

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

EVAN R. PUOPOLO,
Appellant

v.

G1-16-23

TOWN OF MILLIS,
Respondent

Appearance for Appellant:

Evan R. Puopolo
Pro se

Appearance for Respondent:

David C. Jenkins, Esq.
KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

Commissioner:

Cynthia A. Ittleman

DECISION

On February 11, 2016, Evan R. Puopolo (Appellant), pursuant to G.L. c. 31, § 2(b), filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Millis (Respondent) to bypass him for appointment to the position of police officer in the Millis Police Department (MPD). A pre-hearing conference was held on March 29, 2016 and a full hearing was held on May 11, 2016, both at the offices of the Commission.¹ Witnesses, except the Appellant, were sequestered. The hearing was digitally recorded and both parties were provided with a CD of the hearing². The parties submitted post-hearing briefs. On August

¹ 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.

² 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

16, 2017, the Respondent filed a Motion to Dismiss (Motion). On August 23, 2017, the Appellant filed an opposition to the Motion (Opposition). The Motion and Opposition are considered herein. The appeal is denied as follows.

FINDINGS OF FACT:

Twenty-seven (27) exhibits were entered into evidence, twenty-five (25) at the hearing and two (2) after the hearing pursuant to my request at the hearing.³ Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Richard Barrett, Chief, Millis Fire Department (MFD)
- Keith Edison, then-Chief, MPD
- Charles Aspinwall, then-Millis Town Administrator

Called by the Appellant:

- Evan R. Puopolo, Appellant

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

1. The Appellant is a long-time resident of Millis. He graduated from college with a Bachelor's degree in 2014 in criminal justice. In his last few months on campus before

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.

³ At the hearing, the Respondent submitted Appointing Authority's Exhibits 1 – 16 (2 of which were both mistakenly marked as Ex. 15) and the Appellant submitted Appellant's Exhibits 1 – 9. Post-hearing, as I requested, the Appointing Authority produced additional documents (Appointing Authority's Post-Hearing Documents) that were entered into evidence: EMD PowerPhone Flip Sheet; Investigation Reports for Selected Candidates; Appellant's References; Appellant's training certificates; and notes taken during interviews of the five (5) candidates who were interviewed. Post-hearing, as I requested, the Appellant produced two (2) additional documents (Appellant's Post-Hearing Documents) entered into evidence: EMD PowerPhone Flip Sheet (which was the same as the one produced post-hearing by the Appointing Authority) and Millis Fire/Rescue Standard Operating Guidelines. Post-hearing, the Appellant also produced a document he created in support of his contention that the Respondent failed to pay him in full for hours he worked as dispatcher. As indicated to the parties in an email message shortly after I received the document concerning his pay, I did not enter the document regarding the Appellant's hours and pay into the record because it is not relevant to this appeal. (Email message dated May 18, 2016, 6:40pm)

graduating, the Appellant was an intern at the university public safety department. He has taken courses online from the Federal Emergency Management Agency (FEMA). For a number of years ending in 2015, the Appellant worked for a supermarket. The Appellant's licenses or certifications include a Class D Auto license and certifications for Emergency Medical Dispatch, PowerPhone, CPR, and First Responder. He lists his "Special Skills" as "electrical skills"⁴. (Testimony of Appellant; Appointing Authority Ex. 1; Appellant's Post-Hearing Documents)

2. The Appellant took and passed the April 25, 2015 civil service exam for the position of police officer. (Stipulation)
3. Approximately five (5) or six (6) weeks prior to the 2015 police officer civil service exam, the Appellant began working as a part-time dispatcher in Millis Public Safety Department. (Appointing Authority Ex. 1) The Millis Fire and Police Departments have shared dispatchers for decades. The two (2) Departments share supervision of dispatchers but the dispatcher positions are on the MPD budget. Chief Edison was involved in hiring the Appellant to be a part-time dispatcher, not Chief Barrett. (Testimony of Edison and Barrett) Upon being hired, the Appellant was trained for approximately eighty (80) hours of emergency medical dispatch (EMD) training. (Testimony of Barrett) The training involved mainly the MPD; MFD did not have a big role in dispatch training. However, the Appellant sat in on shifts to learn about the Fire Department matters. Chief Barrett was not involved in the hiring of the Appellant as a part-time dispatcher. (Testimony of Barrett) MPD Sgt. Meleski supervises dispatchers. (Testimony of Edison)
4. After the Appellant's training, Sgt. Meleski informed MPD Chief Edison that the Appellant was not improving at the rate they hoped he would. The Appellant sometimes

