

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

ERIK PENA,
Appellant,

v.

G1-15-84

CITY OF LAWRENCE,
Respondent,

Appearance for Appellant:

Pro Se
Erik Pena

Appearance for Respondent:

Brian Magner, Esq.
Deutsch Williams
One Design Center Place, Suite 600
Boston, MA 02210

Commissioner:

Cynthia A. Ittleman¹

DECISION

On May 5, 2015, the Appellant, Erik Pena (Mr. Pena), pursuant to G.L. c. 31, § 2(b), filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the City of Lawrence (Appointing Authority or Respondent) to bypass him for original appointment to the position of permanent full-time Police Officer. A pre-hearing was held on June 23, 2015 at the offices of the Commission and a full hearing was held at the same location on August 11, 2015.² Witnesses, except the Appellant, were sequestered.

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 Chapter 31 or any Commission rules taking precedence

The hearing was digitally recorded and both parties were provided with a CD of the hearing³. Both parties submitted proposed decisions.

FINDINGS OF FACT:

Twenty-four (24) exhibits were entered into evidence at the hearing. Pursuant to the Commission's instructions at the hearing, exhibits twenty-five (25) through thirty-four (34)⁴ were entered into evidence post-hearing. Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent:

- James Fitzpatrick, Acting Police Chief, Lawrence Police Department (LPD)⁵
- Frank Bonet, Personnel Director, City of Lawrence

Called by the Appellant:

- Erik Pena, Appellant

and taking administrative notice of all matters filed in the case, including, without limitation, the Appellant's prior appeal of the Appointing Authority's bypass (docketed #G1-14-215) and pertinent statutes, case law, regulations, policies, and reasonable inferences from the credible evidence; a preponderance of credible evidence establishes the following facts:

1. At the time of the hearing, Mr. Pena was a 31 year old male, residing in Lawrence, Massachusetts. Mr. Pena is married with two children and a step-son. (Testimony of Mr. Pena)

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 the substantial evidence, arbitrary and 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 Exhibit 32 includes Exhibits 32A and 32B.

⁵ When Mr. Pena was bypassed and during the Commission hearing Police Chief Fitzpatrick's position was Acting Police Chief. He was sworn in as permanent Police Chief on September 24, 2015 and will be referred to herein as Police Chief Fitzpatrick.

2. Mr. Pena graduated from Hyde Park High School in Boston and has an Associates' Degree in Psychology from the University of Phoenix. Mr. Pena is working towards a Bachelors' Degree in Psychology at the University of Massachusetts-Lowell. (Testimony of Mr. Pena)
3. Mr. Pena was in the United States Army from 2004 to 2008. He spent a year in Iraq and was stationed at Fort Sill, Oklahoma upon his return. (Testimony of Mr. Pena)
4. While in Iraq, Mr. Pena received a Combat Action Badge, an Army Commendation Medal and several Army Achievement Medals. (Exhibit 34)
5. Since 2008, Mr. Pena has worked at several different jobs. Mr. Pena has worked for Rent-A-Center, Jet Blue, Frito Lay and for Finish Line, where he is currently employed as an assistant store manager. (Testimony of Mr. Pena)

2013 Police Officer Exam and Certification 01451, Civil Service Commission Docket # G1-14-215

6. On June 15, 2013, Mr. Pena took and passed the Civil Service Exam for Police Officers (Administrative Notice; G1-14-215 Stipulated Facts)
7. On December 20, 2013, the state's Human Resources Division (HRD) issued Certification 01451 to the City of Lawrence in order for the Appointing Authority to hire twelve (12) permanent police officers. (Administrative Notice; G1-14-215 Stipulated Facts)
8. The Appellant completed an application for the police officer position and the Appointing Authority conducted a background investigation of Mr. Pena. As a result of this background investigation, the Appointing Authority found that there was a 2014 Massachusetts warrant issued for the arrest of "Erik Pena" stemming from criminal charges pending against him in Salem, New Hampshire in 2014. The warrant was for a Fugitive from Justice Charge

stemming from criminal charges for Theft by Deception and Organized Retail Crime Enterprise. (Administrative Notice; Exhibit 30; G1-14-215 Stipulated Facts)

9. In May 2014, the Appointing Authority sent a letter to HRD proposing to bypass Mr. Pena and asking HRD to remove his name from the eligible list of police officer candidates pursuant to Personnel Administration Rules (PAR) 09 based on the Massachusetts warrant. HRD approved the bypass and removal of the Appellant's name from the eligible list.

