

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

Jeffrey P. Conroy,
Appellant

v.

G1-07-187

City of Worcester,
Respondent

Appellant's Attorney:

Pro Se
Jeffrey P. Conroy

Respondent's Attorney:

Lisa M. Carmody, Atty.
Coordinator of Labor Relations
City of Worcester
455 Main Street, Room 109
Worcester, MA 01608

Commissioner:

Daniel M. Henderson¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Jeffrey P. Conroy, (hereinafter "Appellant") seeks review of the decision of the state's Human Resources Division (hereinafter "HRD") accepting the reasons proffered by the City of Worcester (hereinafter "Respondent", "Appointing Authority" or "City") to bypass him for original appointment to the position of full-time police officer. A full hearing was held on

¹ The Commission acknowledges the assistance of Legal Intern Heather Sales in the preparation of this Decision.

January 12, 2009 at the offices of the Civil Service Commission (hereinafter “Commission”). One (1) audiocassette was made of the hearing.

FINDINGS OF FACT:

Based on the documents entered into evidence, (exhibits 1 - 13), the HRD document packet, a stipulation of facts, the testimony of: the Appellant, Jeffrey P. Conroy, and Officer Michael Girardi, I make the following findings of facts:

1. The Appellant was listed on Certification #260722 issued by HRD, of the Commonwealth, for 15 police officer vacancies including 2 with military appointments in response to a Requisition from The City of Worcester. (Stipulated fact)
2. Appellant ranked 11th on the certification among those willing to accept employment and there were a number of candidates selected that were ranked below the Appellant. (Stipulated fact)
3. On March 15, 2007, by letter HRD accepted the Appointing Authority’s claim that the Appellant did not qualify (unsuitable) for appointment to the position for negative reasons regarding: 1) poor driving record and 2) poor employment history; and notified Appellant of same. (Administrative notice of Case file, Stipulated fact)
4. The City’s bypass letter to HRD dated December 4, 2006 listed “29 traffic violations in the past 8 years, including 4 citations for speeding, 2 surchargeable accidents, and on December 23, 2001 a license suspension due to 7 surchargeable events in a one year period. The numerous traffic violations the candidate has committed demonstrate a total disregard for the law, immaturity, irresponsibility and poor judgment.” The second reason for bypass listed in the letter was a “poor

employment record” which relied entirely upon a telephone representation from Chris Duva of Duva Distributors that the Appellant was fired from his position. Duva apparently explained the four step progressive discipline process that is used to terminate an employee. However, according to the letter, Duva did not claim that the process was followed in the Appellant’s case. (Administrative notice of Case file)

5. The City’s bypass letter to HRD dated December 4, 2006 was prepared and signed by Kathleen G. Johnson, the City’s Acting Director of Human Resources. She did not testify at this Commission hearing. (Administrative notice of Case file)

Poor Driving Record

6. Officer Michael Girardi (hereinafter “Girardi”), who has been employed with the City of Worcester for fifteen years, was assigned to conduct a background investigation on Appellant including the acquisition of a driving history from the Massachusetts Registry of Motor Vehicles. (Testimony of Girardi)
7. The position of a police officer requires the operation of a motor vehicle and a need to show adherence to the laws of operating a motor vehicle. (Testimony of Girardi)
8. The Appellant’s Registry of Motor Vehicle driving record acquired by the Police Department was entered into evidence without objection and the record delineates the following:

Appellant failed to signal in Worcester on November 23, 1998.

Appellant had a surchargeable accident in Worcester on February 10, 1999.

Appellant had a minor traffic incident in Worcester on May 6, 2000.

Appellant had a surchargeable accident in North Brookfield on March 18,

2001

Appellant received a citation for a lane violation and failure to give a signal in Auburn on June 23, 2001.

Appellant received a citation for speeding in Worcester on August 7, 2001.

Appellant received a citation for speeding in Worcester on August 19, 2001. (RMV Driver History) (Exhibit 1)

9. On August 13, 2001 the Appellant was sent correspondence that his license would be suspended for having been involved in 5 surchargeable events if the civil penalty was not paid. (Testimony of Girardi and Exhibit 1)
10. The Appellant paid the fee on September 18, 2001 to ensure his license would not be suspended. (Testimony of Girardi and Exhibit 1)
11. The Respondent took into consideration as factors in the bypass, two traffic violations where Appellant was held not responsible. On February, 13, 2001 in Worcester Appellant was held not responsible for speeding, no license, and no registration; and on June 17, 2001 Appellant was held not responsible for a speeding violation in Leicester. (Testimony of Girardi and Exhibit 1)
12. Officer Girardi testified that a driving record indicating an individual is held “not responsible” does not mean they are not guilty of the offense; rather, it could merely mean that the police officer who issued the citation failed to appear in court or the judge found there was not enough evidence and dismissed the case. (Testimony of Girardi)
13. Officer Girardi explained the importance as a police officer to drive a cruiser safely, responsibly and in compliance with the laws. (Testimony of Girardi)
14. The Appellant does not contest his driving history (except for some duplication due to delayed payment of fines or fees), but contends that the staleness or length of time since his last incident should have been taken into consideration when Respondent completed their bypass background investigation in October of 2006. (Testimony of Appellant and Girardi)

