

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place – Room 503
Boston, MA 02108
617-979-1900

MATTHEW FAIRCHILD,

Appellant

v.

CITY OF SOMERVILLE,

Respondent

G1-21-097

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

CORRECTED COPY: 8/15/22

Summary of Decision

The Commission allowed the appeal of a candidate whose appointment by the Mayor of Somerville to the position of Reserve Police Officer failed to receive confirmation of the Somerville City Council for reasons that involved unsubstantiated claims about the candidate's alleged untruthfulness.

DECISION

On May 5, 2021, the Appellant, Matthew Fairchild, acting pursuant to G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from the decision of the Mayor of the City of Somerville (Somerville), the Appointing Authority, to revoke a conditional offer and

bypass him for appointment as a Reserve Police Officer in the Somerville Police Department (SPD).¹ A remote pre-hearing conference was held via videoconference (Webex) on June 15, 2021 and a full hearing was held via video conference (Webex) on September 21, 2021, which was recorded via Webex.² The Commission received proposed decisions from the parties on November 5, 2021. For the reasons set forth below, Mr. Fairchild's appeal is allowed.

FINDINGS OF FACT

Fourteen (14) exhibits were introduced into evidence (*Resp.Exh.1 through Resp.Exh.8, Resp.PHExh.9 through Resp.PHExh.12; App.Exh.1 through App.Exh.3*). Based on the documents submitted and the testimony of the following witnesses:

Called by Somerville:

- Somerville City Council Vice President Mary Jo Rossetti

Called by the Appellant:

- Matthew Fairchild, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes the following facts:

Procedural Background

1. The Appellant, Matthew Fairchild, is a resident of Somerville, Massachusetts. After graduating from high school in 2002, he enlisted in the U.S. Marine Corps, served two tours in Iraq and was honorably discharged in 2006. He subsequently attended college and obtained a

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² A link to the recording provided to the parties should be shared with a certified transcriptionist if there is a judicial appeal of this decision, as the plaintiff in the judicial appeal would be obligated to supply the court with the stenographic or other written transcript of the hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

bachelor's degree with honors in construction management in 2010. He has held employment as a security supervisor, bartender/bouncer, and kick-boxing instructor. (*Resp.Exh.4; Testimony of Appellant*)

2. The Appellant took and passed the civil service examination for Municipal Police Officer administered by the Massachusetts Human Resources Division (HRD) on March 23, 2019. His name was placed fourth on the eligible list established on December 4, 2019. (*Stipulated Facts; Administrative Notice [HRD letter dated 6/14/2021]*)

3. On December 4, 2019, HRD issued Certification 06794 to appoint sixteen (16) Somerville Reserve Police Officers. (*Stipulated Facts; Administrative Notice [HRD letter dated 6/14/2021]*)

4. Mr. Fairchild was ranked first on Certification 06794 among those who signed the certification as willing to accept appointment. (*Stipulated Facts*)

5. Candidates were interviewed in February 2020 by a panel consisting of SPD Deputy Chief Steven Carrabino; the Mayor's (former) Chief of Staff; and Somerville's Director of Health and Human Services. (*Resp.PHExh.11; App Exh..3*).

6. During their interview, each candidate was asked:

“You and your partner have arrested a suspect for selling drugs. During the arrest procedure at the scene, you recovered illegal drugs and a large amount of money. While you are securing these items for submittal as evidence, you observe your partner place some of the money in his or her pocket. What would you do?”

(*App.Exh.3; Resp.PHExh.11; Testimony of Appellant*)

7. Mr. Fairchild responded:

“I would first have a quiet word with him . . . trying not to make a scene at the scene and tell him what I saw and advise him to take the correct course of action on both [sic] returning the money to the evidence. I’m not exactly certain about what evidentiary procedure would require . . . hopefully that could be it to prevent the problem from becoming a bigger problem. After that, I would definitely need to observe my fellow officer and probably suggest that he should either talk to a supervisor or that I may need to do that myself. Hopefully . . .by returned it to [sic] the scene, it doesn’t escalate it, it doesn’t specifically ruin his career or the case, but

anything that you do wrong in an investigation like that breaks down both the legal case that you would have against the suspect, the relationship the police would have with the community, and really what kind of trust you can place on that officer.”

