

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

ROBERT HEIPT,
Appellant

v.

G1-12-139

TOWN OF SHREWSBURY,
Respondent

Appearance for Appellant:

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Mavricos, LLP
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Appearance for Respondent:

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Commissioner:

Cynthia Ittleman¹

Pursuant to the provisions of G.L. c. 31§2(b), the Appellant, Robert Heipt (hereinafter “Mr. Heipt” or “Appellant”), appealed the decision of the Town of Shrewsbury (hereinafter “Town” or “Appointing Authority”), as the Appointing Authority to bypass him for original appointment to the position of full-time police officer. The Appellant filed a timely appeal with the Civil Service Commission (hereinafter “Commission”) on March 29, 2012. A pre-hearing was held on June 12, 2012. A full hearing was held on October 4, 2012 and October 5, 2012. The witnesses

¹ The Commission acknowledges the assistance of Law Clerk Jared Varo in preparing this decision.

were sequestered during the full hearing except the Appellant. The parties submitted recommended decisions on November 2, 2012. The hearing was digitally recorded and a CD of the hearing was provided to each of the parties.

FINDINGS OF FACT:

A total of twenty-four (24) joint exhibits were entered into evidence by the parties. In addition, the Appointing Authority entered Exhibits 25, 26 and 30. The Appellant introduced Exhibits 27, 28 and 29. One document was marked “A” for Identification (entitled “Background Investigation for Police Officer Position”) that was prepared by Mr. Bruce Lint, a witness for the Appellant. Based on these exhibits, the stipulations of the parties, and the testimony of the following witnesses, as appropriate:

For the Appointing Authority:

- James J. Hester, Chief of Police, Shrewsbury Police Department
- Joseph McCarthy, Lieutenant, Shrewsbury Police Department
- Daniel J. Morgado, Town Manager, Town of Shrewsbury

For the Appellant:

- Robert Heipt
- Anthony Belculfine (under subpoena)
- Bruce Lint

and taking administrative notice of all matters filed in the case; as well as pertinent statutes, case law, regulations and policies; drawing reasonable inferences from the credible evidence; a preponderance of the credible evidence establishes as follows:

1. Robert Heipt is a long-time resident of Shrewsbury, originally from Worcester. He attended the first two years of high school at the Holy Name Catholic School in

Worcester and then attended Shrewsbury High School, graduating in 2007. After graduation, Mr. Heipt rented an apartment and began working at Quizno's, where he worked until approximately 2009. When Quizno's closed, he went to work for a valet company until he was deployed in the National Guard. Mr. Heipt joined the National Guard in January, 2008. He was deployed to a couple of locations within the United States. At or around that time, Mr. Heipt was also taking classes at Quinsigamond Community College. He was subsequently deployed to Afghanistan before final exams in 2010. In Afghanistan, he was assigned various duties; he returned to the U.S. in 2011. As a result of his service, Mr. Heipt was awarded the Army Commendation Medal, a Combat Infantry Badge, the Afghanistan Campaign Medal with Bronze Campaign Star, a NATO Afghanistan Service Medal and a Four Star General's Coin. (Heipt Testimony)

2. Upon his return from Afghanistan, Mr. Heipt worked briefly at a Department of Youth Services facility. In addition, Mr. Heipt sat for the military make-up police entrance civil service examination in September 2011, as well as other tests; he earned a 96 on the police exam. As a result, Heipt's name was placed on an eligible list of candidates for Shrewsbury police officer. (Stipulation of Parties; Heipt Testimony).
3. On or about November 21, 2011 the Town submitted a Civil Service Requisition to the Human Resources Division ("HRD"), seeking the names of eligible individuals to appoint 5 police officers. (Stipulation of the Parties).

4. On or around November 30, 2011, HRD sent Certification No. 202562 to the Town of Shrewsbury's Town Manager, Daniel J. Morgado. (Stipulation of the Parties). Mr. Morgado is the Town Appointing Authority. (Morgado Testimony)
5. Mr. Heipt's name appeared on Certification No. 202562. Mr. Heipt was ranked third on the Certification List. Mr. Heipt received a military preference and a residency preference. (Stipulation of the Parties).
6. Mr. Heipt signed the Certification indicating his willingness to accept appointment. (Stipulation of the Parties).
7. In December 2011, Mr. Heipt submitted an application to the Shrewsbury Police Department (“SPD”) for appointment to one of the five (5) full-time police officer positions that were available. This application disclosed the fact that Mr. Heipt was arrested for involvement in a fight in the summer of 2007, the year that Mr. Heipt graduated from high school, and provided the docket number of the resulting criminal complaint. The complaint included one count of assault and battery and one count of assault and battery with a dangerous weapon, both from the 2007 fight. The complaint was dismissed at the request of the prosecution because: “The victim [Mr. Thomas] has refused to testify against the defendant. He stated that he suffered no injuries and it was childish on his part too. Commonwealth has no other evidence and requests dismissal without prejudice.” (Stipulation of the Parties; Hester Testimony; Heipt Testimony; Ex. 15; quote from Ex.19)
8. On January 5, 2012, Mr. Heipt was interviewed by three members of the Shrewsbury Police Department regarding his application for employment. The

