

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

PATRICK O'BRIEN,
Appellant,

v.

G1-14-211

CITY OF LOWELL,
Respondent

Appearance for Appellant:

Timothy J. Ervin, Esq.
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One Olde North Road, Ste. 103
Chelmsford, MA 01824

Appearance for Respondent:

C. Michael Carlson, Esq.
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Commissioner:

Cynthia Ittleman, Esq.¹

DECISION

On September 4, 2014, the Appellant, Patrick O'Brien ("Mr. O'Brien" or "Appellant"), pursuant to G.L.c. 31, §2(b), filed this appeal with the Civil Service Commission ("Commission"), contesting the decision of the City of Lowell ("Lowell") to bypass him for original appointment to the position of permanent full-time Police Officer. A pre-hearing conference was held at the offices of the Commission on September 23, 2014 and the first day of the full hearing was held at Lowell City Hall on November 10, 2014.² On February 11, 2015, the

¹ The Commission acknowledges the assistance of Law Clerk Chris Windle 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 G.L. Chapter 31, or any Commission rules, taking precedence.

second day of hearing was held at the offices of the Civil Service Commission. The witnesses were sequestered at the first day of hearing, except the Appellant. The Appellant was sequestered during the second day of the hearing.³ The hearing was digitally recorded and both parties were provided with a CD of the hearing⁴. Both parties submitted proposed decisions.

FINDINGS OF FACT:

Twenty-one (21) exhibits were entered into evidence, nineteen (19) of which were entered at the hearing and two (2) of which (Exhibits 20 and 21) were submitted after the hearing at my request. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Deborah Friedl, Deputy Superintendent, Lowell Police Department (“LPD”)
- Carlos Mercado, Detective, LPD
- Ms. M, Appellant’s former girlfriend

Called by the Appellant:

- Patrick O’Brien, Appellant
- Mary O’Brien, Appellant’s wife

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

1. Patrick O’Brien resides in Lowell with his wife, whom he married in July 2011.

(Testimony of Mr. O’Brien)

³ Ms. M was subpoenaed to appear at the first day of hearing but failed to appear. Lowell sought enforcement of the subpoena in Court. Ms. M was represented by her attorney in the Court proceedings. On February 3, 2015, the Court ordered Ms. M to appear at the second day of hearing at the Commission on February 11, 2015. Lowell requested that the Appellant be sequestered during Ms. M’s testimony on the second day of hearing. The Appellant objected. I overruled the Appellant because of the previous restraining orders involving the Appellant and Ms. M and sequestered the Appellant. The Appellant was, however, given the opportunity to listen to the recording of Ms. M’s testimony during breaks in the hearing that day and to prepare for cross-examination of Ms. M.

⁴ 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.

2. At the time of the hearing Mr. O'Brien was employed at United Parcel Service ("UPS").
(Testimony of Mr. O'Brien; Exh. 7)
3. Mr. O'Brien served in the Marine Corps Reserves from May 2007 until 2013 and was on active duty in Afghanistan from May 2011 to February 2012. (Testimony of Mr. O'Brien)
4. Mr. O'Brien was employed by the Brewery Exchange in Lowell as a "bouncer" from July 2008 until July 2010. (Testimony of Mr. O'Brien; Exh. 7)
5. Mr. O'Brien met Ms. M shortly after she had started working at the Brewery Exchange.
(Testimony of Mr. O'Brien; Ms. M)
6. Sometime between December 2008 and October 2009, the two began a dating relationship. They moved in together shortly thereafter, sharing an apartment with two other roommates. (Testimony of Mr. O'Brien; Ms. M; Exh. 13, 16)⁵
7. The relationship between the Appellant and Ms. M lasted until sometime between May and August 2010⁶. After they broke up, the two continued to share a bedroom. Ms. M slept on the bed while Mr. O'Brien slept on his futon. (Testimony of Mr. O'Brien & Ms. M; Exhs. 13, 16)
8. On June 15, 2013, Mr. O'Brien took and passed the Civil Service Exam for the position of Police Officer. (Stipulation of Facts)

