

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

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

**IN RE:  
REQUEST FOR INVESTIGATION  
(BOSTON POLICE SERGEANT'S  
PROMOTIONS)**

**Tracking No. I-15-115**

Appearance for Petitioner:

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Commissioner:

Paul M. Stein

**RESPONSE TO REQUEST TO OPEN INVESTIGATION**

On June 5, 2015, the Petitioner, Sara Dorsey, acting pursuant to G.L.c.31, §2(a), requested that the Civil Service Commission open an investigation into whether factors other than basic merit principles improperly influenced the Boston Police Department (BPD) promotions to BPD Sergeant in November 2014 and March 2015. On June 15, 2015, the Commission issued an Order to Show Cause why the Commission should conduct such an investigation and held a conference on June 30, 2015 in the matter at which the Petitioner and the BPD appeared through counsel. Following the conference, the BPD and the Petitioner submitted additional information which I requested. After carefully reviewing the Petitioner's request and the supplemental information provided by the BPD and the Petitioner, I have determined that it is unlikely that further inquiry would lead to evidence of any violation of civil service law and, therefore, in the exercise of its broad discretion in this regard, the Commission will not open an investigation as requested by the Petitioner.

## **Background**

In April 2013, after years without giving promotional examinations for BPD superior officer positions, HRD entered into a Delegation Agreement with BPD to enable BPD to engage a consultant to design departmental examinations for Boston Police Sergeant, Boston Police Lieutenant and Boston Police Captain.<sup>1</sup> Pursuant to the Delegation Agreement, BPD's consultant, with HRD's approval, designed and administered the examinations for each position (Sergeant, Lieutenant & Captain) comprising three examination components administered in two phases.

Phase I was a Technical Knowledge Written Test, a "closed book" multiple-choice style examination drawn exclusively from materials contained in the required reading list provided to the candidates, administered to all candidates on June 28, 2014. Passing the Written Technical Knowledge Test was a condition to proceeding to Phase II. Of the approximately 850 candidates for Sergeant who took the June 28, 2014 Written Technical Knowledge Test, 625 candidates scored above the passing cut-off of 48 and 224 candidates who took that test failed to pass it..

Phase II was an Ability Based Assessment, consisting of two examination components: (A) Written Work Sample Test administered to Sergeant Candidates on September 9, 2014 and (B) an Oral Board Test administered to Sergeant Candidates over a five day period from November 17<sup>th</sup> to November 21<sup>st</sup> 2014. The Written Work Sample Test was a one-day examination in which candidates were provided various documents describing an "exercise scenario" involving "job situations typical of those a Sergeant might encounter" and candidates were required to assume the

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<sup>1</sup> The unusual hiatus in the BPD promotional examination process (ordinarily on a two-year cycle) can be attributed largely to then pending legal challenges asserted by certain BPD officers that the written multiple-choice style examinations employed in 2008 (and in prior examinations) had a racially disparate impact on minority candidates and were insufficiently job-related to pass muster under federal civil rights laws. The intent of the parties to the Delegation Agreement, in significant part, was to conduct a "comprehensive" analysis that addressed the concerns raised in that litigation before another examination was given, and that over \$1,600,000 was spent in development of the 2014 examination process. See Findings of Fact, Rulings of Law and Order, Smith v. City of Boston, -- F.Supp.3d --, 2015 WL 7194554 at 9-10 (November 16, 2015). See also, Lopez v. City of Lawrence, 2014 U.S. Dist. LEXIS 124139, appeal pending, No. 14-1952 (1st Cir. 2014)

role of a newly promoted Sergeant and prepare a Response Booklet containing written, narrative responses to the issues presented. In the Oral Board Test, candidates were given incident command and employee discipline scenarios and presented oral responses to a panel of assessors.

Upon completion of the examination process, a total of 560 candidates received overall passing scores and were placed on the new eligible list for Sergeant established in May 2015. With the establishment of the eligible list, in accordance with standard procedure, the prior eligible list expired. Since the new eligible list was established, BPD has made promotions from among the top candidates on the list. Historically, BPD generally promotes approximately eighteen Police Officers to Sergeant annually. If that practice continues through a normal two-year life cycle of an eligible list, absent an unusual number of bypasses, BPD Police Officers below the 49<sup>th</sup> place tie group, more or less, can expect a small chance for promotion to Sergeant before the next eligible list (after a new examination) replaces the current list in or about 2017. The Petitioner is ranked in 66<sup>th</sup> place, tied with nineteen (19) other officers.

### **The 2014 and 2105 Promotions**

The present Petition asserts that the BPD chose to make a series of so-called “midnight” promotions to the rank of Sergeant in November 2014 and March 2015, so that certain favored officers received promotions before the expiration of the prior eligible list (on which their names then appeared among a tie group of a total of twenty-six officers remaining at the top of the 2008 list – of which the Petitioner was one of those not promoted). The Petitioner asserts that promoted officers purportedly were selected due to political and personal influence, especially when it became known that the officers placed too low on the new list (or did not take or complete the 2014 examination) and would not be eligible for promotion from the new list.

