

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

LUIS GARCIA,
Appellant

v.

**CITY OF NEW
BEDFORD,**
Respondent

Case No.: G1-12-266

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission.

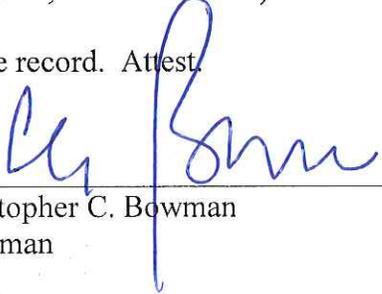
The Commission voted at an executive session on October 3, 2013 to acknowledge receipt of: 1) the Tentative Decision of the Magistrate dated July 9, 2013; and 2) the Appellant's Objections to the Recommended Decision

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Appointing Authority to bypass the Appellant is affirmed and the Appellant's appeal is *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on October 17, 2013.

A true record. Attest.



Christopher C. Bowman
Chairman

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)(1), 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.

Notice to:

Luis Garcia (Appellant)

Jane Medeiros Friedman, Esq. (for Respondent)

John Marra, Esq. (HRD)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-626-7200
FAX: 617-626-7220
WEBSITE: www.mass.gov/dala

July 9, 2013

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

RECEIVED
2013 JUL 10 P 12:47
DIVISION OF ADMINISTRATIVE LAW APPEALS
CIVIL SERVICE COMMISSION

Re: Luis Garcia v. City of New Bedford
DALA Docket No. CS-12-668
CSC Docket No. G1-12-266

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,


Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Luis Garcia
Jane Medeiros Friedman

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals
One Congress Street, 11th Floor
Boston, MA 02114
(617) 626-7200
Fax: (617) 626-7220
www.mass.gov/dala
Docket No: G1-12-266
CS-12-668

LUIS GARCIA,
Appellant

v.

CITY OF NEW BEDFORD,
Respondent

Appearance for Appellant:

Pro se

Appearance for Respondent:

Jane Medeiros Friedman
First Assistant City Solicitor
City of New Bedford Law Department
133 William Street
New Bedford, MA 02740

Administrative Magistrate:

Angela McConney Scheepers, Esq.

RECEIVED
2013 JUL 10 P 12:47
OFFICE OF THE ATTORNEY GENERAL
CIVIL SERVICE COMMISSION

SUMMARY OF DECISION

The City of New Bedford had reasonable justification to bypass the Appellant for the position of permanent full-time police officer. I therefore recommend that the Civil Service Commission dismiss the appeal.

DECISION

INTRODUCTION

Pursuant to the provisions of M.G.L. c. 31, § 2(b), the Appellant, Luis Garcia (Appellant), seeks review of the City of New Bedford's (Appointing Authority or City) reasons for bypassing him for appointment to the position of permanent full-time police officer in the New Bedford Police Department (Department). A pre-hearing conference was held on September 28, 2012 at

the offices of the Civil Service Commission (Commission), One Ashburton Place, Room 503, Boston, MA 02108. A full hearing was held on December 13, 2012 at the offices of the Commission by a Magistrate from the Division of Administrative Appeals (DALA). Ricard Rezendes testified on behalf of the Respondent, and Timothy Sheehan testified on behalf of the Appellant. The Appellant also testified on his own behalf. The hearing was digitally recorded. As no notice was received from either party, the hearing was declared private.

Twenty-two (22) exhibits were admitted into evidence. The Petitioner advised the court of a scrivener's error on Exhibit 22: the date of the letter is May 16, 2012 instead of the stated May 16, 2012. The Appellant submitted a post-hearing brief on January 28, 2013. The Respondent submitted its post-hearing brief on January 29, 2013, whereupon the record closed.

FINDINGS OF FACT

Based upon the testimony and documents presented at the hearing, I hereby render the following findings of fact:

1. In May 2009, the Appellant Luis Garcia took the Civil Service exam for the position of permanent full time police officer. (Exhibit 23; Testimony of the Appellant.)
2. The Appellant's name appeared on Certification 202842, dated March 4, 2011. The Appellant was ranked 1st of 19 applicants who indicated that they would accept the appointment. (Exhibits 1 and 23; Testimony of Appellant.)
3. The Appellant attended New Bedford High School, and received his G.E.D. in December 2006. (Exhibit 18.)
4. The Appellant served in the Army National Guard from August 2007 until June 2010. He studied bomb defusement, and attended sniper school and marksman training. The Appellant served as a motor engineer when he was deployed to Iraq from June 2009 until June

2010. He also served in Afghanistan in late November 2011. Since his honorable discharge from the National Guard in 2010, the Appellant has been a member of the Army Reserves. (Exhibit 3; Testimony of Appellant.)

