

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

STEPHEN M. DWINELLS,
Appellant

v.

G1-15-46

CITY OF METHUEN,
Respondent

Appearance for Appellant:

Pro se
Stephen M. Dwinells

Appearance for Respondent:

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

Commissioner:

Cynthia A. Ittleman¹

DECISION

On March 4, 2015 the Appellant, Stephen M. Dwinells (Mr. Dwinells 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 Methuen (City or Respondent) to bypass him for original appointment as a permanent reserve police officer.

A pre-hearing conference was held at the offices of the Commission on March 24, 2015 and a hearing was held at the same location on June 17, 2015.² The witnesses were sequestered, except for the Appellant. The hearing was digitally recorded and both parties were provided

¹ The Commission acknowledges the assistance of Law Clerk Barbara Grzonka 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.

with a CD of the hearing.³ By agreement, the parties made closing arguments in lieu of post-hearing briefs.

FINDINGS OF FACT

Nine (9) exhibits were entered into evidence at the hearing.⁴ Based on these exhibits, the testimony of the following witnesses:

Called by the City:

- Joseph Solomon, Chief of Police, City of Methuen;
- Stephen Smith, Police Sergeant, City of Methuen;
- Thomas McMenamon, Detective, City of Methuen and President of the Methuen Police Patrolman's Association;
- Michael Pappalardo, Police Lieutenant, City of Methuen;
- Randy Haggar, Police Captain, City of Methuen;
- Kevin Mahoney, Police Lieutenant, City of Methuen;

Called by Appellant:

- Stephen Dwinells, Appellant;

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

1. Mr. Dwinells is 31 years old and resides in Methuen, Massachusetts. (Stipulated Facts)
2. Mr. Dwinells graduated from Methuen High School in 2003. (Testimony of Mr. Dwinells)

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by 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.

⁴ Pursuant to the Commission request at the hearing, the Appellant submitted two photos that were on his Facebook page. They were submitted via email to the Commission and Respondent's counsel.

3. Mr. Dwinells received a Bachelor's Degree from Curry College in 2009. (Testimony of Mr. Dwinells)
4. Mr. Dwinells was on active duty in the United States Marines from 2010 to 2012. He also spent nine months in Afghanistan during 2013 and 2014 as a member of the United States Marines Corps Reserve. (Testimony of Mr. Dwinells)
5. Mr. Dwinells received many awards and letters of recognition while serving in the military. (Exhibit 9)
6. Mr. Dwinells is currently employed at Dow Chemical in Dracut, where he has worked since 2005, with breaks in employment to allow him to serve in the military. Mr. Dwinells also works part-time at a family run gas station and recently started another part-time job working at a friend's bar. (Testimony of Mr. Dwinells)
7. On June 15, 2013, HRD administered a police officer examination, at which time Mr. Dwinells was on active military duty. (Stipulated Fact, Testimony of Mr. Dwinells)
8. In February 2014, the Methuen Police Department wanted to hire twenty-three (23) permanent reserve police officers and requested a Certification of eligible candidates from the state's Human Resources Division (HRD). (Testimony of Chief Solomon)
9. The City hires full-time officers in the regular police force from the ranks of the reserve officers. (Testimony of Chief Solomon)
10. On February 6, 2014, HRD gave the City Certification No. 01595, a list of eligible candidates. Mr. Dwinells' name was not on that list since he had not yet taken the exam. (Exhibit 1)
11. Mr. Dwinells applied for a "prison guard" position with the Essex County Sheriffs' Department towards the end of February 2014 prior to taking the police officer exam and

applying to the Methuen Police Department. The interview was with the Sheriff, during which they discussed material on Mr. Dwinells' Facebook page. The material was the reason he was not hired. (Testimony of Mr. Dwinells)

12. Mr. Dwinells deleted his Facebook page after the interview with the Essex County Sheriffs' Department. (Testimony of Mr. Dwinells)

13. On February 24, 2014, Stephen N. Zanni, the Mayor of the City of Methuen, asked HRD to provide additional names for Certification No. 01595 in order to reach the minimum number of potential candidates. (Exhibit 2)

14. On March 3, 2014, HRD provided additional names to Certification No. 01595. Mr. Dwinells' name was not on this list since he had still not taken the exam. (Exhibit 1)