In particular, the Petitioner claims it is “widely known” that certain of the promoted officers were instrumental in fundraising activities for the Mayor of Boston and others. She points to the fact that campaign finance records showed that one of the three officers promoted in November 2014 had made a recent political donation to his State Representative and, of the ten officers promoted in March 2015, one had made contributions to the Mayor a few days prior to the promotion, two had made contributions to the Mayor in January 2015 and one had made a contribution to the Mayor in February 2014. The Petitioner also complains that one of the officers selected for promotion in March 2015 is the spouse of a BPD Deputy Superintendent and, to the best of the Petitioner’s knowledge, that officer has been assigned to “desk duty” for the past several years. The Petitioner also alleged that one of the officers promoted in November 2014 had not taken the 2014 promotional examination and two others promoted in November 2014 had withdrawn from the promotional exam process shortly before their promotions, as did the Deputy Superintendent’s spouse (promoted in March 2014) who had had withdrawn from the 2014 promotional examination process in September 2014. The petitioner also contends that the number of promotions was inexplicably increased from a planned two new Sergeants to three in November 2014 and from a planned six to ten in March 2015. Finally, although the Petitioner admits that she met with Police Commissioner Evans, who informed her that her prior and pending disciplinary record was a contributing factor to her own non-selection, she contends that the disciplinary issue was a subterfuge intended to distract attention from the other evidence of cronyism in the promotional process.

The BPD, through counsel, provided a detailed response to the questions raised by the Petitioner. Counsel’s letter emphatically attests that the selection from among the twenty-six eligible candidates for promotion to Sergeant was made “without political interference and were based on qualifications and personal knowledge” with the “most qualified” candidates selected. The decision as to whom to

promote was made by Police Commissioner Evans, with recommendations from Superintendent in Chief William Gross, neither of whom “had any knowledge regarding the candidate’s political contributions” and “were not influenced by any external factors”. The BPD represented that the increase in the number of promotions from what was originally anticipated was “[d]ue to an increase in the number of Sergeant vacancies.” BPD counsel could not specifically describe the changes that resulted in the decision to increase the number of promotions, but did represent that it was not unusual for the number to change between the time that the initial Certification was requested and the time that the promotional decisions were made. Also, BPD submitted supplemental documentation that established that the November 2014 promotions were made on November 7, 2014, not on November 21, 2014 as originally supposed, which is before the Oral Board Exam was administered in the 2014 promotional cycles, providing a logical explanation for why two candidates promoted had dropped out of the exam process prior to the Oral Board and dispelling any suggestion of “inside information”.

BPD also noted that the one officer promoted in November 2014 who had made the contribution to his State Representative was the first BPD officer of Cape Verdean descent to be promoted to a supervisory position, and the BPD had received prior considerable positive feedback from BPD Command Staff, as well as from Boston municipal and community leaders “praising him for his work” and stating they “thought he would make a good supervisor”. As to the Deputy Superintendent’s spouse, BPD counsel stated the marital relationship “played no role in her selection from the tie group”, neither Commissioner Evans nor Superintendent Gross had any conversations with the Deputy Superintendent about her promotion, and the Deputy Superintendent “did not play any role in the promotions made in November 2014 or March 2015.”

## **Commission Response**

G.L.c.31, §2 states in relevant part:

In addition to its other powers and duties, the commission shall have the following powers and duties:

- (a) To conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth.”

G.L.c.31, §72 states in part:

The commission or the administrator may investigate all or part of the official and labor services, the work, duties and compensation of the persons employed in such services, the number of persons employed in such services and the titles, ratings and methods of promotion in such services.

. . .

The commission or the administrator or any authorized representatives of either, may summon witnesses, administer oaths and take testimony for any hearing, investigation or inquiry conducted pursuant to the civil service law and rules. Fees for such witnesses shall be the same as for witnesses before the courts in civil actions and shall be paid from the appropriation for incidental expenses.

These statutes confer significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen’s Association et al v. Civ. Serv. Comm’n, No. 2006-4617, Suffolk Superior Court (2007). See also Dennehy v. Civ. Serv. Comm’n, No. 2013-00540, Suffolk Superior Court (2014) (“The statutory grant of authority imparts wide latitude to the Commission as to how it shall conduct any investigation, and implicitly, as to its decision to bring any investigation to a conclusion.”) As a general rule, the Commission has chosen to exercise its discretion to initiate a Section 2(a) investigation sparingly, and only when there has been a threshold showing that there is a reasonable likelihood that a systemic violation of civil service law and rules has occurred that has prejudiced the civil service rights of other innocent parties. A mere possibility of a violation will ordinarily not be sufficient to trigger a full investigation.

