

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

BRANDON COTE,  
*Appellant*

v.

G1-15-25

CITY OF METHUEN,  
*Respondent*

Appearance for Appellant:

*Pro se*  
Brandon Cote

Appearance for Respondent:

Anne Randazzo, Esq.  
Office of the City Solicitor  
41 Pleasant St  
Room 311  
Methuen, MA 01844

Commissioner:

Cynthia Ittleman<sup>1</sup>

**DECISION**

On February 1, 2015, the Appellant, Brandon Cote (Mr. Cote), pursuant to G.L.c. 31, §2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the City of Methuen (City) to bypass him for original appointment as a reserve police officer.

A prehearing conference was held at the offices of the Commission on March 17, 2015 and a full hearing was held at the same location on June 10, 2015.<sup>2</sup> The hearing was digitally

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Evan A. Johnson in the drafting of this decision.

<sup>2</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with G.L. Chapter 31, or any Commission rules, taking precedence.

recorded and both parties were provided with a CD of the hearing.<sup>3</sup> At my recommendation and without objection, the parties made closing arguments in lieu of filing post-hearing briefs.

### **Findings of Fact:**

Ten (10) exhibits<sup>4</sup> were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

#### *Called by the City:*

- Jill Stackelin, Confidential Secretary, City of Methuen
- Joseph Solomon, Chief of Police, City of Methuen
- Steven Smith, Police Sergeant, City of Methuen
- Michael Pappalardo, Police Lieutenant, City of Methuen
- Kevin Mahoney, Lieutenant, City of Methuen
- Thomas McMenamon, Detective, City of Methuen

#### *Called by the Appellant:*

- Brandon Cote, Appellant

and taking administrative notice of all matters filed in the case and pertinent rules, statutes, regulations, case law, policies, and reasonable inferences from the credible evidence; a preponderance of credible evidence establishes the following facts:

1. Brandon Cote is an unmarried 28 year old who resides in Alexandria, Virginia. (Testimony of Mr. Cote)

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<sup>3</sup> 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, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

<sup>4</sup> At my request, counsel for the City of Methuen supplied the background investigations for the eighteen candidates who bypassed the appellant subsequent to the full hearing before the Commission. The background investigations were not exhibited and are cited in the decision while preserving the applicants' anonymity.

2. Mr. Cote graduated from University of Massachusetts Lowell in 2012, majoring in criminal justice. (Testimony of Mr. Cote and Exhibit 1)
3. Mr. Cote is currently employed at the Washington, D.C. Police Department, where he has worked since November 2013. Prior to that date, Mr. Cote was employed as a dispatcher for two (2) months at the Town of Merrimac Police Department, in Merrimac, Massachusetts. Additionally, Mr. Cote was previously employed as an auxiliary police officer for over one (1) year at the City of Haverhill Police Department, in Haverhill, Massachusetts. (Testimony of Mr. Cote and Exhibit 1)
4. In 2009, Mr. Cote filed a bypass appeal with the Civil Service Commission, asserting that he had been bypassed by the Methuen Police Department for illegitimate reasons. (Testimony of Mr. Cote)
5. After filing his 2009 appeal, Mr. Cote notified the Commission that he was going to withdraw his appeal. However, he subsequently chose not to withdraw and he continued with the appeal. (Testimony of Mr. Cote)
6. Shortly thereafter, Mr. Cote received a voicemail message from an attorney he had briefly consulted regarding his 2009 appeal. The message was recorded on Mr. Cote's answering machine. In the message, the attorney states that he spoke to an attorney associated with the City about Mr. Cote's candidacy for a position at the Police Department and about Mr. Cote's 2009 appeal to the Civil Service Commission.<sup>5</sup> (Testimony of Mr. Cote)
7. In a letter from the City dated September 2, 2009, the City denies what Mr. Cote believed the voicemail recording meant and suggested that Mr. Cote make a written apology. (Exhibit 7)
8. Mr. Cote ultimately withdrew his 2009 appeal at the Commission. (Testimony of Mr. Cote)

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<sup>5</sup> Mr. Cote asserts that this message indicates that the City is biased against him. However, since the message constitutes hearsay within hearsay, I give the message no weight. In any event, the attorney who was associated with the City during the 2009 police hiring cycle is not associated with the City any longer.