(Administrative Notice; Exhibit 2; G1-14-215 Stipulated Facts)

10. The Appellant filed the appeal docketed #G1-14-215 on *September 15, 2014*.

(Administrative Notice)

11. Subsequently, it was discovered that the charges in New Hampshire had been the subject of a nolle prosequi "due to ID issue" (Administrative Notice (NH court record in Docket #G1-14-215)). Neither the Appointing Authority nor HRD was aware of this fact when Mr. Pena was bypassed and his name was removed from the eligible list. The Appellant and Appointing Authority, under Docket #G1-14-215, assented to a request for Relief under Chapter 310 of the Acts of 1993, which the Commission granted on *December 1, 2014*, providing, *inter alia*, that Mr. Pena's name shall be placed at the top of the Certification. HRD took no position on the issuance of Chapter 310 relief. (Exhibit 2, Administrative Notice)

**Police Officer Exam and Certification 01939, Civil Service Commission Docket #G1-15-84
(current appeal)**

12. Based on the June 15, 2013 police officer exam that Mr. Pena took, HRD established Certification 01939 on *September 19, 2014* to fill four (4) permanent full time police officers positions at LPD. (Stipulated Facts)

13. Although it initially indicated that it wanted to hire four (4) police officers, the Appointing Authority ultimately hired five (5) permanent full time police officers from Certification 01939. (Testimony of Police Chief Fitzpatrick)
14. Mr. Pena's name was not on Certification 01939 when it was originally issued. However, on December 9, 2014, Mr. Pena's name was placed first on Certification 01939 pursuant to the Chapter 310 relief granted by the Commission in Mr. Pena's previous appeal, Docket # G1-14-215. (Stipulated Facts, Exhibit 3)
15. Sometime after the Appointing Authority received Certification 01939, candidates were notified to sign the Certification at the LPD and obtain and complete an employment application, as well as provide the required backup documents. (Testimony of Police Chief Fitzpatrick and Mr. Bonet)
16. If candidates had questions concerning the application form, they could ask the Personnel Department about them. Mr. Bonet, the Personnel Director, instructs all applicants to "be truthful and detailed" when completing the application. Mr. Bonet does not remember helping Mr. Pena with his application, although he does remember Mr. Pena coming to his office frequently after he submitted his application to find out if a hiring decision had been made. (Testimony of Mr. Bonet)
17. When the Personnel Department received a candidate's completed application, it was forwarded to the Police Department for a background investigation. (Testimony of Mr. Bonet) The Acting Police Chief (now Permanent Chief) was in charge of assigning detectives to conduct the background investigations. (Testimony of Police Chief Fitzpatrick) The assigned detective was the primary interviewer of the candidate. (Administrative

Notice) Mr. Pena was not interviewed by anyone else. (Testimony of Police Chief Fitzpatrick)

18. On or about December 2, 2014, Mr. Pena completed and submitted his employment application for a police officer position. (Exhibit 4, Exhibit 4A, Testimony of Mr. Bonet)
19. Mr. Pena was required to submit a sealed copy of his credit report as part of his application. The credit report he submitted was dated September 15, 2014. (Exhibits 4, 9)
20. Police Chief Fitzpatrick was aware that Mr. Pena had been previously bypassed in error and requested a different detective to conduct Mr. Pena's investigation for this application and background check. (Testimony of Police Chief Fitzpatrick)
21. Detective Sergeant John S. Dushame (Det. Dushame) was assigned to conduct Mr. Pena's background investigation. (Exhibit 5) Det. Dushame had not conducted Mr. Pena's previous investigation. (Testimony of Police Chief Fitzpatrick)
22. On December 8, 2014, Det. Dushame received Mr. Pena's application and began the background investigation. (Exhibit 32A)
23. Det. Dushame was on vacation and unavailable to testify before the Commission and submitted an affidavit outlining his interactions with Mr. Pena. (Exhibit 32A)
24. Det. Dushame reviewed Mr. Pena's application, the sealed TransUnion credit report Mr. Pena submitted and Mr. Pena's prior background investigation information (from early 2014) which included a CORI check. (Exhibit 32A) This CORI check was obtained on January 6, 2014. (Exhibit 30)
25. Det. Duschame obtained updated CORI checks on Mr. Pena on December 8 and 15, 2014. (Exhibit 30)

