

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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**IN RE: INVESTIGATION OF
SELECTIVE CERTIFICATION
FOR FEMALE POLICE OFFICERS**

I-11-319

Appearance for Boston Police Department

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Commissioner:

Paul M. Stein

FINDINGS AND CONCLUSION

On November 3, 2011, acting pursuant Mass.G.Lc.31, §2(a), the Civil Service Commission (Commission), opened an investigation into the practices and procedures of the Massachusetts Human Resources Division (HRD) and the Boston Police Department concerning the use of selective certifications for gender specific appointments, i.e., female candidates, for appointment to the permanent civil service position of municipal police officer. The Commission requested submissions from HRD and the BPD and held an investigative hearing on February 17, 2012, at which time the Commission marked the submissions as Exhibit 1 (HRD'S submission) and Exhibit 2 (BPD submission) and received oral testimony and argument from HRD and the BPD. The Commission also received additional documentation from the BPD after the hearing (Exh. 3).

The Commission commenced this investigation as a result of information that came to the attention of the Commission as a result of an appeal (CSC Docket No. E-10-334) brought against HRD and the BPD, in which the Appellant, Sean S. Pugsley, asserted that he was unlawfully bypassed for original appointment as a BPD Police Officer (the “Pugsley Appeal”) Both HRD and BPD moved for summary decision dismissing the Pugsley Appeal on various grounds. By Decision dated November 3, 2011, the Commission denied the motions for summary decision, but stayed further proceedings in the Pugsley Appeal pending the Commission’s investigation as to whether the alleged irregularities in the practice and procedures used by HRD and the BPD warranted a more global investigation by the Commission into the use of gender specific certifications.

After careful review of the submissions of the parties and the oral testimony and argument at the investigatory hearing, the Commission is satisfied that the alleged irregularities, if any, in the way that HRD processed the gender specific certification which is the subject of the Pugsley Appeal are an isolated, and not systemic problem that are cause for further investigation or action by the Commission.

BACKGROUND

Candidates for original civil service appointments are considered in the order of their place on a “Certification” issued to the appointing authority by HRD, which is generated from the current “eligible list” established by ranking candidates according to their scores on the competitive qualifying examination, along with certain statutory preferences such as veterans’ status, and points for education and experience. As a general rule, in order to deviate from this paradigm, an appointing authority must show specific reasons – either

positive or negative, or both, consistent with basic merit principles, that affirmatively justify picking a lower ranked candidate. G.L.c. 31, §§1, 6,16, 25 through 27.

The authority to approve a gender-specific limitation on the selection of candidates for civil service positions, as an exception to this general rule, is set forth in Section 21 of Chapter 31:

“The administrator [HRD] may limit eligibility for any examination for an original appointment to either male or female persons if the appointing authority requests such limitation in its requisition. Both male and female persons shall be presumed to be eligible for a promotional appointment to any civil service position; provided, however, that the administrator may limit such eligibility to either male or female persons if the duties and responsibilities of such position require special physical or medical standards or require custody or care of a person of a particular sex. Prior to any such limitation of appointment or promotion, the administrator shall submit in writing to the Massachusetts commission against discrimination [MCAD] a request for its recommendation on such proposed limitations.” (Emphasis added)

Pursuant to its rule making authority (which is subject to Commission approval), HRD duly promulgated “Personnel Administration Rules” (PARs), which provide:

PAR.08 Civil Service Requisition and Certification

- (1) Whenever an appointing authority shall make requisition to fill a position, the Personnel Administrator [HRD] shall, if a suitable eligible list exists, certify the names standing highest on such list in order of their place on such list, except as otherwise provided by law or civil service rule. Insofar as possible sufficient names shall be certified to enable such appointing authority to make appointments from among the number specified in PAR.09 [which sets forth the so-called 2N+1 rule]

. . .

- (4) If a requisition is made calling for persons having special qualifications in addition to the general qualifications tested by an examination, the administrator may issue a selective certification of the names of such persons from the appropriate eligible list.¹

¹ The “selective” certification of candidates with “special qualifications” under PAR.08(4), is distinguished from the different PAR.10 “special certification” based on “race, color national origin or sex” used to address past practices of discrimination against those protected classes. The request involved here was a PAR.08(4) “selective certification” and the PAR.10 rule for a “special certification” is not directly applicable. cf, Brckett v. Civil Service Comm’n, 447 Mass. 233 (2006) (affirming validity of PAR.10 to remediate prior discrimination against women and minorities in hiring MBTA police officers)

HRD also has promulgated a set of guidelines entitled “Human Resources Division Civil Service Unit, Selective Certifications, Descriptions and Questionnaires”. (the “HRD Guidelines”) Prior to this investigation, the section of the HRD Guidelines entitled “Gender-Based Selective Certification” contained a sample of the questionnaire, entitled “Human Resources Division/Request for Gender-Based Selective Certification (the “HRD Questionnaire”), required to be completed by an appointing authority who seeks to requisition a gender-based selective certification, as well as the following guidance:

“Massachusetts General Laws, Chapter 31, Section 21, provides that the Personnel Administrator may limit eligibility for appointment to any civil service position to either male or female persons if the duties and responsibilities clearly and unequivocally so require. Requests for such gender-based selective certifications are carefully reviewed by both the Human Resources Division (HRD) and the Massachusetts Commission Against Discrimination (MCAD) to ensure that such certification is valid and job-related.

