

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

Steven Eramo,
Appellant

G1-05-150

City of Haverhill,
Respondent

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Commissioner

John Taylor

DECISION

Pursuant to the provisions of G.L. c. 31, §2 (b), the Appellant, Steven Eramo (hereinafter "Appellant"), is appealing the decision of the Respondent, City of Haverhill (hereinafter "Respondent"), for improperly bypassing him for an original appointment to a Permanent Reserve Police Officer. The appeal was timely filed. A Full Hearing was held on September 21, 2005 at the offices of the Civil Service Commission. Three (3) tapes were made of the hearing. The parties stipulated to fourteen (14) joint exhibits¹, which were admitted into evidence.

¹ A fifteenth exhibit (marked "Exhibit 10") was marked for identification only, and was not admitted into evidence.

FINDINGS OF FACT

Based on the documents entered into evidence, the testimony of the Appellant; Allen DeNaro – Chief, Haverhill Police Department, and Donald Thompson- Captain, Haverhill Police Department, I make the following findings of facts:

FINDINGS OF FACT:

1. The City of Haverhill is the Appointing Authority for the Haverhill Police Department.
2. In the fall of 2004, the City of Haverhill sought a certified list of candidates from the Massachusetts Department of Human Resources, (HRD) seeking to hire fifteen (15) Permanent Reserve Police Officers. (Exhibit 12)
3. On or about September 10, 2004 the City of Haverhill received Certified List #240932 from the HRD. The Certification contained the names of thirty-four (34) candidates, from which selection was to be made from fifteen (15) of the thirty-one (31) highest candidates who would accept. (Exhibit 12)
4. Appellant's name appeared in the seventh position, in a "tie" with the sixth-ranked candidate (Nicholas Brown) through the eleventh-ranked candidate Wayne Tracy). (Exhibit 12)
5. Chief DeNaro credibly testified that he assigned Captain Thompson to conduct a background check of Appellant. (DeNaro Testimony; Thompson Testimony).
6. Captain Thompson credibly testified as to the background check he conducted of Appellant. He began his background check by reviewing Appellant's application. (Thompson Testimony; Exhibit 1)

7. In the course of his investigation, Captain Thompson went to University of Massachusetts – Lowell (hereinafter “UML”), where Appellant had been employed by the UML Police Department since October 1996. He also interviewed a number of individuals, including the Appellant and personal references. In his discussion with the Appellant, Captain Thompson only asked the Appellant about his attendance record at UML and did not solicit further details relative to the disciplinary incidents, which predominantly involved child care issues. (Thompson Testimony; Appellant Testimony; Exhibits 1 and 2)
8. Captain Thompson spoke with Appellant’s supervisor, Captain Linda Thomas of the UML Police Department, and obtained a copy of Appellant’s employment personnel file. (Thompson Testimony; Exhibit 2)
9. Captain Thompson, in reviewing Appellant’s UML personnel file, found that Appellant had several disciplinary issues which rendered him unsuitable for hiring as a Permanent Reserve Police Officer. Specifically, while employed at UML, Appellant had recently been disciplined for disobeying a lawful order in April 2003 and suspended for insubordination in September 2003. (Exhibit 2)
10. On April 3, 2003, the Appellant was disciplined for failing to obey a lawful order, ultimately receiving a written warning. Captain Linda Thomas, a superior officer at the UML Police Department, approached the Appellant at 2:15 p.m. on March 14, 2003 in order to request that he work the third shift (11:00 p.m. to 7:00 a.m.) that day. Apparently, Captain Thomas had reviewed the schedule and discovered that there was no Shift Commander scheduled to work that shift. The Appellant informed Captain Thomas that he was responsible to care for his child that

evening and would not be able to make alternate arrangements on such short notice. The usual rule, according to the collective bargaining agreement, is that schedule changes are to be assigned seven (7) days in advance to afford employees an opportunity to plan accordingly. Captain Thomas then ordered the Appellant to work the third shift and he respectfully declined to do so because, despite his best efforts, he could not secure child care and was left “between a rock and a hard place.” (Appellant Testimony, Exhibit 2)

11. On September 17, 2003, the Appellant was disciplined for insubordination. On September 15, 2003, Captain Thomas ordered the Appellant to report for duty for the second shift (3:00 p.m. to 11:00 p.m.) the following day. The Appellant, who was responsible to care for his child that day, claimed that he could not make alternate arrangements on such short notice, and instead reported for duty, bringing his minor child with him. The Appellant was ordered to return home and suspended for one (1) day as a result of the incident. (Exhibit 2)
12. Appellant had also been late in submitting required reports on several occasions, requiring memos from the Chief of the UML Police Department. Additionally, Appellant’s most recent performance evaluation (dated April 1, 2003) listed his work habits, work attitude, relationships with others and supervisory ability as “below standard”. Nor was this a one time occurrence: Appellant himself testified at hearing that his performance evaluations prior to the most recent evaluation had also included “below standard” rankings. (Thompson Testimony; Appellant Testimony; Exhibit 2)

