

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

CHRISTOPHER DePINA,
Appellant

v.

G1-21-134

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

James Gilden, Esq.
173 North Main Street
Sharon, MA 02067

Appearance for Respondent:

James Megee, Esq.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT’S MOTION FOR SUMMARY DECISION

On November 27, 2019, the Appellant, Christopher DePina (Appellant), a 31-year-old resident of Boston, filed an appeal with the Civil Service Commission, contesting the decision of the Boston Police Department (BPD) to bypass him for original appointment as a police officer. The reasons for bypass centered around performance issues while the Appellant was employed at a health care facility in Brockton as a public safety officer. The bypass letter also alleged untruthfulness regarding one particular incident in which the Appellant purportedly told management at the health care facility that he had called for a stretcher and the health care facility concluded that the Appellant had not.

On March 5, 2020, I held a full evidentiary hearing. At the conclusion of that hearing, I had a colloquy with counsel at which time I stated that: 1) the preponderance of evidence presented at the hearing did not support the untruthfulness allegation; and 2) the preponderance of evidence did support that the Appellant struggled with performance-related issues at the health care facility, employment that had ended approximately five years prior. Since the Appellant was likely to be considered for appointment in a subsequent hiring cycle, I encouraged the parties to consider: a) removing the untruthfulness charge from the bypass letter; b) the Appellant withdrawing his appeal; and c) the Appellant being considered in a future hiring cycle, which likely would not require relief by the Commission. The untruthfulness allegation was subsequently removed from the bypass letter. The Appellant withdrew his appeal and was indeed considered as part of a subsequent hiring cycle, which is the subject of the instant appeal.

On July 29, 2021, the Appellant filed a second bypass appeal with the Commission, contesting the BPD's decision to bypass him for appointment for police officer on July 17, 2021. On August 31, 2021, I held a remote pre-hearing conference which was attended by the Appellant, his counsel, and counsel for the BPD. As part of the pre-hearing conference, the parties stipulated to the following:

- A. On March 23, 2019, the Appellant took the civil service examination for police officer and received a score of 93 or 94.
- B. On September 1, 2019, the state's Human Resources Division (HRD) established an eligible list for police officer.
- C. On January 15, 2021, the Appellant's name appeared on Certification No. 07505.
- D. On July 12, 2021, the Appellant was bypassed for appointment.

E. On July 29, 2021, the Appellant filed a timely appeal with the Commission.

At the pre-hearing conference, the BPD reviewed the reasons for bypass in the most recent hiring cycle, which included the Appellant's poor performance at the health care facility, in addition to two (2) other alleged reasons. First, the BPD stated that the Appellant's employment after the health care facility, at a security company, showed poor performance and misconduct, including: several instances of the Appellant calling out of work, late arrivals, and one instance of a no call, no show. According to the BPD, the security company also produced a corrective action notice dated December 27, 2018, which, according to the BPD, the Appellant failed to disclose to the BPD during this hiring cycle. Second, the BPD reviewed the Appellant's 2020 application for employment to the New Bedford Police Department. According to the New Bedford Police Department, the Appellant failed to list another prior employer [hereafter Security Company II] from which he was also terminated (this time in 2013). At the pre-hearing, the BPD left open the possibility that the Appellant's failure to disclose his termination from Security Company II was a negligent omission, as opposed to an instance of untruthfulness.

At the pre-hearing conference, the Appellant stated that he had subsequently been hired as a safety specialist in a local school system and that he was scheduled for an interview for a public sector EMS position later that day. I asked the Appellant if, as part of the most recent EMS application process, which commenced after he became aware of the reasons for non-selection in New Bedford, he had disclosed to the potential employer that he had been terminated from Security Company II. He indicated that he believed he had provided all information requested by the potential employer.

Prior to determining the procedural next steps of the appeal, I asked the parties to provide the following information to the Commission, if possible:

- a. A copy of the Appellant's application for the EMS position.
- b. A copy of the Appellant's application to the New Bedford Police Department.
- c. A copy of the Appellant's most recent application to the Boston Police Department.
- d. A copy of the most recent background investigation completed by the Boston Police Department.

On January 7 and 11, 2022, the BPD provided the Commission with all of the requested information, including the (very) recent EMS application. Based on my review of that information, it appears that the Appellant did not list Security Company II, from which he was terminated, on the EMS application. I subsequently provided counsel for the Appellant with an opportunity to rebut my observations and conclusions, to which counsel responded: "I do not believe that Appellant listed [Security Company II] on his [EMS] application." The BPD subsequently filed a Motion for Summary Decision and the Appellant did not file an opposition.

Motion for Summary Decision Standard

When a party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he or she is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. 801 CMR 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law—i.e., "viewing the evidence in the light most favorable to the non-moving party", the substantial and credible evidence established that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case", and has not rebutted this evidence by "plausibly suggesting" the existence of "specific facts" to raise "above the speculative level" the existence of a material factual dispute requiring an evidentiary

hearing. See e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). Accord Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249 (2008). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-636 (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss).

Applicable Civil Service Law and Rules

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).

Original and promotional appointments of civil service employees are made from a list of candidates, called a “certification”, wherein names are ranked 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. An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. 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); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182, 187 (2010); 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”).

The governing statute, G.L. c. 31, gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority's action” and it is not necessary that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission “. . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*, then the occasion is appropriate for intervention by the commission.” Id. (*emphasis added*). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

Law enforcement officers are vested with considerable power and discretion and must be held to a high standard of conduct:

“Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.”

Police Comm’r of Boston v. Civil Service Comm’n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986).

Analysis

I have thoroughly reviewed all of the records provided by the BPD, including the background investigation and all other information on which the BPD relied on in bypassing the Appellant. Standing alone, the Appellant’s repeated failure to list the name of a former employer from which he was terminated on applications for public safety positions is a valid reason for the BPD to bypass the Appellant for appointment as a police officer. This lack of candor is also coupled with unrebutted evidence of performance issues. As referenced in the BPD’s motion, what is most troubling here is that the Appellant was clearly on notice after his previous bypass appeal that candor in the application process was of paramount importance. Yet, the Appellant continued to apply for additional public safety jobs withholding negative information about a former employer. Although the EMS application was not available to the BPD at the time of its bypass decision, and was not included in the reasons for bypass, I take notice that this additional instance of a material omission on another employment application provides undisputed evidence that infers that the Appellant has little likelihood to establish that his pattern of omissions can be attributable to good faith, honest mistakes.

Even when viewing the facts most favorable to the Appellant, his undisputed lack of candor on an ongoing basis provides the BPD with reasonable justification for bypassing the Appellant.

Conclusion

The BPD's Motion for Summary Decision is allowed and the Appellant's appeal under Docket No. G1-21-134 is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Stein and Tivnan, Commissioners) on May 20, 2022.

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. 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:

James Gilden, Esq. (for Appellant)
James Megee, Esq. (for Respondent)