

Decision mailed: 5/9/08
Civil Service Commission
CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

CIVIL SERVICE COMMISSION

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

GREGORY DAVIS,
Appellant

v.

G1-07-122

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

Tara L. Chisholm, Esq.
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Commissioner:

John E. Taylor

DECISION

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant, Gregory Davis, (hereafter "Davis" or "Appellant"), seeks review of the Human Resources Division's ("HRD") decision to accept reasons proffered by the Appointing Authority, Boston Police Department (hereafter, "Department" or "Appointing Authority"), to bypass him for original appointment to the position of Boston police officer. The appeal was timely filed. A full hearing was held on September 5, 2007,

at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. One audiotape was made of the hearing.

FINDINGS OF FACT:

Nine (9) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of Edward Callahan, Boston Police Department; Appellant; Michael Miller, a Marine Corps Sergeant; and George Ortiz, a University of Massachusetts police officer,

I make the following findings of facts:

1. On June 20, 2006, Appellant's name appeared on Certification 260616 for the position of police officer. (Exhibit 9, Packet Submitted by HRD)
2. On or about July 14, 2006, Appellant signed his Student Officer Application ("Application") and submitted it to the Department. (Exhibit 7)
3. In his Application, Appellant checked off "yes" as to whether he has operated a vehicle while under the influence of alcohol or drugs. He also checked off "yes" as to whether he has been involved in a motor vehicle accident while drinking. On a separate page that he attached to the back of his Application, Appellant explained that he struck a vehicle and was charged with Operating under the Influence of Liquor in November 1995. (Exhibit 7)
4. In his Application, Appellant checked off "yes" as to whether he has applied for a public safety position before. On the page attached to the Application, Appellant

indicates that he has applied for a position with Framingham State College, the Sherborn Police Department, the Massachusetts Department of Corrections, and the Washington D.C. Metropolitan Police Department. (Exhibit 7)

5. In his Application, Appellant checked off “yes” as to whether he has not been selected for a public safety position. On the page attached to the Application, Appellant indicates that he was not selected because of his “background.” (Exhibit 7)
6. After Appellant submitted his application, a thorough background investigation was undertaken by a Detective assigned to the Boston Police Recruit Investigations Unit. (Testimony of Callahan)
7. Edward Callahan, the Director of Human Resources for over nineteen years, testified that the Department reviews each and every candidate’s suitability for appointment to its force. This review includes not only the applicant’s statements in his application, but also a background investigation to determine his character and fitness. (Testimony of Callahan)
8. The result of Appellant’s background investigation was presented to a Department hiring committee during a “roundtable” discussion, which typically involves the Commander of Recruit Investigations, the Director of Human Resources, a Deputy Superintendent from Internal Affairs, and an attorney from the Legal Advisor’s Office. Callahan was a member of the roundtable discussion involving Appellant. (Testimony of Callahan)
9. Callahan explained the hiring process in order to become a Boston Police Officer, testifying that the Department heavily considers a candidate’s criminal history

when making hiring decisions, since police officers are expected to not only abide by the law, but to enforce those very same laws. He indicated that a firearm is a "tool of the trade" and with that, an officer is given a lot of responsibility and power over the community. Callahan testified that the City has to be "extraordinarily careful" about who becomes a police officer: it must make sound decisions when hiring because the public's safety is at issue and the City is liable for those persons under their employ. (Testimony of Callahan)

10. Callahan offered very credible testimony.

11. The investigation into Appellant's background revealed that on July 2, 1993, he was charged with Breaking and Entering in the Night Time with the Intent to Commit a Felony, Malicious Destruction of Property Over \$250, and Attempted Breaking and Entering in the Night Time, in the West Roxbury District Court. Appellant was placed on pre-trial probation and his case was continued for approximately four months and ultimately dismissed as he was not involved in additional trouble during that time. (Exhibits 2 and 3 and testimony of Callahan)

12. Appellant denied that he was involved in breaking and entering, but that he was identified as one of the assailants by a witness who called the police that evening. (Testimony of Appellant)

13. The investigation further revealed that on July 20, 1994, Appellant admitted to sufficient facts in the Dedham District Court that he drove an Uninsured Motor Vehicle and Attached the Wrong License Plate to this vehicle. As a result he was given a Continued without a Finding and was placed on probation for one (1) year, until July 19, 1995. (Exhibits 2 and 4 and testimony of Callahan)

14. Additionally, the Boston Police background investigation revealed that on October 26, 1995, Appellant admitted to sufficient facts in the Boston Municipal Court that he was in Possession of a Class D Controlled Substance. He was given a Continued without a Finding and was placed on probation for six (6) months, until April 24, 1996. (Exhibits 2 and 5 and testimony of Callahan)
15. When asked about his arrest for Possession of Class D at the Civil Service hearing, Appellant indicated that he was arrested for possessing marijuana while a passenger in his own vehicle. Appellant admitted that he could not drive because he was high on marijuana that he had smoked with his friend before getting into his car. (Testimony of Appellant)
16. On his Application and during his testimony, Appellant admits that he has used marijuana, cocaine, and hashish. (Exhibit 7 and testimony of Appellant)
17. The background investigation also revealed that in November 1995, Appellant was charged with Operating a Motor Vehicle under the Influence of Liquor, Malicious Destruction of Property, and Assault and Battery on a Police Officer. Appellant testified that he and a friend decided to see how much alcohol they could consume before they passed out. He admitted that after drinking, he drove his car, blacked out while driving and awoke at the police station. Appellant stated that he crashed into the rear of a police car and that the charge for Assault and Battery on a Police Officer was for pushed the arresting officer's shoulder. On February 7, 1996, Appellant admitted to sufficient facts to these charges and was given a Continued without a Finding and placed on probation for eighteen months. (Exhibits 2 and 6 and testimony of Callahan and Appellant)

