

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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BRENDAN W. HAMM,
Appellant

v.

BOSTON POLICE DEPARTMENT,
Respondent

CASE NO: G1-07-339

Appellant's Attorney:

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Commissioner:

Paul M. Stein

DECISION ON MOTION TO SEAL RECORDS

The Appellant, Brendan W. Hamm, has appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31, §2(b), alleging that the Massachusetts Human Resources Division (HRD) unlawfully approved his bypass for an original appointment to the position of police officer with the Boston Police Department (BPD). On August 26, 2008, the Appellant filed a Motion to Seal His Record and Enjoin BPD and HRD from disclosing certain documents, which the BPD and HRD opposed. A hearing was held on the motion on September 9, 2008. The Appellant made a post-hearing submission on September 24, 2008.

Statement of Facts

1. The Appellant, Brendan W. Hamm, is a resident of the City of Boston whose name appeared near the top of Certification No. 270048 for original appointment to the position of police officer with the BPD. (*HRD Submission*)

2. As a part of his application process for appointment as a BPD police officer, Mr. Hamm submitted to a medical examination, including a standard psychological screening component. (*HRD Submission*)

3. As a result of the medical examination, BPD determined that Mr. Hamm was unsuitable for appointment as a BPD police officer and should be bypassed. On September 17, 2007, HRD approved the bypass for the reasons stated by BPD. This appeal ensued on October 3, 2007. (*HRD Submission; Claim of Appeal*)

4. Mr. Hamm strenuously denies the grounds asserted for his bypass and infers that his non-selection was due, in part, to a “bulls-eye” on his back as a result of his prior appeal of a bypass by BPD on grounds of residency. That appeal was settled and apparently led to Mr. Hamm’s high standing on Certification No. 270048. (*HRD Submission; Motion to Seal; Appellant’s Argument*)

5. Mr. Hamm now is inclined to withdraw the present appeal, but he is concerned with the possible adverse consequences from the possible future disclosure of the medical information involved in the BPD bypass decision contained in the BPD application files, in HRD’s records regarding the bypass decision, and on file with the Commission. (*Motion to Seal; Appellant’s Argument; HRD Submission: Claim of Appeal*)

6. The specific information that Mr. Hamm seeks to protect has not been specified, but it is reasonable to infer that the information would include his BPD Student Officer

Application, background investigation reports, personal references, reports of medical examinations and reports of psychological screenings that commonly are collected by the BPD as part of the application process for selection of candidates for original appointment as a BPD police officer. (*Motion to Seal; Appellant's Supplemental Memorandum; Appellant's Argument; Administrative Notice of BPD application process*)

Conclusion

The Appellant's Motion to Seal His Record presents questions concerning the authority of the Civil Service Commission to regulate the disclosure of sensitive information, including information filed with the Commission incident to a proceeding before the Commission, as well as information compiled and maintained by an Appointing Authority and/or HRD concerning civil service employees and applicants. Since the relevant considerations are different, the scenarios will be addressed separately.

Applicable Statutes

Under Section 70 of the Civil Service Law, the Commission has broad authority over their records and the records of HRD:

The commission and the administrator [of HRD] shall maintain on file a record of their proceedings. Such records shall be open to public inspection pursuant to the rules of the commission. An appointing authority may inspect applications and references in connection with a certification of names; such applications and references shall be preserved for a period of two years and may then be destroyed. The question and answer sheets of examination papers, other than essay questions and answers, shall not be open for inspection and may be destroyed as determined by the administrator. . . .[A]n applicant's examination papers may be inspected only by such applicant or his designated representative

G.L.c.31,§70 (*emphasis added*)

In the only specific instance that this statute has been construed, the Attorney General of the Commonwealth opined, as to an earlier version of the law, that reports

made by others concerning the physical condition of civil service applicants were neither “records of the proceedings” nor “applications” and do not “fall within the classes of things which are to be kept as records or ‘on file’ ” and, thus, they are not required to be open to public inspection. 12 Op. Atty. Gen. 91 (1938). Assuming this opinion remains valid, the Commission and HRD are authorized to withhold such reports from the public, but nothing would appear to require either agency to do so.

The Civil Service Law distinguishes appeals brought under Section 43 concerning discipline of civil service employees from the class of cases brought pursuant to Section 2(b) known as “bypass” appeals by persons aggrieved by the failure to appoint or promote them to a civil service position. In discipline cases, the statute presumes that the “hearing” of the appeal will be private unless either party requests a public hearing; in practice, the Commission rarely receives a request for a public hearing in discipline cases. No such presumption or express procedure for a private hearing exists for bypass appeals, such as this appeal brought by Mr. Hamm, and bypass cases have always been regarded as fully public proceedings by the Commission. Compare G.L.c.31,§43 with G.L.c. 31,§2(b).

