

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

DAVID G. BELANGER,
Appellant

v.

G2-03-518

TOWN OF LUDLOW,
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, David G. Belanger (hereafter "Belanger" or Appellant") seeks review of the Personnel Administrator's decision to accept the reasons of the Town of Ludlow (hereafter "Appointing Authority" or "Town"), bypassing him for promotional appointment to the position of sergeant. A pre-hearing was held on August 30, 2004 and a full hearing was held on April 9, 2007 at the offices of the Civil Service Commission. One tape was made of the hearing.

FINDINGS OF FACT:

Nine (9) Joint exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- None;

For the Appellant:

- David Belanger, Appellant;

I make the following findings of fact:

1. David Belanger is a tenured civil service employee in the position of police officer in the Town of Ludlow. He has served in that position for the past twelve (12) years.
(Testimony of Appellant)
2. On or about June 2003, the Town of Ludlow requested a civil service certification list for the selection of 2 full-time police sergeants. (Exhibit 6)
3. On July 1, 2003, the state's Human Resources Division (HRD) certified civil service list number 230569 of eligible applicants for the position of police sergeant in the Town of Ludlow. (Exhibit 6)
4. The Appellant was ranked second among the five eligible candidates on Certification 230569 willing to accept the promotional appointment. (Exhibit 6)
5. The Board of Selectmen of the Town of Ludlow is the Appointing Authority for the Ludlow Police Department. (Stipulated Fact)
6. At a meeting of the Board of Selectmen held on July 21, 2003, the Board of Selectmen interviewed the five candidates for promotion to sergeant, and after deliberation, voted to promote the candidate ranked first on the certification and a

candidate ranked third on the certification, thus bypassing the Appellant, who was ranked second. (Stipulated Facts; Exhibit 3)

7. Personnel Administration Rules .08 (3) states in relevant part, “Upon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule .02, an appointing authority shall, immediately upon making such determination, send to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked, or of the reason or reasons for selecting another person or persons, lower in score or preference category.” (emphasis added) (PAR .08(3))
8. On July 24, 2003, the Town submitted to HRD the positive reasons for choosing the selected candidates, including the third ranked candidate who bypassed the Appellant. (Exhibit 2)
9. According to the correspondence submitted to HRD, the third-ranked candidate received a masters degree in criminal justice, received academic awards, served as a military police officer in the Army Reserve and was a community police officer assigned to the Town’s “Gang Intelligence Unit”. In its correspondence to HRD, the Town further stated that the third-ranked candidate’s “flawless work ethic and strong community presence, were influential in his selection.” There was no reference to whether or not the third-ranked candidate interviewed well before the Board of Selectmen and/or whether this was a factor in the Board’s determination, as contrasted with the Board’s observation of the first-ranked candidate in the same correspondence to HRD stating, “he [the first-ranked candidate] interviewed extremely well showing a tranquil but strong personality.” (Exhibit 2)

10. No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. PAR.08(3).
11. The Appellant currently has a masters degree in criminal justice. At the time of the interview, he was completing his thesis. (Testimony of Appellant)
12. The Appellant served full-time in the United States Marine Corps for six years and ten months serving as a military police officer and a traffic accident reconstructionist. In this capacity, he had supervisory experience. During his service in the United States Marine Corps, he also served as the “Operations NCO” for the Okinawa Police Department, a 300-person operation. He was decorated for outstanding work for his service with the Okinawa Police Department. (Testimony of Appellant)
13. During his tenure with the Ludlow Police Department, the Appellant had the same experience in community policing as the third-ranked candidate. (Testimony of Appellant)
14. The Appellant also served on the Department’s bicycle patrol unit, was gang task force-trained and was also trained as an expert in traffic accident reconstruction. (Testimony of Appellant)
15. The Appellant is a life-long resident of Ludlow and is actively involved in the community. Specifically, the Appellant has coached seventh and eighth grade football and coached football at the high school for six years, including at the time he applied for the position of sergeant. (Testimony of Appellant)