⁵ Ms. M offers different dates regarding when she and Mr. O'Brien began their relationship. In one document, she wrote that the relationship began in December 2008. In a second document, Ms. M wrote that the relationship began in October 2009. She testified at the commission that it began three or four months after a specific concert that took place in the late summer of 2009. (Ms. M; Exh. 13, 16)

⁶ There are conflicting dates regarding the date they broke up. Ms. M had written that they broke up in May and June of 2010. Ms. M and Mr. O'Brien testified at the Commission that their relationship likely ended in June of 2010. However, a police report around the pertinent time states that Mr. O'Brien referred to Ms. M as his girlfriend in August 2010. (Testimony of Mr. O'Brien & Ms. M; Exh. 11, 12, 13, 16)

Restraining Orders

9. While living together, there were two incidents involving Mr. O'Brien and Ms. M that lead to a number of court proceedings. The first incident occurred on or around April 1, 2010 and the second incident occurred on August 30, 2010. These incidents led: 1) to Ms. M's arrest on August 30, 2010 for assault and battery of the Appellant; 2) an abuse prevention order against the Appellant on November 4, 2010 ("November 4, 2010 abuse prevention order") pertaining to the incidents on April 1, 2010 and August 30, 2010; 3) an abuse prevention order against Ms. M on February 1, 2011 ("February 1, 2011 abuse prevention order") regarding threatening cell phone text messages sent by Ms. M to the Appellant; and 4) an abuse prevention order against the Appellant on March 22, 2011("March 22, 2011 abuse prevention order") pertaining to incidents on April 1, 2010 and August 30, 2010 referenced in the November 4, 2010 abuse prevention order against the Appellant. (Exhs. 12; 13; 14; 16)
10. The Appellant's and Ms. M's roommates at the time of the April 1, 2010 incident witnessed at least part of the events that day but the Lowell background investigator did not contact them. (Exh. 16) Ms. M provided a photograph of herself with a female friend in a casual outdoor environment that Ms. M reported was taken approximately three (3) days after the April 1, 2010 incident. However, Ms. M is wearing large sunglasses in the photo and no signs of a broken nose, nor black eyes are visible.⁷ (Exh. 21)
11. On August 30, 2010, Ms. M called the police stating that the Appellant hit her. When the police arrived at their apartment, the Appellant told the police that Ms. M had assaulted

⁷ Ms. M testified at the Commission that the nose injury on April 1, 2010, may have been accidental and happened while she was asleep. (Testimony of Ms. M)

him while he was asleep. The police arrested Ms. M and charged her with assault and battery of Mr. O'Brien. (Exhs. 12, 16 and 20)

12. On November 4, 2010, Ms. M went to court to apply for the November 4, 2010 abuse prevention order against the Appellant. In support of Ms. M's request for this abuse prevention order, Ms. M submitted an affidavit stating that Mr. O'Brien broke her nose and gave her two black eyes in an incident in April 2010 and that Mr. O'Brien also assaulted her in or around September 2010. The Court issued the abuse prevention order that day. (Exh. 13)

13. The November 4, 2010 abuse prevention order was extended three times. It was first extended on November 18, 2010, where it was scheduled for another hearing on January 10, 2011. (Exh. 13) The judge informed the parties that the reason he was extending the November 4, 2010 Abuse Prevention Order was that a hearing was scheduled to take place soon regarding the August 30, 2010 arrest of Ms. M for Assault and Battery of the Appellant. (Testimony of Mr. O'Brien)

14. On January 10, 2011, the November 4, 2010 abuse prevention order was extended until January 24, 2011. The Appellant appeared at the January 24, 2011 court hearing. When Ms. M failed to appear, the court vacated the November 4, 2010 order. (Exh. 13)

15. On February 1, 2011, Mr. O'Brien requested and obtained an abuse prevention order against Ms. M. In support of his request, the Appellant submitted an affidavit stating that Ms. M sent him threatening text messages. Further, the Appellant's affidavit stated that he believed that Ms. M was trying to intimidate him so that he would not testify against her in the criminal case related to her August 30, 2010 arrest that charged her with assault and battery. (Exh. 14)