three members were: Chief James Hester (“Chief Hester”), Det. Lt. Joseph McCarthy (“Lt. McCarthy”) and Sgt. Pratt. (Hester Testimony; Heipt Testimony)

9. At this interview, Mr. Heipt was asked about the fight that occurred in July, 2007. He provided an explanation. When asked who else was present, Mr. Heipt could not remember. However, he guessed that a “Brian” may have been present, though he was not sure. (Heipt Testimony)
10. Mr. Thomas made threatening phone calls to Mr. Heipt after the fight. A Police Officer contacted Mr. Heipt by phone. The officer asked Mr. Heipt to turn himself in, which he did. (Heipt Testimony)
11. The SPD consulted a Worcester Police incident report (“Report”) numbered 20007000065867, which detailed the fight in 2007. The Report lists Mr. Thomas as the victim and was based upon Mr. Thomas’s complaint. The Report was reiterated in the court docket in an affidavit by the same officer who filed the original report. The case was dismissed because Mr. Thomas refused to testify, noting that he was equally childish and suffered no injury, as noted above. (Exs. 17, 19)
12. Mr. Morgado has been the Town Manager for fifteen years and he is the Appointing Authority. He is in charge of all employment and personnel, except for those who are appointed by the Selectmen, like the Town counsel. With regard to the appointment of five (5) Police Officers relating to this case, he requested the list from HRD November, 2011. The list is sent to SPD and the SPD begins the process of obtaining applications from candidates, conducting interviews, conducting background checks and related matters. Chief Hester is in

charge of that process. Mr. Morgado appointed Chief Hester. Chief Hester gave Mr. Morgado recommendations whom to hire on February 7, 2012 by letter. Mr. Morgado sent a letter to Mr. Heipt concerning his bypass and attached Chief Hester's bypass letter. Mr. Morgado discussed Chief Hester's hiring recommendations with the Chief but he did not recall how long they discussed it. Mr. Morgado has total confidence in Chief Hester. Mr. Morgado tries to maintain the same paper process the Town used prior to HRD's delegation of authority to cities and towns. Mr. Morgado did not review the candidates' applications and related material. The Town did not send reason for the bypass to HRD because of delegation by HRD. (Morgado Testimony; Ex. 4)

13. Chief Hester has been the Town Police Chief since January, 2007 and a member of the SPD for twenty-five (25) years. He has been through the appointing process for ten (10) Officers. Chief Hester described the hiring process within the SPD in detail, indicating, *inter alia*, that the people involved in interviews are himself, Det. McCarthy, and one or two added supervisors. Chief Hester, Sgt. Pratt and Det. McCarthy interviewed Mr. Heipt in the first of two interviews of Mr. Heipt. There is a list of questions asked at the interviews but interviewers can also ask other questions. They interviewed Mr. Heipt a second time, which SPD does occasionally with candidates.² Mr. Heipt repeated his statements from the first interview, with regarding to the 2007 fight, except that he added that he recalled the name of at least one person who was also at the fight. Chief Hester follows the HRD delegation guidelines for selection and bypass of candidates and untruthfulness is a reason for bypassing a candidate. He acknowledged the

² The names of the all who interviewed Mr. Heipt the second time were not provided.

inconsistencies in the reports about the 2007 fight but testified nonetheless that Mr. Heipt was untruthful about the fight and his associations. (Hester Testimony)