16. According to the unrefuted testimony of the Appellant, he was informed that in order to be considered for promotion to sergeant, he should submit his resume and any pertinent information to the Chief of Police. He was never told that candidates could submit letters of recommendation. (Testimony of Appellant)
17. According to the unrefuted testimony of the Appellant, he learned that the third-ranked candidate submitted reference letters directly to one member of the Board of Selectmen. The Appellant first became aware of this after his interview when he was watching the third-ranked candidate being interviewed on the local cable access channel. (Testimony of Appellant)
18. The Appellant subsequently went to the Ludlow Town Hall and asked to see the above-referenced letters of recommendation in the third-ranked candidate's folder. Fifteen (15) letters of recommendation were in the third-ranked candidate's folder, including recommendations from the Chairman of the Ludlow School Committee; a manager in the Ludlow DPW; the Director of Athletics for the local athletic department; the Vice President of a local savings bank; a Springfield police officer; the Assistant Deputy Superintendent of the Hampden County Sheriff's Office; the President of the Ludlow Chamber of Commerce; and a Ludlow elementary school teacher. The recommendations were not included as part of the information the Chief of Police submitted to the Board of Selectmen, but, rather, were in the folder separately. (Testimony of Appellant)
19. HRD approved the Town's reason for bypass on August 4, 2003. (Exhibit 4)
20. The Appellant filed a timely appeal with the Civil Service Commission.

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, s. 2(b) requires that bypass cases be determined by a preponderance of the evidence. A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The issue for the commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civil

Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

When all factors for selection are equal between a selected candidate and an Appellant bypassed with a higher civil service examination, deference should be given to the candidate with the higher score.

In this case, the reasons proffered by the Town for selecting the third-ranked candidate apply equally to the Appellant, who was ranked second.

- According to the Town, the third-ranked candidate had served as a reserve officer in the United States Army. The Appellant had served full-time in the United States Marine Corps for six years.
- According to the Town, the third-ranked candidate received academic awards. The Appellant was decorated for his exemplary service while serving in the United States Marine Corps.
- According to the Town, the third-ranked candidate is assigned to the Town's Gang Intelligence Unit. The Appellant is also trained to serve in the Town's Gang Intelligence Unit.
- According to the Town, the third-ranked candidate has a flawless work ethic and strong community presence, which, again according to the Town, were "influential in his selection." The Appellant has been trained in community policing, has served on the Department's bicycle unit and has coached football at both the junior high and high school level for several years. Moreover, the fact that the third-ranked candidate was able to submit 15 letters of recommendation from community members to the board outside of the proscribed process, tainted the selection process and gave the third-ranked candidate an opportunity to display community support that was not afforded to the Appellant.
- According to the Town, the third-ranked candidate had a masters degree at the time of the interview; the Appellant was completing his thesis for a masters degree at the time of his application.

In such cases where the candidates have such similar backgrounds, the Appointing Authority often rightfully relies on an interview process to make a final determination.

Although the then-five member Board of Selectmen conducted a personal interview of all

five candidates, for which a copy of a DVD was submitted to the Commission, there is absolutely no reference in the Town's letter to HRD indicating whether the Appellant's performance at the interview was a factor in bypassing the Appellant. This would not appear to be an oversight, as the Board explicitly referenced the interview performance of the first-ranked candidate in the same letter to HRD. Moreover, no reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. PAR.08 (3)

Therefore, the Commission must rely on the written reasons submitted to HRD by the Appointing Authority. Based solely on those reasons, the Town has not provided sound and sufficient reasons for bypassing the Appellant over the third-ranked candidate. The rights of the Appellant were violated through no fault of his own. Therefore, pursuant to our powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs the Personnel Administrator to place the Appellant at the top of the next list of eligible candidates to allow the Appellant to be considered for a sergeant position in the Town of Ludlow.

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Bowman, Guerin, Marquis and Taylor, Commissioners) on April 26, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

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

Notice:

Stanley L. Weinberg, Esq. (for Appointing Authority)

William J. Fennell, Esq. (for Appellant)

John Marra, Esq. (HRD)