18. Callahan testified that all members of the roundtable discussion agreed that the totality of the circumstances surrounding the Appellant's criminal history rendered him unsuitable to be a Boston Police Officer. (Testimony of Callahan)
19. Appellant appeared truthful in his testimony. He has not had subsequent involvement with the police since 1995 and has had an excellent employment record. He has taken computer technology courses in order to advance his career. (Exhibit 8 and testimony of Appellant)
20. Michael Miller, a Marine Corps Sergeant, and George Ortiz, a University of Massachusetts police officer, testified credibly that they have known and worked with Appellant over the past few years and have observed him handle stressful situations and physical and abusive situations appropriately and admirably.
21. Based on the background investigation and circumstances involving Appellant's criminal history, the Department recommended to HRD that Appellant be bypassed for appointment as a police officer. The letter from Callahan to HRD dated November 27, 2006 stated: "Mr. Davis has had a wide variety of criminal charges levied against him including; Operating Under the Influence of Liquor, Malicious Destruction of Property, A & B on a Police Officer, Possession of a Class D Controlled Substance, Compulsory Insurance Violation, Attempted Breaking & Entering, B & E Night Time W/I to Commit a Felony and Malicious Destruction of Property. It is the opinion of the Boston Police Department that Mr. Davis' criminal history renders him ineligible for appointment as a Boston Police Officer." (Exhibit 1 and testimony of Callahan)

22. HRD approved the Department's decision to bypass Appellant for appointment as a Boston police officer and was PAR .09 removed from certification number 260616 on February 1, 2007. (Exhibit 9 and Package Submitted by HRD)

CONCLUSION:

The role of the Civil Service 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." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997); *See* McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 411 (2000); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of 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. City of Cambridge, 43 Mass. App. Ct. at 304; School Committee of Salem v. Civil Service Commission, 348 Mass. 696, 699 (1965). Massachusetts General Law chapter 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." City of Cambridge, 43 Mass. App. Ct. at 304, quoting Selectman of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 262 Mass. 477, 482 (1928); Commissioner of Civil Service v. Municipal Court of City of Boston, 359 Mass. 211, 214 (1971).

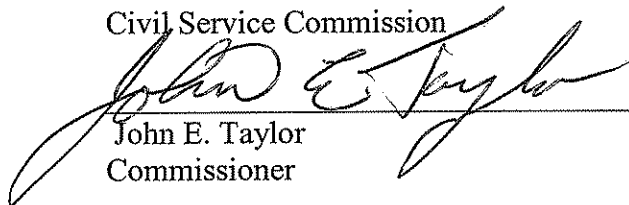
The Commission grants latitude for the discretion of an Appointing Authority when selecting candidates for hire. In a bypass appeal, the question is whether the Appointing Authority “has sustained its burden of proving that there was reasonable justification for action taken by the Appointing Authority.” The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the Commission, there was reasonable justification for the action taken by the Appointing Authority in the circumstances found by the Commission to have existed when the Appointing Authority made its decision.” Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (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 has long 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. Thames v. Boston Police Department, Docket No. G-02-82 (2004) A police officer, as a public figure sworn to uphold the laws of the Commonwealth, is expected to adhere to certain standards of conduct.

In this case, there was reasonable justification for the Department’s action in bypassing Appellant for appointment as a Boston Police Officer. Credible testimony and documentary evidence showed that during the Department’s investigation into the Appellant’s background, it learned that he had had an array of criminal charges levied

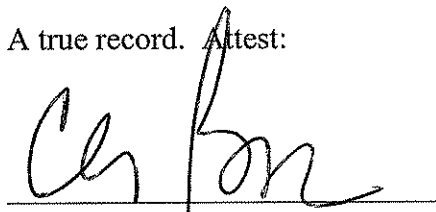
against him, including Operating Under the Influence of Liquor, Malicious Destruction of Property, Assault and Battery on a Police Officer, Possession of Class D Controlled Substance, Compulsory Insurance Violation, Attempted Breaking & Entering, Breaking and Entering Night Time With Intent to Commit a Felony, and Malicious Destruction of Property Over \$250. Although evidence indicated that Appellant's arrests occurred in his younger days and he has since matured and acknowledged his earlier mistakes, his record nonetheless reflected a history of poor judgment, drug use, excessive alcohol use, and criminal behavior and that he has been on probation for criminal offenses for over three years of his life. Accordingly, the Department has met its burden of proving reasonable justification for its action of seeking the removal of Appellant for appointment as a Boston Police Officer due to its conclusion that his criminal history and the three plus years of probation he has served demonstrated his lack of fitness.

The appeal under Docket No. G1-07-122 is hereby *dismissed*.

Civil Service Commission

John E. Taylor
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Taylor, Henderson, and Marquis) on May 8, 2008

A true record. Attest:


Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceeding for judicial review under section 14 of chapter 30A 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 commission's order or decision.

Notice to:
Stephen J. Delamere, Esq.
Tara L. Chisholm, Esq.