26. Det. Dushame met with Mr. Pena twice, once at his home to verify his residency and once at Det. Dushame's office to discuss Mr. Pena's background and application. Det. Dushame did not ask Mr. Pena about his credit history at these meetings. (Exhibit 32A)

27. On December 18, 2014, Det. Dushame submitted his background investigation report on Mr. Pena to Capt. Denis Pierce and Police Chief Fitzpatrick via interoffice memorandum. The report states, in pertinent part:

Criminal History:

... 02/23/12 False Motor Vehicle Insurance Claim. - B.M.C West Roxbury
Attempt to Commit a Crime.

Status: Pretrial Probation-Dismissed.

On 2/11/10 the Boston Police Dept. and the Massachusetts Insurance Fraud Bureau (I.F.B.) conducted an investigation on Mr. Pena for filing a false/fraudulent motor vehicle insurance claim... A forensic examination by the agencies showed the damage was old. (also from a previous paid claim). They interviewed Mr. Pena and he admitted the false claim... I spoke with I.F.B. investigator **Richard Fogerty**. He confirmed Mr. Pena tried filing a claim on old damage. Mr. Fogerty stated when Mr. Pena was confronted with photos, and other evidence, he admitted the fraudulent claim. I asked Mr. Pena about this and he admits to meeting with the investigators, and telling them it was old damage. Mr. Pena claims his ex-girlfriend was misleading the investigators and 'was trying to ruin his life'. I will attempt to secure a subpoena to gain access to the file

10/10/12 - Abuse Prevention Order. B.M.C. Roxbury

Status: Expired.

On 10/10/12 [Ms. A]⁶ was granted a preliminary abuse prevention order against Mr. Pena. On 10/24/12 the order was extended to 1 year. On 1/18/13 the order was modified and the expiration date was shortened to 04/18/13. I asked Mr. Pena about this, and he stated his ex-girlfriend lied to get the order, and prevent him from having visiting privileges with his children. I was unable to interview [Ms. A], or obtain a copy of her affidavit due to time constraints.

01/24/14 Fugitive from Justice – Lawrence District Court.

Status: Dismissed.

Mr. Pena was arrested by L.P.D. for a Fugitive from Justice warrant from

⁶ The name of the requestor of the Abuse Prevention Order was redacted from the records. Therefore, the name of the requestor is referred to as Ms. A.

N.H. Mr. Pena was booked and transported to court. The charges were ultimately dismissed.

02/12/14 - Organized Retail Crime Enterprise- Rockingham County NH. Salem Dist. Ct.
Status: Nolle Prosequi/Dismissed

The charges were a result of a Salem N.H. Police Department investigation. I spoke to the Rockingham County Assistant Prosecutor, **Terry Harrington**, who informed me they dismissed the charges due to a belief **Mr. Pena was NOT the perpetrator of the crime**.

...

Military Service:

... Mr. Pena received a **Field Grade Article 15⁷** for violating two sections (**Article 134 wrongfully wearing rank and false official statements**). Mr. Pena was demoted down to E-1 PVT. Fined two months pay, and given 45 days of extra duty and 45 days of restriction. Mr. Pena signed a waiver admitting to the facts, and accepted his punishment and his Commanding Officers recommended that he be discharged 'Under Other Than Honorable' conditions. He was ultimately given a general discharge...

... I asked Mr. Pena about his military specialty and what was the highest rank he attained. He stated he attained the rank of Sergeant. **I asked him about the Art. 15 and he stated there was some confusion with the Army because they accused him of promoting himself. He stated that the Army did an investigation and 'nothing came out of it'** ... [and] 'I wished I stayed there, I should have fought it instead of getting discharged'...⁸

Credit Check:

According to the credit report provided, Mr. Pena has some outstanding debt on his credit report. Mr. Pena has (6) accounts currently in collection status. Mr. Pena only noted Sleepy's on his application ...

