

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

SCOTT LANCASTER,
Appellant

v.

G1-15-72

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

David Brody, Esq.
Law Office of Joseph Sulman
1001 Watertown Street, 3rd Floor
Newton, MA 02465

Appearance for Respondent:

Peter M. Geraghty, Esq.
Boston Police Department
One Schroder Plaza
Boston, MA 02120

Commissioner:

Cynthia A. Ittleman¹

DECISION

On April 15, 2015, the Appellant, Scott Lancaster (“Mr. Lancaster” or “Appellant”), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (“Commission”), contesting the decision of the Boston Police Department (“Respondent” or “BPD”) to bypass him for original appointment as a permanent full-time police officer.

A pre-hearing conference was held at the offices of the Commission on May 12, 2015. There were two full days of hearings: June 22, 2015 and August 10, 2015. All hearings were

¹ The Commission acknowledges the assistance of Law Clerk Barbara Grzonka in the drafting of this decision.

held at the offices of the Commission.² The witnesses were sequestered, except for the Appellant and Sergeant Detective Brian Riley³. The full hearings were digitally recorded and both parties were provided with a CD of the hearings.⁴ Both parties submitted proposed decisions.

FINDINGS OF FACT

Forty-three (43) exhibits were entered into evidence at the hearing and post-hearing pursuant to a request at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by BPD:

- Rafael Antunez, Detective, Recruit Investigations Unit, BPD;
- Brian Riley, Sergeant Detective, Recruit Investigations Unit, BPD;
- Devin E. Taylor, Director of Human Resources, BPD

Called by Appellant:

- Scott Lancaster, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies; and reasonable inferences from the credible evidence; based on a preponderance of the credible evidence, I find the following:

1. Mr. Lancaster is a 37 years old African-American man who is married and resides in Boston, Massachusetts. (Respondent's Exhibit 1)

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.* apply to adjudications before the Commission with G.L. Chapter 31, or any Commission rules, taking precedence.

³ Due to some apparent confusion, Det. Riley was present in the hearing room when Det. Antunez testified at the Commission.

⁴ 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 he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

2. Mr. Lancaster received a Bachelor's Degree in Criminal Justice from the University of North Carolina at Wilmington (UNCW) in 2000. (Testimony of Mr. Lancaster)
3. After graduating from UNCW, Mr. Lancaster returned to Massachusetts and began working for the Department of Youth Services, now part of the Department of Children and Families as a Youth Group Worker in a secure group home for violent juvenile offenders. He was employed there for approximately one year. (Testimony of Mr. Lancaster)
4. At the beginning of 2001, Mr. Lancaster was hired by the Boston Housing Authority ("BHA") Police Department. His police training was to be completed at the MBTA Police Academy. (Testimony of Mr. Lancaster)
5. Before he could begin training, Mr. Lancaster had to take and pass a Physical Ability Test (PAT). Mr. Lancaster forgot to appear for the test, which was grounds for dismissal from the Academy. He was given a second chance to take the PAT which he took and passed. (Testimony of Mr. Lancaster)
6. On April 9, 2001 Mr. Lancaster received a written warning because he was not clean shaven when he reported for his first day of training at the Academy. Mr. Lancaster had a goatee, which he shaved off the same day he received his discipline. (Respondent's Exhibit 4, Testimony of Mr. Lancaster)
7. On April 26, 2001, Mr. Lancaster received a written warning for failing to properly address a member of the Academy staff in a professional manner and for not being clean shaven. (Respondent's Exhibit 5)
8. The first incident that resulted in the written warning occurred on April 25, 2001 when Mr. Lancaster spoke back to the training instructor, Mr. Frank Wolverton (Mr. Wolverton) about being pepper sprayed in the eyes as part of training. Mr. Lancaster was concerned that the

spray would damage his eyes because he had previously had Lasik eye surgery. Mr.

Lancaster said an instructor would be paying for his eye surgery if he got sprayed in the face.

(Testimony of Mr. Lancaster, Respondent's Exhibit 7)

9. The second incident occurred in the morning of April 26, 2001 when Mr. Lancaster called the Academy saying that he would be late and was "unprofessional" in his tone.

