

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

CIVIL SERVICE COMMISSION

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

SEAN BELL

Appellant,

G-1-07-200

v.

BERVERLY POLICE

DEPARTMENT,

Respondent

Appellant's Attorney:

Jason R. Powalisz, Esq.
McDonald, Lamond & Canzoneri
Cordaville Office Center
153 Cordaville Road, Suite 210
Southborough, MA 01772-1834
(508) 485-6600

Respondent's Attorney:

Robert A. Munroe, Esq.
Assistant City Solicitor
191 Cabot Street
Beverly, MA 01915
(978) 921-6035

Commissioner:

John E. Taylor

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Sean Bell (hereafter "Bell" or "Appellant"), is appealing the action taken by the Appointing Authority, the City of Beverly Police Department (hereafter "the Department") to bypass him for appointment to the position of permanent reserve officer in the Department. The appeal was timely filed. A hearing was held on February 7, 2008 at the offices of the Civil Service

Commission. As no written notice was received from either party, the hearing was declared private. Two audiotapes were made of the hearing.

FINDINGS OF FACT:

Twelve (12) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of: Appellant, (Retired) Police Chief John Cassola, Captain John DiVincenzo, Henry McLaughlin (Security Manager of Northeast Health System, Inc.) and Greg Buckless (Information Technologies Supervisor of Northeast Health System, Inc.) I make the following findings of fact:

1. Appellant was employed as a full time security officer at Beverly Hospital (the Hospital) from approximately 2002 through his termination in June 2006. As a night security officer he performed safety patrols, patient watch, and other general security duties. (Testimony of Appellant)
2. Bell took the civil service exam in May 2005 and was thereafter placed on the eligible list. (Testimony of Appellant)
3. At a June 13, 2006 meeting with multiple Hospital administrators included Security Director Hank McLaughlin and Vice President of Human Resources, Althea Lyons, Appellant was informed that there had been an illegal access of private voicemails. He denied any involvement with improper voicemail access. The Hospital did not show Appellant any pictures, documents or evidence indicating his alleged involvement with voicemail access. As a result of this meeting, Appellant was suspended without pay. (Ex. 5 and testimony of Appellant)

4. Two or three days later, Appellant was contacted by a Hospital Human Resources employee and informed he had been terminated for intentionally accessing the private voicemail system of employees, and should come to the Hospital to pick up a paycheck and other information. (Exs. 5 and 6)¹
5. Appellant testified that he did not receive a termination letter but understood that he had been terminated because of the prior accusation regarding voicemail access. (Testimony of Appellant)
6. In 2006, the Appointing Authority sought to hire multiple permanent Reserve Officers for the Department. Chief John Cassola, Police Chief at that time and since retired, tasked Captain John DiVincenzo with conducting background investigations of all eligible candidates. DiVincenzo, a 26-year veteran of the Department and a Captain since approximately 2001, had previously overseen background investigations for police officer candidates. (Testimony of DiVincenzo)
7. While at the Hospital in late August 2006 investigating a larceny unrelated to Appellant or the appointment of any other candidate, DiVincenzo was approached by Hospital legal counsel Will Donaldson. Donaldson told DiVincenzo that “they were disappointed [the department] was going to appoint Bell” because they had fired him from his position as a security officer at Beverly Hospital for accessing “email/voice systems.”² (Exhibit 8)

¹ Ex-5 is dated June 14, 2006 and Ex-6 is dated June 15, 2006. Both are termination letters communicating roughly the same thing.

² At a few instances during hearing witnesses referred to access of “emails” instead of or in addition to voicemails. Any reference to emails is in error.

8. DiVincenzo testified that he asked the Hospital for “substantial proof” of the allegations. He stated that when he informed Cassola of the allegations against Appellant, Cassola responded that there was “nothing negative in the folders” about Appellant.
9. In late August 2006 DiVincenzo asked Appellant to meet with him and discuss the Hospital’s accusation. DiVincenzo informed Appellant that pictures existed showing him on a telephone that was used to “break into” voicemails but did not show any documents or pictures to Appellant.
10. Appellant denied being involved in any improper voicemail access. He testified that he did not have any Hospital employee’s voicemail password and that he did not know at least two of the six persons whose voicemails were allegedly accessed. Appellant testified that the person in the photographs might be him based on physical resemblance and because he regularly patrolled at and around the ED greeter’s desk. Appellant also stated that being on the telephone was a regular event for him and other security guards.
11. On October 10, 2006 DiVincenzo met with Donaldson, McLaughlin, and Greg Bucklis, the Hospital Telecommunications Supervisor. Russell Fisk, a City of Beverly information technology employee, also attended the meeting. Donaldson gave DiVincenzo photos taken from a surveillance video camera that had been set up to record activity near the greeter’s desk in the emergency department (ED). (Exs. 1, 2 and 7 and testimony of McLaughlin)
12. DiVincenzo testified that Bucklis and Donaldson asserted that the pictures showed Appellant on a telephone at the ED greeter’s desk and stated that that