For example, the Commission entertained a request for investigation by a group of Lieutenants and Captains of the Department of Correction, to determine why no examinations had been held since 1981 for promotion to the civil service position of Captain, which deprived them of the opportunity to obtain civil service permanency in this position. Request by John Mograss, et al. to Investigate the Failure To Administer Civil Service Examinations the Public Safety Position of Captain at the Massachusetts Department of Correction, 28 MCSR 601 (2015). The Commission opened an investigation and ordered relief when it became known that the Deputy Fire Chief of the Springfield Fire Department had been involved in the hiring of a class of firefighters which involved the bypassing of certain more highly ranked candidates in favor the Deputy Chief's son. In Re: 2010/2011 Review and Selection of Firefighters in the City of Springfield, 24 MCSR 627 (2011) Similarly, the Commission took action after investigation of appointments made in Methuen and Oxford in which the direct involvement of the appointing authority (Police Chief and Board of Selectmen, respectively) compromised a selection process which favored certain relatives of the appointing authorities. In Re: Town of Oxford's 2011 Review and Selection of Permanent Intermittent Police Officer Officers, CSC No. I-11-280 (2011); In Re: City of Methuen's Review and Selection of Reserve Police Officer Candidates in the Fall of 2008, CSC No.I-09-290 (2010). It also bears notice that in the Methuen and Oxford matters, no final appointments had been made and, thus, the Commission's order after investigation did not disturb or vacate any appointments.

It is hard to find any comparable set of facts in the circumstantial evidence presented by the Petitioner from which to infer a likelihood of impropriety in the process that resulted in the BPD's promotion here. The thirteen officers selected to fill vacancies in the position of Sergeant all stood at the top of the eligible list and (save for the Petitioner's personal doubts about the Deputy Superintendent's spouse) were lawfully entitled to be promoted to Sergeant. Civil service law has

long provided that an appointing authority may exercise broad, sound discretion to select from among any qualified candidates who are tied on an eligible list, and candidates in the tie group not selected do not have any recourse to appeal to the Commission as they would not be deemed “bypassed” within the meaning of civil service law and rules. See, e.g., G.L.c.31, §27; PAR.02 (definition of bypass).

Any suggestion that an investigation would show that the selection process here was not consistent with basic merit principles is speculative, at best. Of the three officers promoted in November 2014, the only one alleged to have made a political contribution is the highly regarded Cape Verdean officer, who contributed \$100 to his State Representative’s reelection campaign in October 2014. Four officers (of the ten promoted) in March 2015 made contributions to the Mayor of which two were in March 2015 and the rest at earlier times going back to 2013. Neither elected official is the appointing authority over BPD appointments or promotions. No reason has been shown for the Commission to discount the assertions of Police Commissioner Evans and Deputy Superintendent Gross, attested to by reputable and professional BPD counsel, that all promotions were made on the merits and neither decision-maker even knew the status of any such contributions, let alone, allowed the contributions to influence the decision. Nor is there any basis to infer a pattern of favoritism by the fact that most of the promoted officers placed low on the new list. There is no pattern that suggests any reasonable likelihood that a candidate’s place on the new list, or failure to take the exam, could be proved to be a contributing factor. One promoted officer actually placed 11<sup>th</sup> on the 2014 eligible list. Other candidates from the 2008 tie group who withdrew from the 2014 examination process were not promoted. The ranking of candidates who did pass the examination and were promoted included both some who scored higher, and some who scored

lower, than those not promoted. There simply is no reason, based on the circumstantial evidence alone, to disbelieve the BPD's assertion that merit, not favoritism, drove the selections.

I did not overlook that some possible room for doubt might be cast by virtue of the selection of the spouse of a Deputy Superintendent (who withdrew from the 2014 process in September 2014) and the fact that some of the promoted officers who passed the 2014 examination achieved lower scores than some of those who were not selected. But the disparity, if significant at all, shows no clear pattern that could possibly impugn the bona fides of the recommendations made by Superintendent Gross and adopted by Commissioner Evans. Neither is the early withdrawal of the Deputy Superintendent's spouse from the 2014 examination so clearly or temporally related to her selection in the second round of promotions as to raise an eyebrow. I see no cause to order sworn testimony from the BPD's top command professionals to test the veracity of the contentions made by BPD counsel on their behalf.

The Commission notes that the BPD, to its credit, did provide the Petitioner with an opportunity to voice her concerns and obtain an explanation, although apparently not fully to her satisfaction. While considerable discretion is allowed in making the promotions involved and documented explanation for the selection is not required, nothing precludes the BPD from taking those or such further steps with a view to ensure transparency in the reasons for the choices made.

For the reasons stated, I have concluded that opening a further investigation into the matters raised by the Petitioner is not warranted. The request for investigation is denied.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on March 3, 2016.

Notice to:  
Joseph L. Sulman, Esq. (for Petitioner)  
Nichole I. Taub, Esq. (for BPD)  
John Marra, Esq. (HRD)