“To initiate HRD review of a gender-based selective certification request, the appointing authority must file a completed gender-based selective certification questionnaire, a copy of which is included here, documenting such need. The completed questionnaire is then analyzed by HRD, and, if the request appears to be justified, the request is forwarded to MCAD for its review. Once MCAD approves the request, HRD will issue a selective certification. If the request is denied by either agency, the appointing authority will be so notified.

Selective certifications have, in the past, been requested and approved for female police officers so that municipalities will have sufficient shift coverage to ensure privacy rights of clients within such categories as rape crisis intervention, transportation of female prisoners and search of female prisoners. In these cases, the formula used to determine the validity of the request is that a municipal department is allowed one female police officer per shift plus one additional female officer on each shift as a reserve for vacation and sick leave accommodations.”

As more fully explained in the Commission’s Decision on Motions for Summary Decision in the Pugsley Appeal, on or about March 12, 2010, BPD submitted a completed HRD Questionnaire to support a request for a selective female certification,

which HRD approved that same day. HRD acknowledges that, due to an “administrative oversight”, the request had not been submitted to the MCAD prior to HRD’s approval. The evidence presented to the Commission in the Pugsley Appeal also appeared to indicate that the initial request for gender certification by the BPD did not include any information in the HRD Questionnaire that identified the current number of female officers by duty assignment. Finally, it appeared that the BPD had unilaterally increased the number of female candidates selected from the gender specific certification from original number of ten (10) approved by HRD to a total of twenty-eight (28) candidates, and notified HRD of this change only after these candidates had been hired and had entered the Police Academy. These apparent irregularities suggested to the Commission that HRD may not be applying the civil service law and rules regarding gender specific certifications in compliance with the letter and spirit of the law. See Pugsley v. City of Boston, 24 MCSR 544 (2011).

The Role of the MCAD in Gender Specific Civil Service Certifications

In the Commission’s Decision on Motions for Summary Decision in the Pugsley Appeal, the Commission stated that G.Lc.31,§21, and as interpreted by HRD in PAR.08 and in HRD written guidelines for selective certifications, clearly required the approval of the MCAD. In its submission to the Commission (Exh. 1) and in its presentation at the investigatory hearing, HRD took exception to this interpretation. HRD made a persuasive argument that Section 21 states only that HRD must submit to MCAD a “request for its recommendations” on any gender specific certification, but the statute does not expressly make MCAD approval a condition to HRD’s action on the request. HRD also pointed out that, sometime after the year 2000, HRD stopped routinely submitting gender

certification requests to MCAD because, for quite a while, it had never received any response to its requests. Thus, HRD made the assumption that MCAD had decided, for whatever reasons, not to weigh in on requests for selective gender certifications, and leave the matter to HRD's sound discretion.

HRD acknowledged at the investigatory hearing that Section 21 does require that HRD submit all requests for selective certifications to MCAD, and has now implemented procedures to assure that is done. HRD provided two recent examples, one involving a March 2011 request from New Bedford for nine (9) female Police Officers and another in December 2001 from Danvers for one (1) female Police Officer. HRD pointed out that, as of the date of the investigatory hearing in February 2012, MCAD had not responded to either request from HRD for MCAD's recommendation.

In the absence of MCAD's timely response, HRD takes the position that it can deem that MCAD has no objections to approval of the request and process it accordingly. HRD noted that processing of certification requests is time sensitive, and extensive delay would be detrimental to the interests of the municipality requesting the certification, which certification is necessary to commence the hiring process. BPD explained that it can take up to six months from the request for certification to complete the hiring process (which includes extensive background investigations as well as medical and physical abilities screening. HRD has now revised its guidelines to conform to this interpretation.

The plain meaning of Section 21 clearly implies that MCAD is expected to play a role in the process of allowing exceptions, based on gender, to the general rule for selecting candidates for civil service positions based on their relative ranking on a civil service eligible list. As a practical matter, however, the process now followed by HRD is a

reasonable effort to hew as close to the statutory intent of the legislature as reasonably possible. It might behoove HRD to explore directly with the MCAD whether there are means by which MCAD could play a more active role in the process, as the legislature clearly intended, without jeopardizing the time-sensitive turnaround needed in the circumstances. This issue, however, does not warrant direct intervention by the Commission at this time.