15. On March 14, 2014, Mr. Dwinells took the military make-up exam for police officer. (Stipulated Fact)

16. Mr. Dwinells received a score of 99. (Testimony of Mr. Dwinells)

17. On April 11, 2014, Mayor Zanni again asked HRD for additional names for Certification No. 01595. (Exhibit 2)

18. HRD issued an updated Certification to the City on April 11, 2014 and Mr. Dwinells ranked eleventh on this Certification. (Exhibit 1)

19. Each candidate seeking appointment was required to submit a recruit application package and undergo a background investigation. (Testimony of Chief Solomon)

20. On or about April 16, 2014, Mr. Dwinells submitted a completed recruit application package to the Methuen Police Department. (Exhibit 3)

21. Sgt. Stephen Smith was in charge of overseeing the background investigation and interview process. Sgt. Smith assigned the background investigations to various detectives, he

provided some assistance in completing the investigations and he scheduled candidate interviews. Before each interviewee was escorted into the interview room, Sgt. Smith gave the interviewers a brief summary of the investigation findings for each candidate. Sgt. Smith was not a member of the interview panel and did not make hiring recommendations.

(Testimony of Sgt. Smith; Testimony of Cpt. Haggar)

22. Mr. Dwinells' background investigation showed that he has no criminal record, several driving citations and a poor credit report. All of his references and neighbors provided positive feedback about Mr. Dwinells. (Exhibit 4)
23. The background investigation revealed that Mr. Dwinells had sought and did not obtain employment with the Essex County Sheriff's Department. (Exhibit 4, Testimony of Lt. Pappalardo)
24. Upon learning that Mr. Dwinells was not hired by the Essex County Sheriff's Department, Lt. Pappalardo contacted the Sheriff's Department to obtain information about the reasons Mr. Dwinells was not hired. (Testimony of Lt. Pappalardo)
25. Lt. Pappalardo met with the Sheriff's Department and discovered that Mr. Dwinells had material on his Facebook page that resulted in his non-selection. (Testimony of Lt. Pappalardo)
26. One item on Mr. Dwinells' Facebook page was a photograph of an African-American adult male sitting in a bathtub with a caption under the photograph that states, "I was the first Nigga in Paris". A second item on Mr. Dwinells' Facebook page depicts the Appellant standing on a boat with one beer in his hand wearing a pirate's hat.⁵ (Testimony of Lt. Pappalardo, Testimony of Mr. Dwinells)

⁵ See fn. 4.

27. The staff at the Essex County Sheriff's Office did not allow Lt. Pappalardo to make copies of the two Facebook items. No one else at the Methuen Police Department saw the entries on Mr. Dwinells' Facebook page. (Testimony of Lt. Pappalardo)
28. Mr. Dwinells' interview with the Methuen Police Department occurred on June 24, 2014. Approximately one week prior to his formal interview, Mr. Dwinells met with Sgt. Smith, Detective McMenamon and Captain Kris McCarthy at their request. The officers asked Mr. Dwinells for his Facebook user name and password. Mr. Dwinells told the officers he that he was unable to provide the information to them because he deleted his account. (Exhibit 5, Testimony of Mr. Dwinells)
29. All candidates for whom the background investigations were completed, including Mr. Dwinells, were interviewed by a panel appointed by Chief Solomon including: Captain Randy Haggar; Lt. Michael Pappalardo; Lt. Kevin Mahoney; and Detective Tom McMenamon. (Testimony of Chief Solomon)
30. While waiting outside the interview room, Mr. Dwinells was perspiring and "very nervous." Prior to the panel interview, Detective McMenamon advised Mr. Dwinells to take his time and to answer the questions fully, be upfront and breathe. (Testimony of Mr. Dwinells)
31. In the interviews, each member of the panel was given a questionnaire to fill out for each candidate. The questionnaire contained a rating scale that each panel member would use to rate the candidate on how he/she answered each question. The first four items on the questionnaire were "Observations" which each panel member would use to rate the candidate on his/her appearance, demeanor, ability to communicate and self-control. The remainder of the questionnaire was comprised of fourteen (14) general questions plus four (4) questions

related to different scenarios. The questionnaire also contained a comments section for the interviewers to provide any additional observations they may have had. (Exhibit 5)