(Exhibit 5)(emphasis in original) There is no indication in the investigation report that Det. Dushame discussed the Appellant's credit check with him. (Administrative Notice)

28. The investigation report further indicates that Det. Dushame was able to contact one of the Appellant's professional references, one of his personal references and one miscellaneous reference. Other references either did not return Det. Dushame's call, had

⁷ Under the Uniform Code of Military Justice (U.S.C. Title 10, Chapter 47), a member of the military may be subject to non-judicial military discipline pursuant to Article 15 for lesser offenses without a court martial. *See, e.g.* <http://www.military.com/join-armed-forces/the-uniform-code-of-military-justice-ucmj.html>.

no voicemail or their voice mailbox was full. Det. Dushame also spoke to the Appellant's supervisors at his current employer and at three (3) other recent jobs. The Appellant's employment supervisors gave him positive reviews, with only one supervisor indicating that the Appellant had one written discipline warning. (Exhibit 5)

29. Mr. Pena's military records contain Order #086-636, issued at Fort Sill Oklahoma, which indicates that Mr. Pena was appointed to Sergeant effective April 1, 2007. The military record also contains a certificate stating that Sgt. Erik Pena graduated from the Human Resources Specialist Course at Fort Jackson, South Carolina. This certificate is dated October 4, 2007. (Exhibit 34)

30. Mr. Pena's military records include a waiver he signed, dated November 26, 2007. The waiver relates to his separation from the US Army. In it, Mr. Pena acknowledged that he was advised by his consulting counsel of the basis (a pattern of misconduct) for his separation and the consequences of waiving his rights in regard thereto. The waiver also advises that Mr. Pena may encounter substantial prejudice in civilian life if a general discharge under honorable conditions or a discharge under other than honorable conditions was issued to him. (Exhibit 34)

31. The updated CORI checks obtained on December 8 and 15, 2014 included sealed records with a warning that states "[s]ealed records are available to criminal justice agencies as defined in M.G.L. c. 6, s. 167 for official criminal justice purposes and as otherwise authorized by law. In addition, sealed records may include CORI and juvenile criminal history otherwise regulated under M.G.L. c. 6, s. 172 and M.G.L. c. 119, s. 60A...." (Exhibit 30) The updated CORI checks indicated that the 2014 Massachusetts warrant ⁹ and the 2012

⁹ The New Hampshire charges underlying the warrant were not sealed. The Appellant testified that sealing the underlying charges would be very expensive.

Massachusetts false motor vehicle insurance claim charge was sealed in June 2014.

(Exhibits 23 and 30; Administrative Notice)

32. Page twelve (12) of the LPD employment application requires applicants to list any accounts that are over 180 days delinquent and to also list all loans whose principal outstanding balance exceeds \$1000.00. Mr. Pena listed only one account as being over 180 delinquent on his application. (Exhibit 4)
33. Mr. Pena's credit report lists a balance several thousand dollars higher on one credit card than the amount he disclosed on his application; another account balance is almost double the amount he disclosed and he did not mention another credit card account with a balance of several thousand dollars. (Exhibit 9)
34. Mr. Pena's credit report lists six (6) accounts in collection of which four (4) are listed as being "disputed by the consumer". (Exhibit 9)
35. Sometime between December 18, 2014 and December 24, 2014, Daniel Rivera, the Mayor of Lawrence, Police Chief Fitzpatrick and Mr. Bonet had a meeting to discuss the police officer candidates. This group had with them the candidates' application packets, which consisted of the application, a detective's background memo and any underlying documents pertinent to the review. (Testimony of Police Chief Fitzpatrick and Mr. Bonet)
36. At this meeting, the Police Chief made his recommendations and the Mayor and Mr. Bonet discussed the candidates further. The Mayor is the Appointing Authority. Once the hiring decisions were made, the next step was to send conditional offers and bypass letters to the appropriate candidates. (Testimony of Police Chief Fitzpatrick)
37. The Appointing Authority gave conditional offers of employment to five (5) candidates ranked below Mr. Pena to hire. (Exhibit 12)

38. The Mayor of Lawrence sent a bypass letter dated December 24, 2014 to HRD advising of his decision to bypass Mr. Pena and the reasons therefor.¹⁰ The letter states, in pertinent part;

... In (sic) October 25, 2007, Mr. Pena was formally sanctioned by the United States Army ...

Mr. Pena received a field grade article 15 (Uniform Code of Military Justice) for violating two sections (Article 134: wrongfully wearing rank and false official statements). Mr. Pena was demoted to a Private (E-1), fined two months' pay and given 45 days of extra duty and 45 days of barracks restriction. He was ultimately given an 'Other than Honorable' Discharge.

