

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DENNIS OLISKY, JR.,

Appellant

v.

G1-13-5

TOWN OF EAST LONGMEADOW,
Respondent

Appearance for Appellant:

David E. Ashworth, Esq.
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Worcester, MA 01609

Appearance for Respondent:

John P. Talbot, Jr., Esq.
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Commissioner:

Cynthia Ittleman¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Dennis Olisky (hereinafter “Mr. Olisky” or “Appellant”), filed an appeal on January 9, 2013, regarding the decision of the Town of East Longmeadow (hereinafter “Town” or “Respondent”), the Appointing Authority, to bypass him for appointment to the position of Police Officer in the East Longmeadow Police Department (hereinafter “Department”). The Appellant filed a timely appeal. A pre-hearing conference was held on March 13, 2013 and a full hearing was held over two (2) days on May 8, 2013, and June 12, 2013 at the Springfield State Building.² The hearing was digitally recorded

¹ The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR § 1.01 and thereafter (formal rules) apply to adjudications before the Commission, with G.L. c. 31 or any Commission rules taking precedence in the event of a conflict.

and copies were provided to the parties.³ The witnesses (except the Appellant) were sequestered. Both parties submitted post-hearing briefs. For the reasons stated herein, the appeal is dismissed.

FINDINGS OF FACT:

Twenty-one (21) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Town of East Longmeadow:

- Sgt. Patrick Manley, East Longmeadow Police Department

For the Appellant:

- Chief Douglas Mellis, East Longmeadow Police Department
- Superintendent David J. Gromaski, East Longmeadow Department of Public Works (“DPW”)
- James Driscoll, Former Member of the Board of Selectmen, East Longmeadow
- Mr. A, Former Employee of the East Longmeadow DPW
- Dennis Olisky, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, a preponderance of the credible evidence, and reasonable inferences therefrom, establishes the following findings of fact:

1. Mr. Olisky is a resident of East Longmeadow. He took the Civil Service Exam for the position of Police Officer on April 20, 2011 receiving a score of 90. (*Stipulated Facts*)
2. The Town requested a Certification from the state’s Human Resources Division (“HRD”) to fill two (2) police officer positions with the Department on June 27, 2012. Mr. Olisky’s name appeared on Certification number 00169 along with seventeen (17) others. (*Stipulated Facts*)

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, the recording provided to the parties should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

3. After the deadline for candidates to sign the Certification, Mr. Olisky was the highest ranked candidate on the Certification who was willing to accept appointment. Only four candidates of the eighteen (18) on the Certification signed it. HRD then supplied the Town with additional names on September 19, 2012. Mr. Olisky remained the highest ranked candidate on the Certification among those who signed indicating their willingness to accept appointment. (*Exhibits 3, 4, and 5*)
4. Mr. Olisky was employed at the Town's Department of Public Works ("DPW") prior to applying to become a Police Officer. He was with the DPW for five years before resigning on June 24, 2011, with no history of discipline. (*Testimony of Olisky*)
5. Mr. Olisky was interviewed for the Police position by Sgt. Manley and two other Sergeants on November 11, 2012. (*Testimony of Olisky and Manley, Exhibit 8*)
6. Sgt. Manley recognized Mr. Olisky as being a former employee of DPW involved in an incident the prior year regarding a missing generator which belonged to the Town. (*Testimony of Manley*)
7. Sgt. Manley spoke with Chief Mellis about Mr. Olisky and the missing generator incident, which led Chief Mellis to gather more information. (*Testimony of Manley and Mellis*)
8. The Department then contacted the DPW's Operation Manager, John Collins, to obtain more information. The Department also contacted DPW Superintendent Gromaski to obtain any and all documentation about the missing generator incident. (*Testimony of Manley and Mellis*)

