

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

JEFFREY J. CORDEIRO, Jr.,

Appellant

Docket Number G1-07-362

v.

BOSTON POLICE DEPARTMENT,

Respondent

Attorney for the Appellant:

Sheila B. Gallagher, Esq.
Boston Police Department
1 Schroeder Plaza
Boston, MA 02129

Attorney for the Respondent:

Robert H. Clewell, Esq.
Rossman and Rossman
200 State Street
Boston, MA 02109

Hearing Officer:

Angela C. McConney, Esq.

DECISION

Pursuant to the provisions of G.L. c. 31 § 2(b), the Appellant Jeffrey Cordeiro, Jr., seeks review of the Personnel Administrator's (Human Resources Division — hereinafter "HRD") decision to accept the reasons of the Boston Police Department (hereinafter "Appointing Authority" or "BPD"), bypassing him for original appointment to the position of permanent full-time police officer. A full hearing was held on May 7, 2008 and October 6, 2008 at the offices of

the Civil Service Commission (hereinafter “Commission). Three (3) tapes were made and are retained by the Commission.

FINDINGS OF FACT

Fifteen (15) exhibits were entered into evidence at the hearing. Based on the exhibits submitted at the hearing and the testimony of the following witnesses:

For the Appointing Authority

- Robin W. Hunt, Human Resources Director, Boston Police Department, and
- Detective Lanita Cullinane, Boston Police Department,

For the Appellant

- Jeffrey J. Cordeiro, Jr., Appellant, and
- Steven Kenneway, President, Massachusetts Correctional Officers Union;

I make the following findings of fact:

Appellant’s Background

1. The Appellant is a thirty-three (33) year old male from Boston. (Testimony of Appellant)
2. The Appellant was honorably discharged from military service in the United States Navy. He subsequently became attached to the 379th Engineering Company of the United States Army Reserve, Massachusetts National Guard. He has been a member of the United States military since 1993. (Exhibit 3)
3. The Appellant’s name appeared on Certification 270048 for the position of police officer. (Exhibit 1)
4. On or about January 18, 2007, the Appellant attended the BPD Orientation meeting. (Testimony of Appellant)

5. On February 7, 2007, the Appellant signed his Student Officer Application and submitted it to the BPD. (Exhibit 3)
6. The Appellant started as a cadet in the Department of Corrections (hereinafter “DOC”) Academy on February 18, 2007. (Testimony of Appellant)
7. Robin Hunt, (hereinafter “Director Hunt”), the Director of Human Resources for the BPD, testified about the hiring process for becoming an officer. She explained that every candidate must first submit an application to the BPD. Once said application is submitted, detectives from the Recruit Investigation Unit (hereinafter referred to as (“RIU”) conduct background investigations on each applicant. The information is later presented at the “roundtable” discussion. Typically, the “roundtable” discussion involves the Commander of Recruit Investigations Unit, the Director of Human Resources, a Deputy Superintendent from Internal Affairs, and an attorney from the Legal Advisor’s Office. If a recruit’s application is unclear or the results of the background investigation need further clarification, a candidate may be asked to participate in a discretionary interview. (Testimony of Director Hunt)
8. Detective Lanita Cullinane (hereinafter “Det. Cullinane”) testified that she was assigned the Appellant’s case. She stated that she has worked for the BPD for twelve (12) years. Her current assignment is in the Recruit Investigations Unit. (Testimony of the Det. Cullinane)
9. During the hearing, Det. Cullinane described the practice for conducting background investigations on candidates. All applicants must participate in a three (3) hour orientation. At this orientation, the RIU explains the Student Officer Application thoroughly. Applicants are advised to disclose everything, including negative employment history or a criminal record. According to Det. Cullinane, applicants have the opportunity to give an explanation for any entries on their application. (Testimony of Det. Cullinane)

10. Det. Cullinane testified that she explained to the Appellant that he must disclose any forthcoming information after his application is submitted. Det. Cullinane recalled that the Appellant contacted her by telephone because he was having difficulty getting time off from the DOC on the days scheduled for him to be processed by the BPD. Det. Cullinane testified that she did not learn that there were any issues with the Appellant's application until after he was bypassed. (Testimony of Det. Cullinane)
11. After this phone conversation with the Appellant, Det. Cullinane did not hear anything further from him. (Testimony of Det. Cullinane)