Upon being interviewed by the Lawrence Police Department, Mr. Pena indicated that his rank was a Sergeant/E-5 and that the Army made some confusing (sic) about promoting himself. ...

In (sic) February 23, 2012, Mr. Pena was charged with 'False Motor Vehicle Insurance Claim' and 'Attempt to Commit a Crime'. A forensic examination by the Massachusetts Insurance Fraud Bureau found that damage to Mr. Pena (sic) vehicle was old (also from a previous claim). Mr. Pena admitted to the false claim. The LPD has submitted a subpoena to the Insurance Fraud Bureau in an attempt to secure access to this investigation.

On October 10, 2012, Mr. Pena was charged with 'Abuse Prevention Order'. Mr. Pena states that his former girlfriend lied to get the order and prevented him from seeing his children.

Mr. Pena's credit record shows outstanding debts. Mr. Pena only indicated one debt on his employment application when he in fact has six (6) accounts that are outstanding.

Although, some [] charges were dismissed, I find it troubling to hire an individual who has made (sic) himself in questionable locations, dates and time for law enforcement to charge him with crimes. His credibility is in questioned (sic). The City of Lawrence will not consider applicants who do not demonstrate maturity, responsible behavior and sound decision making skills, for hire. The personal characteristics and values that I feel are deemed essential to performing the duties and responsibilities of a Police Officer include the following: honesty; integrity; personal control; interpersonal skills; respect for others; respect for diversity; and teamwork. (sic) An applicant's prior conduct is an indication of whether the applicant possesses these personal characteristics and values. ...

(Exhibit 10)¹¹

¹⁰ Lawrence is a "Consent Decree Community" under the so-called Castro Decree, for appointment of Police Officers which require that preference in hiring be given to certain minority candidates and also requires that HRD must review and approve bypass decisions.

¹¹ The Mayor's letter incorrectly addresses Mr. Pena as Mr. Andy Pena. The parties agree that the letter was intended for the Appellant.

39. In a letter dated January 26, 2015, Ms. Caggiano at HRD wrote to Mayor Rivera, in pertinent part,

... Pena, Eric 534 candidate – bypassed – Information submitted for 2001 is old. Information submitted for 2007, additionally is outdated.¹² The incidents of February 23, 2012 and October 10, 2012 along with Mr. Pena's lack of full disclosure of outstanding debts are sufficient reasons for non-selection. ...

Please be advised once HRD reviews all by-pass and selection reasons notices will be sent to those candidates not selected informing them of their rights to appeal.

(Exhibit 11)

40. In a letter dated June 5, 2015, Ms. Caggiano notified Mr. Pena of his bypass. Her letter stated, in part,

... Enclosed please find a copy of a letter from the appointing authority for the Lawrence Police Department stating the non-selection reasons associated with your bypass from certification number 01939 for the position of permanent full time Police Officer. The Human Resources Division has determined that the reasons given for your non-selection are acceptable.

(Exhibit 14)

Notwithstanding the fact that HRD advised the Mayor that HRD approved only some of the reasons for bypass, HRD apparently enclosed with the letter to Mr. Pena a copy of the Mayor's December 24, 2014 letter, which contained all the bypass reasons in the Mayor's December 25, 2014 letter to HRD, including the 2001 and the 2007 incidents.¹³ (Exhibit 14)

¹² The 2001 and 2007 incidents are not included herein because HRD found them to be stale. I understand HRD's determination to preclude consideration of criminal matters allegedly occurring in 2001 and 2007, not precluding consideration of Mr. Pena's military record even though it involves matters occurring in 2007 and 2008 since a candidate's not-too distant military experience is important for police departments to be aware of since they function as para-military organizations.

¹³ In the spring of 2015, Mr. Pena applied for a fire fighter position in Lawrence. (Administrative Notice of Docket # G1-15-126) On May 1, 2015, Mayor Rivera, who is also the Appointing Authority for the Lawrence Fire Department, sent a letter to Ms. Caggiano at HRD asking to bypass Mr. Pena. Mayor Rivera listed the same reasons for bypassing Mr. Pena for a firefighter position as he did to bypass Mr. Pena for a police officer position, including incidents in 2001 and 2007 that it somehow found outdated in the instant case. (Exhibit 19) In a letter dated June 4, 2015 Ms. Caggiano approved all of Mayor Rivera's reasons for Mr. Pena's firefighter bypass. (Exhibit 20) Mr. Pena initially appealed his bypass for a firefighter position with the Commission (Docket # G1-15-126) but later withdrew his appeal. (Administrative Notice) In 2010, the Legislature enacted significant changes to the Criminal Offender Record Information (CORI) laws requiring employers to disclose to applicants their criminal records prior to asking