13. The Appellant received a number of awards and commendations during his employment at UML, including the following:
- A. A letter of commendation dated November 24, 1998, from the Lowell Spinners professional baseball team relative to the Appellant's arrest of individuals later convicted of Malicious Destruction of Property on the Spinners' premises;
 - B. An "Exceptional Service Award" presented on March 3, 1999, for saving the life of a depressed and intoxicated male who was attempting to commit suicide and "reflecting himself and his Department in a professional, caring, and most proficient light";
 - C. A letter of appreciation from the UML Dean of Students dated May 12, 1999;
 - D. "Officer of the Month" for August, 1999;
 - E. A letter of commendation dated December 23, 1999, from UML relative to community policing; and
 - F. A letter of commendation from the Lowell Police Department dated May 1, 2001, relative to the Appellant's assistance at a murder scene, which contributed to the identification of a valuable witness and the recovery of the murder weapon.

(Exhibits 3 through 9)

14. Captain Thompson credibly testified that while he did not see or consider the majority of these awards/commendations in his evaluation of Appellant (as many of these documents were not contained within either Appellant's Application or

- his UML personnel file), that even had he reviewed these items, they would not have changed his adverse evaluation of Appellant. (Thompson Testimony)
15. In reliance on the report of Captain Thompson, Chief DeNaro declined to recommend Appellant for the available reserve police officer position. (Thompson Testimony; DeNaro Testimony; Exhibit 2)
16. Chief DeNaro credibly testified that his decision to bypass Appellant was based on Appellant's poor performance evaluation, his disciplinary record; and his tardiness in submitting reports. Chief DeNaro also credibly testified that Appellant's action in bringing his minor child to his place of work (a police station), in clear retaliation for being ordered to work, was completely inappropriate, as it placed his child in danger and prevented Appellant from being able to perform his duties. He further credibly testified that while the candidates chosen ahead of Appellant lacked actual police experience, they had excellent work histories; and further, that poor performance while actually performing police duties (as in Appellant's case) was a more reliable indicator of a candidate's ability to perform as a Haverhill Police Officer. (DeNaro Testimony)
17. Appellant testified as to his background, and that he continues to believe that he made the correct decision in bringing his child to work, and would take the same action today. While his testimony was credible, Appellant's position is emblematic of his poor prior judgment, and inability to recognize and learn from his past mistakes. Conversely, Appellant's blanket assertion that he was bypassed because of his position as a steward in his local union was wholly lacking in any objective, credible support (documentary or otherwise). (Appellant Testimony)

18. By letter to the Human Resources Division (hereinafter “HRD”) dated February 10, 2005, the City of Haverhill, pursuant to G.L. c. 31, section 27, submitted its “reason for bypass letter”. As justification for bypassing the Appellant, the Respondent stated the following:

- A. That the Appellant’s employment with UML was “not favorable.”
- B. That the Appellant “had several disciplinary issues,” including having been disciplined for disobeying a lawful order and for insubordination;
- C. That the Appellant has been late in submitting required reports “on several occasions;”
- D. That the Appellant’s most recent performance evaluation lists a number of areas as “below standard”; and
- E. That the Appellant’s “lack of reliability and judgment would contribute to an inability to perform as a public safety employee.”

(Exhibit 13)

19. Thereafter, Appellant timely filed a bypass appeal with the Civil Service Commission.

20. Subsequently, by letter dated June 30, 2004², Police Chief DeNaro requested that HRD permanently remove Appellant from the list of candidates for appointment to the Haverhill Police Department. (Exhibit 14)

CONCLUSION

In the context of reviewing a bypass decision by an Appointing Authority, 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.” City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983). McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995). Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000). City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is “justified” when it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” City of Cambridge at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971).

Basic merit principles, as defined in G. L. c. 31, §1, require that applicants be selected and advanced on the basis of their relative ability, knowledge and skills, assured fair and equal treatment in all aspects of personnel administration, and that they be protected from arbitrary and capricious action. Tallman v. City of Holyoke, et al., G-2134, and compare Flynn v. Civil Service Commission, 15 Mass. App. Ct. 206, 444 N.E.2d 407 (1983).