(Respondent's Exhibit 7)

10. While discussing these infractions with Mr. Lancaster, Mr. Wolverton noticed that Mr.

Lancaster was not clean shaven and he added a violation of the hygiene policy. (Respondent Exhibits 5, 6, 7). Mr. Lancaster inquired about appealing the written warning. (Testimony of Mr. Lancaster)

11. On April 27, 2001, Mr. Lancaster hand wrote an appeal letter. (Testimony of Mr. Lancaster, Appellant's Exhibit 10)

12. On April 27, 2001, Detective Robert J. Powers, Academy Director, authored a report regarding Mr. Lancaster's history of discipline at the Academy and concluded that Mr. Lancaster "has failed to show any desire to improve and correct his attitude or lack of professionalism." (Respondent's Exhibit 6)

13. On May 2, 2001, the BHA terminated Mr. Lancaster's contract with the BHA.

(Respondent's Exhibit 8)

14. On or about April 27, 2001, Mr. Lancaster filed a complaint at the Massachusetts Commission Against Discrimination (MCAD) against the BHA alleging that there were racial overtones at the Academy to which the BHA sent him. (Appellant's Exhibit 24) MCAD found no grounds to go forward on Mr. Lancaster's claim. (Testimony of Mr. Lancaster)

15. In 2003, Mr. Lancaster moved to Virginia to work as a police officer at the Richmond Police Department (“RPD”). (Testimony of Mr. Lancaster)
16. Mr. Lancaster completed training at a Virginia police academy and in 2004 began working as Police Officer at the RPD. Mr. Lancaster’s first assignment was as a patrol officer at the Fourth Precinct. Subsequently, he was promoted to the Focused Mission Team (“FMT”) Unit, which was a unit tasked with combatting ongoing criminal issues in the community such as drugs and prostitution. Mr. Lancaster worked in that unit for almost two years. (Testimony of Mr. Lancaster)
17. In April of 2004, Mr. Lancaster was found at fault by the RPD for a motor vehicle accident he was in while he was on duty.⁵ Mr. Lancaster was not disciplined and/or did not receive counseling for this incident. (Respondent’s Exhibit 2)
18. Sometime in 2005, RPD counseled Mr. Lancaster for unsatisfactory work performance and improper police action involving a female college student who was pepper-sprayed and Mr. Lancaster insisted that the student be brought to the hospital in his police car even though the student did not want to go to the hospital. (Respondent’s Exhibit 2; Testimony of Mr. Lancaster)
19. Another 2005 incident prompted the RPD to counsel Mr. Lancaster for failing to notify a supervisor of the justified use of force when Mr. Lancaster was involved in removing an unruly restaurant patron from the restaurant, during which Mr. Lancaster used force; the patron was criminally charged and subsequently released. (Respondent’s Exhibit 2; Testimony of Mr. Lancaster)

⁵ Det. Antunez requested Mr. Lancaster’s personnel file from RPD. RPD’s policy prohibits the release of personnel files. RPD Detective Angela Palmer provided Det. Antunez a list of Mr. Lancaster’s disciplines via telephone on Friday, September 5, 2014. She could not provide the details of many of the incidents because those are kept with the RPD’s Internal Affairs Division.

20. In 2006, the RPD found Mr. Lancaster at fault for a motor vehicle accident while on duty.

This accident occurred when Mr. Lancaster was pursuing a suspect. Specifically, Mr.

Lancaster crashed into a fence during the pursuit, in violation of RPD rules and regulations.

(Respondent's Exhibit 2) Mr. Lancaster received counseling with remedial motor vehicle training. (Testimony of Mr. Lancaster)

21. In July 2007, Mr. Lancaster received discipline, in the form of a suspension, for pointing his weapon at a fellow officer. The incident occurred when Mr. Lancaster was sitting in the back of an RPD patrol car and two fellow officers sitting in the front. The officer in the front passenger seat was playing with the police cruiser's MDT (mobile data terminal), making a repeated chiming noise that Mr. Lancaster found annoying. Mr. Lancaster asked him to stop but the officer continued making the noise and Mr. Lancaster pointed his gun at the officer's back. The officer was unaware that Mr. Lancaster was doing this at that time. However, at the end of the shift, Mr. Lancaster confessed and apologized to the officer at whom he had pointed his weapon. (Testimony of Mr. Lancaster)

22. The officer filed a complaint after Mr. Lancaster confessed and apologized to him. Mr. Lancaster was on a previously scheduled vacation at that time. When he returned to work, Mr. Lancaster was informed that he was being investigated by the RPD Internal Affairs Division. (Testimony of Mr. Lancaster)

23. Mr. Lancaster cooperated with the RPD investigation and received a five (5)-day suspension that was completed over four (4) days because RPD Officers work ten-hour shifts. (Testimony of Mr. Lancaster)

24. After the suspension, Mr. Lancaster was demoted to patrol officer and he "tried to be the best officer he could be." (Testimony of Mr. Lancaster) He volunteered for unpopular

assignments, was nominated for employee of the month and he received a citation for excellent police work. Mr. Lancaster also took part in a joint task force with the Virginia State Police to apprehend fugitives and to get firearms off the streets during one summer.

