

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

DANIEL ROGERS,

Appellant

v.

G1-12-93

TOWN OF SOUTHBRIDGE,

Respondent

Appearance for Appellant:

Andrew J. Gambaccini, Esq.

Reardon, Joyce & Akerson, P.C.

4 Lancaster Terrace

Worcester, MA 01609

Appearance for Respondent:

John M. Carey, Esq.

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20 Pickering Street, 2nd Floor

Needham, MA 02942

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION

On March 7, 2012, the Appellant, Daniel Rogers (“Mr. Rogers”), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (“Commission”), contesting the decision of the Town of Southbridge (“Southbridge”) to bypass him for original appointment to the position of permanent, full-time Police Officer. On January 29, 2013, the parties attended a motion hearing concerning a motion for an order imposing certain sanctions against Southbridge, wherein Mr. Rogers sought, *inter alia*, to enforce a purported agreement appointing him as a police officer and to preclude the admission of evidence contrary to the purported agreement. The Commission denied, in part, and allowed, in part, the motion. Specifically, the Commission

¹ The Commission acknowledges the assistance of Law Clerk Kari-Ann E. Greene in preparing this decision.

denied Mr. Rogers' request for sanctions in the form of certain facts being conclusively established for purposes of this appeal and that Southbridge be precluded from raising defenses, introducing evidence, or making arguments contrary to those established facts. The Commission indicated that all matters raised by Mr. Rogers' request for sanctions, including the written submissions and exhibits, would be subject to administrative notice. The motion hearing was digitally recorded and both parties were provided with a CD of the motion hearing. Additionally, a full hearing was held on January 29, 2013. The witnesses were sequestered. The hearing was digitally recorded and both parties were provided with a CD of the hearing. The parties submitted proposed decisions.

FINDINGS OF FACT:

Twenty (20) exhibits were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Christopher Clark, Southbridge Town Manager;
- Daniel Charette, Southbridge Chief of Police;

Called by the Appellant:

- Daniel Rogers, Appellant;
- David Rogers, brother of 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 the credible evidence establishes the following findings of fact:

1. Mr. Rogers is a twenty-seven (27) year old father of one who resides in Southbridge, MA. (Stipulated Facts)

2. Mr. Rogers graduated from Shepherd Hill Regional High School in 2003. (Testimony of Mr. Rogers; Exhibit 5)
3. In 2003, Mr. Rogers joined the United States Air Force, where he served in Texas, Germany, Qatar, Turkey, Florida, and Curacao. Mr. Rogers received numerous medals, awards, and ribbons during his time with the Air Force. (Testimony of Mr. Rogers; Exhibit 6)
4. While in the Air Force, Mr. Rogers received specialized law enforcement training as well as weapons training. In addition, Mr. Rogers received college credits through the Community College of the Air Force, where he maintained a 4.0 GPA. (Testimony of Mr. Rogers; Exhibit 6)
5. Mr. Rogers received an honorable discharge from the Air Force in 2011, after four (4) years of active duty and four (4) years of inactive ready reserve. (Testimony of Mr. Rogers; Exhibit 5)
6. In 2011, Mr. Rogers received a ninety-nine (99) on the Civil Service Examination, which when combined with his veteran preference status, placed Mr. Rogers first (1st) on Certification No. 202551, from which Southbridge appointed one (1) permanent, full-time police officer, who was ranked below Mr. Rogers. (Exhibit 4)
7. Town Manager, Christopher Clark (“Mr. Clark”), is the appointing authority for Southbridge. (Exhibit 3)
8. In December 2011, Mr. Rogers was interviewed by Mr. Clark, the Police Chief Daniel Charette (“Chief Charette”), and a police lieutenant. During his interview, Mr. Rogers was asked to disclose anything in his background that could affect his candidacy. Mr. Rogers stated that he had nothing to disclose. (Testimony of Mr. Clark)

