

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MANUELA DESOUSA,
Appellant,

v.

CASE NO: G1-10-327

HUMAN RESOURCES DIVISION,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Paul M. Stein¹

DECISION

The Appellant, Manuela DeSousa ("Appellant"), acting pursuant to G.L.c.31, § 2(b) duly appealed a decision of the Massachusetts Human Resources Division ("HRD"), to cause her conditional offer of employment as a Police Officer with the Boston Police Department to be revoked due to her twice failing the required qualifying Physical Abilities Test ("PAT") administered by HRD. A full hearing was held by the Civil Service Commission (the "Commission") on March 23, 2011. Witnesses were not sequestered. HRD called two witnesses and the Appellant testified on her own behalf. Twenty-two (22) exhibits were received into evidence. The hearing was digitally recorded. Both parties submitted a post-hearing proposed decision.

¹ The Commission acknowledges the assistance of Law Clerk Michael Chin in the drafting of this decision.

FINDINGS OF FACT

Giving appropriate weight to the exhibits, the testimony of the witnesses [Shannon Dwyer, Test Monitor; Paul Roe, Test Monitor; and the Appellant], and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Manuela DeSousa, passed the Open Police Officer Statewide Examination pursuant to Announcement Number 8027 on June 28, 2008. (*Undisputed Fact*)

2. On November 1, 2008, HRD established the eligibility list for Announcement 8027. (*Undisputed Fact*)

3. On April 16, 2010, the Appellant's name was certified on Certification 207159 for the Boston Police Department. The Appellant was then conditionally offered employment as a Police Officer for the Boston Police Department. (*Undisputed Fact*)

4. Candidates for the position of Police Officer must pass, among other requirements, a Physical Abilities Test prior to entering the Police Academy. (*Undisputed Fact*)

5. The PAT is comprised of four timed events: Obstacle Course, Trigger Pull, Pull and Separation, and Dummy Drag. (*Undisputed Fact*)

6. Candidates must complete the obstacle course within two minutes and 10.4 seconds to move on to the next event. (*Undisputed Fact*)

7. The obstacle course event is comprised of several laps around a course containing obstacles to climb over and under, a window to jump through, a staircase, a take-down bag, and a handcuff simulation. (*Exhibit 4*)

8. Failure to complete any one portion of the PAT in the allotted time results in the failure of the entire PAT. (*Undisputed Fact, Ierardi Affidavit*)

9. On November 1, 2010 and November 15, 2010, the Appellant attended PAT Previews offered by HRD at the Hudson Armory. (*Undisputed Fact*)

10. The PAT Preview allows candidates to watch a video on every event and element of the PAT and practice the PAT. Additionally, HRD offers a PAT Preparation Guide and posts the video on their website. (*Undisputed Fact*)

11. Test monitors instruct and demonstrate how to successfully complete each event, including the take-down bag element, at every PAT. (*Ierardi Affidavit*)

12. The take-down bag element requires candidates to push a weighted bag onto the ground, which simulates a “takedown” of a suspect. Candidates must keep every part of their lower body inside the painted box during the take-down bag element and push the weighted bag beyond the marked line. (*Ierardi Affidavit*)

13. Phillip Ierardi, the PAT Coordinator, instructs all test monitors that “inside of the box” means that the candidate’s lower body must remain within the marked line on the floor and cannot physically touch any part of the marked line. If a candidate touches or goes over the line, test monitors are to instruct the candidate to redo the take-down bag element. These instructions have been consistent since 1996. (*Supplemental Ierardi Affidavit*)

14. The introductory overview of the PAT video shows a participant performing the take-down element of the obstacle course and, because of the camera angle, it is unclear whether or not the participant’s knee touches the line. However, following this introduction, the video then focuses on each PAT event individually, and later in the video, the participant demonstrates how to perform the take-down bag element from a clear camera angle in which the participant clearly stays within the line, with no part of his lower body touching the line. (*Exhibit 2 and 2A*)²

15. On November 8, 2010, the Appellant attempted her first PAT. The Appellant successfully completed the obstacle course (event one), including the take-down bag element, in two minutes

² The PAT video may be found online at: <http://www.mass.gov/anf/employment-equal-access-disability/civil-serv-info/multimedia/videos-physical-ability-test-pat.html>

and nine and a half seconds. The Appellant also completed the Trigger Pull (event two), but failed to complete the Pull and Separation (event three)³ event in the allotted time and failed the PAT. (*Undisputed Fact*)

16. On November 17, 2010, the Appellant took a second PAT. (*Undisputed Fact*)

17. The test monitors on November 17, 2010 were Paul Roe and Shannon Dwyer, both current HRD employees. (*Undisputed Fact*)

18. The Appellant was assigned number thirty-eight, out of forty-one candidates. (*Undisputed Fact*)

19. During candidate number five's reexamination, the cable wire holding the take-down bag snapped. The test monitors stopped the PAT and fixed the take-down bag. Candidate five was allowed to resume the PAT at the point where the cable snapped. (*Undisputed Fact*)

