

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

JONATHAN CRUZ,

Appellant

v.

G1-11-241

CITY OF LOWELL,

Respondent

Appellant's Attorney:

Patrick A. Lee, Esq.

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Beverly, MA 01915

Respondent's Attorney:

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Assistant City Solicitor

City of Lowell – Law Department

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Lowell, MA 01852-5909

Commissioner:

Christopher C. Bowman^{1,2}

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Jonathan Cruz (Cruz or Appellant) seeks review of the decision by the state's Human Resources Division (HRD) to accept the reasons of the Lowell Police Department (Appointing Authority, City or LPD), bypassing him for original appointment to the position of police officer. The Appellant filed a timely appeal with the Civil Service Commission (Commission) on July 27, 2011. A pre-hearing

¹ This case was heard by Commissioner Daniel Henderson, whose term expired before drafting a decision. Pursuant to 801 CMR 1.00(11)(e), this case was reassigned to Commissioner Christopher Bowman, who reviewed the CD, notes, and exhibits, and drafted a decision.

² The Commission acknowledges the assistance of Law Clerk Mary B. Flaherty in preparing this decision.

was held on August 16, 2011. A full hearing was held on September 29, 2011. The hearing was digitally recorded.

FINDINGS OF FACT:

Seven (7) exhibits were entered into evidence by the Appointing Authority at the hearing. Two (2) exhibits were also entered into evidence by the Appellant at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Sgt. Thomas Fleming, Director of Recruitment and Training, Lowell Police Department;
- Superintendent Kenneth Lavallee, Lowell Police Department;

For the Appellant:

- Jonathan Cruz, Appellant

I make the following findings of fact:

1. The Appellant is a twenty-four (24) year old male who was born and raised in Lowell and currently resides in Nashua, New Hampshire. When growing up, many of his friends and relatives were involved with drug-related issues which he has sought to distance himself from as an adult. He is now married with two children. (Testimony of Appellant)
2. The Appellant served in the United States Army from November 2007 to March 2011 with various tours of duty, including service in Iraq and Afghanistan. He was the recipient of a number of awards and was honorably discharged. (Testimony of Appellant)
3. The Appellant took and passed an examination for the position of police officer. (Stipulated Fact)

4. On March 9, 2011, the Human Resources Division issued to the City of Lowell Certification No. 204144, on which the Appellant's named appeared, for the hiring of 8 permanent full-time police officers in the City of Lowell. (Stipulated Fact)
5. On March 16, 2011, the Appellant applied for a position as a police officer for the City of Lowell. (Stipulated Fact)
6. On May 7, 2011, the Appellant was bypassed for employment as a police officer with the City of Lowell. (Stipulated Fact)
7. The Lowell Police Department filled seven (7) police officer positions from Certification 204144. Five (5) of the candidates selected for appointment were ranked below the Appellant on the above-referenced Certification. (Stipulated Facts; Testimony of Fleming)
8. The eighth police officer position was filled by a former Lowell police officer who was reinstated. (Testimony of Fleming)
9. On May 23, 2011, the Lowell Police Department notified HRD that it was bypassing the Appellant for appointment due to the decision of Lowell Police Superintendent that the Appellant was not a suitable person to be licensed to carry a firearm within the meaning of G.L. c. 140 §. 131. (Testimony of Lavallee)
10. The May 23, 2011 letter to HRD stated the specific reasons why Superintendent Lavallee concluded that the Appellant was not a suitable person to be licensed to carry a firearm. Among the reasons listed by Superintendent Lavallee was an incident that occurred when the Appellant was 15 years old, described below:

“a ... serious matter that occurred 5/14/04 when he [the Appellant] was arrested and charged with Armed Assault with Intent to Murder, and Kidnapping. According to the reports filed on that matter, the Lowell PD responded to a report of shots fired at 842 Stevens Street. Upon arrival the responding officers discovered shell casings and multiple bullet holes in a SUV parked in the driveway. During a follow-up investigation by the Lowell PD CIB, it was determined that the

[Appellant] and an associate were robbed at gunpoint of two pounds of marijuana. Seeking retribution for this robbery, the [Appellant] and several individuals then drove to the house of a person whom they suspected of setting them up for the robbery. The [Appellant] and his associates then forced this person at gunpoint into their car. They then drove around forcing the alleged victim to find the other person they suspected of being involved in the marijuana “rip”. After finding a SUV parked in front of 842 Stevens St belonging to one of the robbers, two people in the car with Mr. Cruz fired numerous rounds into the vehicle before fleeing. The [Appellant] was later arrested and gave a statement to CIB detailing his involvement with this incident. The charges were later dismissed in Lowell Juvenile Court on 01/06/2004. (Exhibit 6)