16. On February 15, 2011, the Court extended the February 1, 2011 abuse prevention order against Ms. M to a full year.⁸ Ms. M did not attend the February 15, 2011 hearing. (Exh. 14.)
17. On March 22, 2011, Ms. M sought and obtained a second abuse prevention order against Mr. O'Brien. Ms. M's affidavit in support of this abuse prevention order reiterated the allegations in the affidavit that she submitted in support of her request for the November 4, 2010 abuse prevention order. Approximately eight (8) days after the March 22, 2011 abuse prevention order was issued, the Court vacated it stating that the underlying request for the order "failed to demonstrate there is a valid fear from imminent [harm ...]."⁹ (Exh. 16)
18. Since Mr. O'Brien was in the Marine Corps when the two abuse prevention orders were issued against him, his chain of command was notified of the orders. The Marine Corps did not restrict the Appellant's use of firearms or take any other actions against him. (Testimony of Mr. O'Brien)

Police Officer Application

19. On February 20, 2014, Lowell requested a Certification from the state's Human Resources Division ("HRD") to appoint fourteen (14) full time police officers. (Stipulation of Facts)

⁸ I take Administrative Notice that one year is the maximum period of time for which an abuse prevention order may be issued under G.L. c. 209A, § 4.

⁹ The last few words of the Court's order is illegible after the word "imminent." However, I take Administrative Notice that in determining whether to issue an emergency/temporary abuse prevention order under G.L. c. 209A, § 4, the Court is required to make a finding, *inter alia*, that there is a "substantial likelihood of immediate danger of abuse."

20. Mr. O'Brien was ranked seventeenth (17) on Certification 01560, from which Lowell ultimately hired fourteen (14) Police Officers, of which eight (8) were ranked below Mr. O'Brien. (Stipulation of Facts)
21. After HRD sent the Certification to Lowell, the candidates signed it and filled out employment application forms. (Testimony of Mr. O'Brien; Exh. 7) In response to the questions in the application regarding abuse prevention orders involving the applicants, Mr. O'Brien wrote, "[M], not allowed to continue after first 10 days", and "Lowell, expired, an ex-girlfriend filed a restraining order against me, stating I was beating her after I had her arrested for assault". (Exh. 7)
22. After candidates filled out the applications, the LPD conducted background investigations on all of the applicants. During its background investigation of Mr. O'Brien, the LPD found that the Appellant's Criminal Offender Record Information ("CORI") indicated that two restraining orders had been issued against him.¹⁰ (Testimony of Mercado)
23. Detective Mercado, the LPD background investigator, spoke with Mr. O'Brien on March 10, 2014 regarding some of the items that had come up in the course of his background investigation. He specifically told Mr. O'Brien that he would need to be able to explain the abuse prevention orders and related matters at his interview. (Testimony of Mercado)
24. On March 12, 2014, Mr. O'Brien was interviewed by a panel of interviewers, including Deputy Superintendent of the LPD, Deborah Friedl ("DS Friedl"). (Testimony of Friedl)
- At the interview, the interviewers had certain background information about the

¹⁰ The investigation also allegedly found that the Appellant had failed to pay certain excise taxes but Lowell did not bypass him therefor.

Appellant, including his application and CORI, which showed the abuse prevention orders against him. (Exh. 19) However, the interviewers did not have copies of the affidavits that Ms. M submitted to court in support of her abuse prevention order requests. Lowell obtained Ms. M's affidavits shortly after the interview and before Lowell decided to bypass Mr. O'Brien. DS Friedl reviewed the affidavits prior to the bypass and recommended that Lowell bypass Mr. O'Brien. (Testimony of Friedl)

25. DS Friedl has extensive professional police experience with domestic violence cases.

She developed the LPD internal policies on domestic violence. She initiated the LPD's first domestic violence unit and oversaw the unit for five years. DS Friedl is also on the board of directors for a domestic violence shelter and she has testified as an expert witness in domestic violence cases. (Testimony of Friedl)

26. During most of Mr. O'Brien's interview, he was appropriately reserved and he gave appropriate answers to the questions posed to him. (Testimony of Friedl)