5. Lieutenant Ricard Rezendes, employed by the Department for 24 years, has been the Training Director since January 2009. He oversees the hiring of new officers. (Testimony of Rezendes.)

6. Candidates for police officer were given a packet of employment forms, which they may take home for one week. The packet included the Department's employment application, and other Department forms including an application/renewal for a license to carry a firearm. After the forms were returned to the Department, the packet was given to a background investigator for review. (Testimony of Rezendes.)

7. On March 9, 2011, the Appellant submitted his employment packet to the Department. (Exhibits 3 and 9; Testimony of Appellant, Testimony of Rezendes.)

8. Lt. Rezendes assigned Detective Nelson Goncalves, a Background Investigator in the Department's Planning and Training Division, to review the Appellant's file. (Exhibit 18; Testimony of Rezendes.)

9. The Appellant had been previously issued a license to carry on November 24, 2010 after submitting two application forms. (Exhibits 4, 6, 7 and 9; Testimony of Appellant.)

10. On both forms for his initial application, question 8 states: Have you ever been confined to a hospital or institution for mental illness? The Appellant answered "no" on both application forms. (Exhibits 6 and 7; Testimony of Appellant.)

11. On both forms, question 10 states: Have you ever appeared in any court as a defendant for any criminal offense (excluding non-criminal traffic offenses)? The Appellant

answered “yes” on both application forms. On Exhibit 6, the Appellant indicated that the offense was for “A&B Household – Dismissed.” On Exhibit 7, he wrote:

I got out on bail for \$200.00 and appeared in court the next business day. She had left a voicemail telling me she was going to set me up in the same fashion she also admitted to her mother she set me up and lied to the police. I told the district attorney what had happened and [they] listen to the voicemail also her mother talked to the district attorney and told him her daughter had lied all charges were dismissed.

(Exhibits 6 and 7.)

12. On both forms, question 12 states: Are you now or have you ever been the subject of a M.G.L. C209A restraining order or involved in a domestic violence charge? The Appellant answered “no.” (Exhibits 6 and 7; Testimony of Appellant.)

13. As part of the initial application form for a license to carry, the Appellant had to submit to the State Police Identification Section Automated Fingerprint Identification System (AFIS). On December 12, 2010, the AFIS fingerprint check failed to indicate any disqualifying information. (Exhibit 5.)

14. On the renewal form, question 8 states: Have you ever been confined to a hospital or institution for mental illness? The Appellant answered “no” again. (Exhibit 9; Testimony of Appellant.)

15. On the renewal form, in response to question 10 which stated, Have you ever appeared in any court as a defendant for any criminal offense (excluding non-criminal traffic offenses)? The Appellant answered “no.” (Exhibit 9; Testimony of Appellant.)

16. On the renewal form, question 12 states: Are you now or have you ever been the subject of a M.G.L. c. 209A restraining order or involved in a domestic violence charge? The Appellant again answered “no.” (Exhibit 9; Testimony of Appellant.)

17. In the Department's employment application submitted by the Appellant, on page 17, under the heading of Criminal Record, question "i" stated:

Have you ever been or are you currently the subject of any petition for restraining order requested or issued pursuant to c. 209A or other abuse statutes, of the Massachusetts General Laws or any other domestic violence, abuse prevention or "no contact" order in this or any other state?

The Appellant checked the box indicating "No." (Exhibit 3.)

18. As part of the background check, the Department Firearms Division submitted the Appellant's renewal form for a license to carry to the Massachusetts Department of Mental Health (DMH) to check for any history of confinement. On July 25, 2011, DMH informed the Department that the Appellant had been confined to a DMH facility from November 30, 2001 until February 20, 2003, while a minor. (Exhibit 10; Testimony of Appellant, Testimony of Resendes.)

19. The Department submitted Exhibit 11, an unsigned letter from Chief David A. Provencher to the Appellant, dated July 25, 2011. The letter was never sent to the Appellant. (Exhibit 11; Testimony of Resendes.)

