COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK ss.

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

WARREN H. KELLER-BRITTLE,
Appellant
v.
BOSTON POLICE DEPARTMENT,
Respondent

Case No.: G1-07-363

Appellant Pro Se: Warren H. Keller-Brittle
[redacted]

Appointing Authority Attorney: Amanda E. Wall, Esq.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA

HRD Attorney: Martha O'Connor, Esq
Labor Counsel
Mass. Human Resources Division.
1 Ashburton Place, Room 301
Boston, MA 02108

Commissioner: Paul M. Stein

DECISION ON MOTION TO REOPEN

The Appellant, Warren H. Keller-Brittle, acting pursuant to Mass. G.L.c.31,§2(b), brought this appeal to the Civil Service Commission (Commission) in October 2007, challenging the reasons provided by the Boston Police Department (BPD) and approved by the Massachusetts Human Resources Division (HRD) to bypass him in June 2007 for appointment as a full-time BPD Police Officer. The Appeal was dismissed on November 20, 2008, after the Commission received a notice of voluntary withdrawal. Mr. Keller Brittle now seeks to reopen this appeal, claiming that the attorney who filed that notice of withdrawal did so without his knowledge and consent. BPD and HRD oppose the motion.

The Commission's records indicate that a copy of the Decision dismissing the appeal was mailed on November 21, 2008, both to the Appellant as well as to his counsel, and all other parties. The address of record for the Appellant, to which such notice would have been sent, is the same as the Appellant's current return address used to send his letter dated February 14, 2010, and all prior and subsequent notices from the Commission, namely: 16B Downer Court, Boston MA 02122. None of these notices were returned to the Commission as undelivered.

According to the Pre-Hearing Memorandum submitted by the BPD, and the Pre-Hearing packet submitted by HRD, the reasons submitted by the BPD and approved by HRD for bypassing the Appellant for original appointment as a police officer were: (1) a 209A restraining order in effect from August 1998 thru August 1999, after a full hearing at which the Appellant appeared, prohibiting the Appellant from any contact with his then sixteen-year old daughter or her mother; and (2) a decision of rejection by the New York Police Department after he tested positive for the use of marijuana in 2004.

The Commission also takes note that, since this appeal was dismissed, the eligible list from which the certification on which Mr. Keller-Brittle's name had appeared has expired and a new eligible list has been issued based on a subsequent examination.

In view of the foregoing, an Interim Order was issued by the Commission that required Mr. Keller-Brittle to submit a formal motion to reopen which must be supported by documentation or statements under oath as to the following:

1. That he did not receive the notice of the Commission's Decision dated 11/30/2008, which was mailed to his then and current residential address on 11/30/2008.
2. The date on which het first received notice that this appeal had been dismissed.
3. Whether he has taken and passed any civil service examination for entry-level police officer since November 2008 and, if not, why not.
4. The specific facts of which he has any present knowledge or belief that would form a good faith basis to rebut the allegation that a 209A restraining order entered against him as stated in the BPD and HRD records, and/or to rebut the allegation that he had tested positive for marijuana in 2004 which led to his rejection by the NYPD.

In response to the Interim Order, the Commission received a letter from Mr. Keller-Brittle which contained his (unsworn) statements that he "did not receive notice of the Commission's Decision dated November 20, 2008" and that he "received notice of the dismissal of the appeal on December 23, 2009", although he did not identify the source.

Mr. Keller-Brittle's letter also stated that he had not taken or passed any civil service examinations for entry-level police officers since November 2008 although the "Commission administrator" had recommended to him that he do so. Finally, Mr. Keller-Brittle provided a statement regarding his prior bypass by the New York Police Department (NYPD), including copies of the June 2004 drug test that showed he had tested positive for marijuana and a polygraph examination report commissioned by the NYPD which stated he truthfully denied using marijuana or other illegal drugs, or withholding any information or knowledge regarding using any type of illegal drugs. On April 5, 2010, Mr. Keller-Brittle submitted a second letter enclosing a copy of the August 2004 drug test he personally had commissioned that showed he tested negative for marijuana on that date.