14. Det. McCarthy is one (1) of three (3) Lieutenants at the SPD. He has been in the SPD for eighteen (18) years. He is the commander of the Detective Bureau, where he supervises four (4) detectives and conducts investigations. (McCarthy Testimony)
15. Chief Hester assigned Detective McCarthy (“Det. McCarthy”) to conduct interviews regarding the fight. Det. McCarthy first interviewed Mr. Thomas. He then interviewed Mr. Brian B, whom Det. McCarthy believed to be the Brian mentioned by Mr. Heipt.³ Although Mr. B was not present at the fight, he directed Det. McCarthy to John A⁴, who was present at the fight. John A provided his version of events and further directed Det. McCarthy to Anthony Belculfine, who Mr. A erroneously believed to have been present at the fight. Det. McCarthy did not manage to interview Mr. Belculfine, although Mr. Belculfine was subpoenaed for the Commission hearing, where he testified. (Ex. 15, Belculfine Testimony; McCarthy Testimony). At the Commission hearing, Det. McCarthy acknowledged that there are inconsistencies between events as related by those with whom he spoke about the 2007 fight and that some of these people contradicted themselves and/or were not at the fight. (McCarthy Testimony)
16. Mr. Heipt has known Mr. B for many years. He has occasional contact with Mr. B, although he does not want any contact with him. They are friendly but not friends. Mr. B is a recovering drug addict, he has been arrested many times

³ It is not clear whether Brian B was in fact the “Brian” whom Mr. Heipt believed was present at the fight.

⁴ Appellant’s counsel stated at the hearing that he had subpoenaed Mr. A but that Mr. A would not attend the hearing.

and he had been observed by police behaving erratically. (Ex. 15, Heipt Testimony; McCarthy Testimony)

17. Mr. Heipt has known Mr. Thomas for many years and has had a negative relationship with him since childhood. (Ex. 15, Heipt Testimony)
18. Mr. Heipt knows Mr. A from Shrewsbury High School, which Mr. Heipt attended for two years, but he has not had contact with him for approximately three or four years. (McCarthy Testimony)
19. Mr. Heipt and Mr. A remain “friends” on the website Facebook, although this does not necessarily mean that, for traditional purposes, they are friends.⁵ (Heipt Testimony)
20. Mr. A has many arrests and convictions in his criminal record. (Ex. 15; Heipt Testimony; McCarthy Testimony)
21. Mr. Heipt knows Mr. Belcufine from high school but they are no longer close. (Heipt Testimony; Belcufine Testimony)
22. Mr. Belcufine has been arrested once but the case was dismissed. (McCarthy Testimony; Heipt Testimony; Belcufine Testimony) He has no other criminal history and has never been convicted of a crime. (Heipt Testimony; Belcufine Testimony)
23. Mr. Belcufine is a year younger than Mr. Heipt. After high school graduation, Mr. Belcufine worked for one year building trucks at a company called MHK; after

⁵ Facebook is a social media website where individuals can create profiles about themselves and then link those profiles to the profiles of others, allowing communication. When an individual links his profile with another person’s, that person is referred to as a “friend.” However, this does not necessarily correspond to friendship in the traditional sense, as many individual “friends” may be casual acquaintances or even corporate entities. Mr. Heipt testified that there is a way to delete a “friend” from one’s Facebook account but it’s a process requiring deletion from each and every page of the Facebook account.

that, he worked in construction for a year for one company, and then worked another year in construction at another company until he was laid off. Thereafter, he worked at Lovey's Garage for a year. Presently, he works in towing at Ted's in Fayville, where he works approximately sixty (60) hours per week. The towing business contracts with various Police Departments, each of which requires a background check, which he has passed. He possesses a Class A commercial driver's license and a Captain's license allowing him to operate a boat with up to six (6) crewmen, which also requires a background check. He also has a transportation worker card permitting him access to ports through homeland security. (Belcufine Testimony)

24. Mr. Belcufine was not present at the 2007 fight because he was with his girlfriend. However, he went to Mr. Heipt's apartment after the fight, at Mr. Heipt's request when he (Mr. Heipt) received calls from Mr. Thomas. Mr. Belcufine spoke to Mr. Thomas while at Mr. Heipt's apartment; he does not recall what they said other than "mouthing off" to each other. Mr. Thomas did not tell Mr. Belcufine that he was hit with anything at the fight. Mr. Belcufine did not see a bat at Mr. Heipt's apartment and he left Mr. Heipt's apartment approximately thirty-five (35) minutes after he arrived.. (Belcufine Testimony)
25. Mr. Heipt's driving record includes two (2) suspensions, two (2) speeding violations, two (2) inspection sticker violations and one (1) failure to possess

license/registration between 2006 and 2009.⁶ One (1) suspension and one (1) speeding violation occurred while Mr. Heipt was a junior operator. (Ex. 15)