20. The July 25, 2011 letter stated that the Appellant's License to Carry Firearms had been revoked because (1) the Appellant had been deemed to be an unsuitable person (2) due to the fact that he failed to answer the questions on the application truthfully, in particular question 8: failure to notify the Department about his confinement to Taunton State Hospital; (3) had failed to submit along with the application an affidavit of a treating physician, familiar with his mental illness, that the Appellant was no longer disabled from an illness in a manner that would prevent him from possessing a rifle, shotgun or ammunition; and (4) the Appellant had completed the application form untruthfully. (Exhibits 11 and 12; Testimony of Appellant, Testimony of Resendes.)

21. On August 8, 2011, the Department ran a CORI report on the Appellant. It revealed that the Appellant was the defendant in a restraining order issued from the Woburn District Court effective from October 16, 2006 until October 15, 2007. The CORI also showed that the Appellant had been arraigned in Woburn District Court on October 16, 2006 for two offenses: the offense of malicious destruction of property, dismissed on January 5, 2007, and the offense of assault and battery, dismissed after 3 months of pretrial probation. All events had taken place in Burlington, Massachusetts. (Exhibit 14.)

22. On August 15, 2011, Det. Goncalves contacted the Burlington Police Department, requesting any information on the Appellant. The Burlington Police Department sent him 4 police reports. (Exhibit 14, 15 and 16.)

23. In the first police report dated July 16, 2006, around 4:30 p.m., Officer Scott Lauder responded to a residence in order to take a report of a past domestic incident.¹ The Appellant's then-girlfriend told the officer that she had had a verbal and physical argument with the Appellant. She said that they were traveling in the Appellant's car when she attempted to hand him money. When the Appellant refused to take the money, she threw it out of the window. When they returned to her residence, the Appellant pushed her, scratched her, and attempted to choke her. The officer observed scratch marks on her arms. When Officer Kirchner called the Appellant, he said that his girlfriend had been the aggressor, and had kicked and punched him in addition to yelling and screaming at him. The officer advised him of his legal rights and informed him that his girlfriend no longer wanted him around her residence. The officer also spoke to the girlfriend's grandmother, who said that the parties had been arguing since the birth of their child in March. She also said that both parties had made the situation physical and that the Appellant had left his

¹ Date unknown.

girlfriend's home with visible injuries. Both parties were advised of their 209 rights; the girlfriend was given a 209A rights form. Although neither party wanted to pursue criminal charges, the girlfriend said that she was going to court in the morning to seek child support from the Appellant and that she would look into getting a restraining order. (Exhibit 15.)

24. In the second police report dated September 8, 2006, at 9:18 p.m. Officer Robert A. Aloisi responded to Chuck E. Cheese to investigate a call for female sitting on the curb with an infant in a car seat. The female was the Appellant's then girlfriend, and was known to the officer. She told the officer that she was driving with her boyfriend and her child, when the Appellant began arguing about the way she was driving. She pulled over so that he could drive. After she took the child out of the car, the Appellant drove off and never returned. The officer did not notice any bruises on the child or its mother. He advised the mother of her right to an emergency restraining order, but she declined. The officer then left a message for the Appellant to call him, the call was not returned. The domestic violence unit was notified of this incident. (Exhibit 15.)

25. The third and fourth police reports are both dated October 14, 2006. At 5:10 p.m., Officer Leary was dispatched to Simonds Park due to a fight in progress among 3 black males and one female. Before he had been dispatched to the fight, Officer Leary had been traveling behind the motor vehicle carrying the 2 black males when it made a fast and erratic turn into the Simonds Park parking lot. The officer observed the Appellant trying to flag him down, but mistakenly believed that he was waving to the other black males. When Officer Leary returned to the station, he was dispatched back to Simonds Park for a fight in progress.

As Officer Leary approached the scene, he saw the Ford Escort leaving the park. He spoke to the Appellant, who admitted that he had been in a fight with the occupants of the Ford Escort. Officer Leary radioed Officer Aloisi to stop the motor vehicle.

The Appellant informed Officer Leary that he had met his ex-girlfriend in the park for visitation, when they began to argue about custody issues. The ex-girlfriend, who had remained in her car, opened the door and thereby struck the Appellant. The Appellant believed that his ex-girlfriend had done this deliberately and pushed the door back onto her as she tried to exit. The ex-girlfriend then said that she was going to call her current boyfriend to come and "kick his ass." The Appellant tried to take the phone from her and during the struggle, the phone dropped and broke.

