

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

TABITHA CARDONA,
Appellant

v.

G1-15-61

CITY OF HOLYOKE,
Respondent

Appearance for Appellant:

Pro Se
Tabitha Cardona

Appearance for Respondent:

Sara Carroll, Esq.
City of Holyoke
20 Korean Veteran Plaza
Holyoke, MA 01040

Commissioner:

Christopher C. Bowman¹

DECISION

On March 27, 2015², the Appellant, Tabitha Cardona (Ms. Cardona), pursuant to G.L.c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the City of Holyoke (Holyoke) to bypass her for original appointment to the position of permanent reserve police officer. A pre-hearing conference was held on April 8, 2015 at the Springfield State Building and a full hearing was held at the same location on June 24, 2015.³ The hearing was digitally recorded and both parties were provided with a CD of the hearing⁴.

¹ The Commission acknowledges the assistance of Law Clerk Chris Windle in the drafting of this decision.

² Holyoke initially contested the timeliness of the appeal, but later withdrew that objection.

³ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

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. In such cases, this CD should be used by

FINDINGS OF FACT

Holyoke entered fourteen (14) exhibits and Ms. Cardona entered seven (7) exhibits into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by Holyoke:

- James Neiswanger, Chief of Police, Holyoke Police Department (“HPD”);
- Lt. Michael J. McCoy, HPD;
- Lt. David Fournier, HPD;

Called by Ms. Cardona:

- Tabitha Cardona, Appellant;

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

1. Ms. Cardona is thirty-two (32) years-old⁵. She has resided in Holyoke, MA for eight (8) years and lives with her three (3) children. (App. Exh. 1; Testimony of Cardona)
2. Ms. Cardona graduated from Lynn English High School and attended Borough Manhattan Community College, but did not receive any college credits. (Testimony of Cardona)
3. Ms. Cardona has been employed with the Willimansett Center in Chicopee, MA as a nursing assistant for the past five (5) years. (Testimony of Cardona; AA Exh 12)
4. In August 2006, Ms. Cardona moved from New York to Massachusetts. (Testimony of Cardona)
5. Ms. Cardona’s “unattested driving record” states in relevant part:

| <u>INCIDENT DATE</u> | <u>OFFENSE DESCRIPTION</u> |
|----------------------|--------------------------------------------|
| 2/20/2007 | NDR-FINANCIAL RESPON NEW YORK |
| 2/27/2007 | REVOCATION NDR-FINANCIAL RESPON INDEFINITE |

the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

⁵ Ms. Cardona mistakenly testified before the Commission that she was twenty-three (23).

(App. Exh. 1)

6. On April 26, 2007, Ms. Cardona was pulled over for speeding in Massachusetts on the Massachusetts Turnpike. (Testimony of Cardona)
7. The citation that Ms. Cardona submitted as an exhibit indicates that she was also cited that day for “OPER REVOKED”. That citation states that this violation is “crim”. (App. Exh. 3)
8. On May 4, 2007, the Dudley District Court issued a notice to Ms. Cardona stating in relevant part: “The hearing you requested has been scheduled on ... 6-11-07 ... 10:00 AM” This notice only references “Speeding”. (App. Exh. 5)
9. On May 7, 2007, the Massachusetts Merit Rating Board issued a letter to Ms. Cardona which stated in relevant part: “The Merit Rating Board cannot accept your request for a civil hearing before a court Magistrate for the traffic citation identified above [Reg Suspend / Revoked]. A civil hearing is not allowed for this traffic [illegible] because at least one of the violations on the citation is a criminal offense. (App. Exh. 4)
10. On May 22, 2007, a summons was issued for Ms. Cardona to appear in Dudley District Court on June 29, 2007 for an arraignment related to:

| <u>Count</u> | <u>Code</u> | <u>Offense Description</u> |
|--------------|-------------|---------------------------------------|
| 1 | 90/23/D | LICENSE SUSPENDED, OP MV WITH c90 §23 |