Nevertheless, it is recognized that an appellant's "expectation of [selection] based on 'his position on a civil service list' does not rise to the level of a 'property interest' entitled to constitutional protection." Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991). Candidates simply have certain expectations that are substantially diminished by the ability of the appointing authority under state law to consider subjective factors in addition to the written examination score. Burns v. Sullivan, 619 F.2d 99 (1st Cir. 1980). Those factors must adhere to the intent of the civil service system. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300 (1997).

Civil Service law traditionally affords management a considerable degree of latitude in making selection decisions. "The appointing authority...may select, in the exercise of broad discretion, among persons eligible...or may decline to make an appointment." Goldblatt v. Corporate Counsel of Boston, 360 Mass. 660 (1971), citing

² As a result of an obvious typographical error, the letter was dated June 30, 2004 (instead of June 30, 2005)

Commissioner of the Metropolitan District Commission v. Director of Civil Service, 348 Mass. 184 (1964).

In order to show that an Appointing Authority's decision was not justified, an Appellant must demonstrate that the stated reasons of the Appointing Authority were untrue, applied unequally to the successful candidates, were incapable of substantiation, or were a pretext for other impermissible reasons. MacPhail v. Montague Police Department, 11 MCSR 308 (1998) *citing* Borelli v. MBTA, 1 MCSR 6 (1987). In the task of selecting public employees of skill and integrity, moreover, appointing authorities are invested with broad discretion. City of Cambridge at 304-5; Goldblatt v. Corporate Counsel of Boston, 360 Mass. 660 (1971). This tribunal cannot "substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." City of Cambridge. at 304. In light of these standards and the evidence in this case, the appeal must be denied.

It is the conclusion of this Commission that the Respondent has met its burden of proving that there was a reasonable justification for bypassing Appellant for the position of Permanent Reserve Police Officer. Specifically, the evidence proffered by the Respondent is sufficiently reliable to warrant a reasonable mind to find that the Appellant was not among the top fifteen candidates for the available positions.

It is the function of the agency hearing the matter to determine what degree of credibility should be attached to a witness' testimony. School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978). Doherty v. Retirement Board of Medicine, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v. Board of Registration in Medicine, 420 Mass. 154, 165 (1995).

The Commission finds the testimony of all of the witnesses here to be highly credible. Captain Thompson credibly testified as to the background check he conducted of Appellant, and that his recommendation to bypass Appellant was based on objective factors, to wit: Appellant's poor work evaluation, disciplinary record and displays of poor

judgment. Captain Thompson also credibly testified that while he did not see or consider the majority of the awards/commendations Appellant received early in his career at UML (as many of these documents were not contained within either Appellant's Application or his UML personnel file), that even had he reviewed these items, they would not have changed his adverse evaluation of Appellant. Similarly, Chief DeNaro credibly testified that his decision to bypass Appellant was based on Appellant's poor performance evaluation, his disciplinary record and his tardiness in submitting reports. Chief DeNaro also credibly testified that Appellant's action in bringing his minor child to his place of work (a police station), when ordered to work, was completely inappropriate, as it placed his child in danger and prevented Appellant from being able to perform his duties. He further credibly testified that while the candidates chosen ahead of Appellant lacked actual police experience, they had excellent work histories; and further, that poor performance while actually performing police duties (as in Appellant's case) was a more reliable indicator of a candidate's ability to perform as a Haverhill Police Officer. Appellant testified as to his background, and that he continues to believe that he made the correct decision in bringing his child to work, and would take the same action today. While his testimony was credible, Appellant's position is emblematic of his poor prior judgment, and inability to recognize and learn from his past mistakes.

Given the veracity of the testimony from all witnesses, it is evident, based on Appellant's substandard work evaluations, poor judgment; disciplinary record and tardiness in submitting required reports, that the Respondent's bypass decision was based upon adequate reasons, sufficiently supported by credible evidence. Appellant failed to submit any objective, credible evidence to suggest that the bypass decision was a result of political considerations, favoritism or other bias. Appellant's blanket assertion that he was bypassed because of his position as a steward in his local union was wholly lacking in any objective, credible support (documentary or otherwise).

In sum, this case is a classic example of an appointing authority exercising its lawful discretion and choosing from among a group of candidates on the basis of legitimate and relevant factors. The Commission cannot substitute its judgment for that of the Appointing Authority in such a case.

For all of the above stated reasons, it is found that the Respondent has established by a preponderance of the reliable and credible evidence in the record that it had just cause to bypass Appellant for the position of Permanent Reserve Police Officer. Therefore, this appeal on Docket No. G1-05-150 is *dismissed*.

Civil Service Commission

John Taylor, Commissioner

By vote of the Civil Service Commission (Bowman, Guerin and Marquis, Commissioners [Taylor-Absent]) on March 15, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. 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.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

David E. Belfort, Esq., Esquire
William D. Cox, Jr., Esquire