32. The panelists scored each 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”). The scores were tallied to obtain an average score for each candidate. (Exhibits 5, 7 and 8)

33. The majority of Mr. Dwinells’ scores were “2s” and “3s” and his average score was 2.76. The only scores of “5” that Mr. Dwinells received were for his appearance and demeanor from one panel member. Mr. Dwinells received two “4s” for his answers to two (2) questions, one of which was about the City of Methuen and the other was about responding to a given scenario. The panelists’ written comments on the questionnaire referred to Mr. Dwinells as tense, rigid, and struggling in responding to the questions. Each panelist raised concerns in his questionnaire comments about the one or both of the entries on Mr. Dwinells’ Facebook page. (Exhibit 5)

34. Mr. Dwinells’ average score was lower than the score of any of the selected candidates. The lowest average score of the selected candidates was 3.150. The higher-scoring selected candidates received scores of “4s” and “5s” for the majority of their answers whereas the Appellant scored that well on only a small minority of the questions. (Exhibits 5 and 7)

35. During the interview, Mr. Dwinells was given the opportunity to explain two matters on his Facebook page that the Respondent found troubling.⁶ (Testimony of Mr. Dwinells)

36. Mr. Dwinells was embarrassed to discuss with the interviewers a photograph of an African American man with a caption underneath on his Facebook page during his interview and,

⁶ www.facebook.com/help provides information regarding tagging and posting. An individual can post items to his own Facebook page and can be tagged by Facebook friends with photos or other materials that were not created by the individual but will appear on his Facebook page if he allows the tag to remain on his Timeline.

therefore, he did not discuss it in depth. He was nervous during the interview as he had not had a formal interview before. (Testimony of Mr. Dwinells)

37. At the Commission hearing, the Appellant explained the photograph of an African American Man and the caption below it on his Facebook page. This photograph and caption were put on Mr. Dwinells' Facebook page by an African American friend, who is a fellow Marine, when Mr. Dwinells was militarily deployed. The Appellant's friend knew that Mr. Dwinells liked the song entitled, "Niggas in Paris" by Jay-Z, a singer. Mr. Dwinells emphatically denies that he is a racist; he was not trying to "spew hate" on his Facebook page. (Testimony of Mr. Dwinells)

38. When asked about how this material on Mr. Dwinells' Facebook page would be perceived by people viewing his Facebook page, Mr. Dwinells testified that "some [people] would find it offensive, some would not." However, Mr. Dwinells understands that a Caucasian man whose Facebook page has such material on it would be perceived negatively. (Testimony of Mr. Dwinells)

39. At the Commission hearing, the Appellant also explained that in another Facebook photograph of him, on a boat holding a beer, about which the Respondent also had concerns. Specifically, in this photograph Mr. Dwinells is standing on his parents' boat and the photograph was taken the summer prior to his deployment. (Testimony of Mr. Dwinells)
There are no other people in the photograph, no other alcoholic beverages and the Appellant is simply standing on the boat, making no inappropriate gestures. (Administrative Notice)

40. Sometime after his interview with the Methuen Police Department, Mr. Dwinells applied for a position with the Massachusetts State Police. Mr. Dwinells was able to reopen his

Facebook account at that time, he stated, in order to be “forthcoming” with the State Police about the questionable material during his interview there. (Testimony of Mr. Dwinells)

41. Although Mr. Dwinells was able to close and reopen his Facebook account, he did not remove either of the entries that concerned the Methuen Police Department. (Testimony of Mr. Dwinells)

42. At the time of the Commission hearing, Mr. Dwinells’ Facebook account was deactivated but he can reactivate it. (Testimony of Mr. Dwinells)

43. Captain Haggar is familiar with Facebook and indicated several ways material can appear on an individual’s page, i.e. posting, liking, tagging or being tagged, and sharing. Captain Haggar believed that Mr. Dwinells “liked” the photograph of the African American male in the bathtub and the caption that was put on his page and that he did not remove it. (Testimony of Cpt. Haggar)