11. It is the policy of the City of Lowell to apply a “License to Carry Standard” to all applicants in its hiring of police officers. This standard requires that each candidate be measured by the same “suitable person” standard, as determined by the Superintendent of Police, the licensing authority pursuant to .G.L. c. 140, § 131. (Testimony of Fleming; Testimony of Lavallee)
12. Superintendent Lavallee concluded, after consideration of the Appellant’s application, background investigation, and oral interviews that the Appellant was not a “suitable person” to be issued a license to carry. This conclusion was reached for the following reasons: a) The Appellant’s poor motor vehicle driving history; and b) The Appellant’s juvenile criminal history (Testimony of Fleming; Testimony of Lavallee)

Driving History

13. The Appellant’s driving record includes 5 license suspensions and 7 violations within a 4 year period from 2004-2007. (Exhibit 6)
14. The Appellant’s motor vehicle violations include seatbelt violations, speeding violations, an expired inspection sticker violation and violations for driving without a registration and license (Testimony of Appellant; Exhibit 6)

15. Four of the Appellant's five suspensions were for payment defaults for the above-mentioned violations. (Testimony of Appellant; Exhibit 6)
16. The Appellant's violations, considered with his suspensions for non-payment were viewed by the Appointing Authority as a portrayal of bad character. (Testimony of Fleming)

Juvenile Criminal Record

17. The Appellant testified before the Commission regarding the 2004 incident contained in Superintendent Lavellee's letter to HRD. Much of his candid testimony, outlined below, corroborates that written summary. (Testimony of Appellant)
18. Sometime in 2004, at age 15, the Appellant began working as a dishwasher in a local nursing home. After working there for approximately five months, a co-worker at the nursing home asked the Appellant if he knew anyone that could sell him two pounds of marijuana. The Appellant told his co-worker that he did know someone who could provide the marijuana and that he would contact that person. (Testimony of Appellant)
19. The Appellant then proceeded to contact the prospective seller, who was located in New York, and arranged the logistics of the sale, to take place in Lowell. According to the Appellant, the seller of drugs, located in New York, told the Appellant that he didn't have possession of the marijuana (in New York). Rather, a friend of his in Lowell had the marijuana and the Appellant was told to meet that Lowell contact person to "make the switch". (Testimony of Appellant)
20. At some point, the Appellant met up with the Lowell contact person who had possession of the marijuana in the parking lot of a fast food restaurant in Lowell. The Appellant testified that his co-worker from the nursing home did not show up and the Appellant told the Lowell contact person that he "didn't know who the other people were." (Testimony of Appellant)

21. The Appellant testified that “they” (persons undefined) ended up robbing the Lowell contact person and took the two pounds of marijuana from him, which the Appellant estimates was worth approximately \$2,000. (Testimony of Appellant)
22. Later that night, the Appellant received a call from the New York drug seller who told the Appellant that he was coming to Lowell and that the Appellant could either: a) bring him to his nursing home co-worker; or b) be held responsible for the marijuana taken from his Lowell contact. (Testimony of Appellant)
23. The Appellant testified that the New York-based drug seller and a friend of his arrived in Lowell the next night and told the Appellant to take him to the home of his nursing home co-worker. The Appellant complied and took them to the home of his nursing home co-worker (Testimony of Appellant)
24. According to the Appellant, as he, the New York-based drug seller and his friend were walking up to the front door, the New-York based drug seller and his friend pulled out guns and told the Appellant to knock on the door. (Testimony of Appellant)
25. When the Appellant’s co-worker opened the door, the New York-based drug seller and his friend pointed their guns at his co-worker and told him to get in the car. The four men then “drove around Lowell for awhile” while the New York-based drug seller and his friend told the Appellant’s co-worker to call the individuals responsible for taking the two pounds of marijuana the previous night. (Testimony of Appellant)
26. At some point, the Appellant’s co-worker led them to a house on Stevens Street and the four men parked outside. One of the four men, according to the Appellant, called the person inside the house and told him to come outside. When nobody came outside the house, the

New-York based drug seller and his friend lowered the car windows and began shooting at the house and then drove away. (Testimony of Appellant)

27. The Appellant testified that he and his co-worker were eventually dropped off at a local parking lot and were told by the New York-based drug seller that if he told anyone what had just happened, “they would come after him.” (Testimony of Appellant)

28. Two days later, the Appellant received a letter in the mail that his license was suspended and there was a warrant for his arrest. After talking with his father, the Appellant testified that he “turned himself in” to the Lowell Police Department the next day and provided a sworn statement about the events that had transpired. (Testimony of Appellant)

29. The Appellant was arrested and then released on bail. He was incarcerated for a brief time in a juvenile detention facility. (Testimony of Appellant)