⁴ The Appellant noted on his MPD application that he assisted electricians. (Appointing Authority Ex. 1)

failed to update responding officers with information after the initial dispatch as required, to provide the specific address to which officers were to respond, to notify the appropriate first responders (EMT for basic life support or Paramedic for advanced life support, depending on the severity of the injury or illness) to respond to various emergency calls, and he told callers that help was on the way before notifying the first responders. Chief Edison, Sgt. Meleski and Fire Chief Barrett spoke to, and counseled the Appellant that he must obtain and provide correct information but they did not discipline the Appellant in those regards. Chief Edison informed the Appellant that he should focus on improving his dispatch work and, in June or July 2015, Chief Edison wanted the Appellant to have additional dispatcher training at an academy but the Appellant refused. However, the Appellant later asked Chief Edison to sponsor him for training for the position of permanent intermittent police officer at no cost to the Respondent. Chief Edison agreed to sponsor the Appellant for the intermittent police officer position but that did not ensure that the Appellant would be appointed to that position. At the intermittent police officer course, the Appellant was elected president of his academy class by his classmates. (Testimony of Edison and Appellant; Appointing Authority Exs. 3 – 9 and 15; Appointing Authority's Post-Hearing Documents)

5. In the fall of 2015, the Appellant applied for the position of full-time dispatcher. The Respondent did not appoint the Appellant to the full-time dispatcher position because of the problems that he was having and because the counseling he had received produced limited improvement. (Testimony of Edison and Barrett; Appointing Authority's Exs. 9, 10 and 14) When the Appellant was informed that he was not selected for to be a full-time dispatcher, he went to Chief Edison's office and loudly voiced his disappointment to

the Chief. Not long thereafter, two (2) full-time police officer positions became available. (Testimony of Edison)

6. In November, 2015, the Appellant began working in Norfolk as a dispatcher in addition to working in Millis as a part-time dispatcher. (Appointing Authority Ex. 1)
7. On November 1, 2015, the state's Human Resources Division (HRD) issued an eligible list to the Respondent to hire two (2) police officers based on the results of the April 2015 police officer civil service exam. (Stipulation)
8. HRD issued certification #03462 for appointment of police officers in the Town on December 15, 2015. Five (5) candidates signed this certification indicating that they would accept employment if they were appointed. Mr. G was ranked first on this certification, the Appellant was second, and Mr. N was fifth. Chief Edison and Sergeants Soffayer⁵, Dwyer and Maxant conducted the first round of interviews of the five (5) candidates, asking the candidates the same or similar questions and assessed each candidate as a group.⁶ Thereafter, the MPD conducted background checks of the candidates. The background checks of Mr. G, the Appellant and Mr. N did not present any reasons warranting their non-selection. The Millis Town Administrator is the Appointing Authority, with his or her civil service decisions subject to approval by the Board of Selectman. At the pertinent time, Charles Aspinwall was the Town Administrator and he had been in that position for many years. Mr. Aspinwall asked Chief Edison to list the top three (3) of the five (5) candidates after the initial interviews and background checks. In response, Chief Edison listed Mr. G, Mr. N and the Appellant, in that order, as the top three (3) candidates. (Stipulation; Appointing

⁵ Mr. Soffayer is now Police Chief in Millis. (Administrative Notice)

⁶ Chief Edison took notes of the initial interviews. (Appointing Authority Post-Hearing Documents)

Authority Ex. 11; Administrative Notice; Testimony of Aspinwall and Edison;
Appointing Authority Post-Hearing Documents)

9. After Chief Edison and Mr. Aspinwall conducted second interviews of the three (3) top candidates, asking each of the three (3) candidates the same or similar questions, the Respondent appointed Mr. G and Mr. N as full-time police officers. (Stipulation; Administrative Notice; Testimony of Edison and Aspinwall)

10. By letter dated February 29, 2016, the Respondent informed the Appellant that it had bypassed him stating, in pertinent part, that it bypassed him for Mr. N because,

... he “has a degree in Emergency Management from the Massachusetts Maritime Academy. ... [H]e was selected by Academy staff for leadership positions. His commitment to public service is also demonstrated by his current service in the Marine Corp. reserve. He demonstrated a clear understanding of the principles of community policing. A selection committee consisting of Police Chief Edison, Sgt. Dwyer, Sgt. Maxant, and Sgt. Soffayer unanimously ranked Mr. [N] above Mr. Puopolo. Mr. [N] was selected above Mr. Puopolo for these reasons and for reasons listed below.