44. After the interviews were completed, Chief Solomon held a meeting with the panel members to decide which candidates would be recommended for appointment. There were some “spirited” discussions during the meeting, but in the end, everyone was in agreement as to which candidates they would recommend to be hired or bypassed. (Testimony of Chief Solomon)

45. By a letter to Mr. Dwinells dated January 5, 2015, the City informed him that he had been bypassed. The letter which was signed by the Mayor enclosed a document that stated that Mr. Dwinells was bypassed because:

The responses of this individual to the standard series of questions put forward to him and to all candidates during the interview process were insufficient. During a background check of Mr. Dwinells, it was learned that he was denied a position with the Essex County Sheriffs’ Department recently for posting several racist comments and photos on his social media account, including using the term “nigga”. The posts were described as being offensive towards African Americans. The Methuen Police

Department does not tolerate any type of racism and considers this a serious issue with Mr. Dwinells. This person was not selected due to his poor interview performance, his questionable racial beliefs, and his demonstrated lack of good judgment.

(Exhibit 6)

46. Members of the interview panel indicated had concerns about how the photograph of an African American male in the bathtub and the caption below it on Mr. Dwinells' Facebook page may be perceived by the public. They had concern about Mr. Dwinells' motivation for leaving the material on his Facebook page while attempting to obtain a position in law enforcement. (Testimony of Captain Haggar, Lt. Mahoney and Detective McMenamon)
47. The photograph on Facebook of Mr. Dwinells on a boat with a beer in his hand was a concern because it caused some of the officers to question whether Mr. Dwinells was promoting excessive drinking. Both Facebook entries caused members of the panel to question the candidate's judgment. (Testimony of Lt. Mahoney, Captain Haggar, Detective McMenamon)
48. Asked at the hearing if they believed that Mr. Dwinells is a racist; two of the officers said "no" and one said "I don't know". (Testimony of Lt. Pappallardo, Detective McMenamon, Lt. Mahoney)
49. Among the candidates on Certification No. 01595 who ultimately received conditional offers of employment are:
 - **Joseph Aeillo**, the son of a Methuen Police Officer (Ranked 10th);
 - **Mark Parolisi**, the step brother-in law of a Methuen Police Captain (Ranked 21st);
 - **Michael Harvey**, the son of a Methuen Police Sergeant (Ranked 22nd);
 - **Justin Antoon**, the son of a City employee (Ranked 23rd);
 - **Joseph Alaimo**, the son of the City's Former Deputy Police Chief, whose mother also works for the Police Department (Ranked 24th).

- **Patrick Fleming**, the son of a Methuen Police Officer (Ranked 27th)

(Testimony of Chief Solomon)

50. Since the Appellant was ranked 11th, all but Mr. Aeillo bypassed the Appellant since they were ranked lower than Mr. Dwinells on the Certification. (Administrative Notice)

51. All of the candidates listed in Fact 49 received higher average scores than the Appellant on the questionnaires filled out by the interviewers. (Exhibit 7)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 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.

⁷ The Commission recently issued a decision, Phillips v. City of Methuen, G1-15-45 (2015), relating to the hiring of permanent reserve police officers, which admonished the City for not taking additional steps to ensure that there was no appearance of favoritism of candidates who are related to City employees. Although the Appellant had scored poorly at the interview, the City also bypassed the Appellant here based on material on his Facebook page and for poor judgment.

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 Selectman 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. An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. Busa v. Fall River Police Department, 27 MCSR 552 (2014)(citing Beverly, 78 Mass.App.Ct. 182, 189 (2010)). 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). An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone as a new...officer than in disciplining an existing tenured one.” City of Attleboro v. Mass. Civil Serv. Comm’n, BRCV2011-00734 (MacDonald, J.) citing Beverly at 191.

Especially when it comes to an applicant for a sensitive public safety position, “the Commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown...Absent proof that the [appointing authority] acted unreasonably...the commission is bound to defer to the [appointing authority’s] exercise of its judgment that ‘it was unwilling to bear the risk’ of hiring the candidate for such a sensitive position”. Beverly at 190-91. See also, Reading v. Civil Service Comm’n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914 (2004) (rescript opinion). Further, “An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 474 (1995). “Police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

Analysis

The Respondent argues that its decision to bypass Mr. Dwinells was reasonably justified and that it conducted a fair and impartial hiring process in which all candidates were given equal consideration and it had sound and sufficient reasons to bypass Mr. Dwinells due to his poor interview performance and social media posts. Specifically, the Respondent had concerns over

Mr. Dwinells' social media material. Additionally, Mr. Dwinells appeared tense and rigid during the interview and he gave insufficient answers to many of the questions at the interview.