The Appellant then tried to leave, but his ex-girlfriend stood behind his car so that he could not leave. Her current boyfriend and one of his friends arrived and then the 3 men began to argue. The current boyfriend threw the first punch and a fight ensued with the Appellant defending himself against the other 2 men. He sustained a black eye, abrasions on his left knee, hands and elbow, and a laceration on the right side of his neck. The current boyfriend then kicked the trunk of the Appellant's vehicle, leaving a large dent. The current boyfriend also threw the broken pieces of the cell phone at the right side of the Appellant's car, leaving scratches in the paint.

Officer Leary believed that the ex-girlfriend had called her current boyfriend to the scene in order for him to attack the Appellant. Officer Leary also believed that the actions of the current boyfriend led to the dent and the scratches on the Appellant's car. Both men were summonsed on charges of assault and battery. The current boyfriend also faced an additional charge of wanton/malicious destruction of property over \$250. (Exhibit 15.)

26. The next October 14, 2006 report was filed by Officer Aloisi, who also filed the September 8, 2006 report. At 5:10 p.m. Officer Aloisi was responding to Simonds Park for a report of 3 black males and a white female involved in a fight. While he was on his way there, he was alerted by Office Matthew Leary that a Ford Escort occupied by 2 black males was heading in

his direction. Officer Leary also asked that Officer Aloisi stop the vehicle to determine what had happened in the park. Officer Aloisi activated his blue lights and pulled over the vehicle.

Meanwhile Officer Kirchner arrived as back up, and Officer Leary reported from the park that the Appellant had told him that there was a gun in the vehicle occupied by the 2 black males. The black males were removed from the motor vehicle, made to lay on the street and sidewalk, handcuffed, then placed in a sitting position on the sidewalk. No gun was found.

The Appellant's ex-girlfriend then pulled up, told the officers that she knew what was going on and that she had made the call. She said that she had arranged to meet the Appellant at Simonds Park to hand over their child for visitation. When she arrived, the Appellant was upset because she was late, and began to verbally abuse her. As she was retrieving something out of her vehicle, she inadvertently struck the Appellant with the car door. The Appellant then grabbed her by the shoulders and shoved her backwards, almost knocking her to the ground. The Appellant spoke to his ex-girlfriend's grandmother by phone, telling her that he was going to kill his ex-girlfriend and kick her in the end. The ex-girlfriend then called her current boyfriend, one of the 2 black men that Aloisi had pulled over and detained. The Appellant asked his ex-girlfriend to give him the phone so that he could invite her current boyfriend to come to the park to fight. When she complied, he threw the phone on the ground, smashing it to pieces. The value of the phone was approximately \$450.

Officer Aloisi informed Officer Leary that he had probable cause to believe that a domestic assault and battery had taken place. Officer Leary was already on the way to the station because the Appellant wanted to file a complaint against the current boyfriend. Once he arrived at the station, however, the Appellant was arrested and booked by Lt. Steve O'Meara. He was charged with assault and battery and malicious destruction of property over \$250.

27. The ex-girlfriend applied for an emergency restraining order. In her affidavit, she wrote the following:

On or about 10/14/06, the Defendant Luis Garcia was meeting me at Simonds Park to take the baby overnight. When I arrived at the park Luis was there and he was mad because he was waiting there. Luis started to verbally abuse me, and he started to get the babys [sic] things, I pushed the gate of the car open to get the stroller and it pushed Luis back. He then put both hands on my shoulders and pushed me back really hard. Hard enough to knock me over but I caught myself. He was on the phone with my grandmother telling her he was going to kill me & kick me in the head. I was on the phone with my current boyfriend. Luis gave me his keys to hold because he said take my keys and give me your phone. I want to fight him. Luis then grabbed my phone told my boyfriend to come and fight him and then he smashed my phone on the ground.

28. The emergency restraining order was granted, and served upon the Appellant *in hand*, while he was in custody. The emergency restraining order had an expiration date and next court date of October 16, 2006. (Exhibits 15, 16 and 16.)