(Id.)

25. In September 2008, RPD counseled Mr. Lancaster for failure to attend a court proceeding to which he was assigned. (Respondent's Exhibit 2)

26. In July 2009, Mr. Lancaster received a code of conduct reprimand for demanding, on the RPD radio, that his supervisor order two (2) other RPD officers to return to the hospital to which Mr. Lancaster was assigned to maintain custody of a woman sent to the hospital for a psychological observation. (Respondent's Exhibit 2; Testimony of Mr. Lancaster)

27. In September 2009, RPD counseled Mr. Lancaster a second time for failing to attend a court proceeding to which he was assigned. (Respondent's Exhibit 2)

28. Counseling is one of several corrective actions outlined in RPD General Order ("GO") 1-16 dated 3/26/13, entitled "Disciplinary Procedures", which replaced the RPD GO 1-16 dated 9/07/07. Other corrective actions include referral, training, close supervision, a special performance evaluation, an action plan or transfer recommendation. Disciplinary actions may include a written reprimand, suspension, reduction in pay, demotion, forfeiture or termination/dismissal. Discipline is progressive under these procedures. Since the parties did not produce other versions of the RPD Disciplinary Procedures that may have been in effect at the times of Mr. Lancaster's misconduct (which precede 2013), it is unknown how, if at all, if Mr. Lancaster may have been treated differently under any other pertinent versions of the RPD Disciplinary Procedures. (Appellant's Exhibit 22; Administrative Notice)

29. In 2011, Mr. Lancaster and his wife moved back to Massachusetts to be closer to their families here. Mr. Lancaster worked for the Department of Youth Services (“DYS”) for four (4) to six (6) months before being hired by Simmons College as a campus Police Officer in September 2011. (Testimony of Mr. Lancaster, Appellant’s Exhibit 11)
30. By letter dated August 21, 2014, Simmons College informed Det. Antunez that it terminated Mr. Lancaster because he was hired on condition that a Massachusetts academy would accept his Virginia police academy training as a valid equivalent but it was not. (Respondent’s Exhibit 11) Simmons College did not have the budget to send Mr. Lancaster to a Massachusetts police academy. (Testimony of Mr. Lancaster) There were no negative reasons relating to Mr. Lancaster’s performance or otherwise that caused the termination of his employment from Simmons College. (Respondent’s Exhibit 11) After BPD bypassed Mr. Lancaster, he asked Simmons to produce another letter advising that he was never suspended with or without pay because he was concerned that his payroll records contained an error. Simmons complied with this request and produced a letter dated April 17, 2015 stating “at no time was Mr. Lancaster suspended with or without pay.” (Administrative Notice (produced at prehearing conference in this case); Testimony of Mr. Lancaster)
31. In February 2012, Mr. Lancaster was hired by Northeastern University, where he still works. His initial position was as a Community Service Officer (“CSO”) and, on June 21, 2012, Mr. Lancaster was promoted to campus Police Officer at Northeastern University. As a campus Police Officer, Mr. Lancaster’s duties include patrolling and responding to emergency calls regarding assaults or domestic violence issues. (Testimony of Mr. Lancaster)
32. Mr. Lancaster did not meet expectations for cooperation and teamwork on a March 2013 Northeastern University performance progress report, noting that a supervisor spoke to Mr.

Lancaster on at least two (2) occasions in this regard. Mr. Lancaster's evaluation states, in part, "Off. Lancaster is learning to adapt to the NU policies and procedures which differ from his previous police experience in Richmond VA. Captain Sweeney has spoken with Off.