15. Officer Girardi admitted that it is “confusing” to read the Registry of Motor Vehicles’ driving records as an initial incident may result in several duplicative or subsequent entries due to non payment or late payment of fines or fees. (Testimony of Girardi)
16. The Appellant’s last motor vehicle incident occurred in 2001.(Testimony of Appellant and Exhibit 1)
17. The Appellant served previously in the Marine Reserves and entered into active duty in September of 2001 where he was frequently chosen as a driver of military vehicles. (Testimony of Appellant)
18. The Appellant was “[r]esponsible for the combat readiness/accountability/maintenance of all personnel, weapons, and equipment of the squad”; and “[P]atrolled the Red Zone with the battalion’s Military Training Teams...” (Exhibit 5)
19. In 2002 the Appellant received a certificate for satisfactorily completing a twelve (12) hour explosive driver course by the Department of the Navy. (Exhibit 2)
20. The Appellant also completed an AAA driver improvement program in 2002. (Exhibit 4)
21. In 2003 the Appellant issued an Incidental Operator’s license in Japan. (Exhibit 3)
22. In 2004 the Appellant was issued a license from Base Motor Transport to operate a five (5) ton capacity “Comm” vehicle. (Exhibit 3)
23. In 2005 it was noted by a reviewing officer that the Appellant had “grown immensely as a leader, problem solver and decision maker in his time in [his] command.” The Appellant “...was unhesitatingly trusted by his chain of command

and his subordinates to perform under pressure and his decisions were never second-guessed.” (Exhibit 5)

24. The Appellant was honorably discharged from active duty with the marines in November 2005, and went on reserve duty until 2009 with a Joint Service Commendation medal, Meritorious Mast Citation and a Certificate of Good Conduct. (Testimony of Appellant and Exhibit 7-9)

Poor Employment History

25. The Respondent claims that it contacted Appellant’s prior employer, Chris Duva of Duva Distributors via telephone, who indicated that the Appellant was terminated from his position because he was young and had a hard time adjusting to flex-hours. Chris Duva explained that in order to be terminated from their company, there is a four step process: 1) oral reprimand, 2) written warning, 3) suspension, and 4) termination. However, Girardi did not testify that Duva informed him that the progressive discipline process was followed in the Appellant’s case. Girardi did not testify that he either requested or received any documentation or other corroboration that the process was followed in the Appellant’s case. (Testimony of Girardi)
26. The Respondent did not request nor receive any physical documentation of written warnings or suspensions Appellant may have received while employed with Duva Distributors. The telephone conversation between Officer Girardi and Duva Distributors was all only negative employment information.(Testimony of Girardi)
27. The Appellant conceded in his testimony that he was terminated from Duva Distributors for arriving late to the job, but prior to being terminated he was never reprimanded in any way. He was not notified orally or in writing that his job

performance was lacking in any way. He was under the impression at the time of his termination that his employer thought he was an okay employee. (Testimony of Appellant)

28. Duva Distributors was not the most current employment position the Appellant held at the time of Respondent's background investigation. The Appellant began working for Haddad Auto-detail in May of 2006. (Testimony of Appellant)

29. The Respondent did not speak with Appellant's then current employer at the time of the bypass background investigation. (Testimony of Appellant)

30. The Appellant entered into evidence three positive written recommendations from three prior employers (i.e, Haddad Auto Detail, Widoff's Bakery, and Oscar's Super Coin-Op). (Exhibits 11-13)

31. The Appellant testified in a straight-forward manner agreeing with Officer Girard's testimony in several areas. I found his statements unhesitant and ringing true. I find him to be a credible witness. (Testimony and demeanor of Appellant)

CONCLUSION

The Respondent, City of Worcester has not met its burden of proof and failed to establish that it was reasonably justified in exercising its discretionary power in bypassing the Appellant for appointment to the position of permanent police officer.

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence,

when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civ. Serv. v. Mun. Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

Appointing Authorities are obligated to exercise sound discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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 Civ. Serv. v. Mun. Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). However, 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, 43 Mass. App. Ct. at 304. The entirety of the credible evidence, taken as a whole is measured in terms of adequate reasons with the application of common sense. The Appointing Authority's burden of proof by a preponderance of the evidence is

satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

The greater amount of credible evidence must in the mind of the judge be to the effect that such action 'was justified,' in order that he may make the necessary finding. . . . [I]f on all the evidence his mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined. The present statute is different in phrase and in meaning and effect from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, 'unless it shall appear that it was made without proper cause or in bad faith.'

