

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

CARLOS APONTE,
Appellant

v.

Docket No. G-04-505

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant, Carlos Aponte (hereafter "Aponte" or "Appellant") appealed the decision of the Appointing Authority, Boston Police Department (the "Department" or "Appointing Authority"), bypassing him for appointment as a Boston Police Officer. The Appeal was timely filed. A hearing was held on July 7 and August 24, 2005 in the offices of the Civil Service Commission.

Three (3) audiotapes were made of the hearing. Witnesses were ordered sequestered. Proposed decisions were submitted by the parties following the hearing, as instructed.

FINDINGS OF FACT:

Based on the documents entered into evidence (Joint Exhibits 1-8 and a Stipulation of Fact) and the testimony of the Appellant, former Human Resources Director Edward Callahan, Detective Thomas Famolare, Sergeant Detective Catherine Doherty, Commander, Recruit Investigations Unit, and Deputy Superintendent Marie Donahue, and the Stipulations of Fact, I make the following findings of facts:

1. On or about April 29, 2004, the Appellant filed a Recruit Candidate Application.
(Stipulated Fact)
2. On June 22, 1996, the Appellant was married to Nayrobi M. Perez, in Boston.
(Stipulated Fact)
3. During the time they were dating, Ms. Perez, a native of Panama illegally in this country, raised concerns with the Appellant that she might not be able to remain in the country and mentioned marriage to him as a way she would be able to stay. The Appellant told Ms. Perez that he loved her, wanted to be with her, wanted her to stay in the country and asked her to marry him. (Testimony of Aponte)
4. Shortly after they married, the Appellant moved out due to frustration over a living arrangement that resulted in his sleeping on a couch while his wife shared a bedroom with her sister. At some point, Ms. Perez moved to her own apartment

in Somerville but, despite these moves, the married couple continued to see each other. (Testimony of Aponte)

5. At some point in 1998, Ms. Perez informed the Appellant that she wanted to divorce. The Appellant testified that Ms. Perez said that she would take care of obtaining the divorce. (Testimony of Aponte)
6. At the time the Appellant filed his 2004 Recruit Candidate Application, he checked “Married” to indicate his marital status. The Appellant checked “no” in the box inquiring whether he had children. The Appellant’s original application, produced by the Department, showed that the box for “married” was marked with an X. The Appellant testified that he did not put an X in this box and produced a copy of the application he had made before submitting the original which did not have an X. I find that the applications presented are materially the same in every way except for this inconsistent mark indicating marital status. (Exhibits 2 and 8)
7. The Appellant had previously submitted an Application for Appointment in 2000, and a Notice of By-Pass for Appointment as a Boston Police Officer based on that application was issued on March 26, 2001. (Stipulated Fact)
8. On his 2000 application, the Appellant indicated that he was married. The Appellant further placed the name of his wife, “Nayrobi Perez-Aponte” in the section reserved to indicate “Wife/Husband” in the “Relatives” area of the application. In the interview concerning his first application, the Department did not question him about his marital status. (Exhibit 3 and Testimony of Appellant)
9. I find that the Appellant left the “Wife/Husband” section blank in the “Relatives” area of his 2004 application. I make the conclusion that, regardless of the

inconsistent marking in the “Marital Status” section of both 2004 applications submitted to the Commission at hearing, the fact that the Appellant marked the “Wife/Husband” section in 2000 but left it blank in 2004 raised questions about his marital status that the Department’s Recruit Investigations Unit legitimately needed to pursue. (Exhibits 2, 3 & 8)

10. The Appellant appealed the decision of the Human Resources Division (“HRD”) accepting the reasons proffered by the Appointing Authority for by-pass in March 2001, and a hearing was held before this Commission on September 15, 2003. Aponte v. Boston Police Department, G-01-1072. By decision rendered by Commissioner Daniel M. Henderson, Esq. and accepted by the Commission on July 22, 2004, it was found that the Appellant was improperly by-passed for appointment, his appeal allowed and the Appointing Authority was directed to place the Appellant’s name at the top of the present or next certification until such time as he had been considered once for original appointment to the position of Police Officer. (Stipulated Fact)
11. On March 29, 2006, the Suffolk Superior Court (Henry, J.) reversed the Commission’s decision in Aponte G-01-1072. (Suffolk Superior Court Civil Action No. 04-3925)
12. Detective Thomas Famolare, of the Recruit Investigations Unit, was charged with performing a background check on the Appellant in conjunction with his 2004 application. He had access to and reviewed both the 2000 and 2004 applications completed by the Appellant and was aware that the Appellant had previously been bypassed. (Testimony of Famolare)

