

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place – Room 503
Boston, MA 02108

KEVIN M. BRAXTON,
Appellant

v.

G1-18-077

CITY OF MEDFORD,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

DECISION

On May 3, 2018, the Appellant, Kevin M. Braxton (Mr. Braxton), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Medford (City) to bypass him for appointment to permanent reserve police officer in the City’s Police Department (MPD). A pre-hearing was held at the offices of the Commission on June 5, 2018 and a full hearing was held at the same location over two (2) days on July 30th and July 31st, 2018.¹ The full hearing was digitally-recorded and both parties received a CD of the recording.²

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31 or any Commission rules taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

FINDINGS OF FACT

Fourteen exhibits were entered into evidence (Respondent Exhibits 1-11 (R1 – R11) and Appellant Exhibits 1-3 (A1 – A3)). Based on these exhibits and the testimony of the following witnesses:

Called by the City:

- Kevin Faller, Captain of the Medford Police Department
- John Buckley, Lieutenant of the Medford Police Department

Called by Mr. Braxton:

- Kevin M. Braxton, Appellant
- Kevin Braxton Sr.; Appellant’s Father and former Medford Police Detective;
- Barry Clemente, Captain of the Medford Police Department
- Joseph Casey, Lieutenant of the Medford Police Department

and taking administrative notice of all matters filed in the case; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

Mr. Braxton

1. Mr. Braxton is a thirty-four (34) year-old male who resides in Medford. He identified himself as “Black / Latino / Native American” on his student officer application. (Exhibit R4)
2. Mr. Braxton’s family has a long tradition of serving in law enforcement, including his grandfather, who served as one the first black motorcycle police officers in Boston and his father, who served as a detective for the Medford Police Department. He has one (1) infant child. (Testimony of Mr. Braxton)

3. Mr. Braxton's father worked for the MPD for thirty-five (35) years, and as a detective since 1990. He retired on December 31, 2017. (Testimony of Kevin Braxton, Sr.)
4. Mr. Braxton has been employed by the Transportation Security Administration (TSA) as a Security Officer since September 2015. (Testimony of Mr. Braxton and Exhibit R4)

2017 Hiring Process

5. On March 25, 2017, Mr. Braxton took the civil service examination for police officer and received a score of 96. (Stipulated Fact)
6. On August 4, 2017, HRD established an eligible list of candidates for Medford Police Officer, upon which Mr. Braxton's name was included. (Stipulated Fact)
7. On September 14, 2017, the City received Certification No. 04958 from HRD, from which the City eventually appointed thirteen (13) candidates as Permanent Reserve Police Officers. (Stipulated Fact)
8. Mr. Braxton was ranked tenth (10th) on Certification No. 04958 and four (4) of the appointed candidates were ranked below him, resulting in a "bypass" of Mr. Braxton. (Stipulated Facts)
9. Of the nineteen (19) candidates considered for appointment, approximately six (6) were minorities. (Testimony of Lt. Casey)
10. Of the thirteen (13) candidates appointed, one (1) candidate was a minority (Asian). (Testimony of Lt. Casey)
11. Four (4) of the six (6) minority candidates, including Mr. Braxton, were bypassed for appointment. (Testimony of Lt. Casey)
12. The City's stated reasons for bypassing Mr. Braxton were: 1) Failure to submit application and required documents on time; 2) Poor Driving History; 3) Past Employment; 4) Failure to list Social Media site on Application; and 5) Oral Board Interview. (Exhibit R4)