29. The Appellant later posted bail. The police officers, mandated reporters who suspected abuse or neglect of a child, filed a report as mandated by G.L. c. 119, §51A (51A Report) with the Department of Social Services on behalf of the 7 month old infant. (Exhibit 15; Testimony of Appellant.)

30. On October 16, 2006, the Appellant was arraigned in Woburn District Court on the two charges of assault and battery and malicious destruction of property over \$250. (Exhibit 14.)

31. On August 17, 2011, Det. Goncalves contacted the Woburn District Court in order to receive a copy of the restraining order. (Exhibit 17.)

32. The court records revealed that when the Appellant failed to appear for the October 16, 2006 hearing on the restraining order, the restraining order was extended for one year until October 15, 2007. The Appellant was ordered not to abuse the mother, not to contact the Plaintiff, to stay at least 100 yards away from her, to immediately leave and stay away from the mother's

residence, and to immediately surrender his guns, ammunition, gun licenses and FID cards to the Burlington Police Department. Custody of the couple's infant child was awarded to the mother. (Exhibits 14 and 17.)

33. Although the address on the restraining order was the same as the Appellant's address on the October 14, 2006 police reports, the Fall River Police were unable to serve the Appellant, stating "no address exists." (Exhibits 15, 16 and 16.)

34. On September 11, 2007, slightly more than one month before the order expired, the Plaintiff moved to vacate the no contact and stay away provisions of the order "because of an upcoming court date that we need to speak about." The Plaintiff's motion was allowed. The no abuse order, award of custody of the infant child to the Plaintiff and the order that the Appellant surrender his guns, ammunition, gun licenses and FID cards to the Burlington Police Department remained in effect until October 15, 2007. The Fall River Police were unable to serve the Appellant with the amended restraining order. (Exhibits 16 and 17.)

35. On October 15, 2007, the restraining order was scheduled for an extension hearing at 9:00 a.m. Because neither party appeared, the order expired at 4:00 p.m. on the same day. The return of service to the Appellant was returned unserved. (Exhibit 16.)

36. After reviewing the Appellant's CORI, police reports, and restraining order documents, the Department halted the employment check because the Appellant was no longer a viable candidate. In a memo to Lt. Rezendes, Detective Goncalves stated that he would not recommend the Appellant for the position of permanent full-time police officer in the City of New Bedford because he had been untruthful in answering four questions on the renewal of his

application to carry, which was part of his application for employment.² (Exhibits 9 and 18; Testimony of Rezendes.)

37. In his review, Det. Goncalves had been immediately drawn to the fact that the Appellant's license to carry had been revoked by the Department because the Appellant had failed to disclose that he had been confined in a mental health facility, in response to question 8. The Appellant's confinement was a disqualifier unless answered truthfully and accompanied with the affidavit of a registered physician familiar with the applicant's illness, stating that the person was no longer disabled in a manner that should prevent him from carrying a firearm. (Exhibits 9 and 18.)

38. Detective Goncalves also found that the Appellant failed to answer truthfully when he answered that he had never appeared in any court as a defendant for any criminal offense (excluding non-criminal traffic offenses) in response to question 10. Detective Goncalves had received the police reports from the Burlington Police Department indicating that the Appellant had been arrested on October 14, 2006 and arraigned on October 16, 2006 for assault and battery and malicious destruction of property over \$250. (Exhibits 9 and 18.)

39. Detective Goncalves's third reason was the Appellant's failure to answer truthfully in response to question 12, that he was not now or had never been subject to M.G.L. c. 209A restraining order or involved in a domestic violence charge. The detective had found that the Appellant had been served in hand with an emergency restraining order on October 14, 2006, and that the order had been extended in an October 16, 2006 ex parte hearing until October 15, 2007. (Exhibits 14, 16 and 17.)

² The date of the memorandum is unknown.

40. Detective Goncalves's fourth reason was the Appellant's failure to answer truthfully in response to question question "i" on the employment application, denying that he had ever been the subject of any petition for a restraining order pursuant to domestic violence or other abuse statutes both within and outside of Massachusetts. (Exhibits 3 and 18.)

41. The Appellant and his former teacher, Timothy Sheehan, offered testimony about his mental condition at the time of his confinement in a DMH facility. The Appellant, born in the United States, had lived in the Dominican Republic until he was 10 years old. When he returned to the United States, not only did he lack English skills, but he could not read or write in Spanish. He attended classes in Spanish until he was able to transition to classes in English in the 5th Grade. Mr. Sheehan was one of his teachers, who took a special interest in the Appellant because he worked so hard to overcome his earlier educational deficiencies. (Testimony of Appellant, Testimony of Sheehan.)