(App.Exh.3; Resp.PHExh.11; Testimony of Appellant) (*emphasis added*)

8. When Dep. Chief Carrabino asked: “You said ‘may’ report it. May or would?”, Mr. Fairchild responded” “I would have to. I don’t currently know if that is an option, like if I were able to prevent it from becoming worse. I think my understanding is that I would have to.” (*emphasis added*) (App.Exh.3; Resp.PHExh.11; Testimony of Appellant)

9. Dep. Carrabino followed up: “What if [the officer] says, you know it was just a couple of dollars and I don’t know what I was thinking. . . . If you report it, I am going to be in trouble, you know, can’t we just let it go?” Mr. Fairchild responded: “I would definitely understand his position, but, hopefully, our supervisor would understand it better. . . I would really not have that discretion.” (*emphasis added*) (App.Exh.3; Resp.PHExh.11; Testimony of Appellant)

10. Dep. Chief Carrabino again asked: “So you’re saying ‘report it’? to which Mr. Fairchild responded: “. . . I don’t want to ruin anyone’s career, but, like, I don’t see how you can see someone take that kind of risk with the case, the public trust, and all that, and not have it get worked out by superiors.” (*emphasis added*) (App.Exh.3; Resp.PHExh.11; Testimony of Appellant)

11. On March 3, 2020, Mr. Fairchild, received a conditional offer of appointment from the Appointing Authority, Somerville Mayor Joseph Curtatone,, subject to “successful completion of the City’s hiring process for public safety applications specifically, passing drug, medical and psychological testing, and “confirmation of your appointment by the Somerville City Council.”. (Resp. PHExh.10)³

³Section 21 of Title 4 of the Somerville City Charter provided, in part: “The mayor may appoint, subject to confirmation by the [City Council], the following officers and boards . . . (iii) a chief of police [and] all other officers and members of the police department. . . .” (Resp.Exh.9)

12. On September 20, 2020, the Commission issued a Decision in O'Donnell v. City of Somerville, 33 MCSR 291 (2020) (O'Donnell), upholding a bypass brought by one of the candidates on Certification 06794 (ranked below Mr. Fairchild). (*Resp.Exh.7*)

13. The O'Donnell Decision contained references to the interview performance of certain other candidates, identified only anonymously. Two references appear in the Decision about the candidates' SPD interview responses to the question about the drug bust scenario described in Finding No. 6, one about Candidate R-4I and one about Candidate R-4B.

- A. Finding No. 27 in the O'Donnell Decision (at pp. 10-12) quoted excerpts from the SPD Interview responses to the drug bust scenario question by Candidate R-4I who said he would "tell [the officer] to put [the money] back. . . . If he refuses to, I'd be forced to take it to the shift commander", but, "if he puts it back the issue has been resolved . . . It's not the right thing to do" but it "doesn't pose a danger to the community, it's just dishonest."
- B. The Analysis section of the O'Donnell Decision (at pp.16-18) addresses O'Donnell's contention that he received disparate treatment, stating that "the Appellant argues that Candidate R-4B has a criminal record and that he gave a poor response to an interview question when he initially stated that he may report his partner if he witnessed the partner stealing money from the scene of a crime, then clarifying his answer only after Deputy Carrabino asked a follow-up question. . . .The Appellant's argument that Candidate R-4B was purportedly given an opportunity to clarify his answer and that the Appellant was not falls into the . . . category of micromanagement that is not the purview of the Commission. . . . I did not see any evidence that the Panelists' clarifications . . . [were] designed to give [Candidate R-4B] an unfair advantage over any other candidate . . ."⁴

(*Resp.Exh.7*) (*emphasis added*)

14. On January 20, 2021, the names of nine (9) candidates who had not been bypassed and who successfully completed the drug, medical and psychological testing were forwarded to the five-member Confirmation of Appointments and Personnel Matters Committee (Confirmation Committee). Mr. Fairchild's name was the top-ranked candidate on Certification 06794 referred to the Confirmation Committee. (*Resp.Exhs.3, 8 & 10; Testimony of Rossetti*)

⁴ It is not disputed that Candidate R-4B is Matthew Fairchild, the Appellant here.

15. The Confirmation Committee deferred its planned interviews of all nine candidates and decided to proceed to interview only the top three candidates. (*Resp.Exh.8; Testimony of Rossetti*)

16. On February 2, 2021, at 6:00 pm, the Confirmation Committee convened an open meeting (via remote videoconference) which was attended by the top three candidates and was audio-video recorded. Mr. Fairchild was interviewed first, followed by interviews with the one female candidate and then the other male candidates. (*Stipulated Facts; Resp.Exh.4*)

17. Confirmation Committee Chair Rosetti asked each candidate one question, i.e., the same question posed to them a year earlier by the SPD interview panel (see Finding 6, *supra*) about what they would do if they observed a fellow officer talking money found at a drug scene.