First Roundtable

12. Director Hunt testified that she was present at the first roundtable where the Appellant's application was reviewed. Also present were Deputy Superintendent Norman Hill, Attorney Tsuyoshi Fukuda from the Legal Department, and Deputy Superintendent Marie Donahue. After this roundtable, the Appellant was given a conditional offer of employment on April 9, 2008, based upon successful passage of the medical and psychological components of the BPD's screening process. (Testimony of Director Hunt, Exhibits 1 and 2)

Appellant's Testimony before the Commission

13. The Appellant was scheduled to be processed by the BPD on April 17, 18, and 20 of 2007.
14. On April 9, 2007 when the Appellant filed three (3) written requests with the DOC requesting those days off, those requests were denied. (Exhibits 10, 11 and 12)
15. The Appellant did not cancel or postpone his BPD processing appointments for April 17, 18, and 20, 2007. (Testimony of Appellant)
16. Lieutenant Raymond Gonsalves (hereinafter "Lt. Gonsalves"), a member of the training staff at the DOC Training Academy, learned that the Appellant was applying to the BPD. The

relationship between them then deteriorated. Lt. Gonsalves informed the Appellant that he expected him to resign his position with the DOC instead of completing his training course.

(Testimony of the Appellant)

17. As part of his obligations to the National Guard, the Appellant was required to undergo certain pre-school testing. (Exhibits 7 and 8)

18. On April 13, 2007, the Appellant submitted a request to the DOC for time off to attend National Guard pre-school testing on April 17, 2007. On April 19, 2007, the Appellant submitted another request to the DOC for time off to attend further National Guard pre-school testing on April 18 and April 20, 2007. These requests were for the exact same days already denied for the BPD screening. These requests for military time were approved.

(Exhibits 5, 7 and 8)

19. The Appellant testified that on April 17, 2007, he reported¹ to the National Guard Armory, located at 10 Armory Road, Buzzards Bay, MA. The Appellant said that when he arrived, Staff Sergeant David S. Dixon (hereinafter “Staff Sgt. Dixon”) was not there, so the Appellant called him to let him know that he was ready to report. Staff Sgt. Dixon could not be present and informed him that he had fulfilled his reporting obligations and was thus relieved of any obligation to physically report for pre-class requirements. (Exhibit 13)

20. The Appellant said that then he left Buzzards Bay and went to the first day of BPD screening, returning for the continuation of his screening on April 18 and 20, 2007. (Testimony of the Appellant)

21. The Appellant testified that he orally resigned from the DOC with an effective date of April 24, 2007, as acknowledged in the October 15, 2007 letter from the DOC. The Appellant’s

¹ In military parlance, “report” requires both that the member of the military required to report be present at the time and place as ordered and that the individual to whom that member is to report also be present to complete the reporting process. Exhibit 13, Affidavit of Staff Sgt. David S. Dixon.

oral resignation was memorialized by a written resignation dated May 21, 2007. (Testimony of the Appellant, Testimony of Mr. Kenneway, Exhibits 6 and 9)

22. The DOC discovered that the Appellant had indeed attended the BPD screening on those dates and commenced disciplinary action against him by letter dated April 26, 2007, *after* the Appellant had already resigned. The Appellant did not inform the BPD of this action. (Exhibit 5)

23. The Appellant contacted his union president, Steven Kenneway, for assistance with the resignation process.

24. It is common practice for the DOC to accept a verbal resignation as a basis for resolving issues with an employee with the understanding that a written resignation would be forthcoming. (Exhibit 14 – Affidavit of Mr. Kenneway)

25. The Appellant's resignation was accepted, and the proposed termination was rescinded. (Testimony of Mr. Kenneway)

26. The Appellant did not inform the BPD that he had resigned from the DOC. (Testimony of Appellant, Testimony of Director Hunt)

27. The Appellant testified that although he resigned before the DOC terminated him, he was aware that the DOC believed its termination preceded the resignation. This led him to file the instant appeal. (Testimony of the Appellant)

28. The Appellant further admitted that he did not provide the DOC's written termination letter to the BPD. The Appellant stated that since he believed he had resigned, he did not think it was necessary to disclose this information. (Testimony of Appellant)

29. The Appellant testified that although he tried to contact the Department several times, he was never able to reach Det. Cullinane or any other BPD personnel. Te Appellant did call Det.

Cullinane on March 19, March 20 and April 8, 2007. He called the RUI on April 11, 2007.

