

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114
617-979-1900

TREVOR CAETANO,

Appellant

G1-23-142

v.

CITY OF NEW BEDFORD,

Respondent

Appearance for Appellant:

Trevor Caetano, *Pro Se*

Appearance for Respondent:

Jane Medeiros Friedman, Esq.
Mead, Talerman & Costa, LLC
227 Union Street, Suite 606
New Bedford, MA 02745

Commissioner:

Paul M. Stein

Summary of Decision

The Commission upheld the bypass of a candidate for original appointment as a police officer whose military record included a lengthy AWOL and Desertion, resulting in his discharge under other than honorable conditions, for which he failed to take responsibility and provided unsupported explanations for his behavior.

DECISION ON RESPONDENT’S MOTION FOR SUMMARY DECISION

On August 8, 2023, the Appellant, Trevor Caetano (Appellant), appealed to the Civil Service Commission (Commission)¹, contesting the decision of the City of New Bedford (New Bedford) to bypass him for original appointment to the position of permanent, fulltime Police Officer with the New Bedford Police Department (NBPD). The Commission held a remote pre-hearing

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 (formal rules), apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

conference on September 5, 2023. Pursuant to a Procedural Order dated September 17, 2023, the Commission tentatively set November 10, 2023 as a date for a full evidentiary hearing—but, as it appeared that the most relevant facts were not in dispute, provided New Bedford an opportunity to file a Motion for Summary Decision, which it did on October 5, 2023, and to which the Appellant did not file any opposition. For the reasons stated below, New Bedford’s Motion for Summary Decision is allowed, the Appellant’s appeal is dismissed, and the full hearing tentatively scheduled for November 10, 2023 is cancelled.

UNDISPUTED FACTS

Based on the submission of the parties, the following facts are not disputed:

1. The Appellant took and passed the March 18, 2022 entry-level civil service examination administered by the state’s Human Resources Division (HRD) with a score of 94 and his name appeared on the eligible list established July 1, 2022 for original appointment to the NBPD. *(Stipulated Facts; HRD letter to Commission dated 8/28/2023)*
2. On March 22, 2023, HRD issued Certification #09118 authorizing New Bedford to appoint forty-one (41) permanent full-time NBPD police officers. *(Stipulated Facts; HRD letter to Commission dated 8/28/2023)*
3. The Appellant’s name was ranked in the 50th tie group. *(Stipulated Facts; HRD letter to Commission dated 8/28/2023)*
4. On April 9, 2023, the Appellant submitted an application for appointment to the NBPD. *(New Bedford Motion, Exh.A)*
5. At the time the Appellant submitted his application, he was employed as a civilian dispatcher for the NBPD. *(New Bedford Motion, Exh.B)*

6. When he applied for the position of NBPD dispatcher in January 2022, the Appellant completed an employment application. He checked “NO” to a question that asked: “Are you currently serving or have you served on active duty in the Armed Forces of the United States or the National Guard?” (*New Bedford Motion, Exh.B*)

7. An NBPD police investigator (investigator) was assigned to conduct a background investigation of the Appellant. (*New Bedford Motion, Exh.A*)

8. As a result of the background investigation, including an interview with the Appellant and a review of his military records, the investigator learned that the Appellant had enlisted in the U.S. Army and reported to basic training at Ft. Leonard Wood on February 28, 2017. He was reported Absent Without Leave (AWOL) on August 8, 2017. On September 7, 2017, his status was reclassified from “AWOL” to “Deserter”. (*New Bedford Motion, Exh.A*)

9. On his NBPD Application, the Appellant stated that he had served in the Army from 02/28/2017 until 11/12/2021 when he was discharged with the rank of Private (PV1). He stated that his discharge was not Honorable, which he explained as follows:

“General OTH: under general conditions discharge. (OTH) Discharge given to all admin..separated before 180 in. Awol was dismissed.”

