

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

SCOTT P. COMFREY
Appellant

v.

G1-14-81

FALL RIVER POLICE DEPARTMENT
Respondent

Appearance for Appellant:

Pro Se
Scott P. Comfrey

Appearance for Respondent:

Gary P. Howayeck, Esq.
Office of the Corporation Counsel
1 Government Center
Fall River, MA 02720

Commissioner:

Paul M. Stein¹

DECISION

Pursuant to G.L. c. 31 § 2(b), the Appellant, Scott Comfrey (“Mr. Comfrey”), appeals to the Civil Service Commission (“Commission”) from the decision of the Fall River Police Department (“FRPD”) to bypass him for an original appointment to the position of full-time Police Officer. Mr. Comfrey’s appeal was timely. A pre-hearing was held on May 23, 2014 and a full hearing was held on September 12, 2014.² Both hearings were held at the University of Massachusetts School of Law in North Dartmouth. The hearing was digitally recorded, with copies provided to the parties.³

¹ The Commission acknowledges the assistance of Law Clerk Todd M. Hirsch in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

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 the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

Findings of Fact

Giving appropriate weight to the documents in evidence (Exhibits 1 through 12), the stipulations of the parties, the testimony of the witnesses (FRPD Chief Daniel Racine, FRPD Lieutenant Ronald Furtado, and Appellant Richard Comfrey), and inferences reasonably drawn from the evidence as I find credible, I make the following findings of fact:

1. Mr. Comfrey is thirty-eight (38) years old and is a resident of Fall River, Massachusetts. He is currently employed as an investigator in the Bristol County District Attorney's Office. He graduated from Bridgewater-Raynham Regional High School. He is divorced. (Exh. 3; Testimony of Appellant)
2. Mr. Comfrey was previously employed by the Town of Somerset, a non-civil service community, as a police officer from 2000 through December 2012, when he resigned. During his time with the Somerset Police Department, Officer Comfrey received numerous commendations and accolades for his work as a Somerset Police Officer (Exhs. 8 & 12; Testimony of Appellant)
3. Mr. Comfrey's disciplinary record as a police officer in Somerset, includes the following:
 - a. **February 14, 2001** – Officer Comfrey failed to enter motor vehicle citations as per his duties and failed to follow department procedures handling un-entered citations, for which he received a letter of warning.
 - b. **June 16, 2001** – Officer Comfrey ended his shift before his replacement arrived, leaving an inexperienced dispatcher alone, in direct disregard of his instructions.
 - c. **April 19, 2006** – Officer Comfrey was denied permission to come into the station while working his cruiser duty, but he disregarded that order and entered the station. Sgt. Mello inquired why Officer Comfrey was in the station and in reply Officer Comfrey raised his voice. Officer Comfrey received a letter of warning for conduct unbecoming a police officer and insubordination.
 - d. **October 8, 2007** – On July 8, 2007, August 9, 2007, and March 23, 2008, Captain John H. Solomito received various complaints about Officer Comfrey's failure to complete cruiser check lists. Two of these complaints resulted in verbal warnings.
 - e. **October 9, 2007** – Officer Comfrey kicked over a table and some chairs in the station and was placed on report for insubordination, being discourteous, and for

acting in an unprofessional manner. On March 11, 2008, Officer Comfrey was placed on probation for one year.

- f. **November 18, 2008** – Officer Comfrey was put on report for failing to complete cruiser checklists and being insubordinate to Sgt. Mello.
- g. **January 25, 2009** – Officer Comfrey was accused of insubordination and being discourteous and penalized with a thirty day suspension with fifteen days abatement and one year probation. Officer Comfrey was also sent to counseling.
- h. **July 3, 2009** – Officer Comfrey refused to work a bike patrol detail, telling Captain Solomito that he had resigned from the unit. Captain Solomito recommended a last chance agreement, along with Officer Comfrey’s mandatory attendance at an anger management program. Officer Comfrey’s probation was extended to August 13, 2011, and he was warned that one more incident of this type could possibly result in his termination. The Captain also required Comfrey to continue counseling.
- i. **November 20, 2010** – Officer Comfrey’s wife was granted a temporary restraining order against her husband by the Somerset Police Department. This order was vacated on November 22, 2010.

Lieutenant Glenn Neto conducted an internal affairs investigation of this incident. During an interview with Lt. Neto, Officer Comfrey revealed that he was not attending counseling as ordered at a previous disciplinary hearing, thereby violating the Rules and Regulations of the Department.