Failure to Submit Application and Required Documentation On Time

13. All application packets were emailed to the candidates on September 26, 2017. (Exhibit R7)
14. The candidates were instructed to email a copy of their final packet no later than 4:30 P.M. on Thursday, October 5, 2017. A hard copy printout of the same packet was required to be turned in personally to Lt. Casey on October 5, 2017, between the hours of 8:30 A.M. and 4:30 P.M. (Exhibit R7)
15. Five (5) candidates, including Mr. Braxton and Candidate B, failed to meet the October 5th deadline. (Testimony of Lt. Casey)
16. When Candidate B failed to meet the deadline, his father, who is a Medford Police Officer, was contacted by the background investigator. Candidate B told the background investigator that he never received the email with the attached application. He was permitted to turn in his application on October 10th, five days after the deadline. (Testimony of Lt. Buckley)
17. Mr. Braxton submitted his application in-hand to Lt. Casey on Thursday, October 5, 2017 at 9:40 P.M., approximately five (5) hours after the deadline. Mr. Braxton informed Lt. Casey that the delay was, in part, due to the birth of his child the prior weekend. The electronic copy of the application was submitted by Mr. Braxton the following day. (Testimony of Lt. Casey)

Poor Driving History

18. The MPD's background investigation report of Mr. Braxton states in part: "Mr. Braxton has a poor driving history that reflect numerous license suspensions, numerous 'responsible' findings, and several 'at fault' motor vehicle accidents. Mr. Braxton has had his license to operate a motor vehicle suspended five (5) times since 2006." (Exhibit R2)
19. Mr. Braxton's license was not suspended five (5) times. Rather, it appears that his license was suspended twice a decade ago for payment-related issues. (Exhibit A3)

20. In the past five (5) years, Mr. Braxton has had two (2) negative entries on his driving history: a citation for failing to yield in 2012 and a surchargeable accident in 2013. (Exhibit A3)

Past Employment

21. The MPD concluded that Mr. Braxton's employment record "had concerns" due to: Mr. Braxton having held sixteen (16) jobs since 2004; discipline at his current TSA job for repeated tardiness; failure to report employment from 2013 at Home Depot; warnings for tardiness at two (2) other prior employers; and termination from an employer in 2010 for misuse of company equipment. (Exhibit R2)

22. Mr. Braxton has been employed full-time for the TSA at Logan Airport since September 2015. Prior to that, he was employed full-time as a residential counselor for two (2) years at a community health organization in Chelsea. He left that \$12.00 / hour job for a better-paying job with the TSA. (Exhibit R2)

23. Mr. Braxton acknowledges that he forgot to list his part-time employment at Home Depot on the application. He subsequently provided the background investigator with his W-2 from Home Depot. (Testimony of Mr. Braxton)

24. Mr. Braxton worked for Trader Joe's in Cambridge in 2010. At times, the employee entrance door was locked upon arrival. Employees would bypass this entrance by entering through an opening near the conveyor belt. On one occasion when Mr. Braxton used this access point, a visiting Regional Vice President was present. Mr. Braxton was terminated, but received a six (6)-month severance payment. (Testimony of Mr. Braxton and Exhibit R5)

25. Mr. Braxton acknowledges that he was tardy for his current employment with the TSA on multiple occasions. He attributed the problem in part to a drawbridge between the employee parking lot and the airport. (Testimony of Mr. Braxton)

26. Mr. Braxton's current supervisor at the TSA told MPD investigators that Mr. Braxton "is an excellent employee." She described him as a "mature person and a 'go to officer' when she needs assistance." Mr. Braxton had recently been recognized as employee of the month.

(Exhibit R4)

27. The MPD background investigation contains five (5) paragraphs regarding a workers compensation claim filed by Mr. Braxton while employed at the TSA, including detailed medical information regarding Mr. Braxton's diagnosis (back injury, muscle spasms) and treatment (physical therapy). (Exhibit R4)

Failure to list Social Media site on Application

28. The MPD's bypass reasons related to Mr. Braxton's social media account states:

"Mr. Braxton did not report that he had a Facebook account in his application. During his background investigation it was learned that he did in fact have a Facebook account. Upon searching the account, it was revealed that Mr. Braxton's Facebook profile image was that of President Donald Trump performing a Nazi salute while standing in front of a swastika.