26. On January 9, 2012, SPD requested that Mr. Heipt attend a second interview. Shortly before the interview, Mr. A contacted Mr. Heipt to inform him that he had been visited by police in regard to the 2007 fight. This caused Mr. Heipt to realize that Mr. A was present at the incident. At the interview, Mr. Heipt recounted the events of the 2007 again, except noting that Mr. A was present. Mr. Heipt disclosed that he realized this because Mr. A had contacted him regarding the previous visit. He admitted that this “did not look good.” (Heipt Testimony)
27. Lt. McCarthy did not speak to any of Mr. Heipt’s family, employment, or neighborhood references. (McCarthy Testimony)
28. Mr. Heipt was bypassed on February 7, 2012. The reasons provided were:
 - 1) “Mr. Heipt was not truthful about the facts and circumstances surrounding his arrest in 2007 by the Worcester Police Department for assault with a dangerous weapon (baseball bat).”
 - 2) “Mr. Heipt was not truthful about whom he associates himself with and in-fact Mr. Heipt went to great lengths to hide his friendship with these same people. I believe that Mr. Heipt denied his friendship with known criminals because it reflects poorly on his character.”
 - 3) “Mr. Heipt also has a significant driver history including multiple driver license suspensions. Mr. Heipt seems irresponsible having been stopped 3 times within 5

⁶ This list of driving violations includes only those violations for which the operator was found to be responsible. Mr. Heipt was additionally found not responsible for one (1) failure to stop, one (1) use of improper equipment, one (1) speeding violation and one dangerous operation of a recreational vehicle.

months for not having a proper inspection sticker on the vehicle his (sic) was driving.” (Exs. 5, 6).

29. On or about February 7, 2012, Chief Hester recommended five applicants to be appointed to the fulltime police officer positions. Specifically, Chief Hester recommended to Mr. Morgado that the Town hire Patrick Robert, Paul Alward, Adam Cameron, Daniel Cronin and Timothy Charland. All of the selected candidates were ranked below Mr. Heipt. (Exs. 2, 3, 4). Also on or about February 7, 2012, Mr. Morgado sent a letter to Mr. Heipt indicating that he had not been selected. (Ex. 6)
30. Mr. Robert scored a 94 on the civil service exam and is the step-son of Shrewsbury Police Officer Joseph Gonet and the son-in-law of Shrewsbury Board of Selectmen member Maurice DePalo. Mr. Robert received a veteran preference and a residency preference. (Ex. 16; McCarthy Testimony, Heipt Testimony) Mr. Robert’s step-father has worked at the SPD longer than Chief Hester; Chief Hester and Mr. Robert’s step-father have known each other for twenty-five (25) years. (Hester Testimony)
31. Mr. Alward scored an 87 on the civil service exam and is the nephew of Det. McGinnis on the Shrewsbury Police Department. The only driver record noted in the documents submitted to the Commission for Mr. Alward is a 2003 surchargeable accident in Shrewsbury. Mr. Alward claimed residency and veteran preferences. (McCarthy Testimony; Ex. 11)
32. Mr. Robert was married in 2008. However, he does not live with his wife, who lives in Worcester. He lives in Shrewsbury with his mother and stepfather. Det.

McCarthy interviewed Mr. Robert's wife, whereupon she told him that they had not told their respective families of their marriage. McCarthy drove by Mr. Robert's parents' home to confirm that Mr. Robert's car was parked there and it was parked there. (McCarthy Testimony; Ex. 16). Chief Hester knew when Mr. Robert applied for a job that Robert's wife lived in Worcester. (Hester Testimony)

33. Mr. Robert has had two (2) license suspensions, three (3) speeding tickets, and three (3) seatbelt violations between 2009 and 2011.⁷ Mr. Morgado and Chief Hester stated that Mr. Robert's driving record was worse than Mr. Heipt's. (Hester Testimony; Ex. 17)

34. Mr. Cameron's driving record contains one (1) surchargeable accident, one (1) suspension, two (2) inspection sticker violations, and one (1) speeding ticket between 2002 and 2011. The most recent event was the accident, which occurred in 2011.⁸ Chief Hester stated that Mr. Cameron's driving record was about equal to Mr. Heipt's. (Hester Testimony; Ex. 12)

35. Mr. Cameron and Mr. Charland were among the candidates who were selected. They had worked in other Police Departments and had been trained at the academy. Consequently, they needed only in-house training, saving the Town considerable expense and allowing them to begin work sooner. (Hester Academy)

⁷ This list of driving violations includes only those violations for which the operator was found to be responsible.

⁸ This list of driving violations includes only those violations for which the operator was found to be responsible.

DISCUSSION

Applicable Civil Service Statutes and Rules

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315 (1991). G.L. c. 31, § 43.

