

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

NUIAS DAVEIGA,
Appellant

v.

G1-14-78

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Steven J. Topazio, Esq.
10 Winthrop Square: Suite 4100
Boston, MA 02110

Appearance for Respondent:

Peter M. Geraghty, Esq.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman¹

DECISION

Pursuant to G.L. c. 31, § 2(b), Nuias Daveiga (Mr. Daveiga) has challenged the decision of the Boston Police Department (BPD) to bypass him for original appointment to the civil service position of permanent full-time police officer. Mr. Daveiga filed an appeal with the Civil Service Commission (Commission) on March 31, 2014. A pre-hearing conference was held on April 22, 2014, followed by a full hearing on June 19, 2014, both of which were held at the

¹ The Commission acknowledges the assistance of Law Clerk David Roberson in the drafting of this decision.

offices of the Commission² The full hearing was digitally recorded and both parties received a CD of the proceeding.³ Both parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

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

Called by the BPD:

- Erin Schroeder-Withington, Detective, BPD;
- Devin Taylor, Director of Human Resources, BPD;

Called by Mr. Daveiga:

- James O’Gara, Personnel Analyst III, Department of Correction;
- Nuias Daveiga, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, two (2) prior bypass decisions issued by the Commission (see Daveiga v. Boston Police Department, CSC Case No. G1-11-17 (2011) (2011 Bypass); Daveiga v. Boston Police Department, 26 MCSR 243 (2013) (2012 Bypass), regulations and policies, and reasonable inferences therefrom, I make the following findings of fact:

1. Mr. Daveiga is thirty-five (35) years-old. He is single, has one child and lives in Dorchester, MA. He is originally from the Republic of Cape Verde. (Testimony of Mr. Daveiga)

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ 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 substantial evidence, arbitrary or 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.

2. Mr. Daveiga graduated from Brighton High School in 1997. He received a bachelors degree in criminal justice from Mt. Ida College in Newton, MA in 2002. (Testimony of Mr. Davaeiga)
3. Mr. Daveiga is currently employed by the state's Department of Mental Health as a campus police officer and has a Class A Large Capacity license to carry a firearm. (Testimony of Mr. Daveiga)

Prior Bypass Appeals

4. In 2011, Mr. Daveiga was bypassed for appointment as a Boston police officer based on: being discharged from employment as a reserve correction officer at the Essex County Sheriff's Department; and a 1998 indecent assault and battery charge which was continued without a finding. Prior to going to a full hearing, the parties filed a joint request to allow the appeal and allow Mr. Daveiga an additional opportunity for consideration. (2011 Bypass)
5. In 2012, Mr. Daveiga was again bypassed for appointment as a Boston police officer based on his failure to provide the BPD with evidence showing that two (2) open criminal cases against him had been closed. The Commission affirmed the BPD's bypass decision and denied Mr. Daveiga's 2012 appeal. (2012 Bypass)

Instant Bypass Appeal

6. On April 30, 2011, Mr. Daveiga took and passed the civil service examination for Boston police officer. (Stipulated Facts)
7. On May 10, 2013, the state's Human Resources Division (HRD) sent Certification No. 00746 to the BPD from which the BPD eventually appointed eighty-three (83) candidates, seventy-nine of whom were ranked below Mr. Daveiga. (Stipulated Facts)

8. In June 2013, Mr. Daveiga completed and signed a student officer application and submitted it to the BPD. (Exhibit 9)
9. After Mr. Daveiga submitted his student officer application, the BPD's Recruit Investigations Unit (RIU) began an investigation into Mr. Daveiga's background. (Testimony of Detective Schroeder and Ms. Taylor)
10. Detective Schroeder has worked for the BPD for nineteen (19) years. Detective Schroeder began working for the BPD as a patrol officer. She was then assigned as a detective in the Sexual Assault Unit until 2008. She was then assigned to the Homicide Unit until 2010. After that, she was assigned to Crimes Against Children Unit until 2012. From February 2012 to February of 2014 she was assigned to the RIU. While assigned to the RIU, Detective Schroeder was tasked with investigating potential Boston Police Department recruits. (Testimony of Detective Schroeder)
11. When conducting a background investigation, the BPD reviews criminal history, driving record, employment records, neighbor references, personal references, past relationships, etc. (Testimony of Detective Schroeder)
12. Detective Schroeder was randomly assigned to conduct a background investigation of Mr. Daveiga. Upon reviewing Mr. Daveiga's record, Detective Schroeder had several concerns. (Testimony of Detective Schroeder)
13. A primary concern was Mr. Daveiga's separation from his employment with the Essex County House of Correction in 2008. (Testimony of Detective Schroeder)
14. According to Mr. Daveiga's employment application, he was employed at the Essex County House of Correction from September 2007 until March 2008. Under "reason for leaving", Mr. Daveiga wrote: "Temp Job; Discharge / Mutual Agreement." (Exhibit 9)