On April 6, 2010, the BPD and HRD filed a joint opposition to the motion to reopen. The opposition attached a copy of a Decision of the New York City Civil Service Commission, dated December 26, 2006, affirming the decision of the NYPD to bypass Mr. Keller-Brittle, as well as a copy of the Chapter 209A restraining order, which were the two grounds on which the BPD decided to bypass Mr. Keller-Brittle.

CONCLUSION

The Commission is vested with "inherent" discretionary power to reopen a closed proceeding in an appropriate case. See Ung v. Lowell, 22 MCSR 471 (2009). While this proposition is true, such power to reopen "should be exercised by an agency with due circumspection – 'sparingly' as the cases say." E.g., Covell v. Department of Social Services, 42 Mass.App.Ct. 427, 433 (1997). See Malone v. Civil Service Comm'n, 38 Mass.App.Ct.

147, 153-54 (1995) (affirming Commission's refusal to reopen appeal absent "undue haste" in granting the Personnel Administrator's motion to dismiss or any "general equities of the problem. . .upon which to rest the extraordinary decision to reopen the administrative proceeding") citing Aronson v. Brookline Rent Control Bd., 19 Mass.App.Ct. 700, 706, FAR.den., 395 Mass. 1102 (1985) and Davis, ADMINISTRATIVE LAW TEXT §18.09, at 370 (3rd ed. 1972).[1] See also Moe v. Sex Offender Registry Bd., 444 Mass. 1009 (2005) (rescript) ("in absence of statutory limitations, agencies generally retain inherent authority to reconsider their decisions") Compare O'Brien v. Town of Norwood, G1-01-283 (2007) (reopened proceeding to enter order authorizing HRD to implement terms of settlement) with Fredette v. MBTA Police Dep't, 19 MCSR 94 (2006) (denying motion to reopen filed 10 months late)

Accordingly, the Commission evaluates the Appellant's motion according to the mandate of the line of authority described above.

Mr. Keller-Brittle's core argument in support of his request to reopen his appeal rests on his alleged lack of notice of the Commission's November 20, 2008 Decision dismissing his appeal prior before December 23, 2009, which he claims was the result of a "voluntary withdrawal" filed by his former counsel without his knowledge or consent. Were Mr. Keller-Brittle able to show that did not know and had no reason to know until December 2009 that his appeal had been dismissed without his knowledge, the Commission would be inclined to consider exercising its equitable discretion to reinstate his appeal. The Commission agrees

[1] Professor Davis counseled: ". . . [T]he search for a basic principle to guide reopening is futile; the results usually must reflect the needs that are unique to each administrative task. When statutes are silent and legislative intent unclear, agencies and reviewing courts must work out the practices and the limits of reopening. . . . Factors to be weighed are the advantages of repose, the desire for stability, the importance of administrative freedom to reformulate policy, the extent of party reliance upon the first decision, the degree of care or haste in making the earlier decision, and the general equities of each problem." The treatise cautions that an "agency can readily find by experience that too much liberality in reconsidering cases may deprive decisions of dignity and force and may contribute to carelessness on account of undue reliance on reconsiderations"; "sometimes a specific limitation or reopening is desirable", but, "sometimes, the limitation should be indefinite and admit a wide margin of discretion" and "it would be a mistake to . . . harden the arteries of administrative procedure." Davis, ADMINISTRATIVE LAW TREATISE §18.09 at 605-609 (1958)

with the BPD/HRD, however, that Mr. Keller-Brittle has not made the necessary showing that he was unduly prejudiced by a lack of notice though no fault of his own.

The BPD/HRD correctly point out that, in this Commonwealth, it has long been presumed that mailing a properly addressed letter, postage prepaid, is *prima facie* evidence of its receipt by the addressee. See Lechoslaw v. Bank of America, 575 F.Supp.2d 286 (D.Mass.2008), citing Anderson v. Inhabitants of the Town of Billerica, 309 Mass. 516, 518-19 (1941). See also Commonwealth v. Crosscup, 369 Mass. 228, 239-40 (1975); Hobart-Farrell Plumbing & Heating Co., Inc., 302 Mass. 508, 509-510 (1939); In re Dembitzki, 62 Mass.App.Ct. 1116 (2004) (unpublished); Bouley v. Reisman, 38 Mass.App.Ct. 118, 125-26 (1995).