9. On November 26, 2011, Mr. Gromaski sent Chief Mellis a packet of information regarding the investigation into Mr. Olisky's conduct in June 2011 relating to the missing generator incident. (*Exhibit 11, Testimony of Mellis*)
10. Chief Mellis notified the Board of Selectmen ("BOS"), the City's Appointing Authority, that two (2) names were to be taken off of the list of candidates to be interviewed on BOS's agenda for November 27, 2012. The reason for this is that they were going to be bypassed. One of the two candidates removed from the list was Mr. Olisky. (*Testimony of Mellis*)
11. On June 1, 2011, the Town lost electrical power due to a tornado that hit Western Massachusetts, passing close to the Town. (*Exhibit 11*)
12. The Town has nineteen (19) sanitary sewer pumping stations. Five of those stations are above ground and are equipped with generators to be used in the case of a power outage. The remaining fourteen (14) are smaller and located below ground. In the event of a power outage, DPW brings trailer-mounted generators to each of the stations to power the pumps that clear out the sewage in the tanks. (*Testimony of Gromaski*)
13. In addition to these generators, DPW owns a smaller portable generator. It can be used to provide power to outdoor projects for lighting and equipment if needed but it is also used for the Town water tank to provide power in the case of a power outage. At the water tank, there is a Supervisor Control and Data Acquisition system. This is a computerized program that controls the town's water and sewer pumping stations. The Police Department's communications system is also housed at the water tank. (*Testimony of Gromaski*)

14. Should power go out in the water tank, police officers would no longer be able to communicate with each other over two-way radios. (*Testimony of Gromaski*)
15. The portable generator is stored on DPW truck number 49. Truck 49 was usually assigned to Mr. A, a DPW employee. (*Exhibit 11*)
16. On June 2, 2011, Mr. A called out sick, taking a personal day due to the power outage. (*Exhibit 11*)
17. Mr. Olisky was then assigned to truck 49 to replace Mr. A. (*Testimony of Olisky*)
18. On the same morning that Mr. A called out sick, Mr. John Collins (“Mr. Collins”), the DPW General Manager, met with the foremen in his office to prepare for the day’s work. Mr. Collins instructed the foremen that under no circumstances could anyone take home a generator for personal use. Mr. Olisky was not present when this order was given since he was already on the road. (*Exhibit 11, Testimony of Gromaski and Olisky*)
19. Mr. A contacted Mr. Olisky and asked him to bring him his (Mr. A’s) cell phone charger as he had left it in truck 49. (*Testimony of Mr. A*)
20. Mr. Olisky arrived at Mr. A’s house around 2 p.m. on June 2 and he saw Mr. A take the portable generator out of the truck. Mr. A stated that he wanted to use it to cool his refrigerator. (*Testimony of Olisky and Mr. A, Exhibit 11: Appellant’s Written Statement*)
21. Mr. Olisky left the generator with Mr. A and returned the truck to the DPW. (*Testimony of Olisky, Exhibit 11: Appellant’s Written Statement*)
22. Around 4 p.m. on June 2nd, DPW Foreman Roy Esposito was assigned to move the generators from station to station due to the power failure. At approximately 5 p.m., Mr. Esposito called Mr. Collins to report that the portable generator was missing. It was

supposed to be in the rear body of truck 49 but it was not there. Mr. Esposito repeatedly searched all around and could not locate the portable generator. (*Exhibit 11*)

23. Shortly thereafter, Mr. Esposito was instructed to call the water and sewer employees to locate the portable generator but no one knew the whereabouts of the generator. When Mr. Esposito contacted Mr. Olisky around 5:30 p.m. and asked where the generator was located, Mr. Olisky responded "I don't know. You should call [Mr. A]." (*Exhibit 11, Testimony of Olisky*)

24. Mr. Esposito called Mr. A immediately afterward but the call was forwarded to a voicemail messaging system. Mr. Esposito left a message stating that he was looking for the generator and, if he knew where it was located, Mr. A should call him back. (*Exhibit 11*)

25. Later that evening, Mr. Esposito contacted Mr. Olisky a second time, saying he was unable to reach Mr. A and asked Mr. Olisky to try to contact Mr. A. Mr. Olisky did not tell Mr. Esposito that he had seen Mr. A take the portable generator out of the truck earlier that day. (*Testimony of Olisky*)

26. Sometime after 10:30 p.m. that night, Mr. Esposito found the missing portable generator in the water building. He stated that it was not there during his prior searches. (*Exhibit 11*)

27. The following morning, June 3, 2011, Mr. A asked Mr. Olisky not to tell anyone about his having taken the portable generator. (*Testimony of Olisky, Exhibit 11: Appellant's Written Statement*)

