

Decision mailed: 12/11/09
Civil Service Commission 03

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

CHRISTOPHER KENNEDY,
Appellant

v.

G2-08-72

CITY OF PITTSFIELD,
Respondent

Appellant's Attorney:

Jeffrey S. Morneau, Esq.
Donohue, Hyland and Donohue, P.C.
1707 Northampton Street
Holyoke, MA 01040

Respondent's Attorney:

Fernand J. Dupere, Esq.
P.O. Box 373
223 College Highway
Southampton, MA 01073

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Christopher Kennedy (hereinafter "Kennedy" or "Appellant") seeks review of the Personnel Administrator's (HRD) decision to accept the reasons of the City of Pittsfield (hereinafter "Appointing Authority" or "City"), for bypassing him for promotional appointment to the position of sergeant in the Pittsfield Police Department (hereinafter "Department"). The appeal was timely filed on March 28, 2008 with the Civil Service Commission (hereinafter "Commission") and a pre-hearing conference was conducted at Pittsfield City Hall on April 23, 2008. The parties mutually requested that a full hearing not take place until a pending disciplinary appeal was decided by the

Commission. The full hearing was conducted on July 8, 2009 at the Springfield State Building in Springfield, MA. The hearing was digitally recorded. The Commission received post-hearing briefs from the parties on September 18, 2009 (Appointing Authority) and September 22, 2009 (Appellant).

FINDINGS OF FACT:

Sixteen (16) exhibits were entered into evidence at the hearing. Based on the exhibits submitted at the hearing and the testimony of the following witnesses:

For the Appointing Authority:

- Michael J. Wynn, Acting Chief of Police, City of Pittsfield;

For the Appellant:

- Christopher Kennedy, Appellant;

I make the following findings of fact:

1. The Appellant is a tenured civil service employee in the position of police officer in the City of Pittsfield and has served in that position since 1987. (Stipulated Facts)
2. The Appellant served as an Acting Sergeant for a period of six (6) months beginning in September 2007. (Testimony of Appellant)
3. On December 12, 2007, the City received Certification No. 271216 from HRD for the position of permanent full-time police sergeant. The certification contained the names of three (3) police officers. The Appellant's name appeared in the first position with a score of 81. The score of the second place officer, James Roccabruno, was 79. (Stipulated Facts)
4. The Mayor is the Appointing Authority for the City of Pittsfield and Michael Wynn has been the Acting Police Chief since December 2007. Chief Wynn reviewed the personnel

files of all three candidates, participated in the interview of each candidate and recommended the promotion of the second ranked-candidate, James Roccabruna.

(Testimony of Wynn)

5. Chief Wynn is a consummate professional who has worked his way up the ranks to the position of Acting Police Chief over his 14-year career with the Pittsfield Police Department. He has a serious demeanor which was reflected in the thoughtful manner that he answered all questions posed to him. He candidly acknowledged when he couldn't remember something regarding this promotional appointment which occurred almost two years prior to the hearing before the Commission. His rationale for recommending the second-ranked candidate for promotion appeared to be rooted in what he believed was in the best interest of his department. I did not sense that he had any ulterior motive for not selecting the Appellant. For these reasons, I found him to be a good witness and I credit his testimony. (Testimony, demeanor of Wynn)
6. Upon determining that any candidate on a certification is to be bypassed, an appointing authority shall, immediately upon making such determination, send to HRD, in writing, a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked, or of the reason or reasons for selecting another person, lower in score or preference category. HRD is then responsible for reviewing the reasons submitted and informing the appointing authority of approval or disapproval of the reasons for selection of bypass. (PAR.08(3))
7. On March 20, 2008, the City sent a 6-page letter to HRD listing the positive reasons for selecting Mr. Roccabruno for promotion to the position of sergeant as well as the negative reasons for not selecting the Appellant. (Stipulated Fact)

8. The next to last paragraph of the above-referenced letter from the City to HRD stated:

“To summarize, I intend to bypass Christopher E. Kennedy due to the fact that his disciplinary record, particularly the two recent suspensions, show him to be unfit for the responsibilities of command. Mr. Kennedy has demonstrated by his recent actions that he lacks the judgment, responsibility and discipline to effectively serve as a police supervisor. Additionally, by virtue of both the extent of his training and variety of his experiences, James M. Roccabruna is a more suitable candidate for promotion to permanent, full-time police sergeant. Further, Mr. Roccabruna has never received any serious discipline. The one incident involving Mr. Roccabruna was minor in nature and resulted in a verbal reprimand. The incident did not involve his ability to supervise other officers.” (Exhibit 5)

9. HRD approved the reasons proffered by the City on March 28, 2008 and the Appellant filed the instant appeal with the Commission on the same day. (Stipulated Facts)

Appellant's Disciplinary Record

10. On March 22, 1989, the Appellant received a letter of reprimand for discourtesy and the possible use of excessive force during an arrest. (Exhibit 1)

11. On October 12, 1998, the Appellant received a letter of reprimand for abuse of sick time. (Exhibit 2)

12. On March 25, 2004, the Appellant received a 3-day suspension for discourtesy. (Exhibit 3)

13. On March 10, 2008, the Appellant received a 3-day suspension for conduct unbecoming an officer. (Exhibit 4)

14. The Appellant appealed the March 10, 2008 suspension to the Commission and his appeal was allowed in part, with the suspension being reduced to a written warning. I served as the hearing officer regarding that appeal (CSC Case No. D-08-64). Although the penalty was reduced, the Commission did conclude that the Appellant did violate

Department rules related to conduct unbecoming an officer and criticism of officers.