- Mr. Fairchild responded: “I [would] feel it necessary to report the partner for stealing evidence. I don’t believe a police officer can maintain the public trust” if he does not obey the same laws with which every citizen must comply.⁵
- The female candidate responded that she would “report [the officer] to a supervisor” so that he could be “held accountable.”
- The other male candidate said that he would “report my partner” for “breaking the rules” by taking something “that does not belong to him” which was “inappropriate.”

(*Resp.Exh.4*)

18. At the conclusion of initial interviews with the three candidates, at the request of all three, at 7:20 pm, the Confirmation Committee went into Executive Session to discuss protected personnel information and other private personal matters regarding each of the candidates. At the time, Executive Session meetings of the Confirmation Committee were not audio or video recorded and the only record of the meeting were minutes prepared from contemporaneous notes taken by a clerk, as amended by the committee members prior to a vote to approve the minutes.

(*Resp.Exhs.3 through 5; Testimony of Rossetti*)

⁵ The audio-video recording of the Confirmation Committee open meeting is sometimes not clearly audible, but I have paraphrased the inaudible portion of the responses as accurately as possible.

19. Each candidate was called into the Executive Session, one at a time, and asked three additional questions: (1) Do you have any felony or misdemeanor convictions in the last 10 years; (2) Do you have any “any criminal record whatsoever”; and (3) Did you answer the question in the drug bust scenario put by Chair Rossetti the same way that they first answered it during a prior interview. (*Resp.Exh.3; Testimony of Rossetti*)

20. Mr. Fairchild denied having any criminal convictions or criminal record and said he gave the Confirmation Committee the same answer he gave to the SPD interview panel, repeating that “he would ask his partner to return the money but he would still report him.” (*Resp.Exh.3*)

21. The other two candidates also denied having a criminal record and, in response to the whether they gave the same answers to the drug bust scenario question, the minutes reflect simply that “she did” and “he did.” (*Resp.Exh.3; Res.PHExh.12 [CONFIDENTIAL]*)⁶

22. After the third (the other male) candidate had answered those questions, one committee member started to ask an additional question of that candidate. “At any time did you say that when the officer took the money, you would tell him to put it back first, and if he didn’t, then you would report him?” Chair Rossetti stopped the member and called him out of order. (*Resp.Exh.3*)⁷

⁶ The names of the other two candidates, among other information, was redacted from the Executive Session minutes entered into evidence at the Commission hearing . I subsequently received unredacted copies which have been marked as *Resp.PHExh.12 [CONFIDENTIAL]* to preserve Somerville’s request to maintain the confidentiality of the Executive Session.

⁷ The Confirmation Committee did not have access to the recordings of SPD interviews. The committee member’s proposed question, however, is much closer to the second and third candidates’ response to the drug bust scenario at their SPD interview, not Mr. Fairchild’s response.

The female candidate told the SPD panel: “I would tell him not to do it” and then if he proceeds to do it or if he doesn’t do it . . . I would still report it” to a supervisor.”

The other male candidate’s response to the SPD interview panel was “I would tell him” he was a police officer and he cannot take evidence for his “personal use” . After being asked again: “What would you do?” he said he” would report him”.

(*App.Exh.3; Resp,PHExh11, quoted in Findings 7-10, supra; Administrative Notice [SPD Interviews of second and third candidates, filed in O’Donnell]*) (*emphasis added*)

23. With the candidate still in the room, the committee member then brought up O'Donnell. The candidate was excused, and the Somerville City Solicitor joined the meeting. The City Solicitor explained that if they asked different questions to this candidate that he had not put to the other candidates, that would be initiating “your own investigation” into “non-medical” issues which would be acting “with some level of peril”, especially after the candidate has already gone through his medical review. The committee member persisted, however, asserting, in effect, that he was convinced by what he read in O'Donnell — that at least one of the candidates had lied to the committee about having a criminal record and about giving consistent answers to the drug bust scenario. The member said he suspected the other male candidate (not Mr. Fairchild) was the liar, but wasn't sure. Eventually, the male candidate returned and the committee member stated to him: “I'd tell him to put it back first – if not I'd take it to the shift commander. Does that sound familiar to you”? The candidate said it sounded familiar, but he would still report it. (*Resp.Exh.3*)

24. At 8:36 pm, the committee returned to open session. (*Resp.Exhs.3 & 4; Testimony of Rossetti*)

25. Upon return to open session, Chair Rossetti moved to approve Mr. Fairchild's appointment. (*Resp.Exh.4; Testimony of Rossetti*)

