

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114

JASON S. GILMORE, JR.,

Appellant

v.

G1-22-162

BOSTON POLICE DEPARTMENT,

Respondent

Appearance for Appellant:

Stephen Delamere, Esq.
839 Washington Street
Stoughton, MA 02072

Appearance for Respondent:

Amy C. Parker, Esq.
Boston Police Department
Office of the Legal Advisor
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Boston, MA 02120

Commissioner:

Shawn C. Dooley¹

SUMMARY OF DECISION

The Commission affirmed the decision of the Boston Police Department to bypass the Appellant for original appointment as a police officer based on his recent OUI and poor driving record.

DECISION

On November 22, 2022, the Appellant, Jason Gilmore Jr. (Appellant), pursuant to the provisions of G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from a decision by the Boston Police Department (Department or BPD) to bypass the Appellant for original appointment to the position of Boston police officer.² The Commission held a remote

¹ The Commission acknowledges the assistance of Law Clerk Alana Khan with the preparation of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.01, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

pre-hearing videoconference on January 2, 2023. I held an in-person full hearing at the offices of the Commission located at 100 Cambridge Street, Suite 200, Boston, MA 02114 on March 29, 2023. The hearing was recorded via Webex.³ On May 1, 2023, the parties filed proposed decisions, whereupon the administrative record closed. For the reasons set forth below, Mr. Gilmore's appeal is denied.

FINDINGS OF FACT

The Appellant entered four exhibits into evidence (Exhibits 8-11) and the Respondent entered seven exhibits into evidence (Exhibits 1-7). Based on the documents submitted and the testimony of the following witnesses:

Called by the BPD:

- Deputy Superintendent Eddy Chrispin ("Deputy Superintendent Chrispin"), Boston Police Department
- Detective Molwyn Shaw ("Detective Shaw"), Boston Police Department

Called by the Appellant:

- Jason S. Gilmore, Jr., Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

³ A link to the audio/video recording was provided to the parties. 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 they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

Appellant's Background

1. The Appellant is a 26-year-old Lance Corporal U.S. Marines veteran still on active reserve duty. He is a lifelong resident of Roslindale, Massachusetts. He is a graduate of Boston Latin High School. (*Testimony of Appellant*).
2. The Appellant attended the Massachusetts College of Pharmacy for approximately 2.5 years before leaving college to join the Marine Corps at age 24. As a part of his Marine Corps training, he received firearm and motor vehicle transport operator training. He also served as a military recruiter for three months in the Fall of 2021. (*Testimony of Appellant*).
3. The Appellant's father is a Sergeant Detective at the Boston Police Department. (*Testimony of Deputy Superintendent Chrispin; Testimony of Appellant*).
4. The Appellant's criminal history includes:

2021 – OUI and Negligent Operation (*Respondent Exhibit 2*).
5. The Appellant's driving history includes: (*Testimony of Detective Shaw; Respondent Exhibit 1*)

2015 - Surchargeable accident
2018 - Surchargeable accident
2019 - Warning for Speeding (2019)

Application / Review Process

6. The Appellant passed the March 17, 2021 civil service examination for police officer with a score of 87. (*Stipulated Facts*).
7. The Commonwealth's Human Resources Division (HRD) sent Certification No. 08099 to the Boston Police Department on September 1, 2021. The Appellant was ranked 57th among the eligible candidates. (*Stipulated Facts*).