9. Mr. Cote subsequently applied for a dispatcher position with the City Police Department. He received a letter dated April 18, 2012 noting that the interview committee was “favorably impressed with [his] experience and background,” but that he was “not chosen to fill the position.” (Administrative Notice)<sup>6</sup>
10. On June, 15 2013, Mr. Cote took the civil service examination for police officer and received a score of 99. (Stipulated Fact)
11. Joseph Solomon (Chief Solomon) is the Chief of Police for the City. He has worked for the City since 1986 and has been the Chief of Police since 2002. (Testimony of Chief Solomon)
12. Jill Stackelin (Ms. Stackelin) is a Confidential Secretary at the City’s Human Resource Department. She has been employed in that position for fifteen (15) years. Attorney Anne Randazzo, Esq., representing the City in this matter, as the Director of Human Resources for the City, is Ms. Stackelin’s supervisor. (Testimony of Ms. Stackelin).
13. Early in February 2014, Chief Solomon contacted Ms. Stackelin to begin the process of hiring twenty-one (21) reserve police officers for the City Police Department. (Testimony of Ms. Stackelin)
14. Responding to Chief Solomon’s request to begin the reserve police hiring process, Ms. Stackelin submitted a requisition to the state’s Human Resource Division (HRD) on February 6, 2014 for a Certification in order to appoint the reserve police officers. Shortly thereafter, Chief Solomon requested that the Certification be increased to hire twenty-nine (29) reserve police officers.<sup>7</sup> (Testimony of Ms. Stackelin)

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<sup>6</sup> A non-selection letter pertaining to the dispatcher position was supplied by Mr. Cote during the prehearing. At the hearing, I took administrative notice of all matters filed in the case, including this non-selection letter.

<sup>7</sup> Personnel Administrator Rules (PAR).09 provides that appointing authorities “may appoint only from among the first 2n+1 persons” on the certification, where “n” equals the number of appointments to be made. (Administrative Notice, PAR.09)

15. The original Certification provided by HRD, #01595, was sufficient since it had approximately seventy (70) names on it. (Testimony of Ms. Stackelin)
16. When the City decides to hire full-time regular police officers, it hires from among the reserve police officers. (Testimony of Chief Solomon)
17. Chief Solomon asked Ms. Stackelin to increase the number of reserve police officer positions to be filled from twenty-one (21) to twenty-nine (29). The reason for this increase was that the City Police Department had obtained sufficient funding to allow it to send eight (8) of the prospective reserve officers to be sent directly to the regular police academy to become full-time regular police officers. Since Chief Solomon wanted to have twenty-one (21) remaining reserve officers after those eight (8) reserve officers would be sent to the police academy, the number of candidates for reserve police officer was increased by eight (8) to twenty-nine (29). (Testimony of Chief Solomon)
18. At some later time, the City Police Department received sufficient funding to send two (2) additional reserve officers who were sent directly to the regular police academy. (Testimony of Chief Solomon).
19. On February 7, 2014, HRD sent Certification No. 01595 to the City. Mr. Cote was ranked 12<sup>th</sup> among those persons who signed the Certification indicating that they would accept employment if offered. (Stipulated Fact and Exhibit 2)

#### Background Investigations

20. Each candidate seeking appointment was required to undergo a background investigation. Sergeant Stephen Smith<sup>8</sup> (Sergeant Smith) oversaw the background investigations and assigned them to individual detectives in the Department. (Testimony of Chief Solomon)

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<sup>8</sup> In a case heard by the Commission regarding the same applicant pool, it was revealed that candidates' applications were initially referred to Captain Kris McCarthy, whose step-son was appointed as a reserve police officer during

21. The investigations examined the applicants' criminal, education, and driving histories and verified whether each applicant was truthful in their application. (Testimony of Sergeant Smith)
22. Mr. Cote's background investigation revealed excellent references, a very high credit score, no criminal record and no adverse driving history. (Mr. Cote's Background investigation)
23. On August 5, 2014, after the background investigations were completed and prior to his interview, Mr. Cote emailed Sergeant Smith, writing that he was withdrawing his application for the position. Mr. Cote stated:
- “I am less than 2 months away from graduation [from the Washington D.C. police academy]. Once I graduate, I will be locked into a 3 year contract with the Washington D.C. Metropolitan Police Department. As much as I would have loved working for my home town of Methuen, I cannot pass up this great opportunity here in D.C. After my commitment with the Metropolitan Police Department, I will be looking to transfer somewhere near home, perhaps the Methuen Police Department.” (Exhibit 10)
24. On August 6, 2014, Sergeant Smith responded to Mr. Cote, informing him:
- “...if you continue the process, and you are selected as a hire, you would go to a reserve list. Once on a reserve list and full time positions become available you will be offered a position. You are then allowed to refuse the position three times before you would be removed from the list. This period of time could possibly take up to three years giving you the time to full your contractual time [with] DC.” (Exhibit 10)<sup>9</sup>
25. As a result of this email correspondence with Sergeant Smith, Mr. Cote decided to continue with the City's application process and had his interview ten (10) days later. (Exhibit 10)
26. Prior to the email correspondence with Mr. Smith, Mr. Cote did not understand the City Police Department hires full-time regular officers from among its reserve officers.
- (Testimony of Mr. Cote)