41. On May 5, 2015, Mr. Pena filed the instant appeal contesting the Appointing Authority's decision to bypass him for appointment to the position of permanent full-time police officer at LPD. (Administrative Notice)

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. 256, 259 (2001), citing Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 304 (1997). "Basic merit principles" includes, *inter alia*, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

The appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for a 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.,

them about them and requiring employers to disclose a candidate's criminal history if they choose not to hire an applicant based on his criminal history. See G.L. c. 6, § 171A; St. 2010, Chapter 256; Executive Order 495; 803 CMR2.00, *et seq.* In the instant case, Det. Dushame's investigation report indicates that he discussed the Appellant's criminal record with him, although it is not clear if he gave him the record prior to their discussion. The Appointing Authority disclosed the Appellant's record to him in the CSC proceedings but it is unknown if it provided the information to him prior to this appeal as well. With respect to HRD's determinations involving the Appellant's criminal matters in 2001 and 2007, HRD got it right in this case but not in the Appellant's appeal docketed #G1-15-126. The revised CORI laws should be consistently applied by HRD and by all civil service employers.

359 Mass. 211, 214 (1971)(quoting Selectman 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). The appointing authority does not have to prove its valid justification is correct so long as it is supported by credible evidence. Beverly, at 187. 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. at 259. “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)).

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); Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 303-305 (1997); Massachusetts Dep’t of Corrections v. Anderson, Suffolk Sup. Ct., No. 2009-0290 (Memorandum of Decision dated February 10, 2010) reversing Anderson v. Department of Correction, 21 MCRS 647, 688 (2008).

The Commission is also mindful of the standard of conduct expected of officers of the law. “An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Serv. Comm’n, 38 Mass.App.Ct. 473, 474 (1995). “[P]olice 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).

Bypass appeals are governed by G.L. c. 31, § 27, which provides, in pertinent part:

... If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name

appears highest [on the certification] ... the appointing authority shall immediately file ... a written statement of his reasons for appointing the person whose name was not highest....

Id.

Criminal records are governed, *inter alia*, by provisions of G.L. c. 6. Section 167 defines criminal justice agencies as, and 172(a)(1), which provide, in pertinent part:

‘Criminal justice agencies’, those agencies at all level of government which perform as their principal function activities relating to (a) crime prevention, including research or the sponsorship of research; (b) the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders; or (c) the collection, storage, dissemination or usage of criminal offender record information.”

Id.

Section 172(a)(1) of G.L. c. 6 provides that “[c]riminal justice agencies may obtain all criminal offender record information, including sealed records, for the actual performance of their criminal justice duties...” Id. G.L. c. 6, § 171A addresses employers’ use of criminal record information providing,

In connection with any decision regarding employment, volunteer opportunities, housing or professional licensing, a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source prior to questioning the applicant about his criminal history. If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source; provided, however, that if the person has provided the applicant with a copy of his criminal offender record information prior to questioning the person is not required to provide the information a second time in connection with an adverse decision based on this information.

Failure to provide such criminal history information to an applicant pursuant to this section may subject the offending person to investigation, hearing and sanctions by the board. Nothing in this section shall be construed to prohibit a person from making an adverse decision on the basis of an individual's criminal history or to provide or permit a claim of an unlawful practice under chapter 151B or an independent cause of action in a court of civil jurisdiction for a claim arising out of an adverse decision based on criminal history except as otherwise provided under chapter 151B.

A person who annually conducts 5 or more criminal background investigations, whether criminal offender record information is obtained from the department or any other source, shall maintain a written criminal offender record information policy providing that, in addition to any obligations required by the commissioner by regulation, it will: (i) notify the applicant of the potential adverse decision based on the criminal offender record information; (ii) provide a copy of the criminal offender record information and the policy to the applicant; and (iii) provide information concerning the process for correcting a criminal record.

Id.