Mr. Dwinells argues that the material on his Facebook page and his poor interview performance do not justify his bypass. In addition, he asserted that the photograph of an African American male and the caption underneath it was put there by an African American friend who knew that Mr. Dwinells liked the song referenced in the caption. Further, Mr. Dwinells testified that he was very nervous during the interview; he blames his nerves on his lack of experience with formal interviews and his recent return back from military deployment.

The Commission, as part of the civil service system, is tasked with "guarding against political considerations, favoritism and bias in governmental hiring and promotion."

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. There is no indication that anyone on the interview panel had a personal bias against Mr. Dwinells. In fact, a detective saw Mr. Dwinells was nervous immediately prior to his interview and gave him advice on how to calm his nerves. Additionally, Mr. Dwinells had approximately six weeks from the time he completed his application packet to the day of his interview to prepare.

In the recent Phillips v. City of Methuen⁸ decision, the Commission noted the City's use of a candidate interview questionnaire created an overly subjective interview process. The Commission has made clear, however, that subjectivity is inherent and permissible in an interview procedure, and care must be taken to preserve a "level playing field" and "protect candidates from arbitrary action and undue subjectivity on the part of the interviewers," which are core objectives behind basic merit principles of the civil service system. Smyth v. City of Quincy, 24 MCSR 497 (2011) citing Flynn v. Civil Serv. Comm'n., 15 Mass.App.Ct. 206, rev.

⁸ See, n 7.

den., 388 Mass. 1105 (1983). At issue in Phillips were specific questions. However, in the instant appeal, the Appellant was scored poorly by the interviewers on his responses to most of the questions in his interview. The bulk of Mr. Dwinells' scores were twos and threes and these numbers were given to him by all the interview panel members. There were no significant discrepancies between each interview panel member's rating of Mr. Dwinells' responses to the interview questions that might suggest that individual panel members were biased against him. His average score was below the average scores of the selected candidates. Mr. Dwinells suggests that he may not have performed well because he was nervous at the interview. While that may explain his poorly-rated answers to some questions, it does not explain or undermine the Respondent's conclusion that he performed poorly in response to most of the questions and, therefore, the Respondent would not hire him. As a result, the Respondent had reasonable justification to bypass the Appellant based on his overall poor performance at the interview.

The Respondent also bypassed the Appellant for material on the Appellant's Facebook page. Of the two photographs on the Appellant's Facebook page, it appears that the Respondent's greater concern regards the photograph of an African American man with a controversial caption beneath it. The Appellant produced copies of the photographs on his Facebook page and they are part of the record. The Respondent is justified in being concerned about hiring an officer with such material on social media.⁹ Police are held to higher standards of conduct and such material does not meet that standard. In addition, it appears that the Appellant could have removed this photograph from his Facebook page but he did not, even though he conceded that it would offend at least some people. The Respondent also expressed concern about a photograph on the Appellant's Facebook page that shows the Appellant on a

⁹ The Commission has upheld the discipline or bypass of candidates who made racially insensitive comments or gestures. See, Desmarais v. Department of Correction, 25 MCSR 575 (2012); Duquette v. Department of Correction, 19 MCSR 339 (2006); Blais v. Town of Framingham, 20 MCSR 642 (2007).

boat holding a can of beer. Specifically, the Respondent averred that this photo appeared to promote irresponsible alcoholic consumption. However, having viewed this photograph, I find that this posting does not promote irresponsible alcoholic consumption. Rather it shows the Appellant (and no one else) standing leisurely on his parents' boat holding one beer in his hand. There is no other evidence of alcohol or inappropriate conduct on the part of the Appellant in the photograph. Therefore, the Respondent did not have reasonable justification to bypass the Appellant based on this photograph of the Appellant on his Facebook page.