42. The Appellant's mother was unable to care for him. The Appellant lived in foster care and was so hurt by a guardian that school officials, as mandated reporters, filed a 51A report with the then Department of Social Services (DSS). Mr. Sheehan then became a foster parent so that he could look after the Appellant until the DSS investigation was completed. The Sheehans welcomed the Appellant into their family, having him baptized, taking him on excursions to Boston, the College of the Holy Cross and their vacation home on Cape Cod. (Testimony of Appellant, Testimony of Sheehan.)

43. When DSS tried to remove the Appellant from Mr. Sheehan back to other foster care, he was hospitalized because he threatened to harm himself. The Appellant suffered from anger management issues and post-traumatic stress disorder due to child abuse. While he was in

confinement, Mr. Sheehan visited him weekly, gave him an allowance, paid for his toiletries and became his educational advocate. (Testimony of Appellant, Testimony of Sheehan.)

44. The Appellant became a father at age 18. He quit high school and got a full-time job to support his child, while earning his G.E.D. (Testimony of Appellant, Testimony of Sheehan.)

45. In a letter dated August 19, 2011, and sent on August 31, 2011, the City notified the state Human Resources Division (HRD) of the reasons for the Appellant's bypass. The City stated that the Appellant had demonstrated a pattern of lying about his criminal past and withholding information, as evidenced by the untruthfulness in his application for employment, the untruthfulness in the application for renewal of his license to carry and its subsequent revocation. The City also stated that the Appellant's character flaws that make him undesirable as a candidate for police officer combined with the fact that he is unable to possess a license to carry forced it to seek a bypass. (Exhibits 18 and 23.)

46. HRD informed the Appellant that it had approved the reasons for his bypass in a letter dated September 14, 2011. (Exhibit 19 and 23.)

47. When the Appellant returned on short furlough from military duty in Afghanistan in November 2011, he telephoned the Police Department in order to check on his status. Lt. Rezendes asked him to come into the station, where he told him in person of the revocation of his license to carry. The Appellant surrendered his license, and the police accompanied him to his home so that he could turn over his personal firearms.³ (Exhibit 13; Testimony of Appellant, Testimony of Rezendes.)

³ The Appellant resubmitted a license to carry application form in October 2012, along with a medical clearance letter from a Veterans Administration psychiatrist. His license was re-issued on January 18, 2013. (Exhibit 22; Testimony of the Appellant.)

48. On November 13, 2011, the City appointed 7 permanent full-time police officers from Certification 202842, with all of the selected candidates bypassing the Appellant. (Exhibits 2a, 2c and 23; Testimony of Appellant.)

49. On September 17, 2012, the Appellant appealed the City's decision to bypass him to the Civil Service Commission. (Exhibits 20, 21 and 23.)

CONCLUSION AND ORDER

A. *Applicable Legal Standards*

When a candidate for appointment appeals from a bypass, the commission's role is not to determine whether that candidate should have been bypassed. The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. *Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 187 (2010). The commission determines, "on the basis of the evidence before it, whether the appointing authority [has] sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification" for the decision to bypass the candidate. *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 241 (2006), citing G.L. c. 31, § 2 (b). "Reasonable justification in this context means '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.'" *Brackett v. Civil Serv. Comm'n*, *supra*, quoting *Selectmen of Wakefield v. Judge of First Dist. Court of E. Middlesex*, 262 Mass. 477, 482 (1928). See also *Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 189, 190-91 (2010) citing *Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 824-826 (2006). See also *Methuen v. Solomon*, No. 10-01813-D, Essex Sup. Ct. (July 26, 2012); *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012). A "preponderance of the evidence test requires the Commission to determine whether, on the 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 Serv. Comm’n*, 31 Mass. App. Ct. 315 (1991). In determining whether the department has shown a reasonable justification for a bypass, the commission's primary concern is to ensure that the department's action comports with “[b]asic merit principles,” as defined in G.L. c. 31, § 1. See *Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259 (2001). The commission “finds the facts afresh” in conducting this inquiry, and is not limited to the evidence that was before the Department. *Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 187 (2010). The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. *Id.* Cities and towns have wide discretion in selecting public employees, and absent proof that they acted unreasonably, may not be forced to take the risk of hiring unsuitable candidates. *Tewksbury v. Massachusetts Civ. Serv. Comm’n*, No. 10-657-G, Suff. Sup. Ct. (August 30, 2012) (Superior Court found that the town acted reasonably; Commission erred when it reversed DALA Recommended Decision and improperly substituted its judgment).⁴ 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.” *Attleboro v. Massachusetts Civ. Serv. Comm’n et al.*,⁵ No. 2011-734, Bristol Sup. Ct. (November 5, 2012), citing *Beverly* at 191.