8. On October 20, 2022, the Respondent bypassed the Appellant for original appointment as a Boston Police Officer. The Respondent's stated reasons included the Appellant's recent alleged OUI and Negligent Operation conduct as well as his overall driving history.
(Respondent Exhibit 2).
9. The Appellant filed a timely appeal with the Civil Service Commission. *(Stipulated Facts).*
10. Detectives in the Recruit Investigations Unit (RIU) perform background investigations into each recruit candidate at the Department. *(Testimony of Deputy Superintendent Chrispin; Testimony of Detective Shaw).*
11. Detective Shaw has been employed by the Boston Police Department for 27 years. He was assigned to the RIU in 2016. He was responsible for performing the Appellant's background investigation. *(Testimony of Deputy Superintendent Chrispin; Testimony of Detective Shaw).*
12. The Department conducts roundtable discussions to determine which candidates should move forward in the hiring process. Deputy Superintendent Chrispin was included in the roundtable discussions regarding the Appellant. *(Testimony of Deputy Superintendent Chrispin).*
13. The roundtable discussions are informed by guidelines, including one on how to consider OUI conduct. The OUI guideline used by the Department states that candidates are disqualified if they have an "OUI within the last seven years. Unless Not Guilty, then depends on circumstances – check with Supervisor." *(Testimony of Deputy Superintendent Chrispin; Respondent Exhibit 3).*
14. There were two round table discussions involving the Appellant's application. During the roundtable discussions, the participants considered the Appellant's: Board of Probation Record; driving history; criminal history; employment history; references; residency status;

and police reports regarding the Appellant. (*Testimony of Deputy Superintendent Chrispin; Testimony of Detective Shaw*).

The Appellant's OUI and Negligent Operation Conduct

15. In May 2021, the Appellant was working for a full-service special events company that was contracted for a UMass Amherst graduation ceremony. (*Testimony of Appellant*).

16. The Appellant finished taking down equipment after the graduation event at around 10 p.m. Earlier in the day, he had run into a family friend at the graduation, and they agreed to meet at the friend's home in Amherst after work. While at the friend's home, the Appellant drank a number of alcoholic beverages. (*Testimony of Appellant*).

17. The Appellant then drove with his friends to another party nearby. Later, the Appellant dropped the family friend at another party and decided to go back to his hotel. (*Testimony of Appellant*).

18. After dropping his friend off, the Appellant dropped his phone. He reversed the motor vehicle to find the phone and struck a mailbox. He pulled over to the side of the road and waited there. (*Testimony of the Appellant*).

19. Amherst police officers arrived on the scene and identified the Appellant as the operator of the vehicle in question. When the officers asked the Appellant if he had struck a mailbox, he responded, "Not that I know of." The Appellant, however, admits that he knew he had hit the mailbox and told the police he didn't know due to his nervousness. (*Testimony of Appellant; Respondent Exhibit 5*).

20. The police conducted field sobriety tests with the Appellant and took his breath sample twice. The breathalyzer test results displayed results of a .204 and .196 blood alcohol content. (*Respondent Exhibit 5*)

21. The police officers advised the Appellant of the breath test results and suspended his license immediately. They cited the Appellant for OUI and Negligent operation of motor vehicle charges. (*Respondent Exhibit 5*).
22. At no point during the interaction with the police officers did the Appellant mention his father's position as a sergeant detective in the Boston Police Department. He acknowledges that he made a mistake and did not want to use his father's name to get himself out of the situation. He knows he should not have driven that night. (*Testimony of Appellant*).

The Appellant's Brave Act Disposition

23. On March 7, 2022 the court allowed the Commonwealth's Motion to Dismiss the charges of OUI and negligent operation pursuant to the Brave Act under G.L. c. 276A, § 10. (*Appellant Exhibit 9*).
24. The Massachusetts Brave Act allows the dismissal of misdemeanor charges after veterans complete a diversion program. (*Appellant Exhibit 10*, G.L. c. 276A, §§ 7 and 10).
25. Upon advice of counsel, the Appellant met with a therapist one time and attended Alcoholics Anonymous meetings to assess whether he had substance abuse issues. (*Testimony of Appellant*).
26. The therapist concluded that the Appellant did not have substance abuse issues. (*Testimony of Appellant*).

The Department's Decision to Bypass the Appellant

27. During the roundtable discussion surrounding the Appellant, the participants considered the Appellant's charges of OUI and Negligent Operation and his overall driving history. (*Testimony of Deputy Superintendent Chrispin*).

