

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Civil Service Commission

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

DAVID HORTE,
Appellant

v.

G2-04-412

HINGHAM POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

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Commissioner:

John E. Taylor

DECISION

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant, David Horte (hereinafter "Appellant" or "Horte"), is appealing the decision of the state's Human Resources Division (HRD) to accept the reasons of the Respondent, (hereinafter "Town" or "Appointing Authority"), to bypass him for promotion to the position of sergeant. The appeal was timely filed. A full hearing was held on June 21, 2004 at the offices of the Civil Service Commission. Two (2) tapes were made of the hearing. Both parties

submitted post-hearing briefs. Eight (8) exhibits were stipulated to by the parties and entered into the record.

FINDINGS OF FACT:

Based on the documents entered into evidence as Joint Exhibits 1 through 8, and the testimony of the Appellant, David Horte; Taylor Mills – Captain, Hingham Police Department; Melissa A. Tulley – Selectman, Hingham Board of Selectmen; and Russell Erickson – Lieutenant, Hingham Police Department (Ret.), I find the following:

1. The Hingham Board of Selectmen is the Appointing Authority for the Hingham Police Department. (Testimony)
2. In the spring of 2004, the Town of Hingham sought a certified list of promotional candidates from HRD seeking to promote two Hingham patrol officers to the position of sergeant. (Testimony)
3. On or about May 13, 2004, the Town of Hingham received Certified List #240461 from HRD. The certification contained the names of five (5) Hingham patrol officers. (Exhibit 1)
4. The Appellant's name appeared tied for the first position with Officer Michael Peraino. Both the Appellant and Officer Peraino had a score of 87. (Exhibits 1, 3)
5. Officer Kris Phillips appeared in the second position, below the Appellant, on the same certification. He had a score of 83. (Exhibit 1)
6. Since at least the early 1990's, the Town of Hingham has placed a significant degree of importance on having its police officers engage in "community policing" and community service. Under community policing and community service, all officers are encouraged to get involved with the community by interacting with the people

who live and/or work in Hingham, outside of the traditional environments in which people normally encounter police officers. Such community policing activities include, but are not limited to: speaking at civic organizations, volunteering within Hingham with citizen police academies, boy scouts, police explorer posts and similar activities. (Testimony)

7. The Town of Hingham believes that such activities will make officers far more approachable and will make the public more inclined to contact the police if they encounter a problem or see something needing police action. Additionally, such pursuits will, among other things, allow the officers to bond with the people they are protecting and to simultaneously give something back to the community.

(Testimony)

8. Given the ever-changing aspects of police work, the Town of Hingham also places a significant importance on the continuation of one's criminal justice education and on keeping abreast of the issues which are most likely to arise in a non-urban environment such as Hingham. (Testimony)

9. The Town of Hingham also favors promotional candidates who seek a broad range of education and training in several aspects of police work rather than one specialized area. (Testimony)

10. In pursuing the promotional process in this case, the Board of Selectmen, in conjunction with the Hingham Police Department: reviewed the candidates' personnel files and resumes, received input from the police administration and conducted an interview of each of the candidates on June 1, 2004. (Testimony, Exhibit 6)

11. The Appellant and Officer Phillips both started their employment as police officers with the Town on the same day, September 1, 1987. (Exhibit 1)
12. The Appellant received his Bachelor's Degree in Criminal Justice in 1987 and joined the Hingham Police Department as an officer a few months later. (Exhibit 2)
13. The Appellant did not take any non-compulsory training courses between 1987 and 2001, nor did he take any graduate-level courses toward a master's degree in criminal justice during that time or any time thereafter. (Exhibit 2)
14. The Appellant began taking non-compulsory training courses in 2001, which has been narrowly focused and limited to his preferred areas of interest, including accident reconstruction and SWAT team training. To that end, the Appellant has taken several hours of paid training in those areas and has become the Hingham Police Department's expert in motor vehicle accident reconstruction. (Testimony, Exhibit 2)
15. The Appellant has also served as a member of the regional SWAT team overseen by Metro Star. Metro Star is a 40+ community police organization which can mobilize on short notice wherever their services may be needed throughout those 40+ southeastern Massachusetts communities or beyond. (Testimony, Exhibit 2)
16. During their tenure in the Hingham Police Department, both the Appellant and Officer Phillips received a number of letters of gratitude from citizens and business owners whom they have assisted in their official capacities. Officer Phillips has received a number of additional letters of gratitude for his involvement working with students in the Hingham School Department and with his involvement in the Boy Scouts and the Police Explorer Post to which he volunteered his time. (Exhibits 5, 8)

17. Since he has been employed as an officer of the Hingham Police Department, the Appellant has not volunteered any significant amount of time to community policing or similar endeavors in Hingham. (Testimony)
18. Lieutenant Russell Erickson (retired) worked with Appellant and credibly testified that Appellant was an effective patrol officer. (Testimony)
19. Officer Phillips was the Hingham Police Department's School Resource Officer since August 2001. In that capacity, he was assigned to Hingham High School where he would act as an educator, counselor and liaison to the School Department. Additionally, he taught students criminal law classes, and initiated CPR training programs for high school students. He also created a Forensic Science Class. (Exhibit 7)
20. Officer Phillips was a Rape Aggression Defense Instructor (RAD), and taught a self-defense course for women. (Exhibit 7)
21. Officer Phillips was a CPR/First Aid Instructor. (Exhibit 7)
22. Officer Phillips was also the Hingham Police Department's liaison to the South Shore Education Collaborative School (hereinafter "SSECS"), where he advised the school's directors on student needs with respect to past and present crisis issues, as well as assisting them in designing and implementing programs to correct inappropriate student activities. His work at the SSECS resulted in positive relationships being forged between the students, the staff, and the Hingham Police Department. Similarly, Officer Phillips was the Hingham Police Department's liaison to 100 Beal Street, a Massachusetts Department of Social Services group home for troubled youths. At that facility, Officer Phillips, among other things, counseled

youths one-on-one in good decision making, socially acceptable behavior and the importance of education. As a result of his community involvement at this facility, there was a dramatic reduction of calls for police services at that group home.

(Exhibit 7)

23. Officer Phillips was also the Hingham Police Department's Community Policing/Crime Prevention Officer. In that capacity, he was one of the creators of the Town's Citizen Police Academy, where he also taught. Additionally, in keeping with his emphasis on community policing activities, Officer Phillips developed and taught Community Policing philosophies to other officers as well as civilians at the Saint Anselm College New England Community Policing Symposium for four years.

(Exhibit 7)

24. Officer Phillips also conducted home security audits for Hingham residents and he organized the Hingham Police Department's Family Fun Day. (Testimony, Exhibit 7.)

25. Since Officer Phillips started his employment as a police officer in Hingham in 1987, he has continued his academic pursuits while working. He obtained his bachelor's degree in Criminal Justice in 2000 and then his Master's in Criminal Justice in 2002.

Both degrees were from Curry College. (Exhibit 7)

26. The Appellant has served as a Patrol Supervisor for more than 2500 hours cumulatively since 2000. When the Patrol Supervisor is absent for a shift, the practice in Hingham is to have the most senior patrolmen who is on that shift serve as the patrol supervisor. (Testimony)

27. The Appellant has had diversified experience in general patrol duties and traffic enforcement duties. (Testimony)
28. Since 2002, the Appellant has been involved with the Metro Star's SWAT Team and its Rapid Response Team. In that capacity, he has provided support services to its 40+ member agencies with tactical support in matters involving barricaded subjects, rapid deployment, active shooter situations, high risk warrant situations, hostage rescue and terrorist incidents. (Testimony)
29. In 2002, the Appellant was on the Town's joint Police-Fire Dive Team. The Hingham Police Department eliminated its dive team that same year. (Testimony)
30. From 1992 through 2003, the Appellant was a member of the Hingham Police Department's Traffic Enforcement Division, where he was responsible for conducting traffic law enforcement and investigating traffic accidents in Hingham. (Testimony, Exhibit 2)
31. From 1987 through the date of the bypass, the Appellant was a member of the Hingham Police Department's Patrol Division, where he was responsible for answering general calls for service. (Exhibit 2)
32. The three-member Board of Selectmen conducted an interview with each candidate on June 1, 2004. (Testimony, Exhibit 6)
33. When asked by the Selectmen-interviewers where he wanted to be in ten years, the Appellant indicated that he still hoped to be in the patrol division, possibly on a different (presumably more desirable) shift. When asked questions regarding his ability to "multi-task," he indicated that he functions better when he is able to focus on a single issue rather having to multi-task. (Exhibit 6)

34. When Officer Phillips was asked the same question regarding where he wants to be in ten years, he indicated that he wanted to be the Police Chief. (Exhibit 6)
35. When the interviewers asked questions regarding the candidates' respective leadership skills and how they would oversee their subordinate patrol officers if promoted, Officer Phillips indicated that he would coach his officers regularly in the response to both discretionary and mandated situations. (Exhibit 6)
36. The Appellant responded to the same question regarding overseeing his subordinates by indicating that he believes that his subordinate officers would generally be able to handle things themselves without his involvement, because he believed the department practically runs itself. (Exhibit 6)
37. Thereafter, Officer Michael Peraino, the candidate tied in the first position with the Appellant, was selected for promotion to the rank of sergeant by the Hingham Board of Selectmen on June 1, 2004. He was appointed to the rank of Sergeant on July 20, 2004. (Exhibit 1)
38. Officer Kris Phillips, who was below the Appellant on the certification list, was also selected for promotion to the rank of sergeant by the Hingham Board of Selectmen on June 1, 2004, and was appointed to the rank of Sergeant on October 1, 2004. (Exhibit 1)
39. By letter to HRD dated August 23, 2004, the Town submitted its reasons for bypassing the Appellant. In its letter to HRD, the Town states in part, "The determination not to recommend Officer Horte was based on a comparison of professional accomplishments (to include education), community commitment (to

include volunteerism) and communication skills (to include the ability to engage and maintain eye contact).” (Exhibit 3)

40. Thereafter, on or about October 6, 2004, the Appellant filed a timely bypass appeal with the Commission. (Exhibit 1)

41. Melissa Tulley and Captain Taylor Mills credibly testified as to the thorough screening process conducted of all candidates (including the Appellant), and to the fact that at each level of the screening process, from the initial review of Appellant’s application and resume, through the June 1, 2004 interview with the Appellant, only legitimate and relevant factors were considered in making the decision to bypass Appellant.

42. The Appellant credibly testified in a forthright manner as to his background.

Similarly, Russell Erickson credibly testified as to the quality of Appellant’s patrol work.

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). The Appointing Authority's burden of proof is one of a preponderance of the evidence, which is established, "... 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, 343 Mass. 33, 35-6 (1956).

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; *cf* 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* 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, supra. 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.

The Town has met its burden of proving that there was a reasonable justification for bypassing Appellant for the position of Sergeant. Specifically, the evidence proffered by the Respondent provides reasonable justification for bypassing the Appellant.

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 to be highly credible. Melissa Tulley and Captain Taylor Mills credibly testified as to the thorough screening process conducted of all candidates (including Appellant) and to the fact that at each level of the screening process, from the initial review of Appellant's application through the final interview with the Respondent, only legitimate and relevant factors were considered in making the decision to bypass Appellant. I found them to be professional and comfortable while testifying. Similarly, Appellant credibly testified in a forthright manner as to his background. Russell Erickson also credibly testified as to the quality of Appellant's patrol work.

Given the veracity of the testimony from all of the witnesses, it is evident, based on the limited "community policing" and community service undertaken by Appellant over the past several years, his failure to pursue relevant continuing education, as well as his somewhat lackluster interview before the Hingham Board of Selectmen (wherein Appellant exhibited a lack of career planning/motivation, as well as a lesser degree of composure, particularly when compared to the other candidates), that the Town's bypass decision was based upon adequate reasons, sufficiently supported by credible evidence. The Appellant failed to submit any objective, credible evidence to suggest that the bypass decision was a result of political considerations, favoritism or other bias.

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, the Appellant's appeal under Docket No. G2-04-412 is *denied*.

Civil Service Commission

John E. Taylor
Commissioner

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

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. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to G.L. c. 31 s. 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial review under G.L. c. 30A s. 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:

Joseph T. Bartulis, Esq.
F. Robert Houlihan, Esq.