20. The Appellant was unable to pass the PAT on her second attempt. The Appellant was unable to complete the obstacle course (event one) in the allotted time of two minutes and 10.4 seconds. Her time was two minutes and 11.7 seconds. (*Undisputed Fact*)

21. As a result of her second failed PAT, and pursuant to G.L.c.31,§ 61A, the Appellant's conditional offer of employment was revoked. (*Undisputed Fact*)

22. On November 18, 2010, the Appellant, in a letter to the Civil Service Unit of HRD, asserted she was unable to complete the obstacle course in the allotted time because of the malfunction of the take-down bag earlier in the day. The Appellant requested that she be allowed to take a third PAT. (*Exhibit 16*)

23. On November 23, 2010, Bruce Howard, Director of Operations for the Civil Service Unit, denied the Appellant's request. (*Exhibit 17*)

³ The Pull & Separation event also uses the same station as the take-down bag element of the Obstacle Course event, but requires pulling the bag over the line, simulating the separation of two persons in a fight, as opposed to pushing the bag. (*Exh. 2*)

24. On November 30, 2010, the Appellant appealed to the Commission pursuant to G.L.c.31, § 2(b) (*Appellant's Bypass Form*)

25. At the Commission hearing the Appellant did not press the issue of the earlier malfunction of the take-down bag. Rather, the Appellant asserted to the Commission that she failed her second PAT because she had to redo the take-down bag element of the obstacle course event. The Appellant had to redo the take-down bag because her knee touched the line denoting the painted box on her first attempt. The Appellant stated she was never instructed that “over the line” included touching the line and believed she was only prohibited from touching the area outside the painted box. (*Testimony of DeSousa*)

26. Test Monitor Shannon Dwyer was instructed by Mr. Ierardi on how to properly administer a PAT. (*Testimony of Dwyer*)

27. Ms. Dwyer always instructs candidates that they must put the bag outside the box while keeping their body inside of the box. Ms. Dwyer construes “outside the box” to mean both touching or going over the line. (*Testimony of Dwyer*)

28. If a candidate touches or goes over the line, Ms. Dwyer will instruct the candidate to redo the take-down bag element. (*Testimony of Dwyer*)

29. Test Monitor Paul Roe has been a test monitor for thirteen years. Mr. Roe was instructed by Mr. Ierardi on how to properly administer a PAT. (*Testimony of Roe*)

30. Mr. Roe construes “outside the box” to mean both touching or going over the line. If a candidate touches or goes over the line he instructs the candidate to repeat the take-down bag element. (*Testimony of Roe*)

31. The Appellant seeks to be placed at the top of the next eligibility list for the position of Police Officer with the Boston Police Department. (*Appellant's Post-Hearing Brief*)

CONCLUSION

Applicable Legal Standards

Under G.L.c.31, § 2(b), a person aggrieved by any decision, action, or failure to act by an administrator may appeal to the Commission. “Persons aggrieved” are defined by § 2(b) as those who claim that the administrator acted in violation of G.L.c.31 and “the rules or basic merit principles promulgated thereunder.” G.L.c.31, § 2(b). Basic merit principles are defined in G.L.c.31, § 1, to include

(a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration ... with proper regard for ... basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees ... are protected from arbitrary and capricious actions.

Staveley v. City of Lowell, 71 Mass. App. Ct. 400, 407-08 (2008) (quoting G.L.c.31, § 1).

The Commission must determine, under a “preponderance of the evidence” test, whether the administrator met its burden of proof that “there was just cause” for the decision, action, or failure to act. G.L.c.31, § 2(b). See, e.g., Brackett v. Civil Service Com'n, 447 Mass. 233, 241 (2006); Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 260 (2001); Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 303, rev.den., 426 Mass. 1102 (1997).

A decision, action, or failure to act is "justified" if "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." Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Brackett v. Civil Service Com'n, 447 Mass. 233, 241 (2006); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). HRD’s burden of proof is satisfied "if it is made to appear more likely or probable in the sense that actual belief in

its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass App Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony, decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing).

Applying these principles to the facts of this appeal, the Commission concludes that HRD has met its burden of proof on the merits – by a preponderance of the evidence – that the Appellant twice failed the PAT and that her conditional offer of employment was properly revoked.

Jurisdiction for Physical Abilities Test Appeals

HRD initially argues that the Commission is without standing to hear a PAT appeal for initial appointment, but this claim is without merit. The gravamen of HRD's argument is that G.L.c.31, §61A explicitly provides the Commission with the authority to hear PAT appeals for current civil service employees, but §61A is silent on the Commission's authority to hear PAT appeals for civil service candidates. The Commission has rejected this position previously in O'Brien v.