(App. Exh. 7)

11. On June 11, 2007, Ms. Cardona appeared in Dudley District Court regarding her hearing on the speeding ticket. She was found responsible for speeding but the Magistrate reduced the amount of the fine. (Testimony of Cardona)
12. On July 2, 2007, the Dudley District Court issued a warrant for Ms. Cardona’s arrest for failing to appear after being summoned to appear on June 29, 2007. (App. Exh. 6)

13. The following entry is listed on Ms. Cardona's unattested driving record:

| <u>INCIDENT DATE</u> | <u>OFFENSE DESCRIPTION</u> |
|----------------------|------------------------------------------|
| 11/6/2007 | REINSTATED NDR-FINANCIAL RESPON FEE PAID |

(App. Exh. 1)

14. In 2011, as part of a prior hiring cycle, Ms. Cardona's name appeared on a Certification to be considered for appointment as a permanent reserve police officer in Holyoke. (AA Exh. 11)

15. During that prior hiring cycle, Ms. Cardona completed an application for employment.

Question 62 of that application stated: "[e]ither as an adult or a juvenile, have you EVER been detained for investigation, held on suspicion, questioned, fingerprinted, arrested, indicted, criminally charged, or convicted of any misdemeanor or felony offense in this state or in any other legal jurisdiction (including offenses punishable under the Uniform Code of Military Justice)." Ms. Cardona checked "no". (AA Exh. 7)

16. Question 80 on that same application asked, "Has your driver's license ever been suspended or revoked?" Ms. Cardona checked "Yes" and hand-wrote the following: "Around 2006-2007, New York. Did not surrender my plates. Or made changes when I moved to Massachusetts." (AA Exh. 12)

17. During that 2011 hiring cycle, a background investigation was completed. The background investigation stated in relevant part: "Applicant does not disclose arraignment in Dudley District Court Question 62 – In part, have you ever been detained for investigation, held on suspicion, questioned, fingerprinted, arrested, indicted, criminally charged. 'Answer 'NO''") Contacted MSP Charlton – Sgt. Swift. Cardona received Summons on Operating MV after License Suspended on 04-26-07." (AA Exh. 13)

18. During the 2011 hiring cycle, Ms. Cardona also went through the interview process with an interview panel consisting of the Chief of Police (Chief), the Mayor of Holyoke, and the City Solicitor. During the interview, the Chief asked her: “What is community policing?” Ms. Cardona replied to this question that it is similar to what auxiliary police and volunteers do. (Testimony of Chief Neiswanger; AA Exh 11)
19. As part of that 2011 hiring cycle, Ms. Cardona was bypassed. She received a letter notifying her of the reasons for non-selection (2011 Bypass Letter). (AA Exh. 11)
20. The 2011 Bypass Letter stated in relevant part: “Ms. Cardona’s background investigation revealed that she omitted information on her application. A question on the application asked whether Ms. Cardona has been a part of an investigation, held on suspension, questioned, fingerprinted, arrested, indicted, or criminally charged. Ms. Cardona responded, no; however, her background investigation revealed that on June 29, 2007, she was arraigned in Dudley District Court for operating her vehicle after suspension or revocation of her license.” (AA Exh. 11)
21. The 2011 Bypass Letter also stated in relevant part: “ ... When asked the question, ‘what is community policing?’ she replied that it is similar to auxiliary police, what volunteers do. This was an unacceptable answer for an individual pursuing a career in the field of public safety. Reserve police officers are required to have basic knowledge and a general understanding of important developments in public safety.” (AA Exh. 11)
22. Ms. Cardona attempted to appeal the decision regarding the 2011 bypass to the Commission but did not file a timely appeal. (Testimony of Cardona)
23. On June 15, 2013, Ms. Cardona took and passed a subsequent civil service examination for police officer. She received a passing score of 95 or 96 and her name was placed on an

eligible list of candidates by the state's Human Resources Division (HRD). (Stipulation of Facts)