26. One committee member then stated that, for reasons having nothing to do with Mr. Fairchild, he could not “in good conscience” approve any new appointments to the SPD due to his need for healing from the recent national racial trauma and on-going issues over reallocating resources from the SPD to the Social and Racial Justice Department (SRJ). (*Resp.Exh.4*)

27. The committee member who had raised the O'Donnell matter in Executive Session announced he, too, would not vote to approve any candidates because one of them lied to the committee and he did not know which one. He mentioned the O'Donnell decision, specifically its

references to the drug bust scenario question as well as the language on page 17 of O'Donnell that mentioned that one of the candidates had a “criminal record”. Chair Rossetti and the City Solicitor took issue with him, noting that the language the committee member cited only stated what that appellant had “argued”; thus, the statements were that appellant’s allegations, not necessarily statements of fact. The committee member persisted that he thought the statements could not be hearsay if they were included in the decision and a candidate’s criminal record is not hearsay, it’s a “fact”. He also said something to the effect: “To the two who did not lie, thank you, and the committee is doing its best to surround you with honest associates.” (*Resp.Exh.4; Testimony of Appellant & Rossetti*)

28. Upon hearing these committee members’ statements, Mr. Fairchild asked SPD Deputy Chief Ward, the SPD representative at the meeting, to inform Chair Rossetti that he wanted to return to Executive Session to clarify some issues. (*Resp.Exh.4; Testimony of Appellant & Rossetti*)

29. At 9:07, the Confirmation Committee returned to Executive Session. Mr. Fairchild appeared and said he believed he was the candidate mentioned in O'Donnell that the committee member was concerned about. A colloquy ensued about his purported “criminal record” and his responses to the drug bust scenario question at the SPD interview and before the Confirmation Committee. (*Resp.Exh.3; Testimony of Appellant & Rossetti*)

30. This Executive Session colloquy was not recorded. Chair Rossetti provide her best recollections, which was spotty in part. The Executive Session minutes were not entirely accurate and complete; they required substantial amendments before they were approved. Some of Chair Rossetti’s testimony and some of the statements in the minutes attributed to Mr. Fairchild are inconsistent with the recorded SPD interview which was played at the Commission hearing and which I have also reviewed several times. I find Mr. Fairchild’s testimony under oath at the

Commission hearing to be a credible and reliable account of the substance of the unrecorded colloquy. (*Resp.Exhs.3 & 5; Resp.PHExh.11; App.Exh.3; Testimony of Appellant & Rossetti*)

31. Mr. Fairchild explained to the Confirmation Committee that his first thought was about what he would say to his partner. He wasn't sure if the officer had created an irreparable evidentiary problem by putting the money in his pocket, so he told the partner to return the money at the scene, hoping that would solve the immediate evidentiary problem. He did also recall that he initially said he "may" report the fellow officer; then after being asked by SPD Deputy Chief Carrabino to clarify, he said he "would" report his partner. (*Testimony of Appellant*)

32. At the Commission hearing, Mr. Fairchild swore he was never untruthful. After filing this appeal and listening to the actual SPD interview recording (Findings 7-10, *supra*), Mr. Fairchild realized that he was mistaken in his recollection of his SPD interview response provided during the second Executive Session of the Confirmation Committee (a year after he had been interviewed by the SPD). Specifically, he never needed to be told about the "severity of the situation" before he clarified his answer. In fact, the responses he gave – to the SPD panel and to the Confirmation Committee – were remarkably consistent. When that portion of his SPD interview was played at the Commission hearing before Chair Rossetti, she agreed, in effect, that the actual interview tape confirmed these facts. (*App.Exh.3; Testimony of Appellant & Rossetti*)⁸

33. The mention of a "criminal record" particularly troubled Mr. Fairchild. While in the Marine Corps, he once received a "non-judicial" punishment. That incident was sixteen (16) years ago and

⁸ Mr. Fairchild was not the only candidate whose recollection about his answer to the drug bust scenario question failed him when pressed during the Executive Session. The other male candidate was also induced by faulty memory to admit to making a statement to the SPD panel that he did not actually make. In fact, the other male candidate's responses to the Confirmation Committee were, in fact, more inconsistent with his answer to the SPD than Mr. Fairchild's responses. See Finding Nos. 17 & 22, fnt.7 & 27, *supra*. (*Resp.PHExh.11 & Resp.PHExh.12 [CONFIDENTIAL]*)

was explicitly NOT considered a criminal matter by the military. He had truthfully responded “NO” when asked if he had a “criminal conviction” within the past 10 years, although he did disclose the infraction to the SPD during his application process. He did not believe he had been untruthful in denying a criminal record, but he wanted to clear up this matter so that a cloud would not hang over the other two candidates. (*Resp.Exh3; Resp.PHExh.11; Testimony of Appellant*)