Parties' Positions

Mr. Pena believes that his past does not dictate whom he is today. He believes that the Appointing Authority only looked at the negative factors in his background and not positives factors, like his military awards. Mr. Pena also raised concerns about whether his prior background review was used as the basis for this bypass and whether the Appointing Authority can consider sealed criminal records when reviewing candidates. Mr. Pena questions the completeness and accuracy of the military records upon which the Appointing Authority relied to bypass him. Finally, Mr. Pena believes his application process was rushed and the Appointing Authority did a poor job on his background investigation, alleging that Det. Dushame should have asked Mr. Pena about his credit history.

The Appointing Authority argues that it had sound and sufficient reasons to bypass Mr. Pena since he lacks the character and sound judgment necessary to be a police officer. The Appointing Authority cites Mr. Pena's criminal record, military record, the restraining order issued against him, poor credit history and his failure to disclose significant information about his debt and criminal history as valid reasons to bypass him.

Analysis

Applying the foregoing principles to the case at hand, the Appointing Authority had reasonable justification to bypass Mr. Pena for appointment to the position of police officer. In

reaching this conclusion, a review of Mr. Pena's previous appeal, as well as the record in this appeal is necessary. Mr. Pena was bypassed by the Appointing Authority in 2014 in error and he received relief under Chapter 310. That bypass was based on a warrant for open criminal cases in Salem, New Hampshire apparently involving someone else with the same name as Mr. Pena. The charges were not prosecuted and the case was closed. HRD placed Mr. Pena at the top of the most recent Certification and the Appointing Authority reviewed Mr. Pena with fresh eyes for this bypass. In December 2014, the Mayor, Police Chief Fitzpatrick and Personnel Director met to discuss the candidates. Police Chief Fitzpatrick took the additional step of assigning a different detective to Mr. Pena's background investigation in this case than the detective assigned in the previous case. Det. Dushame's affidavit states that he used some information from the prior investigation but he also conducted an updated CORI check that indicated that some of Mr. Pena's records were now sealed. Det. Dushame's investigation report is quite detailed, although he was unable to obtain certain details at the time. The Appointing Authority's consideration of Mr. Pena was, for the most part, a reasonably thorough review, as required.

Mr. Pena averred that the Appointing Authority could not review sealed criminal matters. However, G. L. c. 6, §172(a)(1) authorizes the Appointing Authority, as a criminal justice agency, to review those records. One sealed record involved the warrant for the Appellant's arrest as a fugitive from justice based on charges against him in New Hampshire. The New Hampshire charges were not prosecuted apparently because of mistaken identity. The second sealed record relates to the charge that Mr. Pena filed a false insurance claim in Massachusetts in February 2012, which he admitted. Since police officers must be able to produce truthful reports

and testimony, a false insurance claim acknowledged by a candidate provides reasonable justification for bypassing him.

Another reason that the Appointing Authority bypassed Mr. Pena was that the Court issued and extended an Abuse Prevention Order against him. Det. Dushame viewed certain court records regarding the Order, although he did not see the affidavit submitted by the victim in support of the request for the Order. Mr. Pena claims that the Order was requested by his ex-girlfriend to prevent him from seeing their children because of a custody dispute. Mr. Pena did not appear in court on the return day for the Order. He blames his initial failure to appear on the failure of the Boston Police Department and LPD to serve him with notice of it. When Mr. Pena became aware of this Order and he appeared in Court to face the allegations, the Order was extended, albeit for a period of three months. Since police officers respond to domestic violence calls, the Appointing Authority is reasonably justified in being concerned that, having the subject of an Abuse Prevention Order, Mr. Pena may not handle such matters appropriately, including the issuance and enforcement of such orders. Police officers are held to a higher standard and a candidate who is the subject of an abuse prevention order does not meet that standard.

Mr. Pena's military record further supports the Appointing Authority's determination that it has reasonable justification to bypass Mr. Pena. The Appointing Authority requests military records from all candidates and thus the information is included in a review of the candidates. Since police departments function as para-military organizations, there can be no question that a 2008 military record can be considered by an appointing authority in the course of determining whether a candidate is suitable for employment as a police officer. Mr. Pena's military discipline and less than honorable discharge were based, in part, on his having made false statements. Although he now disputes the charges and claims that he should have fought them,

while in the military Mr. Pena signed a waiver accepting the charges leveled against him by the military, as well as the consequences or difficulties he may face based on his record and type of discharge. While Mr. Pena also received some awards during his military service, they do not erase his military discipline record and discharge.