The final Massachusetts statute that bears on the subject is contained in the Public Records Law, G.L.c.4,§7, clause Twenty-sixth, which provides in relevant part:

“Public records” shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth or of any political subdivision thereof. . . unless such materials or data fall within the following exemptions in that they are: . . . (c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy. (emphasis added)

The Commission is not charged with enforcement of the Public Records Law. Thus, while the Commission and HRD are subject to the Public Records Law, the Commission is not in a position to make a definitive ruling of the applicability of the statute in any particular case.¹ Any person who believes they have been wrongfully denied access to public records by the Commission or any other public body may seek relief from the Secretary of the Commonwealth pursuant to the remedy provided by law. G.L.c.66,§10.

Sealing or Redacting Commission Records

The Commission's rules make provision for the protection of confidential information in the context of proceedings that are pending before it:

In connection with document requests, interrogatories, depositions or other means of discovery, the Presiding Officer may make any order which justice requires to protect a Party or Person from annoyance, embarrassment, oppression, or undue burden or expense. Orders may include limitations on the method, time, place and scope of discovery and provisions for protecting the secrecy of confidential information or documents.

801 C.M.R. 1.01(8)(a)

The Commission's rules would appear broad enough to permit sealing of its own records where the particular circumstances warranted it, but the Commission is not aware of any case in which it has done so, and the parties have brought no such cases to the Commission's attention. The Commission's long-standing practice in this regard is common knowledge, and appellants who exercise their right to appeal to the Commission must be deemed to know the consequences of taking such an appeal. The Commission envisions enormous practical and public policy issues that would arise

¹ The same must be said about the other Massachusetts statutory provisions concerning the right of privacy cited by the Appellant, i.e., G.L.c.111, §70E; G.L.c.214,§1B; and the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §1320d et seq. ("HIPPA") and applicable regulations promulgated thereunder. 45 C.F.R. §164.500 et seq. As to HIPPA, the Commission understands that federal law is primarily intended to cover "health information" that is "created or received" by a "health care provider". 42 U.S.C. 1320d(4).

from routinely sealing its records, including the administrative burden on the Commission's already limited resources and the impact on the Commission's primary mission to interpret and enforce the Civil Service Law through definitive and instructive written opinions issued in the appeals it must decide.

In addition, the Commission is not persuaded that sealing its records would serve any valuable purpose and, indeed, may be inconsistent with the merit principle that requires appointing authorities to hire and retain public employees on the basis of their qualifications and suitability for appointment. Whether or not an individual's records with the Commission are sealed, the Commission would be loathe to preclude the public, especially any other appointing authority, from being put on notice of such potentially relevant information, either by requesting it from the individual or directly from the Commission, in connection with any future application for public employment.² Thus, except in the very rarest of cases, the Commission will not entertain a motion to seal an entire record. Mr. Hamm does not present such a case.

Similarly, the Commission is not persuaded that it should redact from its public records documents or portions of documents presently contained in the record of this appeal. The Commission does not construe any statute brought to its attention to require such action. The public policy and administrative issues noted above, especially given the Commission's role as a quasi-judicial appellate body, warrant public disclosure of the details of its decision-making to the full extent allowed by law.

² This concern does not in any respect imply how an appointing authority might or might not properly use such information with or without further due diligence or investigation before, making it the basis for an employment decision. *cf.* Collette v. Department of Correction, CSC Docket No. G1-08-53 (2008) (bypass appeal upheld when appointing authority drew improper inferences about an applicant solely from a CORI report); Suppa v. Boston Police Dep't, CSC Docket No. G1-07-346 (2008) (record of CWO); Plaza v. Boston Police Dep't, 21 MCSR 320 (2008) (record of medical test)

In particular, the Commission's decisions are clearly public documents that must, by law, state in writing "specific reasons" for each decision that are based on a "preponderance of evidence" and "findings of fact". See G.L.c.31,§2(b); G.L.c.31, §43; cf. G.L.c.30A,§11(8) Moreover, the Commission's decisions are appealable to Superior Court which requires, pursuant to G.L.c.30A, that the Commission file the Administrative Record of the proceedings, including all hearing testimony and exhibits which must be sufficient to permit meaningful further judicial review. See, e.g., Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 332-33, 577 N.E.2d 325, 326-27 (1991); Faria v. Third Bristol Division of the Dist. Ct., 14 Mass.App.Ct. 985, 987, 439 N.E.2d 842, 844, rev.den., 387 Mass. 1103, 441 N.E.2d 260 (1982) No court, to the knowledge of the Commission, has ever held (or been asked) that any portions of the Commission's proceedings should be excluded or redacted from the Administrative Record because they were not properly a part of the public record.