(Exh. 6; Testimony of Appellant & Chief Racine)

- 4. As a result of all the foregoing, Officer Comfrey was subject to a “Last Chance Agreement” dated December 21, 2010. (Exh. 7; Testimony of Appellant)
- 5. On July 3, 2011, Officer Comfrey was suspended for two days for failing to complete any of the reports assigned to him. (Exh. 6; Testimony of Appellant & Chief Racine)
- 6. In November 2011, Officer Comfrey was assigned to four details, but he arrived late for three of them and failed to report for the fourth. (Exh. 6; Testimony of Appellant & Chief Racine)
- 7. On January 6, 2012, as the result of yet another alleged infraction, Officer Comfrey elected to enter into an ‘Agreement and Release’ with the Town of Somerset Police Department, by which he agreed to resign instead of being subjected to termination. (Exh. 8; Testimony of Appellant & Chief Racine)

8. On April 20, 2013, Mr. Comfrey took and passed the Massachusetts civil service exam for municipal police officers and his name was placed on the eligible list established on October 15, 2013 by the Massachusetts Human Resources Division (“HRD”). (Stipulated Facts)
9. On November 22, 2013, after requisition was submitted by the FRPD for a certification to appoint seven permanent, full-time police officers, HRD issued Certification #01394 to FRPD. On December 6, 2013, HRD re-issued certification #01394 to FRPD with additional names. (Exhs. 1 & 2; Testimony of Appellant & Lt. Furtado)
10. Mr. Comfrey signed the certification indicating he was willing to accept an appointment and he received an application and questionnaire to complete. (Testimony of Lt. Furtado)
11. Among the answers given by Mr. Comfrey, on his application, all of which he attested to be truthful, on the Questionnaire:

9. Have you ever surrendered your permit? YES
11. Have you ever received a written reprimand at work? YES
12. Have you ever received a verbal reprimand at work? YES
20. Have you ever violated a company rule or policy? YES
21. To your knowledge has anyone ever complained to a supervisor about you? YES
25. Have you ever had property repossessed? YES
28. Have you ever been delinquent on any credit payments, utility bills, alimony, child support payment or tax payment? YES
50. Have you ever been the subject of any court order? YES
65. Have you ever been subject to a domestic abuse order? YES
70. Is your name in a case file with any police department or law enforcement agency that you know of? YES
72. Have you ever been a suspect in a police investigation? YES
73. Has your spouse ever been a suspect in a police investigation? YES
75. Has your spouse ever been a witness in a police investigation? YES
86. Besides the fact that you will be fingerprinted for this position, have you ever been fingerprinted for any other reason? YES

(Exh. 5)

12. After Mr. Comfrey submitted his application and questionnaire, Lt. Furtado's predecessor and other members of the FRPD began the traditional background investigation on Mr. Comfrey. Mr. Comfrey's past employer (Town of Somerset) and references were investigated. (Testimony of Chief Racine and Lt. Furtado)
13. In addition to confirming the disciplinary history noted above, Mr. Comfrey's background investigation also produced negative comments from two references. One reference commented that he "was late for details." Another reference described his interpersonal issues, stating that he "gets along with co-workers but not with superiors/ personality conflicts." However, there were some positive reflections regarding Mr. Comfrey's knowledge and trustworthiness, including a third reference that states that Mr. Comfrey "deserves a second chance." (Exhibit 9; Testimony of Chief Racine)
14. On December 19, 2013, Mr. Comfrey was interviewed by the FRPD. This gave Chief Racine and the other interviewers a chance to question Mr. Comfrey about his numerous infractions and evaluate his overall character. (Exh. 12; Testimony of Chief Racine)
15. During his testimony, Chief Racine explained that he could not tolerate officers in the FRPD conducting themselves in the way that Mr. Comfrey had behaved, thereby justifying Mr. Comfrey's bypass. As Chief Racine testified, Mr. Comfrey's "anger, insubordination, and difficulty with authority" over a long period of time could not be tolerated, especially in a "paramilitary" organization such as the FRPD. Furthermore, Chief Racine stated that he could not allow Mr. Comfrey's marital issues to interfere with the performance of his duties. (Testimony of Chief Racine)

16. By letter dated March 26, 2014, Chief Racine informed Mr. Comfrey that he had been bypassed for appointment to the FRPD. The reasons for the bypass were stated as follows:

“During our background investigation and interview it came to light that you allowed personality conflicts with past supervisors to cause you to be insubordinate toward those particular supervisors. It was also confirmed by you that you failed to complete assigned tasks while on duty as a Somerset Police Officer after being ordered to do so . . . We also have a responsibility to ensure that our officers follow all lawful orders and carry out their assignments as directed by their supervisor(s), whomever they might be.”

(Exh. 12)

17. In his testimony, Mr. Comfrey explained that his infractions were the cause of “situational” factors, namely a difficult divorce. However, he believed that these situational factors did not affect his abilities as a police officer. (Testimony of Appellant)

18. On April 2, 2014, Officer Comfrey duly appealed his bypass to the Commission. (Claim of Appeal)

Applicable Standard of Review

Appeals from a bypass for original appointment to a permanent civil service position are governed by G.L.c.31, Section 27, which provides:

"If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification] . . . the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest."