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this hiring cycle, for background investigations. Captain McCarthy did not conduct any of the background investigations himself but delegated the work to Sergeant Smith. Phillips v. Methuen, (G1-15-45)(2015)

<sup>9</sup> I take Administrative Notice that Police Chief Solomon concurred in the role of reserve police officers in Methuen, testifying in Phillips v. Methuen (at 14:30 – 16:30) that reserve officers are often asked to work, with appropriate training, supervision and approval, e.g. because there are too many details for the regular Department officers to handle and because it enhances their training.

## Interviews

27. Prior to Mr. Cote's interview, Chief Solomon created a team of panelists to interview applicants. Chief Solomon chose three (3) officers from different City Police Department bureaus: (Testimony of Chief Solomon)
28. Chief Solomon chose Captain Haggar, Lieutenant Pappalardo, and Lieutenant Mahoney to be members of the interview panel. The patrolman's union selected Detective McMenamon as its representative for the panel. No member of the panel was related to anyone who was hired during the 2014 hiring cycle for reserve police officers. (Testimony of Chief Solomon)
- Michael Pappalardo (Lieutenant Pappalardo) is a lieutenant for the City Police, where he has worked for over twenty (20) years. He has been a lieutenant since 2005. (Testimony of Lieutenant Pappalardo)
  - Kevin Mahoney (Lieutenant Mahoney) is a lieutenant for the City Police, where he has worked for twenty-three (23) years. He has been a lieutenant since 2004. (Testimony of Lieutenant Mahoney)
  - Thomas McMenamon (Detective McMenamon) is a detective for the City Police, where he has worked for eighteen (18) years. He is the president of the Patrolman's Union and has recently become a detective. (Testimony of Detective McMenamon)
29. Captain Haggar was a member of the interview panel in 2009, when Mr. Cote last applied for a police position at the City Police Department. (Testimony of Detective McMenamon)
30. Lieutenant Pappalardo, Lieutenant Mahoney, and Detective McMenamon had not served on an interview panel before. (Testimony of Lieutenant Pappalardo, Lieutenant Mahoney, and Detective McMenamon)

31. Chief Solomon informed the panel members that after the interviews were completed they would meet with him to help decide which applicants would be hired. (Testimony of Chief Solomon)
32. For this 2014 hiring cycle, Chief Solomon chose an old questionnaire that the City Police Department had previously used for interviews, making minor changes. He instructed the panelists to ask each applicant the same questions appearing on the questionnaire but added that they could ask applicants follow-up questions to responses, as well as questions pertaining to information revealed in the background investigations. (Testimony of Chief Solomon)
33. The panel was not required to ask every question if they felt that the applicant had answered the question in an answer to a previous question. (Testimony of Chief Solomon and Exhibit 9)
34. The panelists individually scored each applicant's answer on a scale of 1-5 (a "1" denoted that the question was "answered poorly," a "3" denoted that the answer was "average," and a "5" denoted that the applicant "nailed it"). There was a space left for comments at the end of the questionnaire so interviewers could write down their general impressions of the applicants. (Testimony of Chief Solomon and Exhibit 9)
35. Each panelist added up the scores that they gave to each of the applicant's answers to calculate each applicant's total score. In addition, the panelists calculated the average score that they gave to each applicant. Both the total score and average score were calculated to aid discussion of candidates during a subsequent meeting involving Chief Solomon and the

panelists, at which appointment recommendations were decided.<sup>10</sup> (Testimony of Lieutenant Pappalardo and Exhibit 5)

36. Lieutenant Pappalardo, Lieutenant Mahoney, and Detective McMenamon interviewed Mr. Cote on August 16, 2014. (Testimony of Mr. Cote and Exhibit 5)