Finally, most of the information Mr. Hamm appears to be concerned with – i.e., the stated reasons for his bypass – are the gravamen of his appeal and, necessarily have been self-disclosed in the Appellant's own submissions, including his claim of appeal that has been on file since October 2007. The time, if any, to assert whether to keep such information out of the public view would seem to have been when the Appellant chose to take his appeal to the Commission. cf. Globe Newspaper Co. v. Boston Retirement Bd., 446 Mass. 427, 442n24, 446 N.E.2d 1051, 1060 (1983) (questioning but not deciding whether the person submitting information to a governmental body may seek to restrain its disclosure, assuming that the statutory exemptions from public disclosure are not "mandatory" [e.g., can be waived]).

In sum, absent specific statutory or judicial direction to the contrary, the Commission is not persuaded that Mr. Hamm has established sufficient reason to make an exception in his case to its long-standing policy to treat any part of the record of an appeal as open to the public, save for the “hearing” of certain appeals concerning disciplinary cases that are required to be private pursuant to the provisions of Section 43 of the Civil Service Law, which is not applicable to this case.

Sealing or Redaction of HRD Records

The powers and duties of the Commission include oversight of a “decision, action or failure to act by the administrator [of HRD] . . . in violation of [G.L.c.31], the rules or basic merit principles promulgated thereunder” that have “abridged, denied, or prejudiced” a person’s civil service rights “in such a manner as to cause actual harm to the person’s employment status.” G.L.c.31, §2(b). While this authority arguably might extend to cases in which HRD did improperly disclose information or threatened to disclose information protected from public disclosure that caused “actual harm” to a person’s employment status, this case does not present that situation. Indeed, so far as the Commission can determine, there is nothing to suggest that HRD possesses any actual medical reports or any other information not already filed with the Commission in this case. The Commission’s reasons explained above for declining to redact such material from the Commission’s record apply substantially as well to HRD.

Nothing stated in this decision precludes the Appellant from whatever recourse, if any, he may have to protect the privacy of his personnel or medical information under any other Massachusetts or federal law. There may well be limits on what another public agency such as HRD may treat as a public record. See, e.g., Globe Newspaper

Co. v. Chief Medical Examiner, 404 Mass. 132, 533 N.E.2d 1356 (1989) (autopsy reports); Globe Newspaper Co. v. Boston Retirement Bd., 446 Mass. 427, 446 N.E.2d 1051 (1983) (cursory statements of medical reasons for granting disability, i.e., “bad back, heart problem, hypertension”); Logan v. Commissioner of Dep’t of Industrial Accidents, 68 Mass.App.Ct. 533, 863 N.E.2d 559, rev.den., 449 Mass. 1105, 868 N.E.2d 133 (2007) (IME report); Worcester Tel. & Gazette Corp. v. Chief of Police, 58 Mass.App.Ct. 1, 10-11, 787 N.E.2d 602, 609, rev.den., 440 Mass. 1103, 795 N.E.2d 574 (2003) (police internal affairs investigation); Viriyahiranpaiboon v. Department of State Police, 52 Mass.App.Ct. 843, 756 N.E.2d 635 (2001) (blood tests); Connolly v. Bromery, 15 Mass.App.Ct. 661, 447 N.E.2d 1265 (1983) (university students’ evaluations of teachers) The Commission, however, will not instruct HRD as to its obligations under the Public Records Law or other laws respecting privacy (as to which the Commission is not charged with enforcing), and chooses to impose no further obligations upon HRD under the Civil Service Law than those other laws may require.

Sealing of BPD Records

The analysis above applies to the Appellant’s request that the Commission order the BPD to seal Mr. Hamm’s application on file with the BPD or to enjoin the BPD’s “failure to act” to seal that record. Indeed, the Commission’s authority to order a permanent sealing of documents in the possession of an appointing authority is especially uncertain, and it has not been established here. The Commission’s authority to grant injunctive relief under Section 2(b) is limited to actions or inactions by HRD. Chapter 310 of the Acts of 1993 does authorize injunctive relief that affects appointing authorities, but that statute expressly applies only to injunctive relief to rectify a proven injury to employment

rights for a violation of the Civil Service Law, Chapter 31. Neither statute warrants the Commission granting the relief sought by the Appellant in his present motion for injunctive relief against the BPD. Finally, as noted above, nothing stated in this decision precludes the Appellant from whatever recourse, if any, he may have to protect the privacy of his personnel or medical information against unlawful use or disclosure by the BPD under any other Massachusetts or federal law.

For the reasons stated above, the Appellant's Motion to Seal His Records and Enjoin HRD and BPD is *denied*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on November 13, 2008.

A True Record. Attest:

Commissioner

Notice to:
Ronald I. Bell, Esq. (for Appellant)
David M. Jellinek, Esq. (for Respondent)
Martha O'Connor Esq. (HRD)