27. When the interviewers asked Mr. O'Brien about the abuse prevention orders involving Ms. M, his demeanor changed. As the questions continued, Mr. O'Brien became "a bit angry" and "a bit flustered" by the line of questioning. (Testimony of Friedl) Mr. O'Brien repeatedly said during the interview that his ex-girlfriend (Ms. M) was "crazy" and that none of the matters reported by Ms. M had actually occurred. (Testimony of Friedl)

28. After the interview of each candidate, the panel discussed each candidate. Because of Mr. O'Brien's comments about Ms. M and his responses to the interviewers' questions about the abuse prevention orders, which provided so little information about the events that led to the orders and the related court proceedings, the interviewers decided

unanimously that they would recommend against hiring Mr. O'Brien and informed Police Superintendent William Taylor of their recommendation. (Testimony of Friedl)

29. On March 12, 2014, the same day as the Appellant's interview, Detective Mercado began attempting to contact Ms. M to discuss the abuse prevention orders she had obtained against Mr. O'Brien. Detective Mercado attempted to contact Ms. M through her mother and father but to no avail. Detective Mercado exhausted his other leads on Ms. M and temporarily ended his search. (Testimony of Mercado; Exh. 18)

30. On July 9, 2014, Lowell sent Mr. O'Brien a letter informing him that he was being bypassed. The stated reasons for the bypass were (1) he was unsuitable to be issued a license to carry a firearm because of his history of domestic abuse and (2) his history of domestic abuse. (Exh. 2)

31. Mr. O'Brien filed this timely appeal with the Commission on September 4, 2014. (Stipulation of Facts)

32. On October 9, 2014, after the Appellant filed the instant appeal, Detective Mercado resumed actively seeking Ms. M. to obtain information from her regarding the abuse prevention orders. (Exh. 18)

33. On November 5, 2014, Detective Mercado contacted Ms. M. She informed Detective Mercado that she had obtained the abuse prevention orders because the Appellant had assaulted her, adding that she had not heard from the Appellant in years. Detective Mercado found that Ms. M did not sound vindictive when asked to explain the abuse prevention orders and that she seemed disinterested in her previous involvement with the Appellant. (Testimony of Mercado; Exh. 17))

DISCUSSION

Legal Standard

In a bypass 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)).

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See City of Beverly v. Civil Serv. Comm'n, 78 Mass.App.Ct. 182, 189 (2010). “In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev. den., 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). Further, “[t]he commission does not act without regard to the previous decision of the appointing authority, but rather decides whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” Id. at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev. den., 390 Mass. 1102 (1983)).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification”

shown. Beverly, at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone as a new... [employee] than in disciplining an existing tenured one.” See City of Attleboro v. Mass. Civil Serv. Comm’n, C.A. BRCV2011-00734 (MacDonald, J.), (citing Beverly at 191). When there is a factual contest over alleged misconduct, the Appointing Authority does not have to prove its valid justification, so long as it puts forward a sufficient quantum of evidence to support its decision. Beverly, at 188.

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

By virtue of powers conferred by their office, police officers are held to a higher standard of conduct. “In order to perform their jobs, they ‘voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens,’ must ‘comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel.” City of Springfield v Civil Service Commission, 469 Mass. 370, 379(2014) (Quoting Attorney Gen. v. McHatton, 428 Mass. 790, 793-794, 705 N.E.2d 252 (1999), (Quoting Police Comm'r of Boston v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, 494 N.E.2d 27 (1986)

Analysis

Lowell has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. Lowell bypassed Mr. O'Brien for two reasons: (1) that he was unsuitable to be issued a license to carry a firearm because of the abuse prevention orders issued against him and (2) the abuse prevention order that were issued against him. With respect to the first reason, under G.L. c. 140, § 131 the Chief of Police is the licensing authority who is authorized to issue licenses to carry a firearm. Under section 131, the Chief of Police has considerable discretion to determine who may be granted a license to carry a firearm. Specifically, section 131 states that "the licensing authority ... may issue if it appears that the applicant is a suitable person to be issued."¹¹ The same statute provides that a decision to deny an applicant's request for a license to carry a firearm is appealable only to the District Court. There is no evidence here that the Appellant applied for a license to carry a firearm. However, Lowell argues that since police officers must be armed and the Chief of Police has determined that Mr. O'Brien is unsuitable to carry a firearm because of the abuse prevention orders against him, Lowell had reasonable justification to bypass him.