B. Reasonable Justification for Bypassing the Appellant

The City was reasonably justified in bypassing Appellant for the position of permanent full time police officer in the New Bedford Police Department because he was not forthright about his

⁴ *Cyrus v. Tewksbury*, Docket Nos. G1-08-107, CS-08-539, Recommended Decision, (June 5, 2009), *rev’d by Final Decision* 23 MCSR 58 (2010).

⁵ William Dunn.

criminal past and withheld information about his mental health.

Untruthfulness is a serious concern and the Department is justly concerned with candidates' ability to tell the truth consistently. *See Beverly* at 189-190; *Modig v. Worcester Police Dep't*, 21 MCSR 78, 82 (2008) (police officer candidate's failure to respond accurately to a question about his prior employment on a personal history questionnaire was grounds for bypass); *Escobar v. Boston*, 21 MCSR 168 (2008) (candidate's untruthfulness in another police department's application is grounds for bypass); *Moran v. Auburn*, Docket Nos. G1-08-42, CS-08-317, Recommended Decision, (June 5, 2009), *adopted by Final Decision* 23 MCSR 233 (2010) (Town was justified in bypassing the Appellant for multiple reasons including misrepresentations about his extensive driving history and past criminal behavior, including assault and battery and OUI); *Konamah v. Lowell*, Docket Nos. G1-10-131, CS-11-34, Recommended Decision, (January 12, 2012) *adopted by Final Decision* 25 MCSR 73 (2012) (candidate's failure to complete application truthfully and to disclose actual role in business gave appointing authority reason for bypass); *O'Neil v. Cambridge*, Docket Nos. G1-12-14, CS-12-202, Recommended Decision, (August 14, 2012), *adopted by Final Decision* November 5, 2012. (Town was justified in bypassing the Appellant for an arrest for domestic assault and battery).

I find that the Appellant made false statements on the employment application form (Exhibit 4.) and on the renewal application for the license to carry and withheld information on the renewal application for the license to carry (Exhibit 9.). On page 17, under the heading of Criminal Record, the Appellant replied no to question "i" which stated:

Have you ever been or are you currently the subject of any petition for restraining order requested or issued pursuant to c. 209A or other abuse statutes, of the Massachusetts General Laws or any other domestic violence, abuse prevention or "no contact" order in this or any other state?

This answer is belied by the restraining orders which issued from the Woburn District Court on

October 14, 2006 and October 16, 2006, wherein the Appellant was the defendant after a domestic violence incident on October 14, 2006.

On the renewal application for the license to carry, question 12 stated: Are you now or have you ever been the subject of a M.G.L. c. 209A restraining order or involved in a domestic violence charge? The Appellant answered “no.”

On the same renewal form, question 10 asked: Have you ever appeared in any court as a defendant for any criminal offense (excluding non-criminal traffic offenses)? The Appellant answered “no.” The Appellant had been arraigned on October 16, 2006 on charges of assault and battery and malicious destruction of property over \$250.

Appointing Authorities are justified in bypassing candidates who are perpetrators of domestic violence incidents, whether or not those incidents result in arrest or conviction. *See Torres v. Boston Police Dep't*, 20 MCSR 327 (2007) (bypass of candidate with multiple incidents of domestic violence upheld); *Allen v. Boston Police Dep't*, 21 MCSR 45 (2008) (bypass upheld where background check revealed three charges of domestic violence); *Dunn Cooper v. Boston Police Dep't*, Docket Nos. G1-07-333, CS-08-54, Recommended Decision, (April 30, 2008), *adopted by Final Decision* 21 MCSR 417 (2008) (bypass of candidate with two restraining orders and several instances of domestic disputes upheld); *Lee v. Boston Police Dep't*, 22 MCSR 239 (2009), *Boston Police Dep't v. Lee*, No. 2008-1988-E, Suff. Sup. Ct, (October 28, 2010) (Superior Court vacated Commission order, finding that appointing authority had reasonable justification for bypassing candidate with conviction for domestic assault and battery and CWOV for 209A violation); *Woolf v. Randolph*, Docket Nos. G1-09-36, CS-09-125, Recommended Decision, (January 4, 2010), *reversed by Final Decision*, 23 MCSR 209 (2010), *Randolph v. Woolf*, No. 2010-02061-E, Suff. Sup. Ct, (April 28, 2011), *aff'd*, *Randolph v. Civil Serv. Comm'n*, Appeals