15. Detective Schroeder had a concern with Mr. Daveiga's response when asked about why he left the Essex County House of Correction. Mr. Daveiga also told Detective Schroeder that he was discharged under a "mutual agreement." (Testimony of Detective Schroeder)
16. Detective Schroeder contacted the Director of Human Resources at the Essex County House of Correction, who said that the separation of Mr. Daveiga from the department was a termination. The termination had been previously listed as a "mutual agreement"; this categorization was a result of the termination being under review in 2010 with the Essex County Legal Department. (Testimony of Detective Schroeder)
17. In addition, Detective Schroeder spoke with the person who served as the Essex County House of Correction's Commissioner of Public Safety at the time that Mr. Daveiga was employed there. The Commissioner stated that he had terminated Mr. Daveiga himself, because Mr. Daveiga was directed to not give the inmates additional, unauthorized food, but he continued to do so in violation of the direct order given to him by his supervisor. (Testimony of Detective Schroeder)
18. When Detective Schroeder spoke with Mr. Daveiga about the allegation that he was terminated due to giving inmates food after being ordered not to do so, Mr. Daveiga claimed that *other* people were giving out extra food and that he was targeted by other correction officers when he refused to do so. (Testimony of Mr. Daveiga)
19. While reviewing Mr. Daveiga's record, Detective Schroeder noticed that Mr. Daveiga had a charge of Indecent Assault and Battery on his record from 1998. (Testimony of Detective Schroeder)
20. In 1998, while a student at Mt. Ida College, Mr. Daveiga was charged with two (2) criminal offenses in Newton District Court and he admitted to sufficient facts to the offense of

Indecent Assault and Battery on a person 14 years or older, as well as a count for Assault and Battery, and received a continuance without a finding (CWOFF) on both counts which were both then dismissed in 1999. (Exhibit 5)

21. On November 9, 2010, Mr. Daveiga filed a motion for a new trial as to his admission to the offense of Indecent Assault and Battery on a person 14 years or older in the Newton District Court which was allowed by the Court. The Court vacated Mr. Daveiga's CWOFF to the offense of Indecent Assault and Battery on a person 14 years or older and dismissed that charge at the request of the Commonwealth. (Testimony of Mr. Daveiga and Exhibit 5)
22. Detective Schroeder spoke to Mr. Daveiga about the underlying incident that resulted in the 1998 criminal charges against him. Mr. Daveiga stated that while he was living at Mt. Ida College, a physical altercation occurred between himself and his roommate. The victim alleged that Mr. Daveiga inappropriately touched him on the genitals. (Testimony of Detective Schroeder)
23. Detective Schroeder contacted Mt. Ida College to obtain information about this incident, but the college had lost the records. (Testimony of Detective Schroeder)
24. Detective Schroeder also spoke with Mr. Daveiga's neighbors and a former supervisor at a security company. Two (2) female neighbors spoke negatively about Mr. Daveiga. An elderly woman described him as "rude" and a young female stated that Mr. Daveiga doesn't talk to her. During an in-person meeting with Mr. Daveiga's former supervisor, the supervisor expressed concern that Mr. Daveiga had a problem with women and that he was "more aggressive" with women than men. (Testimony of Detective Schroeder)
25. On July 3, 2013, Detective Schroeder presented the results of her background investigation to a "roundtable" of BPD professionals responsible for making final recommendations

regarding police officer appointments. The roundtable consisted of the Director of Human Resources, the Deputy Superintendent of the Bureau of Internal Affairs, the Sgt. Detective who oversees the Recruit Investigations Unit, an attorney from the Legal Advisor's Office, and the Director of the Medical Unit. Devin Taylor is the Director of Human Resources and testified before the Commission. (Testimony of Ms. Taylor)

26. The roundtable had a concern with Mr. Daveiga's termination from his employment with Essex County House of Correction. It was a concern because the position is so closely tied to the law enforcement position he was being considered for. Both positions involve a chain of command which must be strictly followed. (Testimony of Ms. Taylor)

27. Both Detective Schroeder and the the roundtable concluded that Mr. Daveiga was less than forthcoming with information when he categorized his termination as under a mutual agreement. (Testimony of Ms. Taylor and Detective Schroeder)

28. The unfavorable review from Mr. Daveiga's supervisor at the security company was also a concern to the roundtable, because police officers are expected to deal with all members of the community they serve, including both males and females. If an applicant has a predisposition to a certain group noted by a previous supervisor, this poses a public safety concern. (Testimony of Ms. Taylor)

29. Mr. Daveiga's criminal record was of concern to the roundtable. They considered that Mr. Daveiga had admitted to sufficient facts at the time and served probation time. Afterwards, the charge remained on his record for twelve (12) years, until it was later dismissed. (Testimony of Ms. Taylor)