34. The Confirmation Committee adjourned the second Executive Session at 9:57 pm and returned to open session. Upon return to open session, Chair Rossetti withdrew her motion to approve Mr. Fairchild’s appointment. The committee member who raised the truthfulness issue then moved not to approve Mr.Fairchild’s appointment, which motion was adopted unanimously. (*Resp.Exhs.3 & 4; Testimony of Rossetti*)

35. Thereafter, the Confirmation Committee confirmed the appointment of the other two candidates by a 3-2 vote. (*Resp.Exh.4; Testimony of Rossetti*)

36. By letter dated March 3, 2021, Mayor Curtatone informed Mr. Fairchild that:

Given the vote by Somerville City Council . . . you did not successfully complete the City's hiring process for the position of Reserve Police Officer and your name will not be added to the City of Somerville's Police Reserve List.

The . . . reasons for your non-confirmation in the attached letter.

To the extent this determination may be considered a bypass by the Civil Service Commission, you have the right to appeal this by filing an appeal . . . with the Civil Service Commission”

(*Resp.Exh.1*)

37. Attached to Mayor Curtatone’s letter was a letter dated March 2, 2021, signed by Chair Rossetti which stated:

Per Civil Service Certification #06794, you indicated that you would accept an appointment to the Somerville Police Department ("SPD") as a Reserve Police Officer. Following your appointment by Mayor Curtatone, the Somerville City Council, in accordance with authority vested to it under Title 4, Section 21 of the City's Charter, voted on February 25, 2021 not to confirm your appointment. Two (2) candidates who

placed below your name on the Certification were confirmed by the City Council to the position of Somerville Reserve Police Officer.

The grounds for the City Council's vote not to confirm your appointment to the position of Reserve Police Officer include the following:

You admitted that you were not initially truthful when responding to a question posed by the Council's Committee on Confirmations of Appointments and Personnel Matter ("Confirmations Committee") on February 2, 2021.

On February 2, 2021 before the Confirmations Committee, candidates were specifically asked to provide the same response . . . that they had previously provided to the [SPD] panel in February 2020. . . .*[Y]ou told the Confirmations Committee that you would immediately report your partner for stealing evidence.*

This, however, was a different response than you provided to . . . the [SPD] Panel. . . . [Y]ou initially told the Panel that you may report your partner if you witnessed him stealing money from the scene of a crime. Only after Deputy Carrabino posed a follow-up question, and reminded you of the seriousness of not reporting your partner, did you clarify your answer.

When confronted with this inconsistency, you admitted that you had provided the Confirmations Committee with a different answer than you had previously provided the Panel in February 2020. In doing so, you explained that you had initially misunderstood the question when it was first posed to you by the Panel; however, you were unable to explain why you were not truthful to the Confirmations Committee.

While it was honorable that you stepped forward on February 2, 2021 to acknowledge your inconsistent answer, you did so only after the Confirmations Committee suggested that one of the candidates was not being truthful

The two (2) lower-ranking candidates who were confirmed by the Council each provided consistent and truthful answers.

(Resp.Exh.2) (*emphasis added*)⁹

38. On May 5, 2021, this appeal to the Commission ensued. (*App.Exhs.1 & 2; Claim of Appeal*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge

⁹ Although Chair Rossetti’s letter did not mention Mr. Fairchild’s alleged “criminal record”, the committee member who raised that issue, in discussing amendments to the Executive Session minutes, made it clear that, although he was not concerned about the underlying “non-judicial” infraction, he was as equally troubled by Mr. Fairchild’s “lack of forthrightness” about his military record as he was about Mr. Fairchild’s responses to the drug bust scenario. (*Resp.Exh.5*)

and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996).

Original appointments of civil service employees are made from a list, called a “certification”, with names placed in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G. L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 461, 474-78 (2019); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . 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 Service Comm’n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See

also Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”).

The governing statute, G.L. c. 31, gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority's action” and it is not necessary that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission “. . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*,” then the occasion is appropriate for intervention by the commission.” Id. (*emphasis added*). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

ANALYSIS

The preponderance of the evidence establishes that Somerville did not have reasonable justification to bypass the Appellant, who was the highest ranked candidate on Certification 06794 for vacancies in the position of SPD Reserve Police Officer. The decision to bypass the Appellant was based on a flawed review process that was not consistent with basic merit principles. As a result of this improper conduct, Mr. Fairchild’s civil service rights were abridged, denied and prejudiced causing actual harm to his employment status. The Commission must exercise the full measure of its authority available to restore those rights and remediate the harm done to him.