(Testimony of the Appellant, Exhibits 5 and 14)

30. Although he was unable to reach BPD personnel by telephone, the Appellant failed to contact the BPD in writing. He testified that he did not submit a letter or document revealing either his or the DOC's position in regard to his separation. (Testimony of the Appellant, Exhibits 5 and 15)

Lt. Gonsalves Contacts the BPD

31. Before the Appellant took the state administered PAT (Physical Abilities Test), Director Hunt received two phone calls from Lt. Gonsalves. Director Hunt could not recall the exact dates of the calls. In the first call, Lt. Gonsalves informed Director Hunt that the DOC was investigating the Appellant for reporting that he needed time off for required military training - while attending BPD processing on those same dates. Lt. Gonsalves told Director Hunt that the Appellant had only attended military training on one of those dates and had used the remaining two days to report to the BPD for processing. (Exhibit 5, Testimony of Director Hunt)
32. Director Hunt further testified that in the second phone conversation with Lt. Gonsalves, she learned that the Appellant had been terminated in May 2007 due to his lying in order to attend the BPD processing. Director Hunt stated that she learned of the Appellant's "status" from the DOC, the Appellant never updated the BPD. (Testimony of Director Hunt)
33. After he received his conditional offer of employment from the BPD, the Appellant refrained from updating the BPD on his employment status. (Exhibit 5, Testimony of Director Hunt)

34. Director Hunt stated that she never spoke with the Appellant about his status with the DOC.

She further testified that she never received any documents from him showing that he had either resigned or been terminated from the DOC. (Exhibit 4, Testimony of Director Hunt)

35. Based on the information from Lt. Gonsalves, Director Hunt recommended that RIU investigators conduct a discretionary interview so that the Appellant could explain his situation. This interview took place on May 24, 2007 and was videotaped. (Exhibit 4, Testimony of Director Hunt)

Discretionary Interview, May 24, 2007

36. In the approximately thirteen (13) minute discretionary interview, the Appellant admitted that he had not been forthcoming with the DOC. (Exhibit 4, Video of Discretionary Interview)

37. He stated he had asked for the days off from the DOC to attend the Boston Police Department's processing and he was denied. He all but admitted that he planned with his military contacts to have them send him two separate letters regarding mandatory military training on April 17, 18 and 20, 2007: the exact dates of the BPD's processing days. The DOC granted time off for the military obligations. (Exhibits 4, 7, 8, 10, 11, and 12; Testimony of the Appellant)

38. The Appellant said that he did not go to the National Guard Armory in Buzzard's Bay on April 17, 2007. He said that he called Staff Sgt. Dixon and was informed that he did not have to appear there – whether he was showing up or reporting. (Exhibit 4, Testimony of the Appellant)

39. When the detectives asked the Appellant why he did not report back to the DOC when he learned that he did not have to go the Armory, he said that he was not instructed to do so.

40. The Appellant admitted that he told the DOC that he had gone to Armory, when in fact he had not done so.

41. The Appellant agreed with the detectives that the DOC had sent him a termination letter. When he offered to present documentation of his resignation, the detectives declined the offer. (Exhibit 4)

Second Roundtable

42. On May 29, 2008, a second roundtable was convened with Director Hunt present. Also present were Sargeant Detective Norman Hill, and Sargeant Detective Joe Harris. One of the RIU investigators presented a letter from the DOC, indicating that the Appellant had been terminated on April 26, 2007. There was no mention of resignation. There was no information from the Appellant on his status. (Exhibit 5, Testimony of Director Hunt)

43. Director Hunt testified that the second roundtable was presented with two major issues. The first issue was that the Appellant had been less than forthcoming with the DOC: using the days taken off for mandatory military training for BPD processing instead. Second, the Appellant no longer worked for the DOC. According to the information supplied by Lt. Gonsalves, they believed that he had been terminated. (Exhibit 5, Testimony of Director Hunt)

44. Director Hunt admitted that she was provided with an October 15, 2007 letter from the DOC indicating that the Appellant had in fact resigned and not been terminated. The letter acknowledges that the Appellant's effective resignation date was April 24, 2007. However, this letter was provided to the BPD months after the bypass. Admittedly, the Appellant could not have produced it before it existed, but the DOC did not contact the BPD again to correct its mistake. There was no BPD investigation into the discrepancy of Lt. Gonsalves' two

telephone calls and the October 15, 2007 letter from the DOC. (Exhibit 9, Testimony of Director Hunt)

The Bypass

45. The BPD submitted reasons to HRD for the Appellant's bypass on July 12, 2007. The reasons for the bypass were (1) the BPD's belief that the Appellant had been recently terminated by the DOC, while still in the hiring process; and (2) the Appellant's "lack of judgment in lying twice to his current employer (DOC) shows a deceptive personality trait that the Boston Police Department finds unsuitable and unbecoming in a Police Officer." (Exhibit 1)