The Appointing Authority did not establish, by a preponderance of the evidence, that it had reasonable justification for bypassing Mr. Pena based on his credit history. On his employment application, Mr. Pena did not disclose pertinent information regarding his credit, underreporting the number of accounts that were over 180 days delinquent and the balances on other accounts. At the Commission, Mr. Pena testified that he was disputing the accounts in collection on his credit report, alleging that he was the victim of identity thief and that he is working with the credit bureaus to address these matters. I note that the credit report that Mr. Pena provided with his LPD employment application indicates that some, but not all, of the pertinent credit accounts were “disputed by consumer.” Mr. Pena should have disclosed this information on his employment application and that he was disputing them. However, Mr. Pena testified that Det. Dushame did not ask him about his credit when they met. Appointing authorities are required to conduct a reasonably thorough review of a candidate’s background, which includes giving the candidate that opportunity to respond to matters on which the Appointing Authority will rely to bypass the candidate. Det. Dushame’s report indicates on other matters that he discussed them with the Appellant but there is no such indication regarding the Appellant’s credit history. Therefore, the Appointing Authority did not establish reasonable justification for bypassing Mr. Pena on the basis of his credit history.

The Appellant argues that his consideration for appointment was rushed and inadequate. Mr. Pena did not file his previous appeal, docketed #G1-14-215, until September 15, 2014. The

Commission did not rule on the appeal, granting relief to place his name at the top of the list, until December 1, 2014. In the interim, on September 19, 2014, the Appointing Authority received Certification 01939. Since a Certification is valid for only twelve weeks, unless extended, it is more likely than not that the Appointing Authority began the hiring process based on Certification 01939 not long after it received it. Owing to his previous removal from the eligible list at the request of Lawrence, Mr. Pena's name was not on Certification 01939. Mr. Pena's appeal docket #G1-14-215, regarding his previous bypass and the removal of his name from the list, was not decided by the Commission until December 1, 2014. On December 24, 2014, the Appointing Authority wrote to HRD to state that it had decided to bypass Mr. Pena. While twenty-four days appears to be a brief period in which to make such a determination, I find that it was sufficient time in this case to determine that the Appointing Authority would bypass Mr. Pena based on certain, though not all of the reasons it provided. Specifically, on or about December 1, promptly after the Commission issued its decision in G1-14-215, Mr. Bonet contacted Mr. Pena, asking him to sign the Certification and pick up an employment application to complete.¹⁴ Mr. Pena responded in a timely manner. Although Det. Dushame's investigation report indicates that he was unable to complete certain aspects of his investigation, his report also indicates that he otherwise conducted a very detailed investigation of Mr. Pena, including obtaining updated CORI reports, reviewing Mr. Pena's lengthy military record, checking Mr.

¹⁴ At the hearing, the Appellant mentioned a voicemail message that he received from Mr. Bonet on December 1, 2014. After the hearing, Mr. Pena submitted a copy of the voicemail message, arguing that it supports his contention that other candidates had already received offers of employment, indicating that his consideration was rushed and inadequate. Assuming, arguendo, that it is a recording of the voicemail message that the Appellant received, of the parts that are audible, it appears that "Frank" (presumably Mr. Frank Bonet, the Appointing Authority Human Resource Director) states that conditional offers of employment had been made to four candidates, that one additional position is available and being held for Mr. Pena, and that Mr. Pena should go to Mr. Bonet's office as soon as possible to apply for the position. I take administrative notice of this recording but give it limited weight in view of the fact that parts of it are inaudible. The audible contents of the recording do not contradict or undermine the outcome here.

Pena's updated credit information, speaking with several of Mr. Pena's references and meeting with Mr. Pena to discuss these matters, with the exception of the credit matters. Thus, while the Appointing Authority sent a letter to HRD indicating its decision to bypass Mr. Pena little more than three (3) weeks after he submitted his application, the Commission did not issue its decision in the previous case until December 1, 2014 and the Appointing Authority moved quickly, and in a concerted manner to consider Mr. Pena, providing reasonable justification for his bypass. Further, I find that there is no evidence of inappropriate bias or other such motive on the part of the Appointing Authority in considering Mr. Pena's application for employment at LPD.

Conclusion

For the above stated reasons, Erik Pena's appeal, filed under Docket No. G1-15-84 is hereby ***denied***.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on December 10, 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:
Erik Pena (Appellant)
Brian Magnier, Esq. (for Respondent)
John Marra (for HRD)