13. Detective Famolare testified that he was concerned about the Appellant not having completely filled in information on the form about his marital status on his 2004 application. Sergeant Detective Doherty credibly testified that life relationships areas on the form are required to be completed by all applicants due to domestic violence concerns. The Appellant had not completed this form because he failed to furnish certain information about Ms. Perez. (Testimony of Famolare and Doherty and Exhibit 2)
14. Detective Famolare reviewed the Appellant's 2000 application and contacted him about the discrepancy between that and the 2004 application. (Testimony of Famolare)
15. On August 23, 2004, the Appellant faxed information to Detective Famolare to clarify why he answered the way he did on the question of marriage on the application. He wrote, "While completing the initial application, on the question of marriage, I answered 'yes' because at the time I was married. On the second application, on the question of marriage I answered 'no' because I mistakenly believed that my wife took legal action to dissolve the marriage. At this point, I am unable to confirm whether these steps were taken. My reason for this answer was due to my belief that she followed through on her statement that she would handle the divorce accordingly. Please be advised that, now realizing she may not have taken these steps, I will initiate divorce proceedings in Suffolk Probate and Family Court. I am also including a copy of the marriage certificate." (Exhibit 4)
16. Edward Callahan, former Human Resources Director of the Department, was concerned that the Appellant filed conflicting information about his marriage and

recommended the Department conduct a discretionary hearing. (Testimony of Callahan)

17. The purpose of a discretionary hearing is for the Department to clarify issues that it has concerns about and that cannot be clarified through its basic investigation of a recruit. It consists of a videotaped, in-depth interview by the Department with an applicant on these issues. A discretionary hearing is not ordered for every candidate and does not necessarily result in an applicant being bypassed. (Testimony of Famolare and Doherty)

18. The Appellant was ordered to attend a discretionary hearing due to the Department's concerns with his marital status. The hearing was attended by the Appellant, Detective Famolare, Sergeant Detective Doherty and Deputy Superintendent Donohue. Deputy Superintendent Donohue testified that a discretionary hearing is a "casual question and answer session". I find that, after viewing the video tape of the discretionary hearing, it was informal and that the Appellant appeared relaxed and at ease while answering the various questions. (Testimony of Famolare, Doherty and Donohue and Exhibit 5)

19. Detective Famolare testified that he thought the Appellant was untruthful at the discretionary hearing because of inconsistent answers. (Testimony of Famolare)

20. Sergeant Detective Doherty thought that the Appellant was providing confusing and evasive answers during the discretionary hearing, particularly with regard to where the Appellant lived when he was married. She concluded that the Appellant was not telling the truth. (Testimony of Doherty)

21. Deputy Superintendent Donohue testified that the Appellant's answers were vague and evasive at the discretionary hearing and that she had concerns about the Appellant's statement that he was unable to contact Ms. Perez. (Testimony of Donohue)
22. The final decision to bypass the Appellant was made collectively and unanimously at a so-called "round table" meeting which is an internal gathering of personnel decision makers for the Department. (Testimony of Donohue)
23. Callahan stated that he reached the conclusion that the Appellant might possibly be involved in a sham marriage but was not compelled to notify Immigration officials. He was not aware of any decision by any one in the Department to contact Immigration officials. (Testimony of Callahan)
24. On August 23, 2004, Callahan wrote to the HRD requesting that it approve the Department's reasons for bypass and removal from the certification list based upon the Appellant's untruthfulness regarding his marriage to Ms. Perez and the fact that he married her in an effort for her to gain citizenship in violation of the Immigration and Nationality Act. Callahan requested that the Appellant be removed from the eligible list. (Exhibit 1)
25. On or about August 23, 2004, a Notice of By-Pass for Appointment as a Boston Police Officer was sent to the Appellant. (Stipulated Fact)
26. On September 3, 2004, Detective Famolare submitted the summary of his background investigation to Deputy Superintendent Donahue through Sergeant Detective Doherty. In it, he expressed concerns with the Appellant's marital status based on having spoken with the Appellant at the discretionary hearing. He

wrote that the information from these interviews and a closer examination of the Appellant's application called into question his integrity and suitability for employment as a Boston Police Officer. (Exhibit 6)