telephone was used to access voicemails when “a computer said they were being illegally accessed.”

13. The Hospital also provided to DiVincenzo a Call Search Report (“report”) that it alleged corroborated the pictures. DiVincenzo testified that since “I don’t understand this stuff” he gave the pictures and the report to Fisk for further analysis. (Ex. 3 and testimony of DiVincenzo)
14. On or about October 10, 2006 Fisk provided to DiVincenzo a memorandum stating: “The logs do illustrate one extension calling and accessing multiple voice mail boxes, many in the Human Resources Department. The call times in the voice mail log do closely match the photograph of the Security Guard. B. H. (Beverly Hospital) had indicated that the telephone extension used to access the voice mail as the one shown in the photographs.” The memo concludes, “These records do not conclusively prove that these calls were indeed by the security guard in question”. (Ex. 4)
15. DiVincenzo testified that Fisk’s sentence about the records not proving conclusively that the security guard accessed voicemails indicated only that, “they were missing some data.” DiVincenzo testified that he relied entirely on the pictures and report and took the Hospital’s representations at “face value” that Appellant had accessed voicemails.
16. Bucklis testified that he participated only in a conclusion about what telephones might be accessing voicemails and never personally concluded that it was Appellant who accessed voicemails. He stated that the extensions

- allegedly used to improperly access voicemails could also be dialed into from any location in the Hospital, as the extensions are not tied to a specific phone.
17. DiVincenzo testified that he has no knowledge or background in the operation of voicemail systems, telephone systems, video surveillance or computer technology.
 18. On or about October 11, 2006, DiVincenzo had a conversation with Appellant and showed him the photographs, report and termination letters. Appellant informed DiVincenzo that although it was him in the pictures, he had not illegally accessed anyone's voicemail. When pressed for an explanation, Appellant stated that the pictures were forensically altered by the Hospital due to his past union activities. (Exs. 7 and 8 and testimony of DiVincenzo)
 19. DiVincenzo asked Appellant "why would the Hospital make this up, you seem like a pretty good guy." Appellant responded that while he was not sure, it could be because of his past support for the security guard union, and also because he cooperated with the Beverly police department during past investigations at the Hospital. (Testimony of Bell and DiVincenzo)
 20. Appellant was a credible witness.
 21. After the second meeting with Bell, DiVincenzo told Chief Cassola that it was his belief there was no plausible explanation for the photographs, and he therefore recommended bypassing Appellant. (Testimony of DiVincenzo)
 22. DiVincenzo testified that he does not know whether the photographs depict Appellant or another person. DiVincenzo also stated that none of the documents relied upon by the Hospital indicate to him that any person ever

actually illegally accessed voicemail. He testified that the camera times in the photographs are sometimes different from the alleged improper voicemail access times noted in the call search report. DiVincenzo testified he did not know if the extensions allegedly used to access voicemails could be dialed into or from other phones within the ED. (Testimony of DiVincenzo)

23. DiVincenzo offered forthright credible testimony. Buckless was a credible and knowledgeable witness.
24. On October 11, 2006 DiVincenzo drafted a memorandum to Cassola recommending that Appellant not be hired as a Reserve Officer. (Ex. 7)
25. On October 16, 2006 DiVincenzo drafted a letter that reiterated details of the background investigation and concluded that he would recommend to Cassola that Appellant should not be hired as a reserve officer unless Appellant was able to prove his contention that the pictures were forensically altered. (Ex. 8)
26. Chief Cassola testified that he relied entirely on DiVincenzo's representations and Fisk's memorandum and did not speak with Appellant or with Hospital officials. (Testimony of Cassola)
27. An October 18, 2006 bypass letter from Cassola to Appellant stated that he had been withdrawn from consideration for appointment as a permanent Reserve Officer to the Department because the Department had obtained surveillance photos showing him using the telephone at times when unauthorized voice mails were made. (Ex. 9)

