

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

BRIAN KELLY,
Appellant

G1-16-087

v.

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Brian Lin, Esq.
Chang & Yoo, LLP
100 State Street: Unit 402
Boston, MA 02109

Appearance for Respondent:

Kate Hoffman, Esq.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman

**DECISION ON JOINT REQUEST FOR RELIEF
PURSUANT TO CHAPTER 310 OF THE ACTS OF 1993**

1. On June 15, 2013, the Appellant, Brian Kelly (Mr. Kelly) took the civil service examination for Boston Police Officer and received a score of 99.
2. On November 1, 2013, the state's Human Resources Division (HRD) placed Mr. Kelly's name on an eligible list of candidates for Boston Police Officer.
3. On April 27, 2015, HRD sent Certification No. 02742 to the BPD from which it eventually appointed seventy (70) police officers.
4. On July 21, 2015, Mr. Kelly, after undergoing a background investigation, was given a conditional offer of employment by the BPD. Among the required conditions was the completion of a drug test, medical examination, psychological examination and Physical Abilities Test (PAT).
5. Mr. Kelly successfully completed the drug test and psychological examination.

6. On or around August 28, 2015, as part of the medical examination, it was determined that Mr. Kelly had what is considered a “Category A” medical disqualification, pursuant to the HRD medical guidelines.
7. In December 2015, those candidates who met all of the conditional offer requirements were enrolled in the Boston Police Academy.
8. On or around March 16, 2016, approximately seven (7) months after the medical examination was completed and approximately three (3) months after the Police Academy had commenced, the BPD notified Mr. Kelly of his non-selection along with his right to: a) undergo a medical reexamination, pursuant to G.L. c. 31, § 61A; and b) his right to file a bypass appeal with the Civil Service Commission (Commission), pursuant to G.L. c. 31, § 2(b).
9. On May 4, 2016, Mr. Kelly filed a bypass appeal with the Commission.
10. On May 24, 2016, I held a pre-hearing conference at the offices of the Commission which was attended by Mr. Kelly, his counsel and counsel for the BPD. As part of the pre-hearing conference, Mr. Kelly requested a medical reexamination.
11. On June 27, 2016, Mr. Kelly underwent a medical reexamination by a BPD physician who subsequently requested additional information from Mr. Kelly’s personal physician before rendering a final determination.
12. According to the BPD, the BPD physician did not receive the medical documentation requested until October 18, 2016.
13. Sometime after October 18, 2016, the BPD physician determined, as part of the medical reexamination, that there is insufficient evidence of a Category A medical condition.
14. On November 10, 2016, the parties submitted a joint request for relief to the Commission, which would place Mr. Kelly’s name at the top of the next Certification issued to the BPD for police officer, effectively allowing him to be reconsidered for appointment, but requiring that he begin the process anew, including a new background investigation, medical examination, etc.
15. On November 14, 2016, which was the date previously scheduled for a full hearing regarding this matter, I had a colloquy with counsel for both parties regarding the relief requested. In short, I asked both counsel, given that Mr. Kelly had now passed the medical examination, why the BPD should not be required to simply reinstate his conditional offer of employment and process him as part of the current (2016) recruit class, for which a Police Academy will commence in December 2016.

16. The BPD reported that it would be unable to complete a new background investigation, new psychological examination, new drug test, new medical examination, and PAT, given that the Police Academy is scheduled to begin in approximately three (3) weeks.

Analysis

In August 2015, as part of the 2015 appointment process for police officers, the BPD determined that Mr. Kelly had a “Category A” medical condition. The civil service law explicitly states that Mr. Kelly is entitled to a reexamination. Had Mr. Kelly been promptly informed of this, he could have undergone a reexamination and potentially been enrolled in the December 2015 Police Academy.

Instead, Mr. Kelly was not informed of the medical determination – and bypass – by the BPD until March 2016. In large part because of this delay, the BPD now argues that Mr. Kelly cannot be enrolled in a Police Academy until December 2017. Further, as a result of the time delay, BPD also argues that Mr. Kelly, who met all of the post-conditional offer of employment requirements (except for the PAT, which he was not scheduled for), will need to start the process anew in 2017, including a new background investigation, prior to determining whether he will be offered a new conditional offer of employment. The events here illustrate the real harm that can result from administrative deficiencies in the appointment process.

I accept the BPD’s representation that it is not feasible to enroll Mr. Kelly in the December 2016 Academy and, for that reason, am not entering such an order. However, I do not believe the relief requested here, based on the facts of this particular case, is sufficient.

For all of the above reasons, and pursuant to Chapter 310 of the Acts of 1993, the Commission hereby allows Mr. Kelly’s appeal and orders the following:

1. HRD shall place the name of Brian Kelly at the top of any future Certifications issued to the Boston Police Department until he is appointed or bypassed.
2. The BPD may elect to require Mr. Kelly to submit to an updated background investigation, but the BPD shall not bypass Mr. Kelly as a result of any facts or circumstances in his background which it had knowledge of prior to making a conditional offer of employment to Mr. Kelly on July 21, 2015.
3. In the event that the BPD determines that Mr. Kelly has a disqualifying medical condition, he shall be notified within three (3) days of said determination and his right to a reexamination.
4. If Mr. Kelly is appointed as a Boston police officer, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 02742.

I do not incorporate, as part of this decision, the parties' agreement "to waive his [Appellant's] rights to any and all appeals, whether arising under M.G.L. c. 31, § 2(b), or any other provision of state or federal law, including M.G.L. c. 151B, arising from or relating to Case No. G1-16-087 and this Joint Petition for Relief."

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan) on December 8, 2016.

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. 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:

Brian Lin, Esq. (for Appellant)

Katherine Hoffman, Esq. (for Respondent)

Patrick Butler, Esq. (HRD)