

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

MOSES H. BRISSON,
Appellant

v.

G1-22-145

TOWN OF AUBURN,
Respondent

Appearance for Appellant:

Moses H. Brisson, *Pro Se*

Appearance for Respondent:

D. M. Moschos, Esq.
Seder and Chandler
339 Main Street
Worcester, MA 02301

Commissioner:

Angela C. McConney¹

SUMMARY OF DECISION

The Commission allowed the Appellant's bypass appeal, concluding that the Appellant's few, minor discrepancies in the documentation submitted with his application did not provide the Town of Auburn reasonable justification to bypass the Appellant for original appointment as a permanent full-time police officer, especially when he had satisfactorily completed the same application packet a year earlier for a prior hiring cycle in which he was not hired for other reasons that were not relevant to his second application.

DECISION

On October 29, 2022, the Appellant, Moses Brisson (Mr. Brisson or Appellant), acting pursuant to G.L. c. 31, § 2(b), made timely appeal to the Civil Service Commission (Commission) from the September 1, 2022 decision of the Town of Auburn (Respondent), the

¹ The Commission acknowledges the assistance of Law Clerk Alana Khan with the preparation of this decision.

Appointing Authority, to bypass him for appointment to the position of a full-time permanent police officer in the Auburn Police Department (Department).

The Commission held a pre-hearing conference on December 6, 2022, via videoconference. On February 21, 2023, I conducted a full hearing at the offices of the Commission, then located at One Ashburton Place, Boston, MA.² I recorded the hearing via the Webex platform, which serves as the official recording of the hearing.³ The Respondent submitted a Proposed Decision on April 21, 2023, whereupon the administrative record closed. The Appellant did not file any proposed decision. For the reasons stated herein, the Appellant's appeal is allowed.

FINDINGS OF FACT

I admitted six Appellant Exhibits (Exhibits A-F) and twenty-two Respondent exhibits (Exhibits 1-22). I marked the Respondent's Pre-hearing Memorandum "A" for identification. I admitted the Stipulated Facts as Exhibit 23. Based on these exhibits and the testimony of:

Called by the Town:

- Richard S. Mills, Deputy Police Chief, Town of Auburn;
- Stacy Fitzgerald, Administrative Assistant to the Police Chief, Town of Auburn

Called by the Appellant:

- Moses Brisson, Appellant

² The Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. §§ 1.01 (Formal Rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ A link to the Webex recording was provided to the parties. Should there be a judicial appeal of this decision, the plaintiff in the judicial appeal is obligated to supply the court with a transcript of this hearing to the extent that they wish to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, the plaintiff in the judicial appeal must transcribe the transcript from the Commission's official recording.

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, a preponderance of the credible evidence, I make the following findings of fact:

1. The Town of Auburn (Town), located in Worcester County, has a population of approximately 17,000, of which 93% identify as white. ([2022 U.S. Census Data](#))

2. According to annual reports submitted by the Town to the state's Human Resources Division for calendar year 2022, 97% of the Town's 37 police officers identified as white and only one identified as a minority. (2022 Section 67 Report)

3. Moses H. Brisson (Appellant or Mr. Brisson) is a 39-year-old African-American male who has resided in Auburn since 2016. (Exhibits A-C; Testimony of Appellant)

4. Mr. Brisson holds a Bachelor of Arts in Criminal Justice. He is employed by a large Boston metropolitan area city and serves as a reserve Deputy in a County Sheriff's Office. Mr. Brisson also has volunteered as a reserve police officer in the large metropolitan city which employs him. (Exhibits A-C; Testimony of Appellant)

5. Mr. Brisson first took and passed the civil service examination on November 28, 2021. His name appeared on a certification issued by HRD authorizing the appointing authority to hire an additional police officer. In March 2022, Mr. Brisson submitted an employment application to the Department and was part of the Department's hiring process in early 2022. The Department assigned a detective to process Mr. Brisson's application, who assisted him and ensured that he had provided all documentation required to the satisfaction of the Department, and then moved him forward in the process for a background investigation which he passed. (Exhibit D; Testimony of Appellant, Testimony of Mills)

6. After passing the background investigation in the prior hiring cycle, in accordance with the procedure then in place, Mr. Brisson was required to submit to newly-instituted fitness requirements by the Department that go beyond the requirements of the Physical Abilities Test (PAT) administered by the state's Human Resources Division (HRD). (Testimony of Appellant, Testimony of Mills)