28. On April 11, 2007, the Human Resources Division ("HRD") sent Appellant a letter affirming the Appointing Authority's reason for bypassing him for the position of Reserve Police Officer. (Ex. 10)
29. On June 7, 2007, Appellant filed his appeal with the Commission.
30. Appellant testified that throughout 2005 Hospital security officers were involved in a union organizing drive, he was openly in favor of unionization and the Hospital engaged in an anti-union campaign against the organization of security guards. A representation election was conducted by the National Labor Relations Board (NLRB) to determine whether Hospital security guards would be represented by a union for the purpose of collective bargaining. The union lost by one vote. (Testimony 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). "In making that analysis, the Commission must focus on the fundamental purposes of the civil service system-to guard against political considerations, favoritism and bias in governmental employment decisions...and to protect efficient public employees from political control. When there are, in connection with personnel decisions, 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. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997)

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 a bypass appeal, the question is "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the Appointing Authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification requires that the Appointing

Authority's actions be were based on adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law." Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). All applicants must be adequately and fairly considered.

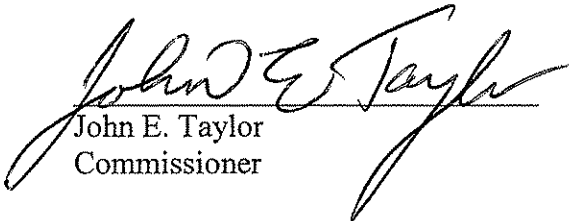
In the present matter, Appellant showed that the Appointing Authority failed to demonstrate a reasonable justification for bypassing him for a position as Reserve Officer in the Police Department. Specifically, the Appointing Authority failed to prove that Appellant illegally accessed voicemails of employees while employed at the Hospital, the reason given for his bypass, and accordingly did not support this reason by the necessary preponderance of the evidence. Although the Hospital maintained that Appellant was terminated for accessing voicemails, it did not present the Appointing Authority with substantial proof of this behavior. Yet DiVincenzo testified that he relied entirely on the pictures and report and took the Hospital's representations at face value that Appellant had accessed voicemails when he made a recommendation for bypass. Further, Appellant testified credibly before the Commission that he never accessed voicemails, stating he had no telephone systems background, knowledge or skill that would allow him to access voicemails, did not have a personal Hospital voice mailbox and he did not know how to access Hospital voicemails. Moreover, no Appointing Authority witness ever testified that the photographs in Exhibits 1 or 2 depicted Appellant. Nor was Appellant ever criminally charged by the Hospital. In sum, there was not sufficient evidence to support the allegation that Appellant was responsible for invalidly accessing the voice mail calls

at Beverly Hospital, yet it was this evidence that the Appointing Authority based its decision on to bypass Appellant.

In light of the above, the Appointing Authority did not have a reasonable justification for bypassing Appellant for Reserve Police Officer for the Department. Therefore, the appeal under Docket No. D1-07-200 is *allowed*.

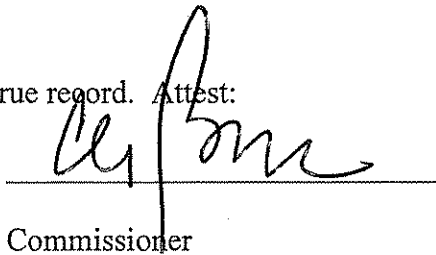
It is further ordered that, pursuant to the powers inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts and Resolves of 1993, the Commission hereby grants equitable relief to the Appellant and orders HRD to place the Appellant's name at the top of the next certification list for the position of permanent Reserve Police Officer to be issued by the Beverly Police Department.

Civil Service Commission


John E. Taylor
Commissioner

By vote of the Civil Service Commission (Taylor, Henderson, Stein [yes] Bowman, Chairman, and Marguis [no] Commissioners) on August 7, 2008.

A true record. 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 M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

SEAN BELL,
Appellant

v.

G1-07-200

BEVERLY POLICE DEPARTMENT,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The instant appeal involves an original appointment to the position of permanent reserve police officer in the City of Beverly (hereinafter "City"). The City bypassed the Appellant in 2007 for reasons related to his 2006 termination from Beverly Hospital for wrongfully accessing other employees' voicemail accounts. The Appellant agrees that he was terminated by Beverly Hospital, but denies that he engaged in the alleged misconduct.