Massachusetts Human Resources Division, 25 MCSR 53 (2012). In O'Brien, the Appellant was denied initial appointment as a Fall River Firefighter because HRD wrongfully reported to the Fall River Fire Department that the Appellant had failed his PAT twice. The Commission concluded that it does have the jurisdiction to hear PAT appeals for initial appointments, stating, “basic merit principles of civil service law do warrant the conclusion that a person who asserts that they failed the PAT because it was improperly, arbitrarily or invalidly designed or administered does deserve a vehicle to obtain an impartial *de novo* review of such a career-determining decision.” Id. at 55.

Here, the Appellant alleges she failed the PAT due to being given improper or inadequate instructions on how to correctly perform the take-down bag portion of the obstacle course and, as a result, she was aggrieved by HRD’s decision to revoke her conditional offer of employment for a Police Officer position for the Boston Police Department. If the Appellant’s claim were true, the way in which HRD administered the PAT in her case could reasonably be argued to have been an arbitrary process that did not afford her a fair opportunity to demonstrate her physical ability and skill and, therefore, a potential violation of basic merit principles. For the aforementioned reasons, the Appellant has standing to bring forth her § 2(b) appeal and has the right to an impartial *de novo* review of the decision to revoke her conditional employment.

HRD’s Justification for Failing the Appellant

On the merits, however, HRD’s determination that the Appellant had twice failed the PAT was supported by the preponderance of the evidence and justified the revocation of the Appellant’s conditional offer of employment as a Police Officer with the Boston Police Department.

First, the Appellant's conditional offer of employment was revoked because she plainly did not possess the requisite fitness ability required for all Police Officers as measured by her performance on the PAT. HRD requires all candidates to pass a PAT before becoming a Police Officer. The allotted time for candidates to complete the obstacle course is two minutes and 10.4 seconds. The Appellant just barely successfully completed the obstacle course, including the take-down bag element, during her first PAT on November 8, 2010 in two minutes and 9.5 seconds. She finished in two minutes and 11.7 seconds on her second, failed, attempt. Thus, there is an inference that the Appellant's fitness level came extremely close to the limits set by HRD. The Appellant's failure on the take-down bag element of the Obstacle Course event was just as plausibly the result of the very narrow margin for error that she had allowed herself in handling this portion of the test. The Appellant should have been fully aware of how close she was to the cut-off set by the HRD for the obstacle course and the challenge she faced with the take-down bag element in particular.⁴

Second, the Appellant's argument that HRD's instructions were ambiguous is not credible. All candidates were consistently instructed and shown a video on how to complete the PAT and the PAT was consistently administered by the HRD. Mr. Ierardi, in his supplemental affidavit, stated that he instructs all test monitors that "inside of the box" means that all of the candidate's lower body must remain inside the box and cannot touch any part of the marked line. According to Mr. Ierardi, if a candidate touches the marked line, he or she must redo the event. Both Ms. Dwyer and Mr. Roe, the test monitors for the Appellant's second PAT, echoed these instructions. The Appellant's PAT was fairly administered by the two test monitors because they were both aware of the standards promulgated by HRD through Mr. Ierardi. The video shown to the

⁴ It is noted that the Appellant's first failed attempt at the PAT involved another portion of the test, the Pull and Separation, which is a different exercise that also makes use of the take-down bag, in which the bag is pulled, as opposed to pushed, over the line. (*Exh. 2*)

Appellant is shown to all other candidates and does reasonably demonstrate the proper technique required to complete the take-down bag element of the obstacle course. It is unfortunate that the introductory clip on the HRD video seems to show a participant who may have put his knee on the line while using the take-down bag, but this possible ambiguity does not override the preponderance of other evidence on the video and otherwise that “inside of the box” is interpreted by HRD to require a candidate to keep all of his/her body within the marked line when performing the take-down bag element of the obstacle course.⁵

Third, the Appellant’s conditional offer of employment was not revoked arbitrarily or capriciously. The Appellant went through the same PAT process, with the same instructions as every other candidate on November 17, 2010 and every candidate gets two chances to successfully complete a PAT. There was no evidence introduced by the Appellant that showed that any other candidate received more specific or different instructions. To make an exception for the Appellant would be unfair to countless other candidates.

In sum, after carefully considering all of the circumstances, I conclude that the revocation of the Appellant’s conditional offer of employment was reasonable because she could not pass the PAT under the same conditions as every other candidate, on two separate occasions, and is not entitled to relief from the Commission. Nothing in this decision precludes the Appellant from continuing to pursue her goal of becoming a Boston Police Officer and duly qualifying for that position in the future.

For the reasons stated above, the appeal of the Appellant, Manuela DeSousa, is hereby *dismissed*.

⁵ It might behoove HRD, however, to consider whether some additional clarification, or at least, documentation of the instructions, would be helpful to assure that future candidates do not make the same mistake as did the Appellant here as to what exactly constitutes “inside the box,” for the purposes of the take-down bag exercises.

Civil Service Commission

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on September 20, 2012.

A true record. Attest:

Commissioner

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:

Nicholas Nardone, Esq. (for the Appellant)
Lindsey Boyle, Esq. (for HRD)