7. Rather than rely on the PAT administered by HRD, the Department required police officer candidates to meet more stringent, upfront fitness requirements imposed by the Municipal Police Training Committee (MPTC or Committee) in 2019. He was unable to pass these more stringent fitness requirements and he was not selected for hire. (Testimony of Appellant, Testimony of Mills) ⁴

8. As stated by Boston Police Department representatives on the MPTC, this new upfront Police Academy requirement may put candidates with limited resources (i.e. – those who must work two jobs and have limited time or financial resources for a gym membership) at a disadvantage (<https://www.mass.gov/doc/municipal-police-training-committee-mptc-meeting-minutes-52819/download>).

9. After being non-selected for appointment by Auburn in the prior hiring cycle as a result of his inability to pass the newly-instituted physical fitness requirements upfront, the Appellant apologized to a superior officer in the hiring process, and promised that he would work on his fitness and would be back for another consideration. He was told that was fine, and the Department would still have all his “paperwork.” (Testimony of Appellant)

⁴ The MPTC determines the entrance requirements for police academies. In 2019, the MPTC modified its fitness requirements, effectively requiring that candidates meet the more stringent MPTC fitness requirements upfront, as opposed to being given the opportunity to meet the fitness standards over the course of the Police Academy. (*Cartwright v. Brockton*, 32 MCSR 375 (2019))

10. The Appellant undertook a months-long fitness regimen with the goal of passing the fitness requirements in a future hiring cycle. (Testimony of Appellant)

11. On March 24, 2022, Mr. Brisson took the civil service examination for police officer a second time. (Stipulated Facts)

12. On July 15, 2022, the state's Human Resources Division (HRD) issued Certification #08711, authorizing the Department to hire additional police officers. (Stipulated Facts; Exhibits 6 and 7; Testimony of Fitzgerald)

13. On July 26, 2022, HRD provided additional names to the Department after only one individual expressed willingness for appointment from the first set of names provided. (Exhibits 6 and 7; Testimony of Fitzgerald)

14. On or about August 8, 2022, Mr. Brisson filed a request with HRD indicating that he qualified for residency preference in Auburn. HRD approved the request. After Mr. Brisson updated his residency preference, his ranking on the certification advanced from 49th to between the candidates ranked 13th and 14th. (HRD Correspondence)

15. On August 24, 2022, HRD issued a third set of names at the request of the appointing authority after only one additional individual expressed willingness to be appointed. When this third set of names was issued to Auburn, Mr. Brisson's new ranking placed him above two other candidates who were ultimately selected for appointment (Mr. R and Ms. C.) Thus, Mr. Brisson's non-selection constituted a bypass that could be appealed to the Commission. (HRD Correspondence)

16. Mr. Brisson signed the certification to indicate his interest in the police officer position, and he received his application packet on August 24, 2022. (Exhibits 8, 10-12; Testimony of Appellant)

17. The application packet included an “Acknowledgement of Receipt of Employment Packet” form; an instructional sheet for the application; a materials list; and a letter of understanding. These documents outlined the instructions for completing the employment packet, listed the documents required to complete the packet, and stated that a fully completed employment packet was required in order to move onto the next phase (Phase II) in the hiring process. Mr. Brisson’s signed the “Acknowledgement of Receipt of Employment Packet”, the “Letter of Understanding” and the “Materials List”. (Exhibits 8, 10-12; Testimony of Appellant)

18. Stacy Fitzgerald, the Administrative Assistant to the Auburn Police Chief, distributed the employment packets. When she handed Mr. Brisson his packet, she advised him that the deadline for submission was August 31, 2022. (Testimony of Fitzgerald)

19. On August 31, 2022, Mr. Brisson hand-delivered his employment packet to Ms. Fitzgerald. He returned later in the day with two additional documents – a cover letter to the application and a copy of his driver’s license. (Testimony of Appellant; Testimony of Fitzgerald).