Court, No. 11-P-998 (March 22, 2012) (The Appeals Court found that the Commission erred when it reversed the DALA decision upholding the bypass of candidate because of his lack of truth and candor in regard to his violation of an abuse prevention order).

The Appellant has offered many reasons why his appeal should be allowed. He testified that he did not think that he had to disclose his mental confinement on his license to carry applications because it occurred when he was a juvenile. He also testified that he was not mentally ill, that he was simply a child who took advantage of the confinement to be away from the horrors of foster care. Respectfully, he is not qualified to determine whether or not he was mentally ill. Only a medical professional could give clearance for eligibility to bear firearms. He did not seek advice from the police officers in the Department's Firearms Division about what he had to disclose. However, he procured a letter of medical clearance from a Veterans Administration psychiatrist on May 16, 2012. The Department has given no explanation for the approval of the Appellant's first application and how it managed to clear the DMH check.

The Appellant has argued that he could not disclose the restraining order on his employment application and the license to carry applications because he did not know about it. It is clear from the Burlington Police Department police reports and the Woburn District Court records that the Appellant was served *in hand* with an emergency restraining order on October 14, 2006, with a return court date of October 16, 2006.

When asked to explain the difference in his response to question 10 on the initial license to carry and the renewal application that was part of the packet, the Appellant testified that a Firearms Division police officer had helped him complete that first application. He said no in error on the renewal application because he was rushed and home on leave before deployment in Afghanistan.

He testified that he did not have the week normally accorded to candidates to fill out and return the application packet to the Department.

The Appellant also gave an alternative version. He testified that he did not disclose his criminal past in the renewal application because the offenses were dismissed after (1) the Appellant played a voicemail of his ex-girlfriend saying that she was going to set him up; and (2) after the ex-girlfriend's grandmother told the prosecution that her granddaughter had lied.

The Appellant was arraigned on October 16, 2006 on the criminal charges of assault and battery and malicious destruction of property. The offense of malicious destruction of property was dismissed on January 5, 2007. The offense of assault and battery was dismissed after 3 months of pre-trial probation. (Exhibit 14.) Nevertheless, the Appellant appeared as a defendant in court on a criminal offense, the information sought by the Department in its employment application form.

The Appellant had many difficulties to overcome as a result of his difficult childhood, and entered the military with the expectation that his experience there would lead him to a law enforcement career. Mr. Sheehan is to be commended for his fine work as a teacher and his good heart in reaching out to a troubled child. But the facts are what they are. I find that the Appellant has failed to meet the standards required in order to be a police officer in the City of New Bedford.

The Appellant's incident of domestic violence, his criminal history, the untruthfulness on the employment application, and the untruthfulness and omission on the renewal application for the license to carry demonstrated his failure to meet the City's standards in order to become a police officer and gave the City reasonable justification to bypass him. Given the fact that the Appellant was involved in an incident of domestic violence, a Department decision to bypass him solely for this reason would have been well supported by a preponderance of the evidence.

Because police officers often respond to domestic violence calls, it would be irresponsible of the New Bedford Police Department to hire such and individual. See *Alfred v. Boston Police Dep't*, 20 MCSR 281 (2007).

There is no evidence that the City's decision was based on political considerations, favoritism or bias. Thus the City's decision to bypass the Appellant is "not subject to correction by the Commission." *Cambridge*, 43 Mass. App. Ct. at 305.

Based on the preponderance of credible evidence presented at the hearing, I conclude that the City was reasonably justified in bypassing the Appellant. Accordingly, I recommend that the appeal be dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Angela McConney Scheepers
Administrative Magistrate

DATED: JUL - 9 2013