CONCLUSION

Standard of Review

The role of the Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the Appointing Authority. Cambridge v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997); See Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civ. Serv. Comm'n, 38 Mass. App. Ct. 411 (2000); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). The Commission has held in numerous decisions that its function is not one of substituting judgment for that of the appointing authority. Cambridge at 304; School Comm. of Salem v. Civ. Serv. Comm'n, 348 Mass. 696, 699 (1965). M.G.L. c. 31 § 2(b) provides that "no administrator ... shall be reversed by the commissioner except upon a finding that such decision was not based upon a preponderance of evidence in the record." An action is "justified" when "done upon adequate reasons sufficiently supported by credible evidence, when weighted by an unprejudiced mind, guided by common

sense and by correct rules of law.” Cambridge at 304, *quoting* Selectman of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioner of Civ. Serv. v. Mun. Ct. of City of Boston, 359 Mass. 211, 214 (1971).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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 at 334. *See* Commissioners of Civ. Serv. v. Mun. Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster at 726, 727-728.

All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are the pretext for other impermissible reasons.” *See* Bowden v. Boston Police Dep’t, 11 MCSR 35 (1998) and Peavey v. Plainville, 11 MCSR 103 (1998) *quoting* Borelli v. MBTA, 1 MCSR 6 (1988).

The Bypass Was Based on Incorrect Information

In the instant case, the BPD bypassed the Appellant because of his representations to the DOC in regard to his military commitment and his failure to disclose his subsequent termination. (Exhibit 1) The July 12, 2007 bypass letter states, “The Boston Police Department was extremely disappointed that Mr. Cordeiro failed to voluntarily disclose his recent termination by the DOC, as he was still in the hiring process for the Boston Police Department. Further, his lack of judgment in lying twice to his current employer (DOC) shows a deceptive personality trait that

the Boston Police Department finds unsuitable and unbecoming in a Police Officer.” The Appeal must be allowed because at least one of these reasons is not true.

In regard to his misrepresentation of his military commitments, there is no doubt that the Appellant took advantage of the formalities of the Army pre-school testing. Although pre-school testing was required, (Exhibit 13) it is reasonable to infer that the Appellant arranged with his military contacts in order to have the exact same days off in order to attend the BPD processing. The Appellant had already contacted Det. Cullinane to let her know that he was having difficulty getting time off in order to attend BPD processing. He also refused to cooperate with the DOC investigation into the fact that he did attend the BPD processing on the days he had been allowed off in order to fulfill his military commitments.

What this Commission finds troubling is that the Appellant had to go to this extent at all. Should the Appellant be penalized for his ambition? Is the Appellant’s deception outweighed by the arbitrariness of the DOC’s behavior? This is not the forum for an examination of Lt. Gonsalves’ motives in denying the Appellant time off in order to attend the BPD processing, but it appears that there was no consideration for another law enforcement agency. Although this is not the type of behavior preferable in candidates for the position of police officer, no one should have to be placed in this position of lying in order to advance his career or being subject to the arbitrary behavior of another individual. This is a matter that the DOC should address.

The discretionary interview with the BPD does not do the Appellant credit. (Exhibit 4) In the interview and in testimony before the Commission, when questioned as to the meaning of “report,” he was most reluctant to describe that it was military parlance, although the meaning was not apparent to lay people. Apparently, the military term “report” is not synonymous with the lay term “showing up. In the hearing before the Commission, this hearing officer had to ask

the Appellant to explain the differences between the two terms more than once. At a time when he should have been forthcoming to assist in his case, he was prickly and uncooperative.”

In the discretionary interview, he again played semantics with the terms “orders” and “memorandum.” Orders from the military meant he had to appear. Memoranda from the military recommended that he appear, but were not orders. The documentation requesting his presence at the Armory on April 17, 18 and 20, 2007 fit in the latter category.

In the video, the Appellant readily admitted that he had been less than truthful with the DOC. However, he appeared to truly believe that he did not have return to the DOC on those three days because he was not specifically requested to. When the Appellant offered evidence of his resignation, the trained investigators did not follow up on it. There should have been more of an investigation. This episode, notwithstanding the behavior of Lt. Gonsalves, was not an exercise of good judgement on the Appellant’s part.