37. Most of the applicants were interviewed in person. Mr. Cote was one of three persons interviewed on Skype, since he was completing police training in Washington, D.C. at the time. The other two applicants given Skype interviews were on active military duty. (Testimony of Lieutenant Mahoney)

38. The average score Lieutenant Pappalardo gave to Mr. Cote was 3.8. Lieutenant Pappalardo's calculations were accurate. In the comments section, he noted that Mr. Cote was "well spoken and articulate. Appears very honest. Would recommend." (Exhibit 5)

39. The average score Lieutenant Mahoney gave to Mr. Cote was 3.15. Lieutenant Mahoney's calculations were accurate. In the comments section, he noted that Mr. Cote was "honest," "not sure which [police department] he would chose," "likeable, respectful," and an "average candidate." (Exhibit 5)

40. The average score Detective McMenamon gave to Mr. Cote was 3.68. Detective McMenamon's calculations were accurate. In the comments section, he noted that Mr. Cote

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<sup>10</sup> There are some applicants for whom the average and total score were not listed on the front page of the interview questionnaire. In my attempts to calculate these scores to aid my analysis, I examined how the interviewers calculated the average score per question (When calculating the average score, did the denominator take into account the number of questions asked or was a set denominator used? Were points from the observation section taken into account?). In examining how scores were calculated, I uncovered many inconsistencies and mathematical errors in the way the scores were added and averaged. Some panelists erred in calculating applicants' total scores. Some panelists used a denominator inconsistent with the number of questions scored. Some questions were answered but the panelist did not provide a numerical score for the question. Fortunately, some interviewers' questionnaires correctly calculated the averages, using only the questions asked and treated each observation in the observations section as a question. One of the panelists did not provide an average score for one of the applicants, prompting me to calculate it. This calculation is indicated by a footnote.

was “likable,” gave “decent answers,” was “not sure why he would leave Washington D.C.,” and “would be a good candidate.” (Exhibit 5)

41. Mr. Cote’s response to question number nine (9) on the questionnaire was cited as the reason the interview panel was concerned about Mr. Cote’s commitment to the City Police Department. (Testimony of Detective McMenamon and Exhibit 5)
42. Question number nine (9) stated: “Why do you want to work for the Methuen Police Department? Are you interviewing at any other police department? If you had to chose between the two agencies which would you chose? Why?” (Exhibit 5)
43. Lieutenant Pappalardo scored Mr. Cote’s response to question number nine (9) a three (3), making the following notes: “wants [Methuen Police], would have to figure out how much to pay back [Washington, D.C.]. Doesn’t entirely know. May love D.C. police.” (Exhibit 5)
44. Lieutenant Mahoney scored Mr. Cote’s response to question number nine (9) a two (2), making the following notes: “would depend on financial cost to leave” and “not sure if he would come to Methuen.” (Exhibit 5)
45. Detective McMenamon scored Mr. Cote’s response to question number nine (9) a three (3), making the following notes: “[at] academy in Washington, D.C.,” “no other agency interviews,” “family in Methuen (hard to answer where he’d go [at] this time).” (Exhibit 5)
46. During the interview, Mr. Cote stated that he may love the Washington, D.C. police and that he would leave Washington, D.C., although it was unclear at what point in time he would do so. (Testimony of Mr. Cote)
47. On August 18, 2014, two days after his interview and approximately one (1) month before the City Police Department would make their appointment recommendations, Mr. Cote sent an email to Detective McMenamon. The email stated:

“Good Evening Detective McMenamon, I would like to thank you and the Lieutenants for the Skype interview of Saturday, August, 16, 2014. I want to [sic] express my excitement for this position, as it is a way to return home, while keeping a job that I’ve worked hard for. I look forward to hearing from the Methuen Police Department soon, Thank you, Brandon Cote” (Exhibit 5)

48. Detective McMenamon thought that Mr. Cote was trying to use the email message to modify the answer he put forth in his interview regarding whether he would stay in Washington D.C. if the City offered him the reserve police officer position. He did not forward the email to other persons involved in the hiring process. (Testimony of Detective McMenamon)
49. On September 18, 2014, Mr. Cote emailed Sergeant Smith, asking when he could expect the City’s hiring decision (Exhibit 10)
50. Sergeant Smith received several email messages from other candidates but did not respond to or forward any of them because it was “was not his position” and “not his responsibility” since he was not part of the group deciding which applicants would be recommended for appointment. (Testimony of Sergeant Smith)
51. Approximately one month after the interviews were concluded, the interview panel and Chief Solomon met to discuss the candidates and make appointment recommendations to the City Mayor, who is the appointing authority for the City. (Testimony of Chief Solomon and Detective McMenamon)
52. The recommended decision for each applicant’s selection or non-selection was decided as a group. (Testimony of Chief Solomon)
53. Detective McMenamon typed the reasons for selection and non-selection that were ultimately sent to the candidates. (Testimony of Sergeant Smith)
54. The interview panel and Chief Solomon decided not to hire Mr. Cote. The “main reason was Mr. Cote’s] noncommittal to accepting the position.” (Testimony of Chief Solomon)