9. On December 19, 2011, Southbridge's Town Council "ratified"² Mr. Rogers' appointment as a permanent, full-time police officer, conditioned upon his successful completion of a physical examination.³ (Exhibit 7)
10. Shortly after Mr. Rogers' conditional appointment was "ratified," a police lieutenant was notified that there were "questionable" video recordings of and/or by Mr. Rogers on the YouTube website on the Internet. (Exhibit 11; Testimony of Chief Charette)
11. On December 26, 2011, Chief Charette and the lieutenant viewed the three (3) video recordings in question on YouTube. (Exhibit 11; Testimony of Chief Charette)
12. In the first video, David Rogers ("David"), Mr. Rogers' adult brother, is depicting a character the brothers created called "Tha tha a cha," which was derived from listening to a certain song. David is wearing a diaper, has his hair in pigtails, and is seen, among other things, dancing around and eating a hot dog covered in whipped cream. David appears to be behaving as a young child or a baby would, repeatedly saying, "That tha a cha." Mr. Rogers appears in the video as David's psychiatrist and ex-roommate. Mr. Rogers is not dressed oddly and does not act in an odd manner. (Exhibit 1 and Testimony of Mr. Rogers)
13. In the second video, David is again dressed as "Tha tha a cha." This time David carols in a baby voice at Mr. Rogers' door. Mr. Rogers points a gun at David and yells at him to get off OF his porch and go away. David wakes up the next morning and opens a present, which is a topless Mr. Rogers, who begins to gyrate to music playing in the background. (Exhibit 1)

² This is how the Town Council minutes refer to its action regarding Mr. Rogers' appointment.

³ There is no evidence that Mr. Rogers successfully completed or failed the physical examination. Since neither party indicated that this is an issue, it appears that Mr. Rogers passed the physical examination.

14. In the third video, music plays in the background while David loads a gun, puts the gun in his pants, and proceeds to walk his Rottweiler. The Rottweiler then appears to play attack a man who is a part of the video. (Exhibit 1)
15. Chief Charette informed Mr. Clark of the existence of the videos. Mr. Clark then viewed the videos. (Testimonies of Chief Charette and Mr. Clark)
16. After Chief Charette and Mr. Clark had viewed the videos, Mr. Rogers was asked to take down the videos from YouTube, which he did immediately. (Testimonies of Chief Charette and Mr. Rogers)
17. At a Southbridge town council meeting on January 23, 2012, Mr. Clark stated that Mr. Roger's candidacy was on hold. (Exhibit 10)
18. Chief Charette sent Mr. Clark a letter on February 13, 2012 requesting that Southbridge bypass Mr. Rogers for the position of police officer. (Exhibit 11)
19. On February 23, 2012, Mr. Rogers' attorney emailed Mr. Clark, inquiring about the likelihood of Mr. Rogers being appointed as a police officer. (Exhibit 12)
20. On March 7, 2012, Mr. Clark sent Mr. Rogers a letter "to confirm the reasons why [he] had not been employed by the Town of Southbridge." In the letter, Mr. Clark states the reasons are that the videos depicted Mr. Rogers "portraying questionable behavior that included the misuse of a firearm and incessant mocking of people with disabilities." (Exhibit 13)
21. Mr. Roger's filed an appeal with the Commission on March 7, 2012.
22. The parties filed a Stipulated Agreement and Request for Relief under c. 310 ("Stipulated Agreement") with the Commission on July 19, 2012, whereby Mr. Rogers would be appointed a police officer of Southbridge. (Exhibit 17)

23. The Commission denied the Stipulated Agreement because the Commission does not issue relief, even when there is a mutual agreement, which orders the appointment of a particular candidate. On July 23, 2012, the parties assented to an Order of Dismissal Nisi. The Commission approved the Order of Dismissal Nisi, effective January 1, 2013, giving the parties time to reach an agreement to resolve the matter prior to that date but also allowing Mr. Rogers to ask the Commission to reopen the appeal if the parties were unable to reach an agreement by that time.
24. On October 15, 2012, Southbridge informed Mr. Rogers that he should reinstate his appeal, indicating that the parties failed to resolve the matter by agreement. (Exhibit 19)
25. On December 26, 2012, Mr. Rogers filed a Motion to Revoke Order of Dismissal Nisi, which was granted.