The Respondent has shown by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. It conducted a reasonable thorough background investigation and review of the Appellant. When the City discovered that Mr. Dwinells was not hired by the Essex County Sheriffs' Department, the City further investigated by sending Lt. Pappalardo to Essex to obtain more information, where it learned about material on the Appellant's Facebook page. Members of the City's Police Department requested that Mr. Dwinells provide his Facebook account information and password which Mr. Dwinells reported he was unable to produce at the time because he had "deleted" his account. The Respondent gave Mr. Dwinells the opportunity to explain the posts during the panel interview but it found his explanation wanting. At the Commission hearing, Mr. Dwinells admitted that he did not sufficiently explain the material on his Facebook page at his interview. Further, the Respondent bypassed the Appellant based on his scores at the interview. The different interviewers consistently rated the Appellant's answers to the questions poorly. The Appellant's average interview score was lower than any of the selected candidates. Finally, the Respondent bypassed the Appellant for poor judgement, a conclusion for which it had reasonable justification based on the photograph of an African American man with a controversial caption below it and his failure

to remove it from his Facebook page even after he was not hired by a Sheriff's Department based it and based on the Appellant's poor performance at the interview

Conclusion

For the above-stated reasons, Mr. Dwinells' appeal under Docket No. G1-15-46 is hereby *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman

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 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:

Stephen M. Dwinells (Appellant)

Anne L. Randazzo, Esq. (for Respondent)

John Marra, Esq. (HRD)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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G1-15-46

CITY OF METHUEN,
Respondent

CONCURRING OPINION OF PAUL STEIN

I concur with the decision to dismiss Mr. Dwinells’s appeal, based on the express findings and credibility determination of the hearing commissioner that Methuen demonstrated, by a preponderance of evidence, that Mr. Dwinell’s poor interview performance included an unconvincing explanation for his poor judgment in handling of a questionable posting on social media. Although I find this a very close call, I agree that, for that reason, Methuen has shown reasonable justification for his bypass.

I would not find, however, that Mr. Dwinells’s handling of the social media posting, alone, serves as an additional legitimate reason for bypassing him or justifies, in effect, stigmatizing him as a racist. Mr. Dwinells did not create or post the offensive material in question. He received it through a “tag” from a friend (himself an African-American) who sent a picture with a caption referencing a popular song that happens to use the “N” word that he sent in jest. The preponderance of the evidence, as found by the hearing commissioner, suggests that no one actually believes the author of the posting is a racist or that Mr. Dwinells is a racist. Mr. Dwinells’s mistake was his neglect in not deleting from his own personal social media page a friend’s post that some would fairly consider racially offensive. As the hearing commissioner has pointed out, the Commission has consistently upheld bypass and discipline of those who have personally engaged in offensive racial or other insensitive and vulgar posting on social media, and that behavior is clearly unacceptable for any public employee. See also Rogers v.

Southbridge, 26 MCSR 359 (2014) (bypass of candidate who appeared in three You Tube videos mocking the disabled); Doherty v. Bourne, 25 MCSR 195 (2012 (repeated postings ridiculing sexual orientation of coworkers, superiors and other municipal employees) Here, however, I am not persuaded that Mr. Dwinells's error should be equated to conduct that can fairly infer he is at risk to carry racial animus or insensitivity into the workplace or that would adversely affect the performance of his duties as a police officer.

I also note my reservation about systemic errors in 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) The written record of Mr. Dwinells's unrecorded interview shows that, as was candidate Phillips, he, too, received low interview scores for not understanding "discretion" in arresting a fellow officer or family member – stating it wouldn't matter "wrong is wrong." In my view, while some degree of subjectivity is inherent in any interview process, .the subjectivity here is particularly problematic in view of the evidence of the number of family members of Methuen Police Department and city employees hired in this cycle, the lack of any recording of the interview that would have been especially helpful to show that the subjective judgments about Mr. Dwinells's disqualifying demeanor and interpersonal skills were justified, and not just a pretext for disliking his answers on questions about "discretion" or discomfort about his social media behavior. See generally, Morris v. Braintree Police Dep't., 27 MCSR 656 (2014)

In sum, I would caution against reading too much into this decision as a guideline for how appointing authorities should use oral interviews or social media in future selection of candidates.

/s/ Paul Stein