Lancaster on at least two occasions to address his concerns and issues. He was instructed to ask for clarification rather than simply register his complaints." (Appellant's Exhibit 17) A subsequent evaluation through June 2013 indicates that Mr. Lancaster met expectations in this regard. (Appellant's Exhibit 18) A letter from Northeastern shows that no disciplinary action has been taken against Mr. Lancaster. (Appellant's Exhibit 19)

33. On June 15, 2013, Mr. Lancaster took the civil service examination for Police Officer.

(Stipulated Fact)

34. The BPD wanted to hire thirty-five (35) police officers. Certification No. 01903 was issued to BPD on June 24, 2014. Mr. Lancaster was ranked forty-third (43rd) on this Certification.

(Stipulated Facts)

35. Subsequently, Mr. Lancaster received a card in the mail from BPD asking him to report to the BPD in order to sign the eligible list and he was given a date for orientation. (Testimony of Mr. Lancaster)

36. At the orientation, Mr. Lancaster received his BPD application and was told that he had two (2) weeks to complete and return it. (Testimony of Mr. Lancaster)

37. On July 26, 2014, Mr. Lancaster completed and submitted his application. (Respondent's Exhibit 1)

38. Section 5 of the BPD application contains questions related to the applicant's employment history. The last two (2) pages of this section ask the applicant to "list all employment within

the past ten (10) years beginning with the most recent going backward.” (Respondent’s Exhibit 1) Mr. Lancaster did not list the BHA in that section. (Respondent’s Exhibit 1)

39. Section 6 of the BPD application contains questions related to gun licenses and question G asks, “Have you ever applied for a public safety position in Boston or any other city, town, agency, etc?” There are yes/no boxes below the question and the following page asks the applicant to list all the agencies where he or she applied. Mr. Lancaster checked “Yes” in response to question G and he listed several agencies where he applied, including the BHA, and he indicated where he was hired. (Respondent’s Exhibit 1)
40. Mr. Lancaster’s BPD application listed his 2007 suspension from the RPD, resulting from the incident in which he pointed his weapon at a fellow officer, as the sole discipline he received. He noted the incident on page 11, question #1H and provided an explanation of the incident on a supplemental page. (Respondent’s Exhibit 1)
41. Mr. Lancaster did not mention in his BPD application the incidents at RPD for which he received counseling, one reprimand and a counseling with remedial training. (Respondent’s Exhibit 1)
42. Section 9 of the BPD application contains questions regarding drivers’ license information. Question C4 asks, “[a]s an operator, have you ever been involved in an automobile crash in any state?” (Respondent’s Exhibit 1) Yes/No boxes include a line on which to indicate the number of crashes the candidate had; the candidates are also instructed to explain each crash. (Respondent’s Exhibit 1)
43. Mr. Lancaster did not mention on his BPD application that he had two on-duty motor vehicle accidents (one in 2004 and one in 2006) while he was employed by the RPD. (Respondent’s Exhibit 1)

44. When he completed the application, Mr. Lancaster gave it to Detective Williams. Mr. Lancaster mentioned to Detective Williams that he would have a difficult time obtaining Mr. Lancaster's personnel records from the RPD because it is the RPD's policy to only permit access to personnel records in person. (Testimony of Mr. Lancaster)
45. Detective Antunez was the background investigator assigned to Mr. Lancaster. (Testimony of Detective Antunez)
46. On August 12, 2014, Detective Antunez faxed a request to the RPD Personnel Department requesting Mr. Lancaster's complete personnel file. He also attached a release signed by Mr. Lancaster. (Respondent's Exhibit 9)
47. Detective Antunez spoke to Detective Angela Palmer at RPD about his request for Mr. Lancaster's file. Detective Palmer would not fax or mail a copy of Mr. Lancaster's file pursuant to its department policy but verbally gave Detective Antunez a list of counseling and/or disciplinary actions involving Mr. Lancaster. Detective Antunez wrote these down and included them in the background investigation information about Mr. Lancaster. (Testimony of Detective Antunez)
48. According to the communication log Detective Antunez kept related to the investigation of Mr. Lancaster, he contacted Mr. Lancaster on five (5) occasions. The first call was to introduce himself to Mr. Lancaster. The next three (3) calls were to make arrangements for a home visit and the last phone call occurred on September 4, 2014 to discuss Mr. Lancaster's termination from the BHA. (Respondent's Exhibit 3)
49. During the last phone call, Det. Antunez questioned Mr. Lancaster about his termination from the BHA and the complaint against BHA. Based on the paperwork Det. Antunez saw in Mr. Lancaster's BHA personnel file, Det. Antunez believed that Mr. Lancaster had filed a

lawsuit against the BHA and MBTA Academy and that Mr. Lancaster had failed to disclose this information on his application. However, Mr. Lancaster had not filed a lawsuit in court but filed a complaint against at the MCAD in this regard. Det. Antunez took away from the conversation that Mr. Lancaster had been terminated from BHA. (Testimony of Det. Antunez; Testimony of Mr. Lancaster)

50. Section 14, “Other Personal Declarations” of the BPD application contains the following question: “Have you ever sued someone or have you ever been sued? Yes/No.”