HRD Review and Approval of Selective Gender Certifications

The Commission also had concern about the adequacy of the process employed by HRD for review and approval of selective certifications. As noted in the Decision on Motions for Summary Decision in the Pugsley Appeal, it appeared that the BPD's initial request for approval of a special certification for ten (10) female policed officers was approved within hours of its submission and the increase from ten (10) to twenty-eight (28) female hires was never presented to HRD for approval until HRD inquired, at which time a cursory explanation was offered to support the request for HRD's nunc pro tunc approval of the increase.

Based on the information provided at the investigatory hearing, this situation was a unilateral decision on BPD's part, without HRD's prior knowledge or approval. In addition, the action taken by the BPD was driven by the unusual circumstances that, due to what was called an administrative oversight, HRD "inadvertently" had provided the BPD with substantially more names on the selective certification than on the "main" certification of candidates. When the "main" list had been exhausted without finding a sufficient number of qualified candidates willing to accept appointment, BPD proceeded to use the extra names on the companion female certification. BPD justified taking this

action by asserting that it was the only practicable way to obtain the necessary number of candidates for the next Police Academy class, noting the long lead-time that would have been required to request a new “main” certification of additional names from HRD and then process them. BPD suggested that using the female list was the only alternative to having a Police Academy class of recruits that would have been substantially below the target that the BPD needed to assure that the sufficient number of new officers needed to meet public safety needs would be “on the street” in a reasonable timeframe.

BPD may well have had legitimate justification for its decision to triple the number of female candidates selected from 10 to 28 or 30, and thereby select females who scored lower than other candidates ranked above them on the eligible list, or who did not have a statutory veteran’s preference. See generally, G.L.c.41, §97B (mandating that each police department establish a rape reporting and prosecution unit and make efforts to assign female police officers to the unit) BPD provided a considerable amount of data that would tend to support this conclusion, including the special job duties that a female officer is required or preferred to perform, the ratio of female officers to the number of female victims and offenders, a particularly high attrition of females officers, and the limited number of female superior officer within the BPD.

The Commission need not address the merits of the justification presented by the BPD for the 2010 selective certification. That is a matter that may be addressed in the related Pugsley Appeal. For purposes of this investigation, the Commission’s focus remains on assuring that the procedures in place for review and approval of selective certifications are designed, as a general rule, to comply with civil service law and rules. Based on the testimony received at the investigatory hearing from HRD’s Director of the

Civil Service Unit, Regina Caggiano, HRD has shown that the unusual circumstances that lead to the Pugsley Appeal were an isolated instance and are not indicative of a systemic deficiency.

In particular, HRD's procedures are designed to require an Appointing Authority to justify a request for selective female certification solely on the grounds of "job related" duties that require a female officer. HRD explained that, although BPD had referenced statistics about the ratio of females in the general population in Boston (i.e. roughly 50%) as compared to the number of female BPD sworn officers (roughly 13% to 16%), HRD does not consider the general population statistics relevant. Rather, HRD considers the number of female officers needed "per shift" and on special assignments to perform job-related duties that call for a female police officer, such as counseling female victims of crime, transporting and booking of female offenders. These criteria are precisely those that appear appropriate for consideration.

HRD has also satisfied the Commission's concerns about the failure of BPD to seek approval of the significant increase (nearly triple) in the number of female officers to be hired through a selective certification. This oversight was the result of unique circumstances which will not be repeated. HRD and the BPD understand that an approved selective certification does not authorize hiring more than the number of persons approved and the number cannot be unilaterally increased by the Appointing Authority without making a prior request to HRD for its approval (and opportunity for MCAD to review).

The time constraints in the hiring process must be acknowledged. An Appointing Authority might find it prudent, when seeking approval of a selective certification, to

request approval of the largest number of candidates that could be justified, although it might initially plan to hire a fewer number, to cover such contingencies. In the case of a change of circumstances that creates an unanticipated larger number of vacancies (which is what the BPD alleged had occurred in the Pugsley Appeal), the need for expedited treatment of such requests is apparent. The Commission is satisfied that these technical issues are best left to HRD to consider and do not need further review by the Commission at this time.

Conclusion

For the reasons stated above, the Commission closes the investigation of the procedures employed by HRD and the BPD for the request and approval of selective gender certifications under Section 21 of the Chapter 31. The stay of the Pugsley Appeal will be vacated by separate order. Nothing in this decision shall affect the right of the Appellant in the Pugsley Appeal to contest the specific merits of the BPD's hiring of female police officers on the specific facts of that case, should he choose to proceed with that appeal.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on October 18, 2012.

A True Record. Attest:

Commissioner

Notice to:

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