DISCUSSION

Applicable Law

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

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

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).

The Parties’ Positions

Southbridge argues that its decision to bypass Mr. Rogers was reasonably justified. Mr. Rogers was featured in three (3) highly inappropriate videos that were readily available to the public. Southbridge contends that the videos not only poke fun at mentally challenged persons, but also show a blatant disregard for respect for firearms. A police officer is a person of authority in the community and as such a police officer candidate cannot create videos that mock people with disabilities. Therefore, Southbridge avers, based on the highly questionable and offensive content of the videos, it was justified in bypassing Mr. Rogers.

Mr. Rogers argues that he should not have been bypassed. He contends that the videos were neither made to mock disabled persons, nor to show disrespect for firearms. Mr. Rogers claims that the purpose of the videos was simply for comedic value and that they are no different than portraying a character in a high school play. Mr. Rogers states that it has always been his dream to be a police officer and that these videos, which were solely meant for comedic purposes, should not be held against him in this pursuit.

Analysis

Although Mr. Rogers argues that the videos are nothing more than comedic clips, Southbridge found them to be offensive and upsetting. However, Mr. Rogers did remove them from Facebook when asked. Mr. Rogers served four years of active military duty and four years in the reserve in the U.S. Air Force, where he received a number of awards and he received specialized law enforcement training and weapons training, making him an admirable candidate

for appointment to the position of police officer. There is nothing in Mr. Rogers' background of which I am aware that would qualify as a reason for bypass. There is no evidence of bias or other inappropriate action by the Appointing Authority in the appointment process. As a result, the only issues for the Commission to address in this bypass case are the videos and Southbridge's response thereto.

The Commission gives deference to an appointing authority's judgment in choosing whether to select a candidate for appointment when it conforms to the requirements of civil service law. The appointing authority here has shown, by a preponderance of the evidence, that it had reasonable justification for not hiring Mr. Rogers as a police officer. Specifically, Mr. Rogers was involved in three (3) videos, which the appointing authority found mocked people with mental disabilities and involved misuse of a firearm.⁴ I have viewed the videos attached to Exhibit 1. Southbridge's perception that the videos were mocking mentally challenged persons is a very subjective determination. However, the videos do clearly display the misuse of a firearm. In the second video, Mr. Rogers is pictured waving a gun around and pointing it at his brother's head. As a police officer, Mr. Rogers would be entrusted to carry a gun and ensure the safety of the citizens of Southbridge. After viewing this video, it is entirely believable and reasonable that the Appointing Authority and the citizens of Southbridge would be concerned about having Mr. Rogers serving the town as a police officer with firearm bearing responsibilities. In effect, the Appointing Authority concluded that the videos, at a minimum, would have an adverse impact on the community at large and law enforcement in particular, which "... carries the burden of being expected to comport [themselves] in an exemplary fashion." McIsaac v. Civil Service Commission, 38 Mass.App.Ct. 473, 474 (1995). Therefore,

⁴ Viewers do not know if the gun featured in the videos was actually loaded or not.

Southbridge was reasonably justified in bypassing Mr. Rogers for appointment to the position of police officer.

CONCLUSION

For the reasons stated herein, the Department had reasonable justification to bypass Mr. Rogers. Therefore, Mr. Rogers' appeal filed under Docket No. G1-12-93 is hereby *denied*.

Civil Service Commission

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on August 8, 2013.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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.

Notice:

Andrew J. Gambaccini, Esq. (for Appellant)

John M. Carey, Esq. (for Respondent)

John Marra, Esq. (HRD)