55. The City appointed twenty-six (26) permanent, reserve police officers, eighteen (18) of whom were ranked below Mr. Cote on the Certification and bypassed him. (Stipulated Fact and Exhibit 2)
56. On January 5, 2015, Mr. Cote received a letter from the City stating that he was not selected to be a reserve police officer for the City. Also enclosed were the reasons for his non-selection. The reasons for his non-selection were that his answers were “sometimes vague and not very well thought out” and that “[w]hen asked whether he would accept the position in Methuen Police, he was vague and noncommittal. He stated he was not sure as to whether he would leave Washington and take the position in Methuen. He told the board that he needed to weigh his options in terms of pay and working environment in Methuen versus his present job in Washington. He did not seem committed to working for this department or this community. This person was not selected due to his lack of commitment to becoming a Methuen Police officer.” (Exhibit 4 and Stipulated Facts)
57. Mr. Cote filed an appeal with the Civil Service Commission on February 27, 2015 (Stipulated Fact)

#### Other Candidates

58. Among the candidates who signed the Certification and were appointed are:
- **Joseph Aeillo**, the son of a Methuen Police Officer (Ranked 10<sup>th</sup>), who did not bypass the Appellant;
  - **Mark Parolisi**, the step brother-in law of a Methuen Police Captain (Ranked 21<sup>st</sup>), who bypassed the Appellant;
  - **Michael Havey**, the son of a Methuen Police Sergeant (Ranked 22<sup>nd</sup>), who bypassed the Appellant;
  - **Justin Antoon**, the son of a City employee (Ranked 23<sup>rd</sup>), who bypassed the Appellant;

- **Joseph Alaimo**, the son of the City’s Former Deputy Police Chief, whose mother also works for the Police Department (Ranked 24<sup>th</sup>), who bypassed the Appellant;<sup>11</sup>
- **Patrick Fleming**, the son of a Methuen Police Officer (Ranked 27<sup>th</sup>), who bypassed the Appellant.

(Exhibit 2 and Testimony of Chief Solomon)

59. One applicant, who was hired and bypassed Mr. Cote and was unrelated to a member of the City Police, had an extensive negative driving history. This included payment defaults and license suspensions. Additionally, this applicant had a poor<sup>12</sup> credit score, although his references were excellent.<sup>13</sup> (Background Investigations)

60. The average score Lieutenant Pappalardo gave to the applicant with a negative driving history was 3.975<sup>14</sup>. In the comments section he noted that this applicant was “trainable,” “polite,” and “seems very honest.” (Exhibit 5)

61. The average score Detective McMenamon gave to the applicant with a negative driving history was 3.52. Detective McMenamon’s calculations appear mathematically inaccurate in a manner that slightly favors this applicant but does not suggest wrongdoing. In the comments section Detective McMenamon noted that this applicant was a “decent candidate,” had a “good history of family service,” and “would make a good candidate.” (Exhibit 5)

62. The average score Captain Hagggar gave to the applicant with a negative driving history was 3.11. Captain Hagggar’s calculations appear mathematically inaccurate in a manner that has no substantive effect on this applicant’s average score and does not suggest wrongdoing. In

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<sup>11</sup> In 2010, the Commission overturned the City’s decision to terminate Chief Solomon as Police Chief. During the multi-day hearing regarding that appeal, then-Deputy Police Chief Joseph Alaimo, the father of Joseph Alaimo, stated that he would “walk through a wall for Joe Solomon.” See Solomon v. Methuen, 23 MSCR 441 (2010).

<sup>12</sup> The Commission adopts the nomenclature of the credit authority to describe applicants’ credit scores.

<sup>13</sup> The City provided this information for this candidate and other candidates who bypassed Mr. Cote in response to my request at the hearing.