(Respondent’s Exhibit 1) Mr. Lancaster checked “No”. (Id.)

51. Det. Antunez saw Mr. Lancaster’s letter to BHA Police Deputy Chief Stephen Melia dated May 2, 2001 responding to his termination from the BHA and alleging that he was the victim of racial discrimination. (Respondent’s Exhibit 2) In this five (5)-page letter, Mr. Lancaster wrote, in part,

... I believe that the BHA Police Department and the MBTA Police Academy and its staff have conspired to terminate my employment as a Police Recruit for minor violations of Academy rules. These same rule violations have been committed by non-minority recruits but no such action has been taken against them for the same rule violations.

If this termination of my employment is not rescinded by the close of business on this Friday, May 4, 2001, it is my intention to immediately engage an attorney, to notify the media and file a wrongful termination suit against the City of Boston, the MBTA and the BHA for wrongful termination. However, I would prefer to settle this matter behind closed doors. Considering the recent history of the BHA and the existing Settlement Agreement and Order with regard to the treatment and discrimination against minorities, I have no desire to publicize this incident. ...
(Appellant’s Exhibit 9)(emphasis in original)

52. Detective Antunez created a private and confidential memorandum (“PCM”) for Mr.

Lancaster that summarized his background investigation. PCMs are used by the BPD hiring roundtable panel, which makes hiring recommendations, as part of the selection process.

(Testimony of Ms. Taylor)

53. On September 14, 2014 members of the BPD had a roundtable meeting to discuss hiring police officers and the candidates. The members of the round table were:

- Nicole Taub, Attorney for BPD
- Sgt. Brian Riley
- Devin Taylor, Director of Human Resources, BPD
- Ian Mackenzie, Director, Occupational Health Services Unit, BPD
- Jeffrey Walcott, Deputy Superintendent, Bureau of Investigative Services, Family Justice Center

In addition, Detective Antunez attended this roundtable meeting and presented the results of his background investigations to which he was assigned, including any concerns he had about a candidate to the roundtable. (Testimony of Ms. Taylor)

54. Detective Antunez's concerns about Mr. Lancaster included the firearm incident at RPD, which was a major concern, his disciplinary history, which showed a number of infractions and terminations and that Mr. Lancaster did not disclose some relevant information.

(Testimony of Ms. Taylor)

55. In addition to reviewing the PCMs for candidates, the roundtable reviews the candidates' applications. However, Ms. Taylor did not conduct a comprehensive review of the applications prior to the roundtable discussion. She focused her review on the PCMs.

(Testimony of Ms. Taylor)

56. Sgt. Riley limited his review for the roundtable meeting to the candidates' PCMs.

(Testimony of Sgt. Riley)

57. Sgt. Riley did not personally investigate anything related to Mr. Lancaster's application.

(Testimony of Sgt. Riley)

58. During the roundtable meeting, the decision was made to recommend that the Respondent bypass Mr. Lancaster. Ms. Taylor and Sgt. Riley both expressed concern that Mr. Lancaster had pointed his gun at a fellow officer while employed by the RPD. (Testimony of Ms.

Taylor, Sgt. Riley) Sgt. Riley considered this inappropriate behavior and it showed a lack of good judgment. (Testimony of Sgt. Riley)

59. Ms. Taylor was also concerned about a pattern of discipline and/or counseling that Mr.

Lancaster had received over the years. She perceived the counseling Mr. Lancaster received as discipline. (Testimony of Ms. Taylor)

60. By letter signed by Ms. Taylor at BPD and dated February 26, 2015, BPD informed Mr.

Lancaster that BPD had bypassed him stating, in pertinent part,

... the Boston Police Department has significant concerns with your work history. Specifically, you have been disciplined by and terminated for multiple law enforcement agencies, including Boston Housing Authority, Richmond Virginia PD, Simmons College Police Department, and Northeastern University Police Department. Additionally, you failed to disclose all disciplinary action as required on page #11, of question #1H. You also failed to disclose two at fault accidents as required in the application. ...
(Respondent's Exhibit 11)