Lt. John Buckley, background investigator for Mr. Braxton, spoke with Mr. Braxton about the image and the symbolism. Mr. Braxton [sic] [apparently should read: "Lt. Buckley"] recognized that while he may have anti-Trump sentiments, the imagery of Nazi salutes and symbols may evoke unwanted fear and strong emotional responses. Mr. Braxton agreed. As of this report, there is no longer a Facebook account for Mr. Braxton. Mr. Braxton was asked about this image at his Oral Board interview on October 18, 2017. Mr. Braxton admitted it was a poor choice and that it was not meant [sic] to be offensive." (Exhibit R2)

29. Mr. Braxton de-activated his Facebook account in February 2017, several months prior to completing his student officer application. (Testimony of Mr. Braxton and Exhibit A2)

30. In October 2016, the president of the Medford Police Patrolmen's Association admitted poor judgment after photographs of Medford officers (in uniform) are shown mockingly "arresting someone" dressed up as Hillary Clinton in an orange jumpsuit. The Patrolmen's Association also posted a photograph of three officers posing with someone dressed up as Donald Trump, with a Trump mask on. The caption said, "Making America GREAT again in West Medford

Square!” The local union president acknowledged it was poor judgment on his part and took the photographs down. (Exhibit A1)

Oral Board Interview

31. The MPD’s bypass reasons related to Mr. Braxton’s interview stated:

“Mr. Braxton completed his Oral Board interview on October 18th, 2017. The interview was conducted by Captain Barry Clemente, Captain Alan Doherty and Captain Keven Faller (video and notes on file). Mr. Braxton scored an overall average score of 20.167 (out of a possible score of 30). Mr. Braxton ranked tied for 16th out of 19 candidates interviewed.” (Exhibit R2)

32. Captain Doherty’s General Comments regarding Mr. Braxton stated:

“Kevin was honest and forthright indicating that he as (sic) made some poor choices in life including too much alcohol and weed in his late teens and early 20s. Kevin is soft spoken serious (sic) and yet affable. Kevin loves music, the arts, camping and current events. He is married with a 3 mo old girl. He presented professionally and describes himself as a critical thinker. Kevin’s lone negatives surround his tardiness in reporting to the workplace, his drivers history including payment defaults, and his social media facebook page offensive profile picture characterization. Kevin makes no excuses and owns his own characterized immaturity but claims it is in the past.” (Exhibit R10)

33. Captain Clemente’s General Comments regarding Mr. Braxton stated:

“Candidate early, dressed professionally. Has a back injury buy (sic) states it is fine. Candidate is growing up and taking responsibility for his actions. Has a newborn with his wife.” (Exhibit R10)

34. Captain Clemente recommended that Mr. Braxton be appointed. (Testimony of Captain Faller)

35. Captain Faller previously served as the supervisor of Mr. Braxton’s father when he served as a detective. Captain Faller once questioned Mr. Braxton, Sr. about how he could work details, but call in sick for detective duty claiming a knee injury. (Testimony of Captain Faller)

36. Captain Faller, with the approval of the Police Chief, removed Mr. Braxton’s father from the Detective division due to a sick time usage issue. (Testimony of Captain Faller)

37. Captain Faller’s rating of the Appellant was the lowest of the three (3) interview panelists.

His General Comments regarding Mr. Braxton stated:

“Dressed Professional. Hard time answering numerous questions. Issues with driving history and job history.”
(Exhibit R10)

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on “[b]asic merit principles.” Massachusetts Assn..Of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001), citing Cambridge v. Civil Serv. Comm’n., 43 Mass.App.Ct. 300, 304 (1997).

"Basic merit principles", means:

“(a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1.

Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304. 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, 332 (1983). *See*, Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Service Comm'n, 447 Mass. 824-826 (2006), and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. Beverly citing Cambridge at 305, and cases cited. "It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." Town of Burlington v. McCarthy, 60 Mass.App.Ct. 914, 915 (2004).

Analysis

As stated in the findings, of the nineteen (19) candidates considered for appointment, approximately six (6) were minorities. Of the thirteen (13) candidates appointed, only one (1) candidate was a minority (Asian). Four (4) of the six (6) minority candidates, including Mr. Braxton, were bypassed for appointment. I have weighed the proffered justifications for bypass here carefully to ensure that the decision making was in accordance with basic merit principles. See Malloch v. Town of Hanover & others, 472 Mass. 783 (2015) citing Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, *supra* at 264.

