

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

RE:

BOSTON POLICE DEPARTMENT & DUE PROCESS OF NON-SELECTED CANDIDATES

Tracking No. I-16-106

**RESPONSE TO BOSTON POLICE DEPARTMENT'S UPDATE & REQUEST
FOR RECONSIDERATION REGARDING CERTAIN ORDERS**

On July 21, 2016, following a status conference, the Civil Service Commission (Commission) completed its review of the Boston Police Department (BPD)'s 2015 appointment process regarding permanent, full-time police officers. As part of that review, the Commission issued two (2) recommendations and two (2) orders to the BPD.

On August 1, 2016, the BPD submitted a reply to the Commission, providing an update on certain recommendations and asking for reconsideration of certain aspects of the two (2) orders.

In regard to the recommendations, the Commission recommended that the BPD, on its own initiative, inquire with some or all of the non-signing disabled veterans (for whom there was a non-sign rate of approximately 80%), to identify the reasons for their decision not to sign the Certification. In its August 1st reply, the BPD reported that the Police Commissioner is already taking steps to implement this recommendation and exploring various avenues to obtain this information. We consider this to be responsive to the Commission's recommendation.

Further, although the BPD appears to have a practice of ensuring that candidates on active military duty receive proper consideration, the Commission found that there is a lack of any written guidelines or procedures. To ensure clarity and uniformity, the Commission recommended that the BPD establish written guidelines. The BPD did not object to this recommendation.

In regard to its two (2) orders, the Commission, for all the reasons stated in the findings issued on July 21st, ordered the BPD to:

1. Provide all candidates deemed by the BPD as having failed to complete the process, with a rank of 1 to 49, with written notification of their non-selection and their right to file an appeal with the Commission; and
2. Provide certain candidates deemed by the BPD as having "voluntarily withdrawn", with a rank of 1 to 49, with written notification of their non-selection and their right to file an appeal with the Commission.

To ensure clarity, neither of these orders requires the BPD to: disturb the 2015 appointment of recruits to the Police Academy; appoint the candidates in question; and/or provide them with a future opportunity for appointment. Rather, the Commission's orders are limited to ensuring that these candidates made an informed decision after being advised of their appeal rights.

In order for these candidates to have their appeal heard by the Commission, he/she would need to first complete the following appellate steps:

- a. File an appeal with the Commission following the normal appeals process;
- b. Show that their non-selection constituted a bypass.

If those criteria are met, there would be a full evidentiary hearing before the Commission, at which point it would be determined if the BPD had reasonable justification to bypass the candidate. Consistent with the normal appeals process, the BPD would have the opportunity to show why they believe there was reasonable justification for the bypass. Only if the Commission determined that there was no reasonable justification for the bypass would the candidate be granted relief in the form of a future opportunity for appointment.

Further, the Commission's Orders regarding notification specifically excluded certain individuals identified by the BPD.

In regard to the first order:

- The BPD does not object to providing notification to those candidates specifically listed as "failed to complete process."
- In regard to those candidates who failed the Physical Abilities Test (PAT), the BPD asks that the state's Human Resources Division (HRD) be responsible for providing these candidates with the required notification.
- In regard to those candidates who were not selected because they reportedly failed to attend an orientation or scheduled meeting with an investigator, the BPD requests reconsideration.¹

We carefully considered the BPD's request to have HRD be responsible for providing notification of appeal rights to those candidates who failed the PAT. That recommendation is not feasible or practical for various reasons, including, but not limited to, the fact that, since 2009, HRD has delegated responsibility for notification of bypass reasons to the Appointing Authority. Further, it is ultimately the BPD, as the Appointing Authority, that rescinds the conditional offer of employment after a failed PAT, thus triggering potential appeal rights. For these and other logistical reasons, we simply don't believe the notification obligation should be transferred to HRD. Nothing in the Commission's order, however, is meant to prevent the BPD, as part of its notification to candidates, from stating that the PAT was administered by HRD.

¹ The BPD also asked the Commission to exclude those individuals who failed to sign the Certification. Those candidates were never included among the individuals to be notified of potential appeal rights.

In regard to those candidates who reportedly failed to attend the orientation session or failed to attend the required meeting with an investigator, this warrants clarification. If the BPD can provide the Commission with documentation that unequivocally shows that a candidate was provided with proper notice regarding the need to attend the orientation or investigatory meeting, and then failed to do so for reasons other than active military duty or medical reasons, notification of appellate rights may not be required.