The Respondent added that, with respect to the Appellant,

... Mr. Puopolo is a part time (sic) dispatcher for the Millis Police Department. Mr. Puopolo demonstrated poor work performance in this position. ... He failed to obtain relevant information from callers. He failed to update Police Officers on scene with new pertinent information. Mr. Puopolo failed to incorporate information provided to him during counseling sessions into the performance of his duties. ... Mr. Puopolo has [been] ... counseled by Police Sgt. Meleski and Fire Chief Barrett, Police Chief Edison, and Police Sgt. Dwyer. A selection committee consisting of these individuals unanimously recommended that Mr. Puopolo not be appointed to a full time Dispatch Position. ... (Appointing Authority Ex. 12)(emphasis in original)⁷

11. While earning his degree at the Mass. Maritime Academy, from which he recently graduated, Mr. N was appointed a platoon leader and he trained freshman students. In the U.S. Marine Corps Reserves, Mr. N has completed a thirteen (13)-week infantry boot camp. One summer, Mr. N obtained some law enforcement experience as the Hingham

⁷ Sgt. Soffayer is the current MPD Chief).

Assistant Harbor Master. Mr. N also spent a brief winter internship in the Watertown Police Department. Mr. N worked for the same supermarket as the Appellant for a similar amount of time as the Appellant. Under the portion of the MPD employment application regarding licenses or certifications, Mr. N's list includes: Class A License to Carry a Firearm, Emergency Management for Supervisors, and Active Shooter Response. His "Special Skill" on the employment application involves his rifleman certification, which affords him skills in tactical combat, casualty care, firearms handling, risk management and protective services. (Appointing Authority Exs. 1, 2 and 15)

12. At his interview for the police officer position in Millis, Mr. N presented as "personable" and "approachable". In addition, Mr. N's "interview results were superior demonstrating maturity and level of self-discipline beyond his years ...", in contrast with the Appellant's interview performance, in which he acknowledged some errors as a part-time dispatcher and referenced his public safety trainings, but he was unable to "elucidate" what motivates him and he was "not as well spoken (sic) as other candidates".

(Appointing Authority Exs. 13 and 15; Appointing Authority Post-Hearing Documents)

13. After being bypassed, the Appellant timely filed the instant appeal on February 11, 2016.
(Administrative Notice)

14. On July 7, 2017, St. 2017, Chapter 33 was signed into law. It provides,

Section 1. Notwithstanding any general or special law to the contrary, officers in the police department of the town of Millis shall be exempt from chapter 31 of the General Laws.

Section 2. Section 1 shall not impair the civil service status of a police officer employed in the town of Millis on the effect date of this act.

Section 3. This revocation shall not affect any contractual or civil service rights which have come into existence between the town and any employee of the police department as a result of the town of Millis' original acceptance of chapter 31 of the General Laws.

Section 4. this act shall take effect upon its passage.

(Id.)

15. The Respondent did not participate in the 2017 police officer civil service exam and hiring process. (Administrative Notice:

<https://www.csexam.hrd.state.ma.us/eligiblelist/communities.aspx?ListTypeId=1&ListId>

=1)

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" 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.

Pursuant to G.L. c. 31, s. 2(b), the Commission has the powers and duties, among other matters,

(b) To hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator

(Id.)

The Commission has the same powers and duties with respect to persons aggrieved by the action, or failure to act, by municipalities through G.L. c. 31, s. 2(c), and via delegation from HRD to the municipality under G.L. c. 31, s. 5(e).

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)).

The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Beverly citing Cambridge at 305, and cases cited. “It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree.” Town of Burlington v.