Was in AIT training school, was very young as well as immature and thought it would be a good idea to leave and not return. Went awol [sic], was apprehended by civilian authorities, and then released on my own recog. to report to fort sill [sic] OK to finish up my discharge paperwork and was granted a General OTH under general conditions discharge of which ive [sic]already attached in the beginning portion of this application.

Although my discharge is oth under general, I am still able to reenlist in the US Army as well as i [sic] will be applying for an upgrade through Boston MEPs as well.”

(*New Bedford Motion, Exh.A*)

10. The NBPD investigation established that, on April 7, 2018, the Appellant was arrested by the Massachusetts State Police while driving an unregistered motor vehicle. He was transported to the Bristol County Sheriff’s Office and released on April 11, 2018 with a Department of Defense

(DD) Form 460 Provisional Pass and plane ticket with orders to report to Ft. Sill, Oklahoma by midnight. He failed to report. (*New Bedford Motion, Exh.A*)

11. More than three years later, on October 21, 2021, the Appellant eventually surrendered to authorities at Ft. Sill on October 21, 2021. (*New Bedford Motion, Exh.A*)

12. The Appellant was the subject of three military law enforcement investigations for Desertion (UCMJ – Article 85) and AWOL (UCMJ – Article 86), for which probable cause was established. The Appellant’s military records do not contain any record that his offense of AWOL was “dismissed.” (*New Bedford Motion, Exh.A*)

13. The Appellant was discharged from the U.S. Army on November 12, 2021. His DD214 states the character of service as: “UNDER OTHER THAN HONORABLE CONDITIONS” and reason for discharge was stated: “IN LIEU OF TRIAL BY COURT-MARTIAL”, the separation code for which is “KFS”.² The Appellant’s Reentry Code is “4”.³ (*New Bedford Motion, Exh.A*)

14. When the NBPD investigator asked the Appellant to explain his military record, the Appellant responded that he had been involved in a few minor incidents of horse-play during basic

² According to Army regulations, a Discharge in Lieu of Trial by Court-martial means, among other things, that the soldier acknowledges he/she is guilty of charges against him under the Uniform Code of Military Justice (UCMJ) that would authorize a bad conduct or dishonorable discharge. In order to receive such a discharge in lieu of court martial, the soldier acknowledges, after being afforded the opportunity to consult counsel, that a discharge in lieu of court martial may be under other than honorable conditions, which deprives the soldier of many or all Army benefits, including veteran’s benefits under state and federal law, and that the soldier may expect to encounter substantial prejudice in civilian life because of an Under Other Than Honorable Conditions Army Discharge. The soldier also acknowledges that there is no automatic upgrading or review of a less than honorable discharge. See Army Regulation 635-200, Ch.10 at pp. 89-94. https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=1020799.

³ According to the Army Review Boards Agency: “The RE code is not upgraded to allow enlistment. Soldiers separated with an RE-3 or RE-4 code must seek a waiver from a recruiter to enlist. Depending on the type of discharge and disqualification, a waiver may not be possible.” <https://arba.army.pentagon.mil/change-re-code.html>

training and that, when he got caught being involved in an “inappropriate” relationship with a female recruit, his Drill Sergeant told him that it was his “third strike” and he was “out”. (*New Bedford Motion, Exh.A*)

15. When asked why he went AWOL and took so long to turn himself in, the Appellant stated that he was “scared” because he had “looked up the repercussions . . . and for what I had done I could have been executed.” (*New Bedford Motion, Exh.A*)

16. The investigator inquired further about the alleged inappropriate relationship. He received a report from the Army that it had no documentation related to the incident and he found no one who had any knowledge of such an incident. The investigator also doubted the veracity of Mr. Caetano’s alleged fear of the consequences of deserting, as he knew that it was extremely unlikely that Mr. Caetano would be put to death for his behavior, there being only two executions for desertion since the Civil War. (*New Bedford Motion, Exh.A*)

17. New Bedford eventually appointed seven (7) candidates from Certification #09118 ranked below the Appellant. (*Stipulated Facts*)