After carefully weighing the proffered reasons for bypass, I have concluded that the City has not shown, by a preponderance of the evidence, that there was reasonable justification to bypass Mr. Braxton for appointment as a reserve police officer.

First, the City acknowledges that at least one appointed candidate was not only permitted to submit his application for employment five (5) days late, but that the background investigator contacted that candidate's father, a Medford police officer, to inquire why the application hadn't been submitted as of the deadline. This type of professional courtesy suggests an uneven playing field among candidates and undermines the City's argument that receiving Mr. Braxton's application five (5) hours after the deadline was a valid reason for bypass.

Second, the City just got it wrong regarding Mr. Braxton's driving history. His license was not suspended five times. Rather, it appears that his license was suspended on two (2) occasions over a decade ago for payment-related reasons. His driving record over the past five years, which is the most relevant, includes one (1) surchargeable accident and one citation for a failure to yield. There were no negative entries on Mr. Braxton's driving history for the four (4) most recent years. This record, when viewed in the proper context, does not provide a reasonable justification for bypass.

Third, while the City has raised legitimate concerns regarding parts of Mr. Braxton's employment history, including tardiness with his current employer, it appeared that the City was attempting to paint a somewhat inaccurate picture of Mr. Braxton, referencing his "sixteen (16) jobs since 2004". Mr. Braxton acknowledges that he was unsure of his career path during his later teens and early 20s, but became more focused in his late 20s. He has been employed full-time for the TSA since September 2015, where he had recently been recognized as employee of the month. He stuck with a \$12/hour job at a community health center for two (2) years prior to that, leaving only to secure a higher paying job to support himself and his family. Again, when viewed in the proper context, and given the appropriate scrutiny that is warranted here, the City has not shown that this is a valid reason to bypass Mr. Braxton for appointment.

Fourth, the purported concerns regarding the Facebook posting appears to be a lot about nothing. I credit Mr. Braxton's testimony that he had de-activated his Facebook account several months before he even took the civil service examination for police officer. Further, the prior posting, discovered by the MPD, appears to fall squarely in the category of a matter of public concern where Mr. Braxton was exercising his First Amendment right to criticize a political figure. Upon being informed that the posting had been discovered, Mr. Braxton promptly re-activated his Facebook account for the sole purpose of deleting the posting, after which he de-activated the account again.

Finally, while the Commission, and prior judicial decisions, has firmly established the permissibility of inherently subjective interviews to screen applicants, the Commission is charged with ensuring that those interviews are fair and impartial. Here, one of the three interview panelists recommended Mr. Braxton for appointment. Of the remaining two (2) panelists, one (1) of them had formed negative opinions about Mr. Braxton's father, a former Medford police detective. I reviewed the entirety of Mr. Braxton's recorded interview. As alluded to by one of the panelists, Mr. Braxton has a rather quiet demeanor. He appears to collect his thoughts before answering each question, at times resulting in awkward moments of silence where rapid fire answers are more common. However, even considering the subjective nature of the interview process and the deference due to the Appointing Authority, it was difficult to see the justification for the unusually low rating by the one (1) panelist who had a prior negative opinion of Mr. Braxton's father. To me, this raised real questions regarding whether Mr. Braxton's interview performance, standing alone, could justify the City's decision to bypass him for appointment.

For all of the above reasons, I believe that limited relief is warranted here to ensure that Mr. Braxton receives one (1) additional consideration for appointment.

Conclusion

Mr. Braxton's appeal under Docket No. G1-18-077 is hereby *allowed*. Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

1. HRD shall place Mr. Braxton's name at the top of the next Certification issued to the City of Medford for reserve police officer to ensure that he receives one additional consideration for appointment.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a 4-0 vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso – Not Participating]) on May 9, 2019.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. 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:

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Kimberly Scanlon, Esq. (for Respondent)
Michael Downey, Esq. (HRD)
Regina Caggiano (HRD)