30. The Appellant eventually agreed to testify against the other individuals and the charges against him were dropped. (Testimony of Appellant)

31. The night before he was scheduled to testify, the nursing home co-worker appeared at the Appellant’s home, pulled out a gun, and told the Appellant that if he appeared in the court room parking lot the next day, he (the co-worker) was going to shoot the Appellant. (Testimony of Appellant)

32. According to the Appellant, the criminal case did not go forward the next day because the New-York based drug seller opted to plead guilty. (Testimony of Appellant)

33. Sgt. Thomas Fleming of the LPD has served as the LPD Director of Recruitment and Hiring since 1995. In his capacity he is responsible for overseeing the application, background investigation and interview process of candidates for appointment to the Lowell Police Department. He testified at the hearing before the Commission. (Testimony of Fleming)

34. Superintendent Lavallee is responsible for making the ultimate decision concerning selection of police officer candidates in the City of Lowell. He also testified before the Commission. (Testimony of Lavallee)
35. Sgt. Fleming assigned Detective Jonathon Noone to conduct a background investigation of the Appellant as a result of the Appellant's application for employment. (Testimony of Fleming; Exhibit 6)
36. Following the conclusion of Detective Noone's background investigation, the Appellant was interviewed by Sgt. Fleming. Fleming characterized the interview as being favorable to the Appellant. Furthermore, Superintendent Lavallee also interviewed the Appellant and stated that the Appellant "...seemed like a gentleman." (Testimony of Fleming; Testimony of Lavallee)
37. Despite the Appellant's favorable interview, exemplary military record and the fact that he has no adult criminal record, Lavallee testified that he examined the Appellant's candidacy as a whole and concluded that the Appellant was not a "suitable person" to be issued a license to carry. Of great concern to him was the seriousness and dangerousness of the 2004 incident, based on his opinion that, in his experience, "...the best indicator of future behavior is past behavior." (Testimony of Lavallee; Exhibit 4)
38. The City of Lowell has applied a "License to Carry Standard" in its hiring of police officers since at least 1995. This standard requires that each candidate be measured by the same "suitable person" standard that the Superintendent of Police is legally mandated to employ in issuing licenses to carry firearms under G.L c. 140 s. 131. (Testimony of Fleming; Testimony of Lavallee)

39. Under G.L. c. 140 s. 131, a local licensing authority is authorized to issue a license to carry to an individual who is not otherwise disqualified for certain reasons enumerated in the statute "...if it appears that the applicant is a suitable person to be issued such a license." G.L. c. 140 s. 131. (Testimony of Lavallee; M.G.L. c. 140 s. 131)
40. The "License to Carry Standard has been employed as the minimum guideline for determining police appointments going back to at least 1995 when Fleming was appointed Director of Recruitment & Hiring. Superintendent Lavallee testified that, in applying the "License to Carry Standard," he carefully exercised his discretion and that each case must be considered on a case by case basis. (Testimony of Fleming; Testimony of Lavallee)
41. The 5 candidates hired by the City of Lowell who appeared after the Appellant on Certification List 204144 were Joseph Kelly, Nicholas Dokos, Jacqueline Mercado, Steven Bugler and William Florence. None of them had any issues that would prevent them from being issued a license to carry a firearm. (Testimony of Fleming; Exhibits 2 & 4)
42. On July 27, 2011, the Appellant filed a timely appeal with the Civil Service Commission regarding the bypass decision. (Stipulated Fact)

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. at 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel

administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, § 1.

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 at 304.

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 at 304. 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.

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).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189 190-191 (2010) citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 824-826 (2006). The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates. Beverly citing Cambridge at 305, and cases cited.

CONCLUSION OF MAJORITY

Jonathan Cruz took and passed the civil service examination for the position of police officer. He scored high enough to rank among those individuals to be considered for appointment as a police officer to the Lowell Police Department. The Appellant served honorably in the United States Army, including service in Iraq and Afghanistan, as well as receiving awards and an Honorable Discharge. A long-time resident of Lowell, the Appellant is currently married with children, living in Nashua New Hampshire, has earned his GED, and has no adult criminal record.

Unfortunately, the Appellant, in 2004, was involved in a troubling narcotics deal which turned into a robbery and later resulted in kidnapping and assault with a firearm. It is undisputed that these disturbing string of events were set in motion by the Appellant's decision to facilitate the initial drug purchase. Although the Appellant was a juvenile at the time and the charges were

later dropped, in part due to the Appellant's cooperation in the investigation, this incident raises concerns over his suitability for a position in law enforcement enforcement.