18. By letter dated July 28, 2023, New Bedford Mayor Mitchell informed the Appellant that he had been bypassed for appointment to as an NBPD police officer, stating that the reasons for the bypass decision were based on the facts that (1) he had received an “other than honorable discharge”; and (2) he had given explanations that could not be verified and were, in part, inconsistent with documented facts about his military service. Based on the record before it, New Bedford could not justify hiring him as a police officer. (*New Bedford Motion, Exh.A*)

19. This appeal duly ensued (*Claim of Appeal; Stipulated Facts*)

APPLICABLE LEGAL STANDARD FOR SUMMARY DECISION

The Commission may, on motion or upon its own initiative, dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3). A motion to resolve an appeal before the Commission, in whole or in part, via summary decision may be filed pursuant to 801 C.M.R. 1.01(7)(h). An appeal may be disposed of, however, on summary disposition only when, “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., Milliken & Co. v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005).

ANALYSIS

The Commission’s review of the decision of an appointing authority to bypass a candidate for appointment to public safety civil service position is governed by Chapter 31, Sections 41-45 of the General Laws. 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 Service Comm’n, 483 Mass. 461, 474-78 (2019); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘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’”. Brackett v. Civil Service Comm’n, 447 Mass. 233, 243 (2006);

Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”).

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 Service Comm'n, 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997); Police Comm'r v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986).

An Appointing Authority is well within its rights to bypass an individual for fudging the truth as part of an application for a civil service position. It is reasonable to infer that a person who does so in order to get a job will be inclined to lie on the job. See O'Brien v. Somerville, 25 MCSR 292 (2012). See also Minoie v. Town of Braintree, 27 MCSR 216 (2014); Polin v. Randolph, 23 MCSR 229 (2011).

However, providing incorrect or incomplete information on an employment application does not always equate to untruthfulness. “[L]abeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and [informed] review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety.” Kerr v. Boston Police Dep't, 31 MCSR 35 (2018), citing Morley v. Boston Police Department, 29 MCSR 456 (2016). Moreover, a bypass letter is available for public inspection upon request, so the consequences to an applicant of charging him or her with untruthfulness can extend beyond the application process initially involved. See G.L. c. 31, § 27, ¶ 2. Thus, the serious consequences that flow from a finding that a law enforcement officer or applicant has violated the duty of truthfulness require that any such charges must be

carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. See, e.g., Boyd v. City of New Bedford, 29 MCSR 471 (2016); Morley v. Boston Police Dep't, 29 MCSR 456 (2016); Lucas v. Boston Police Dep't, 25 MCSR 420 (2012) (mistake about appellant's characterization of past medical history).

Under these well-established principles, the undisputed facts in this appeal, viewed in a light most favorable to the Appellant, establish that, for the reasons stated within New Bedford's Motion for Summary Decision, this appeal must be dismissed. After a reasonably thorough review, New Bedford has come to the reasonably justified conclusion that the Appellant is not a suitable candidate to be appointed to the position of a police officer at this time. His recent military record of over four years of AWOL and desertion, leading to a discharge "in lieu of court martial" and under "other than honorable conditions" less than two years before the bypass, together with unsupported explanations regarding the underlying events that resulted in his desertion, justifies this bypass. I also note that, while not specifically included in the bypass letter, it appears undisputed that the Appellant had originally concealed his military record from the NBPD when he originally gained employment as an NBPD dispatcher.

In sum, after carefully considering the undisputed facts presented here, I am satisfied that New Bedford was fully warranted to bypass the Appellant and that no evidentiary hearing is required.

CONCLUSION

For the reasons stated above, New Bedford's Motion to For Summary Decision is *allowed*, and the Appellant's appeal under Case No. G1-23-142 is *dismissed*. The full hearing tentatively scheduled for November 10, 2023 is cancelled.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, Stein, and Tivnan, Commissioners [McConney – Absent]) on November 2, 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:

Trevor Caetano (Appellant)

Jane Medeiros Friedman, Esq. (for Respondent)