Here, the Commission's records show that a copy of the Commission's November 20, 2008 decision was duly mailed both to Mr. Keller-Brittle counsel and to him, personally, at the residential address in Boston, shown on the docket, and to which all other mail was sent to him before and since, without any indication that any of that mail was not received.

The Commission's November 29, 2008 Decision on file clearly shows that copies of the Decision were mailed to both Mr. Keller-Brittle and his counsel.[2] In his original February 14, 2010 submission to the Commission, Mr. Keller-Brittle attached a letter from the Commission postmarked November 8, 2007, which shows that, indeed, the address in the Commission's data base is his proper Boston residence. Mr. Keller-Brittle's February 14, 2010 submission attached a copy of an envelope addressed to him from his counsel, postmarked November 24, 2008, presumably erroneously sent to an address in Jamaica Plain. Mr. Keller claims that this letter was sent to an address that "does not exist", but nothing on the face of the envelope appears to shows any notation by the USPS to indicate that it was returned as undelivered.

[2] Mr. Keller-Brittle's February 14, 2008 letter attached a copy of the November 20, 2008 Decision, but it was photocopied in such a way as to leave off the part of the Decision showing the names of the recipients to whom it had been sent.

The BPD/HRD opposition also points out that, even assuming non-receipt of any information from his counsel or the Commission, Mr. Keller-Brittle had reason to inquire long before February 2010 regarding the status of his appeal. Drawing all inferences in favor of Mr. Keller-Brittle, it appears that his last verifiable written contact with his counsel was his e-mail to counsel on October 30, 2008, requesting a meeting, to which there is no record of a reply or any other record of further conversation about the hearing then scheduled for November 20, 2008. According to Mr. Keller-Brittle, more than another year passed – until December 23, 2009 – before he learned that his appeal had been dismissed.

All that Mr. Keller-Brittle proffers to support his position that it took more than a year for him to learn of November 20, 2008 dismissal of his appeal are his own unsworn bald statements to that effect. The Commission's Interim Order required Mr. Keller-Brittle to produce evidence in testimonial form (i.e. under oath),.to rebut the prima facie fact that he had received timely notice of the dismissal of his case. Mr. Keller-Brittle's failure to comply with this directive, alone, justifies drawing the inference against him and in favor of the BPD/HRD. However, even if the statements made by Mr. Keller-Brittle were treated as if they were made under oath, the Commission finds that those bald assertions are not sufficient to outweigh the evidence of due mailing, together with the other evidence arrayed against his claim that infers Mr. Keller-Brittle did know, or had good reason to know, on or about November 20, 2008, that his appeal was dismissed, and that he was obliged to have taken proactive steps to protect his rights, certainly long before December 23, 2009.

Finally, the Commission doubts that the dismissal of this appeal prejudiced Mr. Keller-Brittle or that now reopening the appeal is necessary in the interest of substantial justice.

First, the Commission takes notice that Mr. Keller-Brittle failed to take any subsequent entry-level police officer civil service examination during the two years since the appeal was dismissed in November 2008. Since he had not been in contact with anyone at BPD or the

Commission during that period, his continuing decision to forego taking such subsequent examination was his choice. Had he been proactive and taken a subsequent examination, and scored high enough to be chosen for consideration, he would likely have been reached for consideration much sooner than if he had simply continued to do nothing as he did. Even if Mr. Keller-Brittle was, again, bypassed, his prior dismissal would not prejudice him in anyway to reassert his rights and litigate all the issues that concern him here, in a timely-filed new appeal.[3] The Commission agrees with BPD/HRD that there is a reasonable inference that Mr. Keller-Brittle chose not to be proactive about his continued interest in becoming police officer because his priorities in 2008 and 2009 were elsewhere – namely, as he stated, obtaining a graduate degree and resolving a dispute with his mortgage lender.