28. On June 6, 2011, Mr. Collins summoned all the employees into the lunch room and asked if anyone knew anything about the portable generator disappearing. No one came forward. (*Exhibit 11*)
29. After Mr. A returned the portable generator, it was not used for any reason until June 6, 2011. (*Testimony of Gromaski*)
30. On June 7, 2011, the DPW contacted the Police Department to request an investigation regarding the portable generator. Sgt. Manley responded to the request and met with Mr. Collins. (*Testimony of Manley, Exhibit 11*)
31. On June 8, 2011, Mr. A came forward admitting that he was the one who taken possession of the generator. He was visibly shaken, taking it since he was worried about his young family and pregnant wife. He also stated that as soon as he knew that the DPW was looking for it, he brought it back, never intending to keep it. (*Exhibit 11*)
32. On June 9, 2011, Mr. Collins asked Mr. Olisky to provide a written statement, accounting for his actions during the working hours of June 2nd. Mr. Olisky presented his written statement the following day. (*Exhibit 11, Testimony of Olisky*)
33. On June 14, 2011, letters were sent to Mr. A and Mr. Olisky informing them of a disciplinary hearing to be held at the Board of Public Works (“BPW”) on June 23, 2011. (*Testimony of Olisky, Exhibit 11: Notice of Hearing*)
34. Both Mr. Olisky and Mr. A appeared for their disciplinary hearing on June 23, 2011, stating how sorry they were. Mr. Olisky apologized for his role in the situation but stated that, at the time, he did not think it was an issue. Members of the BPW emphasized how serious the situation was, given the importance of generators during such an emergency. One member of the BPW stated that Mr. Olisky’s and Mr. A’s behavior showed a lack of

honesty and integrity and deception and that it created anxiety and, in this case, it was a potential theft. (*Exhibit 11: BPW Meeting*)

35. The BPW unanimously voted to terminate the employment of both Mr. A and Mr. Olisky. The BPW members also stated that they were willing to delay issuance of their termination letters, giving Mr. Olisky and Mr. A the opportunity to resign instead. (*Exhibit 11: BPW Meeting*)

36. On June 24, 2011, Mr. Olisky offered his letter of resignation. This letter was received on June 28, 2011 by the BPW. (*Exhibit 11: Resignation Letter*)

37. On July 1, 2011, Mr. Olisky attempted to withdraw his resignation, claiming that the Town lacked just cause to terminate him and that he wished to be reinstated and made whole.⁴ The BPW declined to accept his withdrawal. (*Exhibit 11: July 1 Email*)

38. Based upon the information about the missing generator incident, Chief Mellis gave his recommendation to the Appointing Authority to bypass Mr. Olisky. (*Testimony of Mellis*)

39. The Town provided its reasons to bypass Mr. Olisky to him on December 12, 2012, listing the missing generator incident and stating that this type of conduct is contrary to the conduct and integrity expected of all Police Officers. (*Exhibit 14*)

40. Mr. Olisky filed his appeal on January 9, 2013.

⁴ There is no appeal before the Commission alleging that the appointing authority in that regard did not have just cause to terminate Mr. Olisky from his employment at DPW and seeking Mr. Olisky's reinstatement. I make no finding whether Mr. Olisky was a civil service employee when he was employed at the Town DPW and whether his resignation was valid. In any event, the Commission has found, absent a lack of mental capacity, that when an Appellant tenders a resignation in anticipation of being discharged and the appointing authority accepts the resignation, the appellant's "employment status is conclusively severed." *Travers v. Fall River*, D1-07-90 (2008)(citation omitted; *see* cases cited); *see Cynthia Champion v. Weymouth Fire Department*, 25 MCSR 223, 227 (2012).

DISCUSSION

Applicable Law

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.

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 189 (2010). “In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). Further, “[t]he commission does not act without regard to the previous decision

of the appointing authority, but rather decides whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” *Id.* at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. Beverly at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone … than in disciplining an existing tenured one.” *See City of Attleboro v. Mass. Civil Serv. Comm’n*, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly, supra, at 191. In light of the high standards to which public safety personnel are appropriately held, appointing authorities are given significant latitude in screening candidates. City of Beverly v. Civil Service Commission, 78 Mass.App.Ct. 182, 188 (2010), citing Cambridge, supra, at 305.

The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001). “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” *Id.* (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)).