McCarthy, 60 Mass.App.Ct. 914, 915 (2004). The essential issue being evaluated in a bypass appeal to the Commission remains whether or not the appointing authority has reasonable justification, under basic merit principles, to select a candidate whose performance on the civil service qualifying examination placed him lower than the bypassed candidate, thus skipping over a higher ranked candidate for a valid reason.

Analysis

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant for appointment to the position of full-time police officer in Millis. As the parties stipulated, the Appellant was bypassed for negative and positive reasons. The negative reasons involved the mistakes the Appellant made as a part-time dispatcher for the Respondent such as whether or not to ask paramedics to respond to appropriate emergency calls, providing imprecise addresses to responders, telling callers that responders were on their way even though he had not yet contacted them, and failing to provide updated information to responders. In addition, the Respondent asked the Appellant to take additional dispatcher training because of his mistakes but he declined. The positive reasons for bypassing the Appellant related to Mr. N's candidacy. Specifically, Mr. N obtained a degree in Emergency Management from the Mass. Maritime Academy, where he had been appointed a platoon leader and he trained freshman; he joined the U.S. Marine Corps Reserves and completed a thirteen-week infantry boot camp. In addition, Mr. N listed several pertinent licenses and/or certifications on his MPD job application, as well as a number of related special skills. Further, the Respondent found Mr. N's interview superior to that of the Appellant. Combined, the negative and positive factors relied upon by the Respondent have been

established by a preponderance of the evidence and they provide reasonable justification for the Appellant's bypass.

The Appellant makes several arguments that his bypass was not supported by reasonable justification. First, he argues that any errors he committed as a part-time dispatcher were the result of inadequate training and were limited when he was new on the job. Next, the Appellant argues that his work as a dispatcher provided him with police experience that other candidates did not have. The Appellant also denied that he raised his voice to Chief Edison to express his disappointment when he was not appointed to full-time dispatcher prior to the two (2) police officer appointments at issue here. Moreover, he states, it is inconsistent for the Respondent to argue that he is not qualified to be a full-time police officer since it sponsored him so that he could attend a training academy for intermittent police officers. These arguments are unavailing. The Respondent was concerned enough about the Appellant's performance as a part-time dispatcher to decline to appoint him to the position of full-time dispatcher. While there was some dispute about the exact words the Appellant used to loudly vent his disappointment to Chief Edison when he was not appointed a full-time dispatcher, it was established that he had gone to Chief Edison's office and loudly expressed his disappointment. Further, the Appellant's argument about having police experience through his part-time dispatcher position is contradicted by his argument that the Respondent should not have considered his dispatcher experience because it is different than being a police officer. Finally, Chief Edison's sponsorship of the Appellant to attend intermittent police officer training does not necessarily indicate that the Respondent had assessed the Appellant's qualifications to be a police officer and that it found him to be so qualified. The Appellant paid for the Appellant's intermittent police officer training

himself, not the Respondent, and there is no indication that a police department's sponsorship of an individual for academy training obliges the police department to hire the person it sponsored.

Beyond the substantive aspects of this appeal, the Respondent avers that the appeal is moot since enactment of St. 2017, Chapter 33, exempting the Town's police officer hiring process from civil service, effective July 7, 2017. The Appellant avers that he was harmed by the regrettable length of time it took to render this decision. Even if the Commission allowed the instant appeal prior to July 7, 2017, the appeal would have been moot since the remedy for a wrongful bypass is to put the name of the aggrieved appellant at the top of the certification issued following the next civil service exam for police officer and the Town did not participate in the 2017 civil service exam and hiring process and no certification will be issued to the Town on which the Appellant's name could appear. *See Miller v. Marlborough Fire Department*, G1-17-026 (July 20, 2017)(enactment of legislation removing members of Fire Department below the rank of Fire Chief from G.L. c. 31 renders bypass appeal moot). Moreover, unless the Town takes legal action to reinstitute the police officer civil service exam and hiring process, there will be no further certifications for Millis on which the Appellant's name could appear even if his appeal had been allowed.

Conclusion

Accordingly, for the above stated reasons, Evan Puopolo's appeal, filed under Docket No. G1-16-23, 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 7, 2017.

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:

Evan R. Puopolo (Appellant)
David C. Jenkins, Esq. (for Respondent)
Patrick Butler, Esq. (for HRD)
John Marra, Esq. (HRD)