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. Cambridge, 43 Mass.App.Ct. at 304.

Credibility

Mr. Heipt

Mr. Heipt's testimony provided a mostly favorable impression. He sat erect in the witness seat, responding seriously, directly, and sincerely to questioning. Further, he responded to questioning promptly, without being untoward, while comfortably making eye contact with the person asking him questions. However, he testified that he could not recall certain details of events. I also take into consideration that Mr. Heipt disclosed the 2007 arrest in his application and that his recounting of the events of 2007 remained consistent while acknowledging that he did not recall the names of all who were present at the fight. Further, he admitted to Det. McCarthy that at least one of his social contacts looked bad for the purposes of his application for employment. He also admitted to having some contact with Mr. B, although he diminished its significance. Finally, Mr. Belcufine corroborated those significant aspects of Mr. Heipt's testimony that he could recall. In light of the foregoing, I find Mr. Heipt mainly credible and give his testimony considerable weight except with regard to his association with Mr. B.

Mr. Belcufine

Mr. Belcufine testified in response to the Appellant's subpoena, suggesting that Mr. Belcufine would not have testified otherwise. Indeed, in response to Mr. Belcufine's

concerns that he was missing work by having to testify, he was allowed to testify as the Appellant's first witness. Mr. Belcufine testified earnestly and straightforwardly, according to his memory, corroborating significant aspects of Mr. Heipt's testimony. He recalled that he was not at the fight because he was asleep with his girlfriend at that time but that when Mr. Heipt called and asked him to come to his apartment he did so. Mr. Belcufine testified that he believed he talked to Mr. Thomas on Mr. Heipt's phone, that they were "mouthing off" to one another and that Mr. Thomas did not say he had been hit with anything but Mr. Belcufine admitted not recalling further details in this regard. Therefore, I find Mr. Belcufine credible and I give his testimony considerable weight.

Mr. Lint

Mr. Bruce Lint was retained by the Appellant as an expert; he has been a self-employed consultant with BHL Investigation, a security company, for approximately two years and he is an attorney. Before that, Mr. Lint was employed as a Mass. State Police Officer for twenty-eight (28) years. Mr. Lint spoke professionally, carefully and directly, although his responses to questions were terse at times. As a member of the Mass. State Police, Mr. Lint was trained at, and performed many investigations, including background investigations, and he has extensive experience with regard to traffic violations and records thereof. Mr. Lint opined that the driving records of the Appellant and the selected candidates were relatively minor and that some candidates' investigation written reports addressed all twelve (12) of the Town's investigation criteria while others' did not. He also testified that Mr. Robert's residency warranted further investigation. I accept these aspects of Mr. Lint's testimony as the product of his experience applied to the evidence. However, when Mr. Lint was asked if lying is a sufficient reason for

bypassing the Appellant, he answered that it did not. While Mr. Lint may have meant that he does not believe that the Appellant in this case lied, there can be no doubt generally that lying in pursuit of, or in the practice of the law enforcement profession cannot be tolerated. Otherwise, I find Mr. Lint's testimony credible although I assign it limited weight.

Det. McCarthy

Det. McCarthy was very focused and professional during his testimony. He provided a detailed description of how he conducts investigations generally and how he conducted the one involving Mr. Heipt in particular. He spoke directly in his testimony and responded to questions promptly. However, he candidly acknowledged that people he spoke with regarding the 2007 fight gave inconsistent responses to his questions, that some of them even contradicted themselves, and/or they were not present at the fight. In addition, ironically, Det. McCarthy acknowledged relying on statements of some people whom he referred to as "known criminals" when one of them had been arrested once, the criminal complaint involving the arrest was dismissed, and he has passed law enforcement background checks related to his employment. Although Det. McCarthy also alleged that Mr. Heipt associated with Mr. A and that Mr. A was also a known criminal, Mr. Heipt credibly testified that he had not been in contact with Mr. A for roughly three years. On the other hand, Det. McCarthy's investigation states, and Mr. Heipt acknowledged, that Mr. Heipt had occasional contact with Mr. B, who did, in fact, have a considerable criminal record and was recovering from drug addiction. However, Det. McCarthy chose not to give similar attention to the investigation of Mr. Robert's residency and truthfulness that he gave to the investigation of Mr. Heipt. In view of these

inconsistencies, on balance, I find that Det. McCarthy was somewhat credible and I give his testimony limited weight.

