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COMMISSION OF MASS  
CIVIL SERVICE COMMISSION

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NUIAS DAVEIGA vs. CIVIL SERVICE COMMISSION & another.<sup>1</sup>

1 Boston Police Department

16-P-723

## APPEALS COURT OF MASSACHUSETTS

2017 Mass. App. Unpub. LEXIS 359

April 6, 2017, Entered

**NOTICE:** SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28*, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

**JUDGES:** Grainger, Massing & Desmond, JJ.

**OPINION***MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

The plaintiff, Nuias DaVeiga, appeals from a Superior Court judgment on the pleadings affirming the Civil Service Commission's (commission's) ruling that the Boston police department (department) was justified in bypassing DaVeiga for a police officer position. We affirm.

We recite the relevant procedural posture and the facts as the hearing commissioner found them, reserving some additional facts for further discussion. DaVeiga's

results on the civil service examination qualified him for appointment as a Boston police officer, and he submitted a student officer application to the department.<sup>2</sup> The department conducted a customary background investigation that raised several concerns regarding DaVeiga's candidacy: (1) his separation from employment with the Essex County house of correction, (2) his untruthfulness regarding the reason for his separation, (3) his criminal record, and (4) his treatment of women, gathered from testimonials by his neighbors and former supervisor. Due to these concerns, the department decided to bypass DaVeiga for the position. DaVeiga appealed, and after a full hearing, the commission issued a unanimous decision denying DaVeiga's appeal. It ruled that the department conducted an impartial and thorough review, and was reasonably justified in its decision to bypass DaVeiga.

<sup>2</sup> DaVeiga had previously been bypassed for the same position in 2011 and 2012.

Pursuant to *G. L. c. 31, § 44*, and *G. L. c. 30A, § 14*, DaVeiga brought proceedings for judicial review of the commission's decision in the Superior Court, where it was affirmed. DaVeiga now seeks our review. We "inquire whether the commission's decision was legally tenable and supported by substantial evidence on the record as a whole."<sup>3</sup> *Gloucester v. Civil Serv. Commn.*, 408 Mass. 292, 297, 557 N.E.2d 1141 (1990) (quotation omitted).

<sup>3</sup> A candidate may be bypassed if there is "reasonable justification" to do so. *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 241, 850 N.E.2d 533 (2006). The department bears "the

burden of establishing by a preponderance of the evidence that it had such a reason." *City of Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 187, 936 N.E.2d 7 (2010).

DaVeiga argues that the Superior Court judge erred in affirming the commission's decision, that the department failed to show by a preponderance of the evidence that DaVeiga was untruthful on his application, and failed to show that he had a negative work history at the Essex County sheriff's department. We disagree. The commission carefully considered both DaVeiga's testimony and the version of events conveyed to it by the Essex County house of correction director of human resources and by the then Commissioner of Public Safety. The commission ruled that the department's findings, based on the testimony and other evidence, were untainted by personal or political bias and, accordingly, upheld the bypass.

DaVeiga further claims that the commission failed to address the fact that the department placed undue weight on his prior criminal charges of assault and battery and indecent assault and battery in 1998, both of which were continued without findings and ultimately dismissed.<sup>4</sup> Although these charges occurred over ten years prior to DaVeiga's employment application, "[p]rior misconduct has frequently been a ground for not hiring ... a police officer." *City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 305, 682 N.E.2d 923 (1997). The department's consideration of DaVeiga's misconduct was based not only on his criminal offender record information (CORI), but included inquiries to the college and the Newton Division of the District Court Department for records and a personal interview with DaVeiga.<sup>5</sup> Furthermore, the commission determined that DaVeiga's CORI report was but one factor among many that resulted in his bypass.

4 The charges stem from an altercation that DaVeiga had with his then college roommate. He admitted to sufficient facts on both charges and served probation on the indecent assault and bat-

tery charge. The assault and battery charge was dismissed after a hearing.

5 The department also attempted to obtain information about the incident from the college DaVeiga attended, but the records had been lost.

Finally, DaVeiga claims that he was denied due process when the commission allowed testimony of an off-the-record comment from an unidentified source at the hearing; the source commented that DaVeiga was hostile to women. However, as DaVeiga has no right to prospective employment, his due process claim is unavailing. See *Callanan v. Personnel Administrator for the Commonwealth*, 400 Mass. 597, 601, 511 N.E.2d 525 (1987) ("[I]ndividuals do not have a vested right in their particular positions on the eligibility list once it is established"). Without a legitimate property interest, he cannot make a showing of a constitutionally inadequate process.<sup>6</sup> See *Costello v. School Comm. of Chelsea*, 27 Mass. App. Ct. 822, 828, 544 N.E.2d 594 (1989). The department based its conclusion that DaVeiga was hostile to women on the testimony of DaVeiga himself and of three other individuals, one of whom was DaVeiga's supervisor.<sup>7</sup> The commission properly determined that the department had met its burden by a preponderance of the evidence.

6 He was, however, afforded due process in appealing his bypass in the form of a full hearing in front of the commission.

7 DaVeiga stated he did not believe his supervisor had any personal animus against him that would have caused the supervisor to make false allegations.

In sum, the judge did not err in affirming the commission's decision.

*Judgment affirmed.*

By the Court (Grainger, Massing & Desmond, JJ.<sup>8</sup>),

8 The panelists are listed in order of seniority.

Entered: April 6, 2017.