Respondent’s Argument

The Respondent argues that Mr. Olisky knew the location of the missing generator, lied to his supervisor when asked, and failed to disclose its whereabouts for seven (7) days as the

DPW repeatedly requested information on how and why it disappeared. A police officer is held to a high standard. Integrity and honesty are at the core of an officer's job and responsibilities. It had only been one year since Mr. Olisky's dishonest conduct led to his resignation. The BPW found Mr. Olisky's dishonest actions during an emergency situation to be worthy of termination, and he would have been terminated had he not resigned. He received two calls about the whereabouts of the generator and failed to disclose what happened to the generator. He knew that the DPW was looking for it over the next several days but did not come forward. Even after Mr. A came forward, Mr. Olisky remained silent until approached by management. He concealed facts until he was approached by management and told to submit a statement. Mr. Olisky's contention that the generator was never used misses the point. The issue before the appointing authority was that he concealed information from his employer. For these reasons, the Appointing Authority argues that it had reasonable justification to bypass Mr. Olisky.

Appellant's Argument

The Appellant argues that the Appointing Authority has failed to meet its burden to set forth a valid reason or justification for the bypass. He argues that there was no credible and reasonable explanation why his June, 2011 resignation was revisited on November 26, 2012, the day before his final interview before the Board of Selectmen, which followed his initial interview with Sgt. Manley and the two other Sergeants on November 11, 2012. The Appointing Authority, according to Mr. Olisky, repeated materially false information, leaving the Appellant no fair opportunity to respond. He argues that the written reasons sent to HRD for bypassing the Appellant are patently false, unfair, and grossly inaccurate. He claims that he told Mr. Esposito the truth about who had the generator on June 2, 2011 and that he did not lie or cover it up.

The Appellant further avers that the opinions contained in the allegations against him were the result of arbitrary predispositions against him and the Appointing Authority based their determination on “unsubstantiated and subjective” criteria that lacked adequate factual support. Removing Mr. Olisky from the interview list on November 27, 2012, was a violation of due process and fundamental fairness as the Appointing Authority failed to provide him with the written reasons for bypass prior to November 27, 2012, which would have been the date of Mr. Olisky’s final interview. Mr. Olisky therefore had no meaningful opportunity to respond to these allegations. For these reasons, Mr. Olisky argues that his bypass was arbitrary and capricious, and the Appointing Authority has not proven by a preponderance of the evidence that his bypass was reasonably justified.

Analysis

A preponderance of the credible evidence establishes that the Appointing Authority had reasonable justification to bypass Mr. Olisky for the position of police officer. Honesty and integrity are essential for a police officer. Mr. Olisky avers that the written reasons for bypass are patently false, unfair, and grossly inaccurate, even stating that he told Mr. Esposito the truth about who had the generator on June 2, 2011 and that he did not cover up the facts or conceal any facts from his employer. Quite the contrary, Mr. A’s testimony indicated that he asked Mr. Olisky to not tell anyone that what happened to the generator and Mr. Olisky obliged. Not once did Mr. Olisky come forward after the DPW asked for anyone who had any information to come forward. Mr. Olisky might not have been the one to take the generator, but he did know its whereabouts, when, how and why it disappeared, and how it could have been returned.

While Mr. Olisky argued that the portable generator was not actually needed during this emergency situation, that does not justify his conduct, nor was that his call to make. Mr. Olisky

stated during the local disciplinary hearing that he did not believe use of the portable generator was an issue at the time. However, a tornado had just cut off power in the Town and the DPW was called upon to perform its essential function as a public works agency. Since Police are regularly called upon to respond to emergencies, the Town could properly rely on its concerns that Mr. Olisky failed to adequately respond to the emergency facing the Town as a result of the tornado. Moreover, there can be no question that police officers are held to higher standards, requiring them to be truthful, especially since they are called upon to testify in court, where their credibility is essential. In view of these considerations, the Town had reasonable justification to bypass Mr. Olisky based upon his conduct. There is no evidence of improper motive or bias undermining the Town's decision.

CONCLUSION

Based on the findings of fact herein and the applicable law, the Appellant's appeal under Docket No. G1-13-5 is hereby *dismissed*.

Civil Service Commission

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on April 17, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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:

David E. Ashworth, Esq. (for Appellant)

John P. Talbot, Jr., Esq. (for Respondent)

John Marra, Esq. (HRD)