The City investigated the reasons surrounding the Appellant's termination from Beverly Hospital. Exhibit 6 is a copy of the June 15, 2006 termination letter from Beverly Hospital to the Appellant outlining the reasons for his termination, which states in relevant part:

"For several weeks, we have been aware that the voicemail system of certain employees was compromised by someone hacking into the voicemail. As a result, the hospital installed surveillance cameras in the areas from which the calls originated. The information from the surveillance cameras was matched against the detailed phone reports and showed that you were the employee inappropriately accessing other people's voicemail. On the morning of June 12, 2006 you used the phone at the main hospital entrance of Beverly Hospital (Greeters Desk) to access several Northeast Hospital's employee's (sic) voicemail. You used the extension of 2760 and were inappropriately accessing voicemail from 12:05:44 AM to 12:07 AM. As stated, we had a surveillance camera which confirmed your presence in this area, and that you were on the telephone for this time period. The time information gathered from our telecommunication date and the

surveillance camera confirm that you were the only person who could have done this.

After we suspended you without pay we ran telecommunication and surveillance camera information for the morning of June 13, 2006. During that morning, at the main hospital entrance of Beverly Hospital (Greeters Desk) at 12:55:50 AM you accessed several Northeast Hospital's employee's (sic) voicemail for a period of 08:10 minutes from the extension of 2705. Again, this was confirmed by both surveillance cameras and detailed telephone reports." (Exhibit 6)

The Hospital also provided the City with the time and date-stamped surveillance camera pictures and telephone logs that were used as part of the Hospital's investigation, which were reviewed by the City's Information Systems Manager. (Exhibits 1 and 2) The Captain assigned to oversee background investigations, who was deemed a credible witness by the Commission, met with the Appellant on two occasions and received what he deemed to be an inadequate explanation from the Appellant regarding his denial that he was engaged in the conduct that resulted in his termination from Beverly Hospital. The City subsequently bypassed the Appellant for the position of permanent reserve police officer.

The Commission, relying primarily on the Appellant's testimony before the Commission, concluded that "the Appointing Authority failed to prove that Appellant illegally accessed voicemails of employees while employed at the Hospital, the reason given for his bypass..."

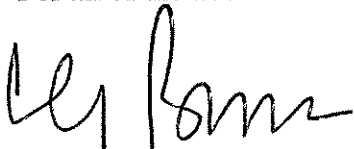
I respectfully suggest that the overwhelming evidence that is part of the record in this case shows otherwise.

Moreover, I believe the Commission has applied the wrong standard in this case, by requiring that the City "prove" that the Appellant accessed the voicemails at Beverly Hospital, leading to his termination. The position of police officer is an office of special public trust. A city or town has the right to expect that its police officers will be persons with good judgment...as well as persons of integrity and good character. A city or town has the duty to select officers that will be looked up to in the community, persons who will behave in a manner that brings honor and

respect to the force. Police Commissioner of Boston v. Civil Service Commission, 22 Mass. App. Ct. 364, 371 (1986).

In this case, the City was presented with evidence that the Appellant was terminated from his most recent employer for allegedly accessing other employees' voicemails without their permission, a serious offense. Rather than rely solely on the fact that he was terminated, a Captain with decades of law enforcement experience in the Beverly Police Department and the City's IT Director reviewed the circumstances that resulted in his termination and provided the Appellant with two opportunities to provide additional information regarding the termination. They were not convinced by the Appellant's explanations at the time and the City ultimately chose to bypass the Appellant. There is nothing in the record that concludes, or even suggests, political overtones or personal bias on the part of the City. Rather, it was a valid exercise of judgment in deciding whether or not the Appellant should serve as a police officer, be issued a badge, a gun and all of the authority that comes with that. I believe the Commission has impermissibly substituted its judgment for that of the Appointing Authority on a matter within the Appointing Authority's "broad discretion," the candidate's suitability to serve as a police officer in Beverly. Cambridge v. Civil Service Commission, 43 Mass. App. Ct. at 304-05; Burlington v. McCarthy, 60 Mass. App. Ct. at 914-15.

For all of the above reasons, I respectfully dissent.



Christopher C. Bowman
Chairman
August 7, 2008