The evidence is also quite clear that the Appellant, on his own, then with the assistance of his union, made a number of attempts to resign from the DOC. That process was eventually acknowledged by the DOC in Exhibit 9. The BPD was contacted twice by Lt. Gonsalves, an employee at the DOC Academy, with no apparent affiliation with the DOC Human Resources Department. In contrast, Exhibit 9 which acknowledges the Appellant’s April 24, 2007 resignation, is a signed document on letterhead from the DOC Human Resources Director. The BPD should at least have contacted the DOC Human Resources Department: this may have uncovered the fact that there were both a resignation letter and a termination letter in the same file.

The Appellant never informed the BPD, orally or in writing, that he was separated from the DOC. Although he claims that he gave a verbal resignation to the DOC, he never informed the

BPD about this change in employment status. The Appellant also testified that he was aware that the DOC believed it had terminated him. Regardless of what he believed, the Appellant failed to act by not keeping the BPD abreast of the change in his employment status. That was his responsibility, as was explained to him during the three (3) hour orientation with the RIU. In her testimony, Det. Cullinane stressed that this made clear to all the candidates.

The Appellant is not blameless in this course of events. It was his affirmative duty to inform the BPD of his oral resignation forthwith. His failure to do so lent credence to Lt. Gonsalves' actions. Although the BPD should have contacted DOC Human Resources or launched its own investigation, with no countering information from the Appellant, it chose to believe Lt. Gonsalves.

Months after he left the DOC and after he had been bypassed, the Appellant produced a letter from the DOC which was not part of his BPD application. This letter documents that the Appellant had indeed resigned in April, 2007. To say that doing so in advance of receiving a conditional offer from the BPD is foolhardy may be an understatement. In the absence of this letter or similar evidence, the BPD's actions for seeking the removal of the Appellant from appointment to the Boston Police Department were reasonable.

It is apparent that the Appellant is an earnest young man, full of his ambition for his future. I do believe that he was under the censure of Lt. Gonsalves after the lieutenant discovered that he had applied to the BPD. It is not clear what other means were available for him in order for him to attend the BPD processing, but it appears that he went about it the wrong way. Hopefully this experience will have taught the Appellant that candor with the BPD up front and throughout the process, rather than concealment was the better course of action. Had the Appellant kept the

BPD informed of his circumstances, I am certain the BPD would have seen the situation in a completely different light, favorable to him.

Hopefully the DOC will address this issue that appears to prevent its corrections officers from advancing in the field of law enforcement.

I find that he presented the DOC with valid military commitments on April 17, 18 and 20, 2007 with the National Guard, which in his own words were “memoranda,” not “orders” to appear. (Exhibits 5, 7 and 8) I do not believe that he went to the National Guard Armory in Buzzards Bay on Armory 17, 2007. I find that he attended BPD processing instead on those days and that he did not inform the DOC of this. I further find that the Appellant was not terminated by the DOC, but resigned first orally, then in the form of a written document. (Testimony of the Appellant, Testimony of Mr. Kenneway, Exhibit 6) I also find that he did not inform the BPD of his separation status with the DOC. (Testimony of Director Hunt, Testimony of the Appellant) The Commission respects the fact that not every action of every DOC employee is necessarily what the agency’s senior management may have intended, but I find that Lt. Gonsalves precipitately informed the BPD that the Appellant had been terminated. (Testimony of Director Hunt) The BPD failed to contact DOC Human Resources or conduct a full investigation into these allegations.

Given the findings that the bypass was based on erroneous information in regard to the Appellant’s separation from the DOC, the Appellant’s appeal must be allowed. This is not a reason for jubilation by the Appellant. This entire episode may have been precluded if he had done his duty and had been fully forthcoming with the Department.

The BPD may indeed bypass the Appellant again, just not for that invalid reason as stated in the July 12, 2007 bypass letter.

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, the Civil Service Commission directs that the Division of Human Resources place the Appellant's name at the top of the current eligibility list for appointment to the position of permanent full time police officer so that his name appears at the top of the existing certification list, or the next certification list if the current one has expired, requested by the City of Boston Police Department from the Human Resources Division and from which the next original appointment to the position of permanent full time police officer shall be made by the City of Boston. The Appellant shall receive at least one opportunity for consideration and appointment and the City shall not use the same reason for bypassing him that were used in the events noted in this case. Upon appointment, the Appellant shall receive additional relief consisting of retroactive seniority from the date of the improper bypass.

WHEREFOR, the appeal filed under Docket No. G1-07-362 is hereby *allowed*.

Civil Service Commission

Angela C. McConney, Esq.
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and Taylor, [Marquis, NO] Commissioners) on January 15, 2009.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:
Sheila B. Gallagher, Esq. (for Appointing Authority)
Robert H. Clewell, Esq. (for Appellant)