30. In a letter dated February 12, 2014, Mr. Daveiga was informed of the BPD's decision to bypass him for appointment. The reasons included Mr. Daveiga's termination from the

Essex County House of Correction; their concern that Mr. Daveiga represented the termination as a mutual agreement; the 1998 criminal charges; and the concerns expressed by a former supervisor regarding Mr. Daveiga's behavior toward women. (Exhibit 15)

31. The BPD did not provide Mr. Daveiga with a copy the CORI report upon which they relied in part to make this adverse employment decision⁴. (Testimony of Ms. Taylor)

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. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. at 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 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

⁴ G.L. c. 6, § 171A states in relevant part: In connection with any decision regarding employment ... a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source prior to questioning the applicant about his criminal history. If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source ..." (emphasis added) Although it appears that the BPD did not comply with this statutory requirement, it does not alter my conclusion regarding whether the BPD had reasonable justification to bypass Mr. Daveiga. Further, it would appear that Mr. Daveiga's recourse regarding the CORI-related issue, in this particular case, would be with the Criminal Records Review Board.

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 Serv. 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, 60 Mass. App. Ct. 914, 915 (2004).

Analysis

In Beverly, a candidate for police officer was bypassed for appointment because he was terminated from his previous employer for serious misconduct – the unauthorized access of the voicemail accounts of other employees. A three-person majority of the Commission concluded that the City “failed to prove that [the candidate] illegally accessed voicemails of employees the reason given for his bypass, and accordingly did not support the reason by the necessary preponderance of the evidence.”

That decision was subsequently vacated by the Superior Court. Agreeing with the Superior Court, the Appeals Court stated, “Instead of focusing on whether the city had carried its burden

of demonstrating a ‘reasonable justification’ the commission focused on whether the city had proven that [the candidate] in fact engaged in the misconduct. We believe the commission erred as a matter of law in placing such an added evidentiary burden on the city. In simple terms, neither [the candidate] nor the commission has presented a convincing argument that the Legislature intended to force an appointing authority to hire a job applicant for such a sensitive position unless it is able to prove to the commission’s satisfaction that the applicant in fact engaged in the serious alleged misconduct for which he was fired.”

Further, the Commission has previously held that an applicant’s arrest record, even where there is no conviction, is entitled to some weight by the appointing authority in making its decision. Labriola v. Town of Stoneham, 25 MCSR 36, 38 (2012), citing Thames v. Boston Police Dep’t, 17 MCSR 125, 127 (2004); Soares v. Brockton Police Dep’t, 14 MCSR 109, 110 (2001); Brooks v. Boston Police Dep’t, 12 MCSR 19, 20 (1999); Frangie v. Boston Police Dep’t, 7 MCSR 252, 253 (1994)). This is especially true when the applicant is seeking appointment to a public safety position,” Campbell v. Boston Fire Dep’t, 22 MCSR 489 (2009). However, in relying on a candidate’s arrest record, the appointing authority is obligated to produce sufficient substantiation of the facts underlying those charges. Lee v. Boston Police Dep’t, 22 MCSR 239 (2009). Additionally, in order for an appointing authority to rely on a record of prior criminal conduct as the grounds for bypassing a candidate, there must be a sufficient nexus between the prior misconduct and the candidate’s current ability to perform the duties of the position to which he seeks appointment. The amount of time that has passed since the misconduct occurred, the nature of the offense, and evidence of the candidate’s subsequent record are factors that should be taken into account on a case-by-case basis. See e.g., Langston v. Cambridge Police

Dep't, 7 MCSR 178, 179 (1994); Dowd v. Lowell Fire Dep't, 14 MCSR 31, 32 (2001); Ellis v. Dedham, 17 MCSR 30, 31 (2004).

Applied here, the BPD was allowed to consider the 1998 criminal charges against Mr. Daveiga, even though one of the charges was dismissed and another vacated. Similarly, they were also allowed to consider Mr. Daveiga's separation from employment from the Essex County House of Correction as well as the negative references they received from a former supervisor and two (2) neighbors. Further, I cannot require the BPD to prove that Mr. Daveiga engaged in the alleged criminal behavior or that he engaged in misconduct at the Essex County House of Correction. Rather, my role here was to review the "legitimacy" and "reasonableness" of the BPD's decision and to determine if the BPD conducted an impartial and "reasonably thorough" review in reaching that decision. They did.

A veteran Boston police officer, whose testimony I found highly credible, conducted a fair, thorough and objective background investigation of Mr. Daveiga. Rather than relying solely on the CORI report related to the 1998 criminal charges, Detective Schroeder: reached out to the college where the incident occurred to try and obtain additional records; contacted the Newton District Court where this matter was adjudicated; and spoke personally with Mr. Daveiga about what occurred. Based on all of the information obtained, Detective Schroeder and members of the roundtable remained concerned about these criminal charges and the underlying incident, particularly given the inherent law enforcement responsibilities of a police officer.