<sup>14</sup> No average score was provided by Lieutenant Pappalardo on the front of this applicant’s questionnaire. Lieutenant Pappalardo made a small mathematical error in adding up the scores for this applicant, giving this applicant 3 more points than his questionnaire scores indicate. With the error, this applicant averaged 3.975. Without the error, this applicant averaged 3.825.

the comments section he noted that this applicant gave “short answers,” was an “average candidate,” and “seemed like a decent candidate.” (Exhibit 5)

63. A different applicant, who was hired, bypassed Mr. Cote, and was unrelated to a member of the City Police, had negative employment histories with two employers. While working for one of these employers, this applicant resigned instead of being fired. The other employer that this applicant had worked for stated that it would not hire him again. The applicant with negative employment histories had a “fair” credit score and positive personal references. (Background Investigation)

64. Captain Haggar, Lieutenant Pappalardo, and Detective McMenamon interviewed the applicant with negative employment histories. (Exhibit 5)

65. The average score Captain Haggar gave to the applicant with negative employment histories was 2.92. Captain Haggar’s calculations appear mathematically inaccurate in a manner that slightly disfavors this applicant but does not suggest intentional wrongdoing. In the comments section, he noted that this applicant’s “background is questionable and should be followed up, possible 2<sup>nd</sup> interview,” “decent average candidate,” “has made some mistakes and relates he has changed and learned from these mistakes,” “did he change?” (Exhibit 5)

66. The average score Lieutenant Pappalardo gave to the applicant with negative employment histories was 3.31. Lieutenant Pappalardo’s calculations appear mathematically inaccurate in a manner that slightly disfavors this applicant but does not suggest intentional wrongdoing. In the comments section, he noted that this applicant had “‘bumps’ while at [one employer],” “states he left [another employer] due to financial reasons. [Supervisor] indicated [this applicant] chose to resign rather than be terminated.” (Exhibit 5)

67. The average score Detective McMenamon gave to the applicant with negative employment histories was 3.225. Detective McMenamon's calculations were accurate. In the comments section, he noted that this applicant "had ups and downs at [one employer] - \*his words," was "nervous," "was very eager to be good at past jobs. Seems to realize he made poor choices and regrets them," and "could be considered after careful review." (Exhibit 5)

## DISCUSSION

### 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, section 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.

Pursuant to G.L. c. 31, s. 2(b), the Commission has the powers and duties, among other matters,

(b) To hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator ....

(Id.)

The Commission has the same powers and duties with respect to persons aggrieved by the action, or failure to act, by municipalities through G.L. c. 31, s. 2(c), and via delegation from HRD to the municipality under G.L. c. 31, s. 5(e).

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Comm’rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971) (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

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) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was

“reasonable justification” shown. Beverly citing Cambridge at 305, and cases cited. “It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree.” Town of Burlington v. McCarthy, 60 Mass.App.Ct. 914, 915 (2004). The essential issue being evaluated in a bypass appeal to the Commission remains whether or not the appointing authority has reasonable justification, under basic merit principles, to select a candidate whose performance on the civil service qualifying examination placed him lower than the bypassed candidate, thus skipping over a higher ranked candidate for a valid reason.

#### *The Parties’ Arguments*

The City argues that a preponderance of the evidence shows that it had reasonable justification to bypass Mr. Cote. Specifically, it asserts that it conducted a fair and impartial hiring process in which all candidates were given equal consideration. As a result of that process, the City argues that it had sound and sufficient reasons to bypass Mr. Cote. The City argues that the reason for the bypass was ultimately his noncommittal response during the interview to question nine (9) regarding whether he would leave his present police department employment. In fact, the statement in Mr. Cote’s non-selection letter that his answers to the interview questions were “vague and not very well thought out” primarily pertained to his response to whether he would leave the Washington, D.C. Police Department if the City offered him the reserve police position. Further, the City avers that it encouraged him to continue with his application to the City Police Department when he initially indicated that he intended to withdraw his application. In addition, the City asserts that its consideration of his application was more than fair since it agreed to conduct Mr. Cote’s interview online, in light of the fact that he

lives and works in Washington D.C., an opportunity provided only to two other applicants because they were on active military duty.

Mr. Cote was adamant that the hiring process did not abide by the basic merit principles of the civil service system, arguing that the City unfairly favored candidates who are related to members of the police department. In support of this claim, Mr. Cote averred that five (5) of the candidates who bypassed him for appointment were related to persons who currently or formerly worked for the City. Mr. Cote further felt that the City bypassed him because he appealed the City's decision to bypass him in 2009. To this end, Mr. Cote offered a voicemail recording relating to his 2009 bypass appeal and the City's request for a written apology from the Appellant, which Mr. Cote believed was strong evidence that the City was now retaliating against him for appealing his 2009 bypass. Moreover, Mr. Cote asserts that he told the panel interviewing him that he would accept the position and sent email messages to both Sergeant Smith and Detective McMenamon in this regard.