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (*emphasis added*) The Commission must take account of all credible evidence in the administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

Poor Driving Record

The only circumstance as a reason for bypass, which the Respondent proved, was the poor driving history of the Appellant; however, this bypass reason is substantially mitigated when taking into consideration subsequent substantiated rehabilitation and the amount of time that had lapsed from the date of Appellant's last motor vehicle incident to the time the background investigation was done.

It is unreasonable for Respondent to conclude that the incidences on Appellant's driving record exemplify a current lack of ability to adherence to the laws of operating a motor vehicle, given the intermediate events. The background investigation on Appellant

was completed in 2006, five (5) years after his last minor traffic offense in 2001. There is ample time over the course of a five year span to rehabilitate an individual's immature behavior, and this rehabilitation was reflected in the Appellant's actions and service in the marines. During that time, Appellant was issued a license to operate military vehicles as well as completing an explosive driving course through the military, and a driver improvement program through AAA in 2002. Appellant has not been involved in any motor vehicle incidences since 2001 and served commendably in active duty in the U.S. Marines who has determined he is able to safely operate a vehicle in the pursuit of the protection of other's safety. Consequently, a common sense determination under the totality of circumstances and the evidence would not disqualify the Appellant to be a police officer.

Poor Employment Record

The Commission finds that the poor employment record the Appointing Authority proffered as a reason for bypass is neither justified nor substantiated. The City did not request nor receive any documentation or other corroboration that the Appellant had received any notice of poor performance from Duva Distributors, prior to his termination. A limited telephone conversation with an unknown person is a poor method of accurately and reliably determining a prior employee's work performance. Chris Duva did not claim in the telephone conversation that the four step progressive discipline process had been applied in the Appellant's termination. The failure of the City to provide any documentation or other corroboration of the hearsay telephone conversation renders that conversation unreliable. The Appellant, a credible witness effectively refuted the

substance of the conversation, other than being fired for being late for work one time.

The poor employment record related to Duva Distributors is not supported by the credible and reliable evidence in the record. Further, the City of Worcester failed to inquire into Appellant's other positions of employment. Appellant was employed with Haddad Auto Detail at the time of the background investigation, yet Respondent did not contact Haddad Auto Detail. As indicated by three written references entered into evidence, the Appellant had at least two other previous employment positions that Respondent chose not to contact. It appears that the only employer Respondent contacted via telephone was Chris Duva of Duva Distributors. The Appellant gave a plausible and believable explanation of the circumstances which caused him to lose that job.

The City of Worcester has also failed to sufficiently support the claim that Appellant withheld information pertaining to his employment termination with Duva Distributors. Mr. Duva informed Respondent during their telephone conversation, that in order for an employee to have been terminated from his company, employees would have to follow a four-step progressive discipline process including receiving an oral reprimand, a written reprimand, and a suspension before being terminated. Conversely, Appellant testified that no such process was applied to him prior to being terminated. Appellant was under the belief that Duva Distributors thought he was an okay employee up until the time of his termination (as a result of his being late to work). The Respondent did not request, nor receive, any documentation from Duva Distributors demonstrating that a four-step progressive discipline process had been followed. More importantly, Respondent did not subpoena Mr. Duva to be a witness at the hearing to corroborate Respondent's assertions.

It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility or reliability cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility). Here, the Commission is unable to determine the credibility of Mr. Duva's statements without Mr. Duva's appearing as a witness, thus Respondent's second reason (i.e., poor employment record) to bypass the Appellant remains unsubstantiated.

The Commission, after hearing and pursuant to the powers of relief inherent in Chapter 534 of the acts of 1976, as amended by Chapter 310 of the Acts of 1993, to order the Human Resources Division to take the following action:

The Civil Service Commission directs that the Human Resources Division and the City of Worcester place Jeffrey P. Conroy's name at the top of the eligibility list for appointment to the position of police officer, so that his name appears at the top of the existing certification. If there is no existing certification and the City of Worcester shall request a certification from HRD, the Appellant's name shall appear at the top of said certification. Therefore this certification shall be used as the next certification requested by the City of Worcester from the Human Resources Division or the City of Worcester

and from which the next appointment to the position of police officer in the City of Worcester Police Department shall be made by the Appointing Authority, so that the Appellant shall receive at least one opportunity for consideration. If selected, the Appellant's seniority date in the position of police officer for civil service purposes only shall be the date of this bypass, which appears to be December 4, 2006.

The Respondent shall not use the same reasons for bypass of the Appellant on his next consideration for appointment.

As ordered above the Appellant's appeal, Docket No. G1-07-187 is hereby *allowed*.

Civil Service Commission,

Daniel M. Henderson,
Commissioner

By 3-2 vote of the Civil Service Commission (Bowman, Chairman - No; Henderson - Yes, Marquis - No, Stein - Yes and Taylor - Yes, Commissioners) on July 23, 2009.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Jeffrey P. Conroy
Lisa M. Carmody, Atty.
John Marra, Atty. HRD