elapses before the relief is effective will give the Appellant the opportunity to demonstrate the traits of leadership, including flexibility and the appropriate use of discretion, that are required of any candidate seeking a leadership position in a police department.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein, Taylor, Commissioners [Marquis – not participating]) on January 8, 2009.

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)(1), 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:

Gary Nolan, Esq. (for Appellant)

Brian Magner, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)