Chief Hester

Chief Hester is a long term member of the SPD and has been Chief of Police since 2007. He spoke professionally, in a relatively soft-spoken manner and articulated a number of details of the events relating to Mr. Heipt's interviews. He testified that "honesty is paramount." Both he and Det. McCarthy testified incorrectly that Mr. Heipt attended all four years of high school in the same place with "Brian," leading them to doubt Mr. Heipt when he told them that he could not recall "Brian's" full name. Chief Hester acknowledged that Mr. Heipt gave the same answers to questions about the 2007 fight at his first and second interview but believed that the reason Mr. Heipt supposedly recalled at least one name at the second interview that he hadn't recalled at the first interview was that those people told Mr. Heipt after the SPD investigator contacted them in this regard. He further acknowledged that there were inconsistencies between the reports of individuals regarding what occurred at the fight in 2007, who was there, and what they did. Notwithstanding the inconsistencies, Chief Hester was convinced that Mr. Heipt was friends with known criminals and that Mr. Heipt was untruthful about the 2007 fight. Chief Hester also testified that Mr. Heipt's driving record indicated that he was irresponsible but he eventually acknowledged that Mr. Heipt's record was no worse than Mr. Cameron's record and that Mr. Robert's record was worse than Mr. Heipt's. In addition, Chief Hester testified that it does not matter to him if a candidate with a motor vehicle infraction on his driving record is ultimately found 'not responsible.' Asked the difference between Mr. Heipt's purported untruthfulness and Mr. Robert's living in

Shrewsbury with his parents although his wife lives in Worcester, Chief Hester testified the difference is that Mr. Robert was forthcoming and Mr. Heipt was not. This undermines Chief Hester's statement that "honesty is paramount." Although some may reach a different result than Chief Hester, it is clear that he holds firm in his belief and that Mr. Heipt fell below his standard of truthfulness. Therefore, I find Chief Hester credible and give his testimony appropriate weight.

Mr. Morgado

Mr. Morgado appeared as a professional and soft-spoken Town Manager who testified in a careful and deliberate manner. His brief testimony concerned his role in hiring in the Town, indicating that Chief Hester is in charge of processing candidate applications, interviews and background checks and related matters. Chief Hester recommended to him the candidates to select. Mr. Morgado had a "brief discussion" with Chief Hester about his recommendations, suggesting that he had limited involvement in the process. He drafted a letter to the Appellant, attaching Chief Hester's bypass letter. Mr. Morgado spoke highly of Chief Hester, stating that he believes that the SPD took the hiring process very seriously and addressed it in a detailed manner. He also disclosed that he is the person who appointed Chief Hester, thereby acknowledging a possible bias in his approval of the process. Based on these observations, I find Mr. Morgado credible as to the limited subjects of his testimony.

The Respondent's Argument

The Appointing Authority argues that it has reasonable justification to bypass Mr. Heipt because he recounted a version of the 2007 fight that was inconsistent with the versions provided by the police report, Mr. Thomas, Mr. A and Mr. B. They also argue

that he lied about his friendships with Mr. A., Mr. B. and Mr. Belculfine. The Appointing Authority believes Heipt hid these associations because these men are “known criminals.” The Appointing Authority argues that this dishonesty justifies the bypass, not the fight itself. Additionally, the Appointing Authority argues that Mr. Heipt’s driving record supports the bypass, though they do not argue that the driving record alone would justify bypassing the Appellant.

The Appellant’s Argument

The Appellant argues that he was not untruthful in providing his recollection of events and points out the event was disclosed on the application and that he provided a docket number. He further argues that his failure to mention Mr. A was a mere lapse in memory. He argues that he has no continuing friendship with his former associates. Further, he argues that Mr. Robert and Mr. Alward, who are related to members of the Police Department, were not selected on basic merit principles and received preferential treatment. He also argues that Mr. Robert and Mr. Cameron had driving records that were as bad as or worse than his. Finally, the Appellant avers that Mr. Robert had a suspicious living arrangement which raised possible residency and truthfulness questions but received less scrutiny than the Appellant’s conduct.

Analysis

The Appointing Authority has shown, by a preponderance of the credible evidence, that it had reasonable justification to bypass Mr. Heipt because he was untruthful about whom he associates with regard to Mr. B. Although Mr. B was not involved in the 2007 fight, the Town’s investigation revealed Mr. Heipt’s association with Mr. B, who is a recovering addict with a considerable criminal record. The

Appointing Authority has not shown, by a preponderance of the credible evidence, that it had reasonable justification to bypass Mr. Heipt based on his driving record or his alleged untruthfulness in relation to the 2007 fight.

Untruthfulness Regarding the Fight

During the Appointing Authority's investigation, many versions of the 2007 fight were heard. Each version was somewhat different. It is thus necessary to review each version.