27. The Appellant was a humble, polite young man who appeared nervous but answered questions appropriately. However, I cannot credit his testimony that he did not intend to conceal or misrepresent his marital status and that he answered "no" as to his marital status on his 2004 application because he believed Ms. Perez had taken steps to obtain a divorce and not to engage in subterfuge of the application process. The evidence, particularly the videotaped discretionary hearing which was played and commented upon at the Commission's hearing, demonstrated that once the Department undertook questioning the Appellant regarding his marital status, the Appellant appeared to be struggling with his responses. (Demeanor of Appellant)

28. During the discretionary interview, the Appellant gave conflicting answers to questions about basic relationship issues including, most disturbingly, whether or not he was even still married. Detective Famolare testified under cross-examination that it was his understanding that divorces can occur without the active participation of both parties. However, I find that it is too much of a stretch of credulity to believe that a divorce can occur without the *knowledge* of both parties. I gained the sincere impression from the Appellant that a flame still burned in his heart for Ms. Perez. This was strengthened by the fact that he still had not filed for divorce as of the date of this hearing, despite his August 23, 2004 letter stating that he would do so. (Demeanor of Appellant and Exhibit 4)

29. Three Boston Police Department professional investigators - with well over fifty (50) years of experience among them - were all troubled by the fact that the Appellant's discretionary hearing interview became longer and longer as he provided more and more conflicting, confusing and vague answers. Each interviewer expressed that their misgivings and subsequent negative recommendations were based largely on the Appellant's lack of candor regarding his personal relationship with Ms. Perez. I find that, while the Appellant admitted to going along with the marriage to Ms. Perez so she could remain in the United States, this flawed relationship, and the subterfuge in which he engaged to perpetuate it, was ultimately his undoing in his attempt to become a Boston Police Officer, a position rooted in trust and integrity. (Testimony of Famolare, Doherty and Donohue and Demeanor of Appellant)

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). See 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." Id. 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 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, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

In reviewing a bypass for original appointment under c. 31, § 2(b), the Commission must determine whether a preponderance of the evidence demonstrates that the reasons for the bypass submitted by the Appointing Authority and approved by HRD in accordance with c. 31, § 27 "were, more probably than not, sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315, 320-321 (1991).

An Appointing Authority enjoys broad discretion in selecting an eligible candidate for appointment. Goldblatt v. Corporate Counsel of Boston, 360 Mass. 660, 666 (1971); Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987). "It is not within the authority of the commission . . . to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." *See* City of Cambridge at 304 (1997). "In the task of selecting

public employees of skill and integrity, appointing authorities are invested with broad discretion.” Id. at 304-05.

Here, the reason for the Appellant’s being bypassed centers on the Department using the Appellant’s misrepresentation of his marital status as justification to bypass him for appointment as a Boston Police Officer. Specifically, the reason offered by the Department was that the Appellant provided conflicting and untruthful information regarding his marriage to Ms. Perez.

The Department has sustained its burden of proof as its action of bypassing the Appellant was based on a preponderance of the credible evidence. The Appellant failed to offer credible testimony that he did not intend to conceal or misrepresent his marital status, and that he answered “no” as to his marital status because he believed Ms. Perez had taken steps to obtain a divorce. The evidence, particularly the videotaped discretionary hearing, demonstrated that once the Department undertook questioning the Appellant regarding his marital status, he was less and less forthcoming in terms of the information he divulged.

Moreover, the Appointing Authority did establish that the Appellant intended to withhold information regarding his marital status and that he filed conflicting and untruthful information in order to perpetuate what can only be characterized as a sham marriage.

Based on the reasons stated herein, the Department established that it was reasonably justified in exercising its discretionary power in bypassing the Appellant for appointment to the position of permanent full time police officer as its actions were supported by a preponderance of the credible evidence presented in this matter. Therefore, the appeal on Docket No. G1-05-505 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Guerin, Taylor and Marquis, Commissioners) on September 20, 2007.

A True copy. Attest:

Commissioner

A motion for reconsideration may be filed by either party 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 GL c. 30A, s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to GL c. 31, s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under GL 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:

John A. Morrissey, Esq.
Boston Police Department Office of the Legal Counsel
John Marra, Esq.