(Exhibit 13)

15. During Mr. Roccabruna's 14-year career, his only discipline was a single verbal reprimand which was levied in 2006 for a minor complaint of rudeness. (Exhibit 6 and Testimony of Wynn)
16. I find that the Appellant's disciplinary record was far more serious than the selected candidate's, even after factoring in the greater time span.
17. In addition to the number of disciplinary actions against the Appellant, Chief Wynn was also concerned about the nature of the underlying actions that led to the discipline. Chief Wynn believed that the Appellant's disciplinary record indicated that he displayed a temper and lost control. (Testimony of Chief Wynn)

Positive Reasons Associated with Selected Candidate

18. The Appellant offered testimony regarding his 21-year career with the Pittsfield Police Department and why he believes that many of the positive reasons cited in support of the selected candidate, Mr. Roccabruna, apply equally to him. (Testimony of Appellant)
19. The Appellant had approximately 21 years of experience with the Department at the time of the interview while the selected candidate had 14 years of experience. Both the Appellant and the selected candidate previously served in the role of Acting Sergeant. Both the Appellant and the selected candidate have completed specialized training during their careers. (Testimony of Appellant and Exhibits 7, 8 and 14) I find that, in these areas, the positive reasons associated the selected candidate apply at least equally to the Appellant, even after considering the City's argument that the selected candidate's specialized training was more extensive in certain areas.

20. I also find, however, that some of the positive reasons cited in support of the selected candidate do not apply equally to the Appellant, including the fact that the selected candidate was a member of the City's Special Response Team (SRT), a SRT Team Leader and a detective. The Appellant did not serve in any of these roles. (Exhibit 5, 7 and 8 and Testimony of Appellant and Wynn)
21. As a Team Leader with the Special Response Team, Mr. Roccabruna was partially responsible for the immediate supervision of a highly trained group of police officers, engaged in hazardous assignments, including the service of high-risk warrants, fugitive apprehensions and dignitary protection. (Exhibits 5 and 7 and Testimony of Wynn)
22. In regard to education, the Appellant possesses an Associates degree while Mr. Roccabruna has a Masters degree in criminal justice. (Exhibits 5, 7 and 8). Chief Wynn testified that this was the least important factor in his decision-making process.
(Testimony of Chief Wynn)
23. Both candidates were interviewed by the City's Mayor with Chief Wynn present.
(Testimony of Wynn and Appellant)
24. The Appellant testified that his interview with the Mayor was relatively short and focused almost exclusively on questions related to his most recent discipline. When asked, the Appellant told the Mayor that he would not have done anything differently regarding the underlying incident that led to the discipline. (Testimony of Appellant)
25. The performance of the candidates during their respective interview was not cited as part of either the positive or negative reasons that the City submitted to HRD. (Exhibit 5)

CONCLUSION

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). 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 Civil Service v. Municipal 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 rightfully granted wide 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 Civil Service v. Municipal 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. City of Cambridge, 43 Mass. App. Ct. at 304.

Based on all of the reasons cited in the findings, I conclude that the City has shown, by a preponderance of the evidence, that it had reasonable justification to bypass the Appellant for promotional appointment to the position of sergeant.

The Appellant has a problematic disciplinary record, particularly when contrasted against that of the selected candidate. Based on this disciplinary record, it was reasonable for the Police Chief to conclude that the Appellant has trouble controlling his temper, a trait that would be problematic for someone serving permanently in a supervisory capacity.

Further, although I concluded that some of the positive reasons cited in favor apply equally to the Appellant, others do not. For example, the selected candidate served as a detective, a member of the City's Special Response Team (SRT), and as a SRT Team Leader. These are appropriate differences for the Police Chief to consider when making a recommendation regarding who should make up his leadership team to the Appointing Authority, who in this case is the Mayor.

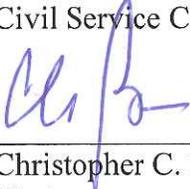
The Appellant contends that the brevity of his interview with the Mayor, the fact that it focused primarily on his most recent discipline and there were no set of written uniform questions asked of all candidates, is a violation of basic merit principles and implied that it should be a pretext to accomplish a pre-determined result. While I am chagrined that a more uniform and documented interview process did not take place here, there is insufficient evidence of a pretext to justify intervention by the Commission.¹

¹ Had the City listed the interview performance of the candidates as a reason for bypass, it is unlikely that the Commission would have considered this a sound and sufficient reason given the lack of uniformity and documentation. With this in mind, the City would be well-advised to establish a more formal, uniform and documented interview process on a going-forward basis.

I conclude that the reasons provided by the City for the bypass of the Appellant were sound and sufficient for the selection of Sergeant Roccabruna.

For all of the above reasons, the Appellant's appeal under Docket No. G2-08-72 is hereby *dismissed*.

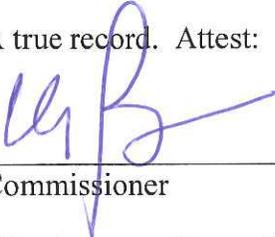
Civil Service Commission



Christopher C. Bowman
Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman; Marquis and Stein, Commissioners [Henderson, Taylor, Commissioners – No]) on December 10, 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:

Jeffrey S. Morneau, Esq. (for Appellant)
Fernand Dupere, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)