24. On August 26, 2014, Ms. Cardona's name appeared on Certification No. 2197, from which Holyoke planned to appoint ten (10) permanent, intermittent reserve police officers. Ms. Cardona was ranked 20th on the Certification and one (1) of the appointed candidates was ranked below her. (Stipulation of Facts)
25. Similar to the 2011 hiring cycle, all candidates were required to complete an application for employment, undergo a background investigation and participate in an interview. (Testimony of Chief Neiswanger)
26. On September 9, 2014, Ms. Cardona completed her application for employment. This 2014 application contained the same "Question 62" as the 2011 application, stating: "Either as an adult or a juvenile, have you EVER been detained for investigation, held on suspicion, questioned, fingerprinted, arrested, indicted, criminally charged or convicted of any misdemeanor or felony offense in this state or in any other legal jurisdiction (including offenses punishable under the Uniform Code of Military Justice)?" (AA Exh. 7)
27. Ms. Cardona once again answered "No" to Question 62. (AA Exh. 7)
28. The 2014 application also contained the same Question #80 which asked: "Has your driver's license ever been suspended or revoked?". Ms. Cardona again answered "Yes" and then hand-wrote the following: "When I first moved to MA State from N.Y. I was unaware of surrendering the NY vehicle plates. Until I got letter from MASS RMV and Holyoke Police had a warrant while my license was suspended. I then return (sic) plates and send (sic) proof of MA insurance with MA plate." (AA Exhibit 7)

29. In 2014, Ms. Cardona again interviewed with the Police Chief and others. She was nervous during the interview. (Testimony of Cardona)
30. During the 2014 interview, the Police Chief once again asked Ms. Cardona if she understood what “community policing” was. Ms. Cardona responded with words to the effect, “community policing is keeping the community safe by being an officer 24/7.” (Testimony of Chief Neiswanger)
31. Chief Neiswanger was looking for a candidate to touch on community outreach, police officers getting to know the citizens they serve and understanding the issues that impact the residents’ quality of life. (Testimony of Chief Neiswanger)
32. All of the appointed candidates gave answers that reflected a good understanding of the concept of community policing. (Testimony of Chief Neiswanger)
33. In a letter dated January 15, 2015, Ms. Cardona was informed that she was being bypassed for the position of permanent reserve police officer (2015 Bypass Letter).
34. The 2015 Bypass Letter stated in relevant part: “Ms. Cardona’s background investigation revealed that she was untruthful on her Personal History Application when she failed to disclose that she had been arraigned in 2007. Question #62 on the application asked whether Ms. Cardona has been a part of an investigation, held on suspension, questioned, fingerprinted or criminally charged. Ms. Cardona responded ‘no’. Ms. Cardona’s background investigation revealed that on June 29, 2007, she was arraigned in Dudley District Court for operating her vehicle after suspension or revocation of her license. Reserve police officers are expected to demonstrate credibility and candor by being honest and complying with full-disclosure requirements. Ms. Cardona was not honest when she completed her application without full disclosure of this incident.” (AA Exh. 6)

35. The 2015 Bypass Letter also stated in relevant part: “Ms. Cardona’s response to an important interview question indicates a lack of knowledge regarding the important role police officers serve in the community. During her interview, Ms. Cardona was asked, ‘what is community policing?’ Ms. Cardona replied that it is keeping residents safe as a cop 24/7. This was an unacceptable answer for an individual pursuing a career in the field of public safety. Reserve police officers are required to have basic knowledge and a general understanding of important developments in public safety. Additionally, officers are expected to demonstrate commitment to community policing and continuing education. Based on her responses to this question, it is evident that Ms. Cardona is not prepared for the position. She failed to demonstrate basic knowledge and comprehension of important police responsibilities.” (AA Exh. 7)

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.