28. At the time of the March 2022 roundtable, the Appellant's charges were still open, with the motion to dismiss pending before the court. By the time of the second roundtable discussion, the charges had been dismissed. (*Testimony of Deputy Superintendent Chrispin; Respondent's Exhibit 6; Appellant Exhibit 9*).
29. In the first roundtable, the nature of the OUI conduct gave Deputy Superintendent Chrispin concern. He and the other participants in the hiring discussion concluded that the Appellant was ready to become a police officer. He noted that OUIs and traffic violations are one of the public's key concerns for officer behavior. (*Testimony of Deputy Superintendent Chrispin*).
30. The main factor in the decision to bypass the Appellant was that the date of the offense was recent, happening less than a year prior to the roundtable discussion of the Appellant. The Appellant's driving history may have been overlooked if not for the OUI incident. (*Testimony of Deputy Superintendent Chrispin*).
31. The second roundtable discussion revisited the Appellant's standing after dismissal of the OUI and Negligent Operation charges. The decision to bypass him was confirmed based on the concerning conduct and poor judgment of the Appellant. (*Testimony of Deputy Superintendent Chrispin*).
32. Because patrol officers are required to operate motor vehicles, their ability to safely do so is heavily considered in the hiring process. (*Testimony of Deputy Superintendent Chrispin*).
33. Applicant 105 had a similar OUI conduct history as the Appellant but was not bypassed. He was charged with OUI on December 1, 2018 in California, completed a diversion program under California's Brave Act (similar to Massachusetts'), and the charge was expunged from his criminal record. (*Respondent Exhibit 7*).

34. Applicant 105's Privileged and Confidential Memorandum (PCM) was dated November 21, 2021, roughly three years after his arrest. (*Respondent Exhibit 7*).
35. Applicant 105's OUI arrest occurred whilst he was pulled over on the side of a highway, and his breathalyzer had readings of .122 and .127. (*Respondent Exhibit 7*).
36. The Roundtable participants distinguished the conduct of Applicant 105 from the Appellant by stating that his conduct was much further in the past than the Appellant; there were no further incidents in a longer amount of time; he had a lower breathalyzer result; and his incident involved no property damage. (*Testimony of Deputy Superintendent Chrispin; Respondent Exhibit 7*).
37. If the Appellant's incident had not been as recent, it likely would have been given less weight by the Respondent. (*Testimony of Superintendent Chrispin*).
38. The roundtable's decision to bypass the Appellant was memorialized in a bypass letter. The roundtable believed that the Appellant's OUI and driving history reflected poorly on the Appellant's ability to operate a motor vehicle safely and obey traffic laws. (*Testimony of Deputy Superintendent Chrispin*).
39. The Department notified the Appellant of its decision to bypass him for original appointment in an October 20, 2022 letter, which included his appeal rights. (*Respondent Exhibit 2*).

Applicable Civil Service Law

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 appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn 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).

Public safety officers are vested with considerable power and discretion and must be held to a high standard of conduct. See, e.g., Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997); Police Comm'r v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986).

Analysis

The Department has shown, by a preponderance of the evidence, reasonable justification for bypassing the Appellant for appointment as a police officer based on his recent OUI and Negligent Operation coupled with his driving history.

When evaluating the Appellant's application, the Department reasonably relied on the Appellant's recent OUI arrest in its decision to bypass him for original appointment. The Appellant's blood alcohol content was well above the legal limit, and the OUI occurred less than one year before the bypass. The Department also reasonably considered the totality of the

Appellant's driving history given his recent OUI conduct. As a police officer, the ability to operate a motor vehicle safely while on patrol is of the utmost importance and is integral to the position. (See Kelly v. Town of Wakefield, 22 MCSR (2011)). Although the Appellant's charge was dismissed pursuant to the Brave Act, the Department may still consider the severity of the charge as reasonable justification for his bypass. The Department is entitled to "give reasonable weight to the facts of [an] incident as disclosed in the police reports" regarding the OUI incident, regardless of whether charges were dismissed. Christopher O'Rourke v. Boston Police Department, 26 MCSR 434 (2013).