In regard to Lowell's reliance on the abuse prevention orders to bypass the Appellant, the parties dispute whether Lowell conducted a reasonably thorough review of the abuse prevention orders. Mr. O'Brien contends that Lowell's background investigation was not sufficiently thorough because Detective Mercado, who conducted the background investigation of the Appellant, failed to speak with the two witnesses who shared an apartment with Ms. M and Mr.

¹¹ G.L. c. 140, § 131 does not define who a suitable person is but it does provide seven (7) automatic disqualifiers. These are if applicant: 1.) has been convicted of any felony, misdemeanor punishable by imprisonment over two years, or violent crime; 2.) has been previously confined hospital or institution for mental health and does not have a doctor's order saying the applicant is deemed cured; 3.) has previous drug or habitual alcohol treatment or confinement without a doctor's order saying the applicant is not disabled by such illness; 4.) is under 21; 5.) is an Alien; 6.) is currently subject to a restraining order requiring suspension or surrender of a gun under G.L. c. 209A in Mass. or other jurisdiction; and 7.) currently has a warrant against him.

O'Brien at the time of the April 1, 2010 incident; that Lowell did not speak with Ms. M to verify her statements against the Appellant until the Appellant filed the instant appeal, denying him the ability to respond to Ms. M's statements; and that Lowell did not provide him an opportunity to respond to Ms. M's statements after it obtained Ms. M's affidavits after Mr. O'Brien's interview. In addition, Mr. O'Brien avers Lowell's bypass should be reversed since Ms. M was arrested and charged with assault and battery of Mr. O'Brien; an abuse prevention order was issued against Ms. M, which lasted a full year while the abuse prevention orders against him were short-lived, based on untrue statements and designed to intimidate him from testifying against her in the criminal case against her¹²; there are inconsistencies in the affidavits submitted by Ms. M in support of her two applications for restraining orders and her testimony at the Commission hearing; that the photo of Ms. M a few days after Ms. M stated that Mr. O'Brien hit her, resulting in a broken nose and two black eyes, shows no such injuries.

Lowell contends that it conducted a reasonably thorough investigation of the abuse prevention orders against Mr. O'Brien; that it repeatedly attempted to contact Ms. M before bypassing Mr. O'Brien; that DS Friedl has extensive experience with domestic violence cases, she observed Mr. O'Brien during his interview and found his responses to questions about the abuse prevention orders were markedly different from his responses to other questions, becoming angry and flustered, that the Appellant provided little information about the abuse prevention orders, that he repeatedly stated that Ms. M was "crazy" and that none of the events Ms. M described actually occurred. Based on the Appellant's responses, Lowell averred that it determined the alleged domestic abuse was likely true, and, therefore, it decided to bypass Mr. O'Brien. Lowell argues that it does not have to prove that Mr. O'Brien engaged in the acts

¹² The status of the criminal charge against Ms. M is unknown.

stated by Ms. M in applying for the abuse prevention orders, only that there was there was a sufficient quantum of evidence to substantiate a legitimate concern that he had committed the violent acts Ms. M reported, which is what Lowell found.