61. Ms. Taylor drafted the letters sent to candidates who were bypassed. (Testimony of Ms. Taylor)

62. Five (5) candidates ranked lower than Mr. Lancaster were selected. (Stipulated Fact)

63. Ms. Taylor acknowledged in her testimony at the Commission that there was nothing negative about Mr. Lancaster's employment record with Simmons College and that his termination from Simmons should not have been listed as a reason for bypass. (Testimony of Ms. Taylor)

64. Ms. Taylor considered Mr. Lancaster's discipline and termination from BHA relevant because "all details about one's involvement with law enforcement" are relevant.
(Testimony of Ms. Taylor)

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

The appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm'n., 447 Mass. 233, 241 (2006) Reasonable justification is established when such an action is "done upon adequate reasons sufficiently supported by credible evidence when weighed by an unprejudiced mind, guided by common sense and correct rules of law." Comm'rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971)(quoting Selectman of Wakefield v Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct.

of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. Busa v. Fall River Police Department, 27 MCSR 552 (2014)(citing Beverly, 78 Mass.App.Ct. 182, 189 (2010)). The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. Beverly citing Cambridge at 305, and cases cited. "It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." Town of Burlington, 60 Mass.App.Ct. 914, 915 (2004). An appointing authority "should be able to enjoy more freedom in deciding whether to appoint someone as a new...officer than in disciplining an existing tenured one." City of Attleboro v. Mass. Civil Serv. Comm'n, BRCV2011-00734 (MacDonald. J.) citing Beverly at 191.

Especially when it comes to an applicant for a sensitive public safety position, "the Commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was 'reasonable justification' shown...Absent proof that the [appointing authority] acted unreasonably...the commission is bound to defer to the [appointing authority's] exercise of its judgment that 'it was unwilling to bear the risk' of hiring the

candidate for such a sensitive position”. Beverly at 190-91. *See also*, Reading v. Civil Service Comm’n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914 (2004) (rescript opinion). Further, “An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 474 (1995). “Police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

Parties’ Positions

Mr. Lancaster argues that BPD’s reasons for bypassing him are untrue. He maintains that he has not been disciplined and/or terminated from all the law enforcement agencies listed on BPD’s bypass letter. Mr. Lancaster believes he truthfully filled out his application and did not attempt to mislead or be evasive about his past. Mr. Lancaster asserts that his employment at the BHA should not be considered because it was beyond the ten year employment history requested by BPD and asserts that he referenced his BHA employment in the part of the BPD application that asked for the name of all law enforcement agencies to which the candidate has applied. Finally, Mr. Lancaster avers that BPD did not conduct a reasonably thorough investigation since Detective Antunez did not follow up thoroughly with the MBTA Academy and the RPD when he discovered that Mr. Lancaster had been disciplined by these two agencies.

The Respondent argues that its decision to bypass Mr. Lancaster was reasonably justified based on his prior history of discipline while employed by several law enforcement agencies, the most serious incident occurring in Richmond when he pointed a gun at a fellow officer. The Respondent also argues Mr. Lancaster failed to disclose prior discipline and driving accidents on

his application and therefore it had reason to doubt his ability to be truthful, an essential trait for police officers.

Analysis

The Respondent has established by a preponderance of the evidence that it had reasonable justification by bypass Mr. Lancaster based on some, but not all of the reasons contained in its bypass letter to Mr. Lancaster. The Respondent failed to establish that it had reasonable justification to bypass Mr. Lancaster based on his termination from Simmons College. During her testimony, Ms. Taylor acknowledged that the Respondent should not have included Simmons College as one of the law enforcement agencies who disciplined and/or terminated the Appellant because Simmons terminated him only when it found that a Massachusetts academy would not accept Mr. Lancaster's Virginia police academy training the equivalent of Massachusetts training and the College could not afford to send Mr. Lancaster to a Massachusetts academy. As a result, the parties agree that the Respondent lacked reasonable justification to bypass Mr. Lancaster based on his termination at Simmons College.