The Commission has regularly affirmed the Appointing Authority's decision to consider OUI conduct alone or as part of a pattern of questionable conduct in deciding to bypass candidates for employment. See Carson Straughn v. Department of Correction 33 MCSR 394 (2020) (upholding a bypass for an Appellant with a recent OUI and breathalyzer reading of only .09); See Pimentel v. Department of Correction, 26 MCSR 304 (2013) (upholding the bypass of an otherwise qualified candidate due to an OUI incident within 5 years of the bypass, showing poor judgment); See Johnson v. City of Cambridge, 22 MCSR 589 (2009) (affirming the bypass of a candidate based on a three-year-old arrest and conviction for DUI).

Here, the Appellant's very recent OUI is a valid cause for concern. His blood alcohol content was more than two times the legal limit, and he caused property damage when he struck a mailbox while operating a vehicle under the influence of alcohol. This was two months after the Appellant had already taken the civil service exam. Additionally, at the time of the OUI, the Appellant had told police officers at the scene that he didn't think he hit the mailbox; however, he admitted during the hearing that he knew he hit the mailbox at the time of the incident. The Appellant also received a warning for speeding in 2019 and had two surchargeable accidents in

2015 and 2018. The driving history alone, without considering the OUI conduct, would not have risen to reasonable justification for a bypass. But, looking at the totality of the facts and circumstances, the Department had reasonable cause for concern in appointing the Appellant as a police officer.

The Department followed basic merit principles and guidelines when conducting investigations into candidates. Detective Shaw compiled a comprehensive history of the Appellant's criminal and driving history, and even reached out to speak with the officers involved in the Appellant's OUI charge. No extraneous information or influences were considered, including the Appellant's familial relations in the Boston Police Department. Deputy Chrispin and the other participants at the roundtable discussion made their decision based solely on whether or not each candidate is ready for appointment as a police officer. Deputy Chrispin explained significant differences in the concerns for the Appellant and Applicant 105, which ultimately came down to the amount of time that had passed. Applicant 105 has had no subsequent negative conduct or driving violations since his OUI charge, which is a significantly longer period of time to prove his behavior was not part of a pattern that was cause for concern.

At the first roundtable discussion, the appellant's case was pending and only was dismissed due to the Brave Act immediately preceding the second round table discussion. This second roundtable is when it was determined that the Appellant should be bypassed. Of note is that the Brave Act dismissal is not the same as a not guilty verdict and the Appellant has not claimed to have been not guilty.

Deputy Superintendent Chrispin stated that had the Appellant's incident happened in 2019 rather than 2021, it likely would have been given less emphasis in the roundtable's decision. If there is a more significant amount of time during which the Appellant can prove his maturity and

good judgment, and that his past indiscretion is not part of a pattern, then he could be reconsidered for original appointment with the Boston Police Department in the future. Should the Appellant reapply to the position in the future, absent any similar criminal charges or causes for concern, the reasons for this bypass should not be considered by the Department when determining the Appellant's eligibility for appointment.

Conclusion

For all the above reasons, the appeal of Jason S. Gilmore, Jr., under Docket No. G1-22-162 is ***denied***. However, this decision should not be viewed as permanently disqualifying the Appellant for appointment by the BPD. Should the Appellant apply to become a Boston Police Officer in the future, the city may not simply rely on this decision as a justification for bypass. It must continue to conduct a detailed, thorough review of the Appellant's employment application, and of his suitability for the position of police officer. Further, it is the Commission's expectation that Mr. Gilmore will be given the same consideration that the Boston Police has given others with similar histories whose charges were dismissed under the Brave Act and not exclusively use that history as a reason for bypass in the future.

Civil Service Commission

/s/ Shawn C. Dooley

Shawn C. Dooley, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein, & Tivnan, Commissioners) on June 29, 2023.

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)(1), 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 to:

Stephen Delamere, Esq. (for Appellant)

Amy C. Parker, Esq. (for Respondent)