20. Richard S. Mills has served the Department for almost 26 years. He became the Deputy Chief of the Department on September 12, 2022. Dep. Chief Mills is responsible for overseeing the Department, including disciplinary incidents, fiscal operations and the hiring process. (Testimony of Mills)

21. Nine applicants submitted employment packets indicating willingness for appointment as police officers by the August 31, 2022 deadline. When Ms. Fitzgerald began reviewing the packets, she found that some of the files were missing various required items and/or documents. Mr. Brisson’s application was among the four of the nine applications that

were marked as incomplete and set aside for further review by Deputy Chief Mills. (Testimony of Fitzgerald, Testimony of Mills)

22. Specifically, Mr. Brisson's application packet contained the following noted discrepancies:

- 1) Mr. Brisson submitted a copy of his high school diploma rather than a high school transcript;
- 2) He submitted a copy of his college transcript, signed by the college registrar, rather than a sealed copy;
- 3) He submitted a photocopy of a certified birth certificate, not an original "certified" copy;
- 4) He omitted providing his Selective Service Registration and Number;
- 5) He failed to submit a copy of his License to Carry a Firearm, mistakenly submitting a copy of the back of his driver's license instead;
- 6) He submitted business tax returns not personal.

(Exhibit 14 - 19B; Testimony of Fitzgerald, Testimony of Mills)

23. Although Ms. Fitzgerald had set aside Mr. Brisson's application packet as incomplete, he was invited to proceed to take the physical examination. He was not informed at that time that his application was incomplete. The next day, the Department rescinded Mr. Brisson's invitation for the physical examination and disqualified him and the three other candidates whose applications were deemed incomplete. (Exhibits 8 and 9; Testimony of Appellant; Testimony of Fitzgerald)

24. At the Commission hearing, Mr. Brisson produced a copy of his high school transcript and showed that the "original" sealed college transcripts and birth certificates were identical to the "copies" he originally had provided to the Department. After questioning by me, the Department also acknowledged, and I find (1) that the tax returns provided by Mr. Brisson were, in fact, his personal returns and (2) because Mr. Brisson's License to Carry was issued by the Town of Auburn, the Department had a record of it. (Exhibits A - F; Testimony of Mills)

25. The Respondent notified Mr. Brisson of his non-selection in a September 1, 2022 letter, which enclosed his appeal rights. The Respondent cited Mr. Brisson's incomplete application, only identifying his failure to submit a copy of his firearms license and Selective Service Registration and Number. (Exhibit 24; Testimony of Appellant, Testimony of Fitzgerald, Testimony of Mills)

26. Mr. Brisson filed a timely appeal with the Commission on October 29, 2022. (Exhibit 1)

Applicable Law

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. *See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259 (2001); *MacHenry v. Civil Serv. Comm’n*, 40 Mass. App. Ct. 632, 635 (1995), *rev. den.*, 423 Mass. 1106 (1996). *See also Brookline v. Alston*, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

Original appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G. L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09.

The Commission’s role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications

bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't v. Civil Serv. Comm'n*, 483 Mass. 461, 474-78 (2019); *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

Public safety officers are vested with considerable power and discretion and must be held to a high standard of conduct. *See, e.g., Falmouth v. Civil Serv. Comm'n*, 61 Mass. App. Ct. 796, 801 (2004), citing *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev. den.*, 428 Mass. 1102 (1997); *Police Comm'r v. Civil Serv. Comm'n*, 22 Mass. App. Ct. 364, 371, *rev. den.* 398 Mass. 1103 (1986).

Analysis

As a preliminary matter, for the reasons cited in the findings, Mr. Brisson's non-selection did constitute a bypass which carries with it appeal rights to the Commission. Specifically, two candidates ranked below Mr. Brisson on the re-ordered certification were selected for appointment. Thus, his non-selection was indeed a bypass.

Regarding the appointing authority's reasons for bypassing Mr. Brisson, I acknowledge that an incomplete application can be a legitimate factor in an appointing authority's decision to bypass a candidate. *See Nicholas Felix v. Civil Serv. Comm'n et al*, Docket No. 2014-2097-C (Suff. Sup. Ct., Jun. 23, 2015). However, the Commission must evaluate the totality of the circumstances to ensure the appointing authority acted within basic merit principles.

When viewed in a more proper context, the decision to bypass the Appellant is not warranted and reconsideration of his candidacy is appropriate. Like many other communities in Massachusetts, the town of Auburn faces the challenge of appointing qualified and diverse police officer candidates. As the evidence showed, the initial certification issued to the Department

produced only one interested candidate. Here, the Appellant, who has a bachelors' degree in criminal justice, a solid employment history, and has volunteered as a reserve police officer in a large Boston metropolitan area city, is a qualified candidate that would assist the Town in bringing much-needed diversity to its Police Department.