An appointing authority’s discretion to bypass candidates for civil service appointment who have qualified for the position by taking and passing a civil service competitive examination is not absolute and is subject to review by the Commission. When a candidate for appointment appeals from a bypass, however, the Commission’s role is not to determine whether that candidate should have been bypassed. Rather, the Commission determines, on the basis of the

evidence before it, whether the appointing authority has sustained its burden of proving, by a preponderance of the evidence, that the discretion to bypass the candidate was made after a “thorough review” and that there was “reasonable justification” for the decision. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Brackett v. Civil Service Comm’n, 447 Mass. 233, 241 (2006), citing G.L. c. 31, § 2(b); Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 187 (2010); See generally Barry v. Town of Lexington, 21 MCSR 589, 597 (2008), citing Sabourin v. Town of Natick, 18 MCSR 79 (2005) (civil service test score is a baseline tool for relative ability, knowledge, and skills under basic merit principles).

“Reasonable justification” in this context means “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991) (discussing preponderance of the evidence test); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (same).

The Commission's primary concern is to ensure that the appointing authority's action comports with "basic merit principles," as defined in G.L.c.31, § 1. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) citing Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001). In conducting this inquiry, the Commission "finds the facts afresh," and is not limited to the evidence that was before the appointing authority. E.g., Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003). See also Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) ("An Appointing Authority must proffer objectively legitimate reasons for the bypass"); Borelli v. MBTA, 1 MCSR 6 (1988) (bypass improper if "the reasons

offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.")

The Commission must take account of all credible evidence in the record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). It is the purview of the hearing officer to determine the credibility of the witnesses who appear before the Commission. See e.g., Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997).

Especially when it comes to an applicant for a sensitive public safety position, "the commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was 'reasonable justification' shown . . . Absent proof that the [appointing authority] acted unreasonably . . . the commission is bound to defer to the [appointing authority's] exercise of its judgment" that "it was unwilling to bear the risk" of hiring the candidate for such a sensitive position. Id., 78 Mass.App Ct. at 190-91. See also, Reading v. Civil Serv. Comm'n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914, (2004) (rescript opinion); Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303-305 (1997); Massachusetts Dep't of Corrections v. Anderson, Suffolk Sup. Ct., No. 2009-0290 (Memorandum of Decision dated February 10, 2010), reversing Anderson v. Department of Correction, 21 MCSR 647, 688 (2008).

The Commission is also mindful of the standard of conduct expected of officers of the law. "An officer of the law carries the burden of being expected to comport himself or herself in

an exemplary fashion." Mclsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 474 (1995).

"[P]olice officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens." Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

Analysis

Applying these principles to the facts of this appeal, the FRPD, by a preponderance of the evidence, has shown that it had reasonable justification for bypassing Mr. Comfrey for appointment as a FRFD Police Officer. Mr. Comfrey's history of conflict with superiors and record of insubordination, leading to his resignation in lieu of termination, were appropriate factors to warrant a decision that he would not be suitable to serve as a FRPD police officer.

A thorough background check revealed that Mr. Comfrey had numerous incidents in which he failed to follow orders from his superiors, thereby neglecting his duties as a police officer. Further, there were various times when he was overtly disrespectful to his superiors, failing to show them the requisite deference that is required of a police officer. This pattern persisted over a considerable period of time, involved a multitude of colleagues and superiors, and culminated in his resignation from his position of Police Officer in Somerset less than two years earlier.

I find that Mr. Comfrey testified truthfully that he believed his past disciplinary incidents were caused by "situational" stress due to a difficult marital breakup and divorce and that he has overcome those problems. He was truthful and forthcoming about his role in the various disciplinary incidents. Furthermore, the record shows that Mr. Comfrey performed many years of admirable service while serving with the Somerset Police Department. Ultimately, however, FRPD Chief Racine is entitled to decide whether, in the exercise of his own sound judgement, Mr. Comfrey's past record presented an unacceptable risk that precluded his employment as a

FRPD Police Officer at the time of his application to the department. Respect for superiors and strong personal restraint are clearly legitimate and important characteristics for an officer in a paramilitary organization such as the FRPD.

There is no indication that the bypass decision was based on personal bias. Chief Racine made his judgment regarding Mr. Comfrey, as merit principles of civil service law require, based on a reasonably thorough review of the facts he learned through his department's background investigation into Mr. Comfrey's prior employment history, without any indication of animus or bias against Mr. Comfrey, personally. This history included a Last Chance Agreement and a Resignation Letter, plus an hour long interview with the Appellant and thorough input from his former superior officers. Mr. Comfrey may well deserve a "second chance," and, in time, perhaps even Chief Racine will agree. But that decision rests with the FRPD, not this Commission.

CONCLUSION

In sum, the evidence established reasonable justification for the decision of the FRPD to bypass Mr. Comfrey as a candidate for Police Officer, notwithstanding his many years of admirable service with the Somerset Police Department.

For all of the above reasons, the bypass appeal of Mr. Scott P. Comfrey, under Docket No. G1-14-81, is hereby *dismissed*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell & Stein, Commissioners on June 25, 2015.

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)(1), 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice To:

Scott Comfrey (Appellant)

Gary P. Howayeck, Esq. (for Respondent)

John Marra, Esq. (HRD)