### Analysis

The City has established by a preponderance of the evidence that it had reasonable justification to bypass Mr. Cote. The gravamen of Mr. Cote's appeal are his allegations that the City bypassed him in retaliation for having appealed its 2009 decision to bypass him, that the City bypassed him to hire relatives of the City's Police Department employees, and that he was not noncommittal about whether he would accept the City's offer of employment, if it was offered.

The voicemail message that Mr. Cote provided at the Commission hearing is given no weight. The message references events which occurred in 2009. None of the persons involved in Mr. Cote's 2009 interview were part of Mr. Cote's most recent interview panel. In addition,

Chief Solomon was on administrative leave in 2009. Further, the recording is hearsay within hearsay, reporting what someone else allegedly said, from someone who was providing limited legal advice to Mr. Cote. Therefore, the voicemail recording Mr. Cote provided does not affect this decision.<sup>15</sup>

A preponderance of the evidence establishes that the City Police were not retaliating against Mr. Cote for his 2009 bypass appeal to this Commission. The members of the City Police who interviewed Mr. Cote and testified at the Commission did not try to rewrite the history of this selection process and cast Mr. Cote in a negative light. They pointed out many qualities which were favorable to Mr. Cote and scored him well on the interview questionnaire. What errors were made in computing applicants' scores on the questionnaire appeared to be innocent mistakes and did not appreciably affect Mr. Cote's chances of being hired. In addition, the City Police were under no obligation to grant Mr. Cote a Skype interview, something otherwise only granted to applicants serving active military duty. Furthermore, if the City Police wanted to undermine Mr. Cote's candidacy, they could have simply accepted his withdrawal rather than encouraging him to continue applying. Finally, it is worth noting that Captain Haggar, the one interview panelist who had also served on an interview panel in 2009, was not an interview panelist for Mr. Cote's interview in 2014 and Chief Solomon was on administrative leave in 2009. In light of all of these factors, I conclude that the City did not bypass Mr. Cote in retaliation for appealing its decision to bypass him in 2009.

The reasons cited for bypassing Mr. Cote were that his answers were "sometimes vague and not very well thought out" and that he was "vague and noncommittal" about "whether he

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<sup>15</sup> Mr. Cote also believed that the City's request for a written apology after he accused the City of a biased hiring process in 2009 was evidence of further bias by the City in the present hiring process. How this request for a written apology from the City was evidence of impropriety in the present case was not explained by Mr. Cote. Given the limited relevance and content of the letter, I find that it is not evidence of impropriety in the instant appeal.

would leave Washington [D.C.] and take the position in Methuen.” At the hearing, Mr. Cote agreed that during the interview he stated that he was unsure whether he would return to Methuen and that he may end up loving Washington, D.C. However, he argued that these statements had been taken out of context. Regardless of the context, Mr. Cote’s response to the question put forth was noncommittal and vague at best.

Additionally, it is clear that Mr. Cote was concerned about these statements that he made during the interview because, only two days later, he followed up with two email messages iterating his interest at working for the City Police. The City Police were under no obligation to take the emails Mr. Cote sent after his interview into the consideration of his candidacy. If they did, the interview process would never end. Equally important, it would be inappropriate for an appointing authority to accept such information after the interview from one candidate when other candidates did not have that opportunity.

Chief Solomon testified that he increased the number of reserve officers he wanted to hire from twenty-one (21) to twenty-nine (29) because he found that he had sufficient funding to be able to send eight (8) of the reserve police officers to be selected directly to the training for full-time regular police officers. It was clear from his testimony that he had immediate need of such full-time officers and that he sought to train and employ the selected candidates quickly. The City was within its rights as an appointing authority to consider a candidate’s availability in order to decide whom it would hire.

That Mr. Cote was bypassed by someone with a poor driving record and by someone else who had poor employment experiences does not undermine the City’s reasonable justification since, unlike Mr. Cote, there was apparently no issue with their commitment to accept the job if it was offered to them.