The BPD did not rely solely on these criminal charges, relating to an incident that occurred fourteen (14) years ago, in making their decision to bypass Mr. Daveiga. Detective Schroeder had also received conflicting information about whether Mr. Daveiga's separation from employment from the Essex County House of Correction was "mutual" as he had stated in his

student officer application. As part of her investigation, she spoke personally to the Director of Human Resources at the Essex County House of Correction as well as the person who was Mr. Daveiga's direct supervisor. She also spoke directly to Mr. Daveiga. Ultimately, Detective Schroeder reached the conclusion that: Mr. Daveiga was indeed terminated from the Essex County House of Correction; that his termination was related to his failure to obey orders; and that his characterization of the termination as "mutual" was not accurate. Detective Schroeder noted her concerns in her written report which was submitted to members of the roundtable, which shared Detective Schroeder's concerns.

Detective Schroeder's investigation also included interviews with Mr. Daveiga's neighbors and a meeting with Mr. Daveiga's former supervisor at a security company. Two (2) female neighbors made negative comments about Mr. Daveiga and the male supervisor stated that Mr. Daveiga was "more aggressive" with women than he was with men. This information was also included in Detective Schroeder's report, which the roundtable relied on in making their decision.

Mr. Daveiga, during his testimony before the Commission, provided his recollection of what occurred during the 1998 incident at Mt. Ida College and his decision to dispose of the criminal matter through a CWOFF.

According to Mr. Daveiga, his roommate at Mt. Ida College did not care for the music that Mr. Daveiga played in their shared dormitory room. Upon arriving back at the dorm room after a weekend at home, Mr. Daveiga discovered that his belongings were missing. An altercation ensued between Mr. Daveiga and the roommate. Mr. Daveiga admits to grabbing the roommate's wrist and/or striking or blocking the roommate but argues that he was acting in self defense.

Mr. Daveiga also testified that he chose not to go to trial and contest the criminal charges against him because he was young and unfamiliar with the judicial process and that he accepted his court-appointed attorney's advice to make the criminal charges "go away" via a CWOFF. As part of his testimony, Mr. Daveiga described a phone conversation that followed his failure to appear for a scheduled hearing that he claims he was unaware of. He testified that his female attorney was "pissed off at [him]" and he sought to place blame on her for how the matter was disposed of.

Mr. Daveiga also testified about his employment at the Essex County House of Correction. He adamantly denies that he engaged in misconduct. Rather, Mr. Daveiga testified that, while assigned to the cafeteria, inmates, without authorization, would seek to obtain additional food, some of which they were bringing back to employees at the House of Correction. In summary, Mr. Daveiga testified that when he sought to *prevent* this from happening, he was ostracized and "bullied" by fellow employees who urged him to look the other way. As a result, he testified that he and his supervisor mutually agreed that the job was not a "good fit" for him and they mutually agreed that his employment as a reserve correction officer would be terminated and that he would not seek to become a permanent correction officer.

Standing alone, portions of Mr. Daveiga's testimony regarding what occurred while he was employed at the Essex County House of Correction are highly plausible and cast doubt (for me) on what actually occurred. Even if his account is true, however, the preponderance of evidence stills shows that the BPD, at the time, based on a thorough review of this matter, ultimately accepted the version of events conveyed to them by the facility's Director of Human Resources and the then-Commissioner of Public Safety. Their judgment call was not tainted by any personal or political bias against Mr. Daveiga and, notwithstanding my observations that Mr.

Daveiga may not have engaged in misconduct, I am not permitted to substitute my judgment for that of the BPD on this matter.

Finally, the BPD received negative comments about Mr. Daveiga's interaction with women, including allegations by a former supervisor that he was "more aggressive" with women than men. While Mr. Daveiga adamantly disputes this allegation, and points to his time as a domestic violence victim advocate, he does not believe that the supervisor had any personal animus against him that would cause him to make false allegations.

Given the precedent-setting judicial decisions regarding the "substantial deference" due to Appointing Authorities when making appointments and because of the findings and conclusions above, including those outlining the fairness and thoroughness of the BPD's review here, they were reasonably justified in bypassing Mr. Daveiga for all of the reasons contained in the bypass letter.

Conclusion

The BPD's decision to bypass Mr. Daveiga is affirmed and Mr. Daveiga's appeal under Docket No. G1-14-78 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on October 2, 2014.

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.

Notice:

Steven J. Topazio, Esq. (for Appellant)

Peter M. Geraghty, Esq. (for Respondent)

John Marra, Esq. (HRD)