The Respondent also failed to establish by a preponderance of the evidence that it had reasonable justification to bypass Mr. Lancaster based on his performance as a campus police officer at Northeastern University. In a regular performance evaluation, Mr. Lancaster did not meet expectations in one area (cooperation and teamwork) early in his employment at Northeastern. The Northeastern record shows that Mr. Lancaster met with a supervisor in this regard and subsequent evaluations show no further difficulties. Mr. Lancaster may have had a shaky start but he has adapted to Northeastern University's processes and he is doing well. A performance evaluation is an assessment of an employee's work performance over time and while it could include instances of discipline, there are none here and no punitive actions were

taken again the Appellant. For these reasons, the Respondent's reliance upon one area needing improvement in a performance evaluation does not, without more, provide reasonable justification for bypassing the Appellant.

The Respondent further failed to establish a reasonable justification to bypass Mr. Lancaster based on his failure to list BHA as a previous employer. As the Respondent accurately points out, the BPD application indicated that candidates are to provide previous employers within the past ten (10) years. Mr. Lancaster's employment at BHA is beyond the ten-year period. Moreover, Mr. Lancaster disclosed elsewhere on his BPD application that he had applied to and was hired by the BHA. Therefore, it cannot be said that Mr. Lancaster failed to inform the Respondent of his employment at BHA and the Respondent did not have reasonable justification to bypass Mr. Lancaster on this basis.

Because Mr. Lancaster disclosed his employment at BHA, a question arises as to whether Mr. Lancaster's record with BHA is too stale to be considered by the Respondent since it occurred nearly fifteen (15) years ago. The Commission's review is limited to whether the appointing authority has sustained its burden of proving there was reasonable justification for the action taken, not to substitute its judgment for that of the Appointing Authority. *See Cambridge* at 305. The Commission finds that the Respondent was justified in considering the BHA record since it was listed on Mr. Lancaster's application (as it should have been) as another law enforcement agency to which Mr. Lancaster had applied, the incidents at BHA involve discipline (albeit prior to performing the services of an officer) and it involved a law enforcement position. Further, it is information which precedes Mr. Lancaster's experience as a police officer in Richmond, raising valid concerns that RPD is not the only law enforcement job where Mr. Lancaster has exhibited misconduct and that he could continue such misconduct if he were

appointed a police officer in the BPD. Further, it was within the Respondent's discretion to find that the Appellant's improvements, while laudable, do not outweigh his earlier transgressions, at least at this time. For these reasons, the Respondent had reasonable justification for bypassing Mr. Lancaster based on his termination at BHA.⁶

The Respondent has established reasonable justification for bypassing Mr. Lancaster for additional reasons. These include his disciplinary record at the RPD, his failure to disclose all of the RPD counseling and/or disciplinary incidents in which he was involved, as well as the two (2) on-duty motor vehicle accidents at RPD. The most serious disciplinary action in Mr. Lancaster's record is the 2007 incident in Richmond when he pointed a gun at the back of a fellow officer, which Mr. Lancaster disclosed in his BPD application. The incident occurred in 2007. At that time, Mr. Lancaster was several years into his career as a police officer at RPD. In a major lapse in judgment, Mr. Lancaster pointed his weapon at a fellow officer. While this matter is now eight (8) years old, Mr. Lancaster worked hard to overcome the effects of his action and Mr. Lancaster has not repeated such conduct, the Respondent was justified in relying upon this information as a reason to bypass Mr. Lancaster. The Commission has upheld both a termination and a bypass when an officer points a gun at someone in jest or anger. *See, e.g., Weiland v. City of Holyoke*, D1-14-270 (2015); *Alicea v. City of Holyoke*, 27 MCSR 150 (2014); and *Rogers v. Town of Southwick*, 26 MCSR 359 (2013)(Commission upheld bypass of candidate who pointed a gun at his brother in a video). It is within an appointing authority's discretion to bypass a police officer candidate who pointed his weapon at a fellow officer, whether out of frustration or jest.

⁶ Employment decisions should not be made based on a candidate's decision to file a complaint at MCAD based on the alleged wrong-doing of a previous employer.

Mr. Lancaster had work performance and/or disciplinary difficulties at the RPD that he failed to disclose on his BPD application. He averred that counseling at the RPD that he failed to disclose did not constitute discipline. Whether the actions taken against Mr. Lancaster for his conduct at RPD are called corrective counseling actions or disciplinary action, they are part of the RPD “Disciplinary Procedures” and the first steps in a progressive discipline action plan. Even if Mr. Lancaster’s actions did not result in “disciplinary” action, the Respondent cannot be faulted for being concerned about his previous misconduct. In addition, Mr. Lancaster admitted on his BPD application that he had been disciplined by the RPD for the