Appointing authorities weigh many factors when determining whether to hire a candidate, some of which are subjective. It is arguable that the appointing authority placed excessive weight on whether Mr. Cote would accept the position if it were offered to him, in light of the flaws in other applicants. However, if the Commission is to give substantial deference to an appointing authority's exercise of judgment in determining whether there was reasonable justification shown in bypassing a candidate, the Commission can not simply state that the appointing authority should have given specific factors greater weight when hiring applicants. Provided that the criteria used to weigh the applicant's abilities reflects basic merit principles, the appointing authority has discretion to determine which factors are necessary to being hired. Whether an applicant will accept the position if it is offered to them is a factor which an appointing authority may consider.

Given that approximately one quarter of the persons ultimately appointed had personal and family connections to City and Police Department employees, including the Police Chief, I was disappointed that the City did not take additional steps to assure that candidates would receive equal consideration. First, employees whose immediate family members are seeking appointment should have no role in any part of the review and selection process, including assigning the oversight of background investigations to a subordinate employee, as occurred here with Captain McCarthy. See Investigation Re: Braintree Police Department's 2013 / 2014 Police Officer Hiring Process (I-14-145) (2015). Also, to dispel even the appearance of potential favoritism here, the City could have – and should have – sought out at least one (1) non-City employee to participate in the interview process. It is unsurprising that applicants perceive there is a biased hiring process when these measures are not adopted and family and friends, who may be qualified or unqualified, are hired by the City.

In summary while the review and selection process had deficiencies, I do not believe that the decision to bypass Mr. Cote was based on personal or political bias. The City's decision cannot be said, in any way, to indicate that Mr. Cote was not qualified for the position of reserve police officer. Rather, the issue was whether Mr. Cote was available for the job at the pertinent time, which his interviewers found was uncertain. Given Chief Solomon's interest in taking timely action in the hiring process, the City had reasonable justification to bypass him on that basis. While it is arguable the City placed excessive weight on whether or not Mr. Cote would accept the position, in light of the problems with other applicants, the Commission will not intervene so long as those factors are applied evenly across applicants and reflect basic merit principles<sup>16</sup> See Maillet v. City of Medford, 27 MCSR 397 (2014).

For these reasons, Mr. Cote's appeal under Docket No. G1-15-25 is hereby ***denied***.

Civil Service Commission

/s/ Cynthia A. Ittleman

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Cynthia A. Ittleman, Esq.  
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on August 6, 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)(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. 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

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<sup>16</sup> The Commission recently granted the appeal of another applicant from the same Certification. The appellant in that case was unfairly penalized by his responses to the interview questions. In the present case, Mr. Cote was *not* unfairly penalized by his responses to the interview questions. Therefore, the outcome of the prior case has little bearing upon Mr. Cote's case.

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:

Brandon Cote (Appellant)

Anne Randazzo, Esq. (for Respondent)

John Marra, Esq. (HRD)

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

BRANDON COTE,  
*Appellant*

v.

G1-15-25

CITY OF METHUEN,  
*Respondent*

**CONCURRING OPINION OF PAUL STEIN**

I concur in the result. I do not believe Mr. Cote’s bypass can be justified solely on the grounds that he acknowledged (candidly, in my view) that he could not accept an appointment and immediately relocate to Methuen due to his current employment as a police officer in Washington DC. Mr. Cote is a candidate who, without doubt, presented an impressive record as a highly qualified candidate. He was specifically encouraged by Methuen to pursue this candidacy, at the investment of considerable personal time and expense. Methuen wound up filling less than all of the available positions. The Commission has previously found systemic errors in the selection process that Methuen has used in this hiring cycle, which required, so far, overturning at least one other bypass decision in this same cycle. See Phillips v. City of Methuen, 28 MCSR --, G1-15-45 (2015). See also Dorgan v. City of Methuen, 28 MCSR 200 (2015) Ordinarily, I would expect that, consistent with basic merit principles, a more highly ranked and qualified candidate should be afforded a conditional offer and be allowed a specific date by which to make a firm commitment, rather than be bypassed on an interview response and speculation that he or she is not “committed” to taking the job.

However, Mr. Cote had a three-year commitment to his current employer, the Washington DC Police Department, and the undisputed evidence showed that Methuen appointed ten reserve officers forthwith to permanent positions and routinely used reserve officers to support and supplement certain essential functions of the department. Therefore, I do agree that, on the particular facts of this case, Methuen was justified to bypass Mr. Cote, as he was clearly not currently available to perform the duties of a reserve police officer that Methuen rightly could expect from one who was appointed to such a position in that municipality.

/s/ Paul Stein