Mr. Heipt's Version

Mr. Heipt has consistently given the same version of events throughout each interview and at the hearing, although he initially failed to remember the names of those with him. According to Mr. Heipt, the fight occurred after he had left his home to drop his girlfriend off at her home. After dropping off his girlfriend, Mr. Heipt came to a red light at an intersection in Worcester. Mr. Heipt noticed a group hanging around a table outside a donut shop at approximately 1:00 am. An individual from that group approached Mr. Heipt's car. Mr. Heipt recognized this person as Michael Thomas. Mr. Thomas attempted to punch Mr. Heipt. Mr. Heipt proceeded to exit his vehicle and engage Thomas in a fistfight.

Mr. Heipt states that no one in his party was armed with a bat, as recorded in the police report, although he does not dispute that the car window could have been smashed by a bat wielded by a member of the opposing party. Although he initially stated that he was with "Brian," he later remembered that John A., not "Brian," was present. He states that Mr. Belculfine was not present at the fight but met with him later, after Mr. Thomas began making threatening phone calls.

Police Version (based on the statements of Mr. Thomas)

After Mr. Heipt was arrested, a police report was generated. The report is very brief and appears to be based chiefly on the version of events related to the officer by Mr. Thomas, who initially reported the fight. The report lists Mr. Thomas as the victim and Mr. Heipt as the arrestee. The report also states that Mr. Heipt was aided by seven other men, all armed with bats. The report states that Mr. Heipt “came at Mr. Thomas with a baseball bat and punched him in the face.” The court docket provided a restatement of the incident report written by the same officer.

Mr. Thomas’s Version (Second)

Although Mr. Thomas’s statements appear to have formed the basis of the police report of the fight, the version of events he later provided to Det. McCarthy during the course of this investigation by Det. McCarthy was quite different. Thus, Mr. Thomas gave two different accounts. In the second version, Mr. Heipt was the aggressor and attacked suddenly without provocation but without a bat. In this version there were only about four attackers, only one of whom, a Mr. “Johnny Mac,” had a bat. Mr. Thomas stated that no one in his party was armed with a bat.

Mr. B’s Version

Mr. B. was not at the fight and had no first-hand knowledge of it. However, Mr. B claimed that “Johnny A” had a bat and that Mr. Belculfine was also present.

Mr. A.’s Version

According to Mr. A.’s version, the fight was pre-arranged. He claims that he and Mr. Belculfine were armed with bats as were many of the opposing party. He stated that

the back window of the car was smashed with a bat or pipe. He also claimed that he had been drinking with Mr. Belcufine before the incident.

Mr. Belcufine's Version

Mr. Belcufine testified that he was not present at the fight, although he did meet with Mr. Heipt later at Mr. Heipt's apartment. At the apartment, he spoke to Mr. Thomas over the phone. He also spoke to a police officer on the phone. He did not see any bats at the apartment. Mr. Belcufine denied drinking with Mr. A. that night.

Analysis of Untruthfulness Regarding the Fight

The Appointing Authority claims that Mr. Heipt was untruthful about the 2007 fight because his version of events did not match those discovered in the investigation. While the Appointing Authority has broad discretion to make such determinations, in this case the result reached was unjustified.

To find that Mr. Heipt was untruthful about the fight requires that some other version is more credible. Mr. Heipt was a mainly credible witness. His story was consistent throughout each telling, although he did not recall certain names at first. His version of events matched with those described by Mr. Belcufine. In contrast, the versions relied upon by the Appointing Authority were problematic. Mr. Thomas's statement contradicted the original police report, both in the number of attackers and their armament. Thomas, though he claims to have no ill-will toward Mr. Heipt, is known to be a long-time nemesis, and both Mr. Thomas and Mr. Heipt spoke of a rivalry dating back to grade-school.

Mr. A.'s version contradicts Thomas's and Heipt's versions as to who was armed and Mr. Belcufine's version as to his presence at the scene. Mr. A. is not a credible

source as he is a “known criminal” (by the Appointing Authority’s own claim) and did not testify. Likewise, Mr. B did not testify, is also a “known criminal” (the Appointing Authority asserts) and he has no first-hand knowledge of these events. Mr. B did not testify here and the evidentiary value of his version of events is marginal, at best. Mr. A did not testify here and his version is similarly of marginal value, at best.

There is no consensus regarding the manner in which the 2007 fight actually played out. However, it is clear that the Appointing Authority chose to credit the versions of events supplied by “known criminals” over those of Mr. Heipt. The Appointing Authority ignored the inconsistencies in these versions, as well as the inconsistencies between versions supplied by Mr. Thomas. As such, it was unreasonable to rely upon these versions as true and accurate.