Of great concern to Superintendent Lavalley was the seriousness and dangerousness of the 2004 incident, which caused him to conclude that the Appellant was not qualified for a license to carry, and thus not qualified for appointment as a Lowell police officer.

The Lowell Police Department had sound and sufficient reasons for bypassing the Appellant for selection as a police officer in the City of Lowell. Mr. Cruz appears genuinely remorseful—and candid—about his involvement in the 2004 incident, and by all accounts, he has had an exemplary life since then. I listened to the Appellant's testimony from the full hearing and recall his statements from the pre-hearing conference I conducted. If ever there was an individual who deserves a "second chance," Mr. Cruz strikes me as that person. Had I been the Appointing Authority, I may have reached a different conclusion and appointed Mr. Cruz.

Here, however, Superintendent Lavalley is the Appointing Authority and, based on undisputed evidence, including the Appellant's own statements, he has made a supportable judgment call that is free of inappropriate motivations or objectives that would warrant the Commission's intervention.

For all of the above reasons, the appeal under Docket No. G1-11-241 is hereby *dismissed*.
Civil Service Commission

Christopher C. Bowman
Chairman

DISSENT OF COMMISSIONER STEIN:

I respectfully dissent. The Commission does tread carefully in appeals of this kind, and I acknowledge that, in general, an appointing authority's "judgment call" concerning the original appointment to the position of a municipal police officer carries considerable weight. In the unique circumstances of this case, however, I cannot find that that, on the preponderance of all the credible (and substantially undisputed) evidence here, there is rational support for Lowell's subjective conclusion that Mr. Cruz is a person who is "unsuitable" to be licensed to carry a firearm, and, therefore, Lowell is justified to bypass him as unqualified to become a Lowell police officer in favor of candidates who are ranked lower than he according to performance on the objectively administered qualifying civil service examination for the position.

The basis given for bypassing Mr. Cruz centers on a single seven-year old incident, when Mr. Cruz was a 15-year-old teenager, in which he facilitated a marijuana buy with some unsavory characters that turned violent. Accepting as true, the largely undisputed facts of this incident as found by the presiding Commissioner, Mr. Cruz showed extremely poor judgment as youth. He was not, however, the instigator of any violence, and, indeed was, himself, forced, in effect, at gunpoint, to participate in the armed assault that resulted in criminal charges. It took some courage, thereafter, to agree to testify against the principal perpetrators. As the presiding Commissioner concluded: "Mr. Cruz appears genuinely remorseful – and candid – about his involvement in the 2004 incident, and by all accounts, he has had an exemplary life since then." Thus, this is not the case, such as others, in which the Commission found a "pattern" of behavior to justify the conclusion that a candidate posed a current risk of repeating his prior bad behavior.

In addition, considering the totality of the evidence, as the Commission must, I find no rational basis to conclude that Mr. Cruz is a person who is currently "unsuitable" to be licensed

to carry a firearm. First, as noted, his juvenile conduct, although troubling, involved no suggestion of violent behavior. Second, any legitimate lingering question about Mr. Cruz's ability to be trusted with a firearm is unassailably laid to rest by his exemplary military record. According to the evidence in the record, he enlisted in the U.S. Army in 2007 and served more than three years on active duty, including two tours with a combat infantry regiment, achieving the rank of E04 (Specialist) before receiving an honorable discharge in March 2011. According to his DD-214, he carried the Military Occupational Specialty (MOS) "11B10", which designates him as a "Rifle Infantryman." His weapons training included required certification for the M-16 rifle, hand grenades, and use of a bayonet. He received numerous citations for distinguished combat performance, including the Army Commendation Medal, the Army Achievement Medal, and a Citation for "exceptional" mission support of the "Blackjack" Squadron (10th Cavalry Regiment) during Operation Iraqi Freedom. I cannot find any reasonable justification to conclude that such a decorated combat rifle infantryman as Mr. Cruz can, on any level, be considered unsuitable to be licensed to carry a firearm of any kind upon his return to civilian life, or that he can possibly pose a risk to himself or the public should he be awarded a police badge and a gun after successfully completing the requisite Police Academy training and one-year probation required of all newly appointed police officers.

In sum, I believe that Lowell demonstrated no reasonable justification to bypass Mr. Cruz and that it is obliged to honor his service to his country and his high standing on the civil service examination by providing him the opportunity to fulfill his aspiration to serve the public as a Lowell police officer.

Paul M. Stein, Commissioner

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman-Yes; Ittleman, Commissioner-Yes; Marquis, Commissioner-Yes; McDowell, Commissioner-Yes; Stein, Commissioner-No) on June 28, 2012.

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:

Patrick A. Lee, Esq. (for Appellant)

Maria Sheehy, Esq. (for Appointing Authority)