While Lowell did not obtain information directly from Ms. M until the Appellant filed this appeal, nor question him about Ms. M's affidavits, I find that Lowell conducted a reasonably thorough review in view of the domestic violence issues involved here. Detective Mercado, who conducted the background investigation of the Appellant, specifically informed the Appellant prior to his interview that he would need to explain the abuse prevention orders at his interview. While the Appellant disclosed the abuse prevention orders in his application, he failed to explain them at his interview, as Detective Mercado advised. Instead, at his interview the Appellant provided little information or explanation of these events, repeatedly referred to Ms. M as "crazy", and denied that the events she described in her affidavits occurred at all. As the subject of the abuse prevention orders, the Appellant was aware of the information based upon which the Court issued the orders and, therefore, could have addressed his concerns about that information at his interview even though Lowell did not obtain Ms. M's affidavits until after the Appellant's interview and did not question him about the affidavits. Deputy Superintendent Friedl, who has years of professional experience working with domestic violence cases, indicated that the Appellant provided little information about the abuse prevention orders and that he became angry and flustered when the interviewers asked him about the orders. Based on her experience, DS Friedl found the Appellant's comments very troubling and relayed her concerns to the Supervisor. In view of this information, Lowell had reasonable justification to be concerned that these matters indicated that the Appellant would not be able to respond to domestic violence

calls, as all police officers are required to do, in the manner required by law, especially since the abuse prevention orders here were issued only a few years ago.

The Appellant's comments about Ms. M warrant attention. Ms. M is not the one who applied to be a police officer. Therefore, it is not her conduct that is at issue here but the conduct of the Appellant. Regardless of the duration of the abuse prevention orders against the Appellant, the Court issued them for the term it deemed appropriate pursuant to G.L. c. 209A. The Commission is not in the position to question the Court's determinations here. It is part of the record in this case that the Appellant also obtained a restraining order against Ms. M and that Ms. M was arrested for assault and battery of the Appellant. However, those matters do not negate the abuse prevention orders that Ms. M obtained against the Appellant, nor do they undermine Lowell's reasonable justification for bypassing the Appellant.

With respect to the bypass based on the Appellant's lack of suitability to carry a firearm, this bypass reason, on its own, would not provide reasonable justification for the bypass. The Appellant did not apply for a license to carry a firearm, so the Respondent's determination in that regard is premature. In addition, such action cannot be taken to deprive an individual of his rights under the basic merit principles of civil service law. Sweet v. Civil Service Commission and Department of State Police, Middlesex Superior Court, C.A. No. 2013-02245-H (May 4, 2015). Finally, a denial of a request for a license to carry a firearm (of which there was none here) must be done in good faith. Id. Denying such a request when no request has been made suggests bad faith. Nonetheless, I uphold the bypass based on the domestic violence matters proved by a preponderance of the evidence.

Conclusion

Accordingly, based on the reasons provided herein, the appeal filed under Docket No.

G1-14-211 is hereby *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners)

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 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:

Timothy J Ervin, Esq. (for Appellant)

C. Michael Carlson, 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

PATRICK O'BRIEN,
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v.

G1-14-211

CITY OF LOWELL,
Respondent

CONCURRING OPINION OF CHRISTOPHER BOWMAN AND PAUL STEIN

We concur with the sound conclusion of Commissioner Ittleman that the City had reasonable justification to bypass Mr. O'Brien for the position of police officer. We reach that conclusion, however, based on more limited reasons.

The City was justified in its concern that multiple restraining orders had been issued against Mr. O'Brien. As part of the review, veteran members of the Lowell Police Department questioned Mr. O'Brien and heard his version of events. They were troubled by various aspects of his response, including his statement that the person who sought the orders against him was "crazy". That is not the type of thoughtful, mature response expected from someone seeking to be appointed as a police officer and clearly impacted the interview panel's assessment of his maturity and credibility. Those are all valid reasons for bypass.

The Commission, through a series of decisions, has firmly established that engaging in domestic violence is a valid reason for bypassing candidates – and disciplining incumbent civil service employees. We do not, however, based on the facts here, accept the far-reaching and damning conclusion, proffered by the City, that Mr. O'Brien, has "a history of domestic abuse." The record does not show that. Rather, the record shows that Mr. O'Brien was the subject of

short-term restraining orders that were obtained ex-parte. On each occasion, after Mr. O'Brien had the opportunity to be heard by the Court, those restraining orders were promptly vacated. Further, Mr. O'Brien has never been charged with domestic abuse. In fact, the only person who was criminally charged was the person who sought the restraining orders against him. It is wrong to label Mr. O'Brien as a serial abuser when the preponderance of the evidence does not show that.

/s/ Christopher Bowman

/s/ Paul Stein

August 6, 2015