During the prior hiring cycle, the Appellant was disqualified based solely on a decision by the Department to front-load fitness requirements during the appointment process. Instead of granting candidates a conditional offer of employment subject to passage of the fitness requirements of HRD, the Department, early in the application process, now requires candidates to meet more stringent fitness requirements only now required of candidates prior to entry into a Police Academy several weeks later. As stated by the Boston Police Department representatives, this new upfront Police Academy requirement may put candidates with limited resources at a disadvantage. A decision to "front-load" the new front-loaded MPTC fitness requirements, early in the municipal application process, and the likelihood of harming certain candidates, further complicates the process.⁵

⁵ The Commission has previously noted that the implementation of the front-loaded MPTC fitness test was controversial when initially promulgated and has expressed concern that these MPTC standards may unfairly deprive candidates of the chance of selection. *See Carnell v. Boston Police Dep't*, 33 MCSR 68 (2020) (allowing the bypass appeal of Appellants, stating it was likely that the Academy's fitness training program would have allowed the Appellants to improve physical ability performance.) *See also Cotto v. Taunton*, Docket No. G1-22-020 (Mar. 9, 2023) (concern that a candidate must pass both the traditional PAT administered by HRD and MPTC's rigorous pre-admission physical performance test.) *See also* <https://www.mass.gov/doc/municipal-police-training-committee-mptc-meeting-minutes-62119/download>)

After being rejected in the prior hiring cycle based on these new, upfront fitness requirements, the Appellant underwent a months-long fitness regiment, re-took the civil service examination, and again sought to be appointed as a police officer in his hometown of Auburn. It is hard to imagine a candidate more qualified and more committed to becoming an Auburn Police Department officer than the Appellant.

There is something amiss here. Mr. Brisson served as a reserve deputy in the Sheriff's office and has volunteered as a reserve police officer in a major Boston metropolitan city. He possesses a degree in criminal justice, and clearly is committed to becoming an Auburn police officer. In a town whose Police Department had one minority police officer in the last reporting period, the decision to bypass a talented, educated, qualified and diverse candidate such as the Appellant is not justified.

By a preponderance of the evidence, I find that the appointing authority did not have reasonable justification to bypass Mr. Brisson. It is undisputed that, save for the two items specifically mentioned in his bypass letter (his License to Carry and his Selective Service registration), Mr. Brisson submitted substantially accurate copies of all documents required of him. The Department was mistaken about the tax returns being business rather than personal returns. Mr. Brisson had provided all required documents in the prior hiring cycle less than a year before and was informed that his application would be kept on file. He had only a week between being informed that his name was up for consideration and the deadline to submit an application. He was not given any notice or opportunity to supplement his application, although there would be no prejudice to the Department to do so while he was processed through the fitness test. It is especially ironic to disqualify him because he mistakenly did not supply a copy of his License to Carry when the original was issued by the very same Department.

Under the particular circumstances here, I find that the few discrepancies in Mr. Brisson's application packet, along with the fact that the Department had previously obtained everything it needed to move Mr. Brisson through the process less than a year earlier, cannot support justification for a bypass under basic merit principles of civil service law.

For the reasons stated herein, this appeal of the Appellant, Moses Brisson is *allowed*.

The Commission, pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of 1993, orders the Human Resources Division or the Department as its delegate, to take the following action:

The name of Moses Brisson shall be placed at the top of all current and future certifications for the position of permanent full-time police officer with the Auburn Police Department until he receives at least one future opportunity to be hired or bypassed. Further, if the Appellant is selected for appointment, he shall receive a retroactive seniority date for civil service purposes equivalent to the earliest civil service seniority date of any candidates selected from Certification #08711 issued on July 15, 2022. This retroactive seniority date is not intended to provide the Appellant with any additional and/or retroactive compensation and should not be used to determine time served in the position of police officer regarding eligibility for any future civil service promotional examinations.

CIVIL SERVICE COMMISSION

/s/ Angela C. McConney

Angela C. McConney, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein, and Tivnan, Commissioners) on August 24, 2023.

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)(1), 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 to:

Moses H. Brisson, *pro se*

D. M. Moschos, Esq. (for Respondent)