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, 60 Mass. App. Ct. 914, 915 (2004).

Analysis

Holyoke identified two (2) issues for bypassing Ms. Cardona: 1) her “untruthfulness” for failing to disclose that she was arraigned in Dudley District Court on criminal charges in 2007; and 2) her poor response to an interview question.

I listened carefully to Ms. Cardona’s testimony and reviewed all of the documents submitted, including her 2011 and 2014 employment applications. As noted in the findings, Ms. Cardona stated, in response to Question 80 on the 2014 employment application: “When I first moved to

MA State from N.Y. I was unaware of surrendering the NY vehicle plates. Until I got letter from MASS RMV and Holyoke Police had a warrant while my license was suspended. I then return (sic) plates and send (sic) proof of MA insurance with MA plate.” That answer is not indicative of a candidate who is attempting to be “untruthful” or attempting to hide the fact that she was cited for operating a vehicle without a license.

Rather, Ms. Cardona simply believed that being cited for operating without a license, did not equate to being “detained for investigation, held on suspicion, questioned, fingerprinted, arrested, indicted, criminally charged, or convicted of any misdemeanor or felony offense in this state or in any other legal jurisdiction (including offenses punishable under the Uniform Code of Military Justice)” despite that multiple notices referenced that the matter was deemed “criminal”.

Had this been the first time that Ms. Cardona answered “no” to Question 60, I would not consider this to be a valid reason for bypass. However, in 2011, Ms. Cardona was informed by Holyoke that she was being bypassed for answering “no” to Question 60. Despite being armed with that information, Ms. Cardona, in 2014, once again answered “no” and did not provide any written clarification regarding that particular question. In that context, her incorrect answer provides a valid reason for bypassing Ms. Cardona to the extent that it shows a failure to follow directions. It does not, however, show that Ms. Cardona was untruthful and/or attempting to hide information about the underlying incident. Had the background investigator and/or any member of the interview panel given Ms. Cardona the opportunity to address the issue, as she did before the Commission, that likely would have been evident to the City.

Holyoke is on more solid footing in regard to their concerns about Ms. Cardona’s interview performance. Put simply, she gave an incomplete – and wrong – answer regarding her understanding of community policing – twice. In 2011, she simply stated that community

policing is “what auxiliary police and volunteers do.” Three (3) years later, after being informed, in writing, that she was being bypassed for her incorrect answer to this question, she answered the same question by stating words to the effect that community policing referred to police officers being able to protect the public “24/7”. Chief Neiswanger was rightfully concerned by her insufficient response to this question, particularly after having three (3) years to develop an appropriate, and accurate, response. While Ms. Cardona testified that she was nervous during the interview, that does not justify her insufficient response, particularly given that police officers are often called upon to respond to inquiries under highly stressful situations, including as witnesses in Court.

An applicant's poor performance during the interview process is a relevant factor an appointing authority can use to judge an applicant. See Frost v. Town of Amesbury, 7 MCSR 137 (1994) (Commission upholds bypass where applicant's answers to situational questions were unsatisfactory); LaRoche v. Department of Correction, 13 MCSR 159 (2000) (Commission upholds bypass where applicant's answers to situational scenarios did not comply with department policies and procedures and failed to demonstrate an ability to lead); McMahon v. Town of Brookline, 20 MCSR 24 (2007) (poor interview performance can stand alone as the sole basis for bypass where there is no evidence of any inappropriate motivations on the part of the Appointing Authority).

Conclusion

For these reasons, Holyoke’s decision to bypass Ms. Cardona for the position of permanent reserve police officer is affirmed and her appeal under Docket No. G1-15-61 is *denied*.

Civil Service Commission

/s/ Christopher Bowman

Christopher Bowman

Chairman

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 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:

Tabitha Cardona (Appellant)

Sara Carroll, Esq. (for Respondent)

Melissa Thomson, Esq. (HRD)