Second, while the substantive grounds for the BPD's decision to bypass Mr. Keller-Brittle have not been fully developed on the record, the undisputed facts on this record as presented in the motion papers contain powerful indications that Mr. Keller-Brittle is unlikely to refute, and, indeed, may be precluded from refuting, at least one of the reasons that the BPD bypassed him, specically, that his failure to pass a pre-employment drug screen in 2004 with the NYPD (positive test for marijuana) justified his bypass by BPD.

The Commission is well aware of the many legal issues surrounding the validity of drug testing, and hair sample testing in particular, as well as the position that drug screens can produce false positives and that an appellant may have the right to a plenary hearing on whether they, in fact, did use illegal substances. See, e.g., Boston v. Downing, 73 Mass.App.Ct. 78 (2008); Dean v. Civil Service Comm'n, 64 Mass.App.Ct. 1111, *FAR den.*, 445 Mass. 1107 (2005); Pinckney v. Boston Police Dep't, 23 MCSR 146 (2010); Sailor v.

[3] Indeed, as noted below, assuming Mr. Keller-Brittle's subsequent application came to the BPD with a spotless record since 2004, his chances of selection prospectively would be no less, and would probably be greater, than his chances of persuading the Commission that "at the time of his bypass" in 2007, the BPD did not have sound and sufficient reasons for disqualifying him.

City of Medford, 22 MCSR 743 (2009); Thompson v. Boston Police Dep't, 16 MCSR 33 (2003), *remanded to Commission*, SUCV2008-03620 (2004). See generally, Jones et al v. Boston Police Dep't, USDC (Mass.) Civil Action No. 2005-cv-11832-GAO.

In this case, however, Mr. Keller-Brittle has already once fully litigated that issue by appealing his non-selection to the New York City Civil Service Commission (NYCCSC), which unanimously affirmed his 2004 bypass by Decision dated December 26, 2006. The written decision of the NYCCSC makes clear that it fully considered all of evidence in support of Mr. Keller-Brittle's denial of the use of marijuana (including his testimony and the results of the NYPD commissioned polygraph test that supported his claim), but concluded that "the appellant's testimony and demeanor is less than credible" and that the weight of the substantial evidence to the contrary was more persuasive that the test was valid and that the "record before us establishes a rational basis for the conclusion of the NYPD that appellant is medically unsuitable for the position of Police Officer."

Thus, it appears that one of the grounds upon which the BPD has bypassed Mr. Keller-Brittle was actually litigated and fully adjudicated against him shortly prior to the BPD bypass decision, and the BPD would appear to stand on reasonably firm ground to assert that, as a matter of law, Mr. Keller-Brittle should be precluded from contesting the validity of the NYPD decision that he was found unfit to become a police officer and that the BPD was not justified to rely on that decision to bypass him in 2007. See George v. City of Lynn, 21 MCSR 652, 660 (2008) (Prevailing Opinion), citing In Re Brauer, 452 Mass. 56 (2008) (conditions for issue preclusion); Jarosz v. Palmer, 436 Mass. 536 (2002) (same). See generally, Plaza v. Boston Police Dep't, 21 MCSR 320 (2008), *vacated sub nom* Boston Police Dep't v. Plaza, Suffolk Superior Court 2008SUCV-03620 (2008). The high legal hurdle that Mr. Keller-Brittle would face in pursuing his present appeal, while not dispositive, certainly is a factor to take into account in weighing the equities in this particular case.

Accordingly, for the reasons stated above, the Commission finds that this case does not represent one of the rare occasions that warrant the exercise of its discretion to reopen a now stale and long-dismissed appeal, and the Commission declines to do so.

The motion of the Appellant, Warren H. Keller-Brittle, is hereby ***denied.***

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis McDowell & Stein, Commissioners) on May 6, 2010.

A True Record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:
Warren H. Keller-Brittle (Appellant)
Amanda E. Wall, Esq. (for Appointing Authority)
Martha O'Connor,, Esq. (HRD)