The Appellant’s credible and consistent testimony in this regard, and its corroboration by Mr. Belculfine, assures that the version of events that he related at the interviews were his genuine recollection of events. Moreover, Mr. Heipt disclosed the incident on his application and provided a court docket number for the criminal charge related to the fight, acts which support the conclusion that Mr. Heipt did not intend to deceive the Appointing Authority about the fight. Finally, it is only natural that different people will have different recollections of a chaotic event, especially after four (4) years. More likely than not, the fact that Mr. Heipt’s version was different from the others’ does not necessarily warrant the conclusion that it was fabricated and untruthful. Hence, the Appointing Authority failed to show, by a preponderance of the evidence, that Mr. Heipt was untruthful regarding the 2007 fight, lacking reasonable justification therefor.

Untruthfulness Regarding Associations

It is undisputed that the Appellant failed to remember whom he was with during the 2007 fight. The Appointing Authority found that, in doing so, Mr. Heipt was attempting to hide his association with known criminals. The Appointing Authority has established, by a preponderance of the evidence, that Mr. Heipt was untruthful about his association with Mr. B but not with regard to his association with Mr. A and Mr. Belcufine. It was established that Mr. B was battling drug addiction and has a considerable criminal record. Although Mr. B was not at the fight, Mr. Heipt acknowledged he had occasional contact with Mr. B and that it did not look good that he associated with a known criminal. He acknowledged his association, stating that they are friendly, though not friends. In addition, Mr. B referred to Mr. Heipt as a friend, although Mr. Heipt attempted to diminish their association. Mr. Heipt's credibility in this regard is significantly impaired. For these reasons, a preponderance of the evidence establishes that Mr. Heipt associated with Mr. B, he was untruthful in this regard, and the Appointing Authority had reason justification to bypass Mr. Heipt therefor.

Driving Record

Mr. Heipt's driving record was given as a reason for bypass. At the hearing, Chief Hester admitted that the driving record alone would not be enough reason for a bypass. He also admitted that Mr. Robert's driving record was worse than Mr. Heipt's, and that Mr. Cameron's was about equal. All three of these candidates have a number of events on their record, although the majority of those on Mr. Heipt's record are less serious and he was found to be not responsible for some of them. All of these candidates have license suspensions. Mr. Robert's record had a significant number of offenses

within a three year period and Mr. Cameron's record had a very recent accident. As standards must be applied equally, a bypass of Mr. Heipt cannot be justified by his driving record as the standard has not been equally applied in violation of basic merit principles. Therefore, the Appointing Authority has failed to show, by a preponderance of the evidence, that it provided reasonable justification for Mr. Heipt's bypass in this regard. That said, this approach to consideration of candidates' driving records sets a very low standard which does not serve the public good.

Bias

Civil Service merit principles bar favoritism or bias. The town hired candidates who scored lower on the exam than Mr. Heipt, including Mr. Alward and Mr. Robert, who are related to members of the Town Police Department, and Mr. Robert is related to a Town Selectman. Mr. Robert's driving record is worse than Mr. Heipt's but Mr. Alward's record was limited to a 2003 surchargeable accident. At the time of his application, Mr. Robert had been married for three years but had kept the marriage secret, living apart from his wife who lived in Worcester and instead living with his mother and step-father in Shrewsbury. This is a plainly suspicious situation and it does not appear that it was given the same level of scrutiny to which Mr. Heipt was subjected. While Det. McCarthy did interview Mr. Robert's wife and did check to see if his car was parked at his parents' house this does not approach the level of investigation devoted to Mr. Heipt. Hiding a marriage and living apart in this manner should raise serious questions about a candidate's residency and truthfulness, especially when the situation was ongoing. However, there is insufficient evidence showing that the hiring process was biased in these regards. What may have affected Mr. Heipt's candidacy, as a practical matter, was

that Mr. Cameron and Mr. Charland, two of the successful candidates, were already academy trained police, having worked in other Police Departments, allowing the Town to fill two vacancies almost immediately and saving the expense of sending the two officers to the academy. There can be no question that the Town is authorized to take prior training into consideration as appropriate in its decision-making.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, the Appellant's appeal under Docket No. G1-12-139 is hereby *denied*.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, Marquis and Stein, Commissioners, on September 19, 2013.

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:

Donald C. Keavany, Jr., Esq. (for Appellant)
T. Philip Leader, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)