That leaves the second and final order regarding notification of certain candidates, ranked from 1 to 49, who were deemed to have “voluntarily withdrawn.”

Two (2) of the concerns identified by the Commission regarding this group of candidates have not been disputed by the BPD, either at the status conference, or via this request. First, the BPD has not shown, nor has it argued, that prior to signing a “voluntary declaration” form, those candidates (ranked 1 to 49) were informed that, if they chose *not* to sign the voluntary declaration, they could file an appeal with the Commission. Rather, the BPD, as part of the status conference, stated that these high-scoring applicants were intelligent enough to make an informed decision. Put simply, it would be impossible for any candidate to make an informed decision, unless they are advised of their appeal rights. It is not reasonable to assume that these candidates were aware of their right to appeal to the Commission should they choose not to sign the voluntary declaration form.

Further, as discussed in the Commission’s findings, these voluntarily declaration forms contain language that could lead a reasonable person to conclude that failure to sign the form could serve as a barrier to consideration in a future hiring round. Specifically, these forms require the candidate to acknowledge that he /she “must contact Human Resources [BPD] directly to formally withdraw my candidacy for the student officer applicant selection process cited above. Failure to notify Human Resources of my voluntary withdrawal from this student officer applicant selection process may result in my removal from the current eligible candidate list for this student selection process and any future student officer applicant selection processes selected from the current eligible candidate list.” (*emphasis added*) As stated in the findings, the BPD has no authority to unilaterally remove candidates from an eligible list and/or unilaterally prohibit a candidate from participating in a future hiring process. Rather, removal requests must first be submitted to HRD and, if approved, the candidate is provided with appeal rights to the Commission.

These two concerns, standing alone, call into question whether those candidates who signed the voluntarily declaration form made an informed, and voluntary, decision.

The BPD argues that the Commission should not have relied on the statements of a higher-ranked veteran, identified in the Commission’s decision as candidate B1, to reach conclusions about whether candidates who signed the voluntary declaration form without the BPD having the opportunity to cross-exam him. As stated above, the information provided by the BPD, standing alone, was sufficient for the Commission to order the limited relief described above (i.e. – notification of potential appeal rights.)

To the extent that the BPD may be concerned that, going forward, all candidates who

withdraw from the process must be deemed as bypassed candidates, some clarification may be warranted. To the extent that the BPD, on a going forward basis, can unequivocally show that a candidate was aware of his /her right to file an appeal with the Commission and that failure to sign the form would NOT impact his/her future hiring prospects, we concur with the BPD that those candidates are no longer “willing to accept employment” and should not be considered as bypassed candidates. As referenced by the BPD, even candidates who file an appeal with the Commission, sometimes choose to withdraw their appeal. That occurs, however, only after the Appellant: 1) has exercised his /her right to file an appeal; 2) been afforded the option, at his/her discretion, to obtain legal counsel; and 3) been verbally informed, as part of a pre-hearing conference, of the entire appellate process, including the right to contest any Commission decision in Superior Court. Even after withdrawing the appeal, the Appellant, both via email and in an attached order of dismissal, is informed by the Commission of his/her right to file a motion for reconsideration and/or appeal in Superior Court. The bottom line is that the BPD must show evidence that the candidate’s decision was indeed informed and voluntary. Should the process, on a going forward basis, sufficiently show that the candidate’s decision was informed and voluntary, we see no reason for those candidates to be deemed as bypassed.

We appreciate the efforts already made by the BPD to address the issues identified in the Commission’s findings and orders. Further, as referenced in the Commission’s July 21st findings and orders, the Commission appreciates the willingness of the BPD, along with Massachusetts Veterans Edge and the Lawyers’ Committee for Civil Rights and Economic Justice, to participate in ongoing meetings with the Commission to discuss global issues relating to the civil service appointment process.

Civil Service Commission
/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on August 4, 2016.

Any party aggrieved by this Commission order may initiate proceedings for judicial review. 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:

Nicole Taub, Esq. (Boston Police Department)

Courtesy Copies to:

John Marra, Esq. (Human Resources Division)

Oren Sellstrom, Esq. (Lawyers’ Committee for Civil Rights and Economic Justice)

Patrick Bryant, Esq. (Massachusetts Veterans’ Edge)