Jurisdiction

Somerville argues that the Commission lacks jurisdiction over Mr. Fairchild’s appeal because he was not “bypassed” but “appointed” by the Appointing Authority (the Mayor) and the

Commission is not authorized to question the confirmation process conducted by the Somerville City Council under its authority granted by the Somerville City Charter and, arguably, independent of civil service law. This argument lacks merit.

First, Somerville cites no binding or persuasive authority that supports such a patently absurd result—that the Commission cannot address violations of civil service law committed by the confirming body, especially an inherently political legislative body such as a committee of an elected City Council, because that body acts under authority of a municipal charter that purportedly overrides a civil service statute. See generally Desrosiers v. Governor, 486 Mass. 369, 376-79 (2020), cert. den., 142 S.Ct. 83 (2021) citing Commonwealth v. Kelly, 470 Mass. 682, 688-89 (2015) (statutes are to be construed “as a whole” to effect the intent of the Legislature, gleaned from the “ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished to the end that the purpose of its framers may be effectuated.”)

The Commission has already concluded as much. See Re: Request for Investigation Against City of Somerville, CSC No. I-18-018 (June 30, 2022) (declining to open an investigation into the failure to confirm a police sergeant’s promotional appointment but noting that the Commission retained jurisdiction to adjudicate a pending companion “bypass appeal” in which the Appellant in that appeal alleges that the failure to confirm his promotion appointment was a violation of the sergeant’s civil service rights). See also G.L. c. 31, § 2(a); St. 1976, c. 534, § 1, as amended by St. 1993, c. 310 (independent of its authority to review “bypass” cases, the Commission has broad statutory discretion to redress alleged misconduct by any person responsible for violations of the rights of civil service employees or applicants for civil service appointments and promotions, either on request or on its own initiative).

Second, it bears notice that it was the Mayor, not the City Council, whose action on March 3, 2021, formally nullified Mr. Fairchild's conditional offer of appointment and forced the SPD to process the appointment of two lower ranked candidates, which is the basis for Mr. Fairchild's appeal that he was aggrieved. While the "reasons" for the bypass in this instance were not the Mayor's choice, but rather flowed from an arbitrary and capricious decision of the City Council with which the Mayor did not agree, that technical distinction does not immunize this result from review by the Commission brought by a party who has a bona-fide basis to claim to be aggrieved by a violation of civil service law.

Untruthfulness

Law enforcement officers are vested with considerable power and discretion and must be held to a high standard of conduct. See, e.g., Police Comm'r v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986). The duty imposed upon a police officer to be truthful is one of the most serious obligations he or she assumes. "[P]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer." Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997) ("The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer.... It requires no strength of character to speak the truth when it does not hurt.") See, e.g., Desmond v. Town of West Bridgewater, 27 MCSR 645 (2014); Ung v. Lowell Police Dep't, 24 MCRS 567 (2011); Gallo v. City of Lynn, 23 MCSR 348 (2010). See also Minoie v. Town of Braintree, 27 MCSR 216 (2014); Everton v. Town of Falmouth, 26 MCSR 488 (2013) and cases cited, aff'd, SUCV13-4382 (2014); Gonsalves v. Town of Falmouth and cases cited, 25

MCSR 231 (2012), aff'd, SUCV12-2655 (2014); Keating v. Town of Marblehead, 24 MCSR 334 (2011) and cases cited.

Providing incorrect or incomplete information during the hiring process does not automatically equate to untruthfulness. “[L]abeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and [informed] review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety.” Kerr v. Boston Police Dep’t, 31 MCSR 35 (2018), citing Morley v. Boston Police Department, 29 MCSR 456 (2016). Moreover, a bypass letter is available for public inspection upon request, so the consequences to an applicant of charging him or her with untruthfulness can extend beyond the application process initially involved. See G.L. c. 31, § 27, ¶ 2. Thus, the serious consequences that flow from a finding that a law enforcement officer or applicant has violated the duty of truthfulness require that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. See, e.g., Boyd v. City of New Bedford, 29 MCSR 471 (2016); Morley v. Boston Police Dep’t, 29 MCSR 456 (2016); Lucas v. Boston Police Dep’t, 25 MCSR 420 (2012) (mistake about appellant’s characterization of past medical history).

The Confirmation Committee’s conclusion that Mr. Fairchild was untruthful in his response to questions it asked him about the drug bust scenario and his criminal record are both unsubstantiated by the evidence and fall woefully short of having been based on a properly vetted, reasonably thorough review of the relevant facts.

Mr. Fairchild’s responses to the drug bust scenario question when posed to him by the Confirmation Committee were substantially the same as the answers that he gave to the SPD panel – he would counsel his colleague to put the money back and “would have to report” his misconduct

to a superior. I see no significant difference in the language he used in responding to the Confirmation Committee and to the SPD. He provided the SPD panel more detail than most candidates to explain his thought process, recognized the important evidentiary issue for which he did not have answers (apparently not realizing that he had correctly identified what is known as a “chain of custody” problem), and provided the most specific and eloquent explanation of all the candidates as to why the colleague’s violation was a serious breach of the public trust vested in police officers and as such required that the violation could not go unreported.

Mr. Fairchild’s only shortcoming in his subsequent responses to the *Confirmation Committee* was his faulty memory of what had actually been said during his SPD interview one year earlier. The recorded interview tape confirmed that he clearly expressed to the SPD, without “counselling” or being apprised of the severity of the misconduct, that after counseling his colleague, he “*would*” report him to a supervisor. Contrary to what the Confirmation Committee letter stated, he apologized for the confusion, but he never believed or “admitted” that he had been “untruthful”. His honest, but mistaken memory of events that had occurred more than a year earlier, falls woefully short of supporting a potentially career-ending charge of untruthfulness.

As to the “criminal record”, Mr. Fairchild should be commended for coming forward to clear up this matter for the benefit of all three candidates. He correctly understood that a sixteen-year-old military discipline was nothing that required disclosure as a “criminal record”. No basis existed to accuse him of a “lack of forthrightness” by his initial failure to mention it to the Confirmation Committee. In fact, to even ask the question was extremely problematic. See G.L. c. 151B, § 4(9) & 4(9-1/2); Kodhimaj v. Department of Correction, 32 MCSR 377 (2019), citing Kerr v. Boston Police Dep’t, 31 MCSR 25 (2018) (broad questions designed to obtain information from an

applicant about interactions with law enforcement, beyond what is provided for under Chapter 151B, are not permissible).

In sum, the preponderance of the evidence establishes that Mr. Fairchild was not dishonest or untruthful in any of his responses to the Confirmation Committee and the statements to the contrary in Chair Rossetti's March 2, 2021 letter are unfounded and unsupported by the evidence.¹⁰

Other Issues

The substantive errors described above, alone, require that the Commission must allow this appeal. In addition, however, I take notice of several other issues that raise red flags which need to be given appropriate attention in future consideration of Mr. Fairchild or any other duly qualified candidate similarly situated.

First, the refusal to confirm an innocent candidate for political reasons unrelated to that candidate's fitness for appointment calls for careful scrutiny. The Confirmation Committee should take care that, in exercising its oversight role to confirm appointments under the Somerville municipal charter, its decision will hew to "neutrally applied public policy" and not stray into the type of "arbitrary and capricious" behavior or carry "overtones of political control or objectives unrelated to merit standards" prohibited by basic merit principles as well as basic rules of common decency. G.L. c. 31, § 1. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Serv. Comm'n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996). See also, Agis v. Howard Johnson Co., 371 Mass.

¹⁰ I also take administrative notice that the Peace Officer Standards and Training Commission (POST), as part of its authority under recently enacted G.L. c. 6E to certify police officers, is currently requiring Police Chiefs to indicate whether an officer is "of good moral character and fit for employment in law enforcement." To ensure clarity, there is nothing in the record before me that would support a conclusion that Mr. Fairchild does not meet this standard.

140 (1976) (conduct of manager who sought to uncover a thief by firing his employees in alphabetical order until culprit was identified held liable to innocently terminated waitress for infliction of emotional distress found to be extreme and outrageous, beyond all possible bounds of decency, and utterly intolerable in a civilized community)

Second, the authority of the Confirmation Committee to inquire into “non-medical issues” in its role as confirming the appointment of a qualified candidate who had received a bona-fide conditional offer, also calls for a careful balance of the oversight duty of the committee under the Somerville municipal charter with the statutory duties imposed by law. See G.Lc.151B, §4(16); MCAD Guidelines. Employment Discriminations on the Basis of Handicap, at V(A), <https://www.mass.gov/doc/mcad-guidelines-on-disability-discrimination-in-employment/download?ga=2.172354080.2002105299.1658605764-1012015416.1615982009>(“An employer must make a conditional job offer before requiring a medical examination A conditional job offer is an offer of employment to a job applicant which is contingent upon the satisfactory results of a medical examination. . . . Prior to making a conditional job offer, the employer should have evaluated all relevant non-medical information.”). See also Boston Police Dep’t v. Kavaleski (2014), citing Leonel v. American Airlines, Inc., 400 F. 3d 702, 708 (9th Cir. 2005); Rogers v. Boston Police Dep’t, 33 MCSR 244 (2020); Morley v. Boston Police Dep’t, 29 MCSR 456 (2016). The lines are less than clear on this subject, but the Commission considers the privacy of a candidate’s personal, medical history a matter of high importance and expects appointing authorities to do the same.

CONCLUSION

For all of the above stated reasons, the bypass appeal of Matthew Fairchild, under Docket No. G1-21-097, is allowed.

Relief to Be Granted

I have considered the form of relief that must be granted to the Appellant. The Commission's power of equitable relief in bypass appeals is derived primarily from St. 1976, c. 534, § 1, as amended by St. 1993, c. 310 (Chapter 310), which states, in relevant part: "If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights ...". The most common type of relief granted by the Commission pursuant to Chapter 310 in a bypass appeal is to order the placement of the candidate's name at the top of the next Certification to ensure reconsideration.

The Commission, however, has broad discretion regarding the appropriate remedial relief to be granted for violation of civil service law, based on the circumstances presented in each appeal. See Boston Police Dep't v. Kavaleski, 463 Mass. 680 (2012) (nothing in the HRD rules requires further [psychological] screening after BPD candidate had successfully appealed a psychological bypass decision); Mulhern v. Civil Service Comm'n, 57 Mass. App. Ct. 920 (2003) ("The remedy to be accorded a plaintiff is a matter within the commission's discretion and will rarely be overturned"), citing Bielawski v. Personnel Administrator, 422 Mass. 459, 464 n.1, 465 (1996) and Thomas v. Civil Serv. Comm'n, 48 Mass. App. Ct. 446, 451 (2000). See also Dunn v. Boston Police Dep't, 27 MCSR 497, on reconsideration, 27 MCSR 602 (2014) (reviving certification and ordering candidate whose conditional offer was wrongfully revoked to be processed for enrollment into the next available police academy).

Here, I have taken into account (1) the undisputed evidence that the SPD and Mayor Curtatone found Mr. Fairchild, the top-ranked candidate on the eligible list, to be a well-qualified candidate with strong potential to serve as a Somerville Police Officer, a conclusion with which (at least a

majority of) the Confirmation Committee initially had expressed agreement until their judgment was tainted as described in this Decision; (2) but for the flawed process that prevented Mr. Fairchild from confirmation by the City Council, Mr. Fairchild successfully satisfied all conditions precedent set for in the conditional offer of employment extended to him; and (3) the special circumstances associated with appointments to public safety civil service reserve lists and subsequent seniority when appointed from those lists to permanent full-time public safety appointments pursuant to G.L. c. 31, § 60, as construed in Ragucci v. Town of Saugus, 21 MCSR 667 (2008). See also Fairbanks v. Town of Oxford, 30 MCSR 38 (2017); Lombardozi v. Town of Leicester, 287 MCSR 298 (2014).

Order of Relief

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby ORDERS that the Massachusetts Human Resources Division and/or the City of Somerville, in its delegated capacity, take the following actions:

A. Place the name of Matthew Fairchild at the top of all current and future certifications for appointment to reserve and/or permanent, full-time **police officer** with the Somerville **Police** Department (**SPD**) so that he is first in line for appointment to the next available vacancy in a position as a permanent, full-time SPD Police Officer until he is so appointed or bypassed.

B. Mr. Fairchild shall not be bypassed for appointment to the position of a reserve and/or permanent full-time SPD Police Officer for any of the reasons found insufficient in this Decision or based on any other facts that were known or reasonably should have been known at the time of his bypass in February 2021.

C. If Mr. Fairchild is bypassed for appointment as a permanent, full-time SPD Police Officer, no future appointment of any other person to that position shall become effective until such time as: (1) Somerville has provided Mr. Fairchild with sound and sufficient reasons for the bypass; (2) Mr. Fairchild

has the opportunity to file an appeal with the Commission; and (3) the Commission has issued a final decision related to the bypass.

D. Mr. Fairchild shall be given a retroactive civil service seniority date that is the same civil service seniority date he would have received had his appointment to the position of an SPD Reserve Police Officer been confirmed in February 2021 as the top ranked candidate on Certification 06794.]

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair, Stein & Tivnan, Commissioners) on August 11, 2022.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

John J. Greene, Esq. (for Appellant)

Timothy D. Zessin, Esq. (for Respondent)

Jason Piques, Esq. (for Respondent)

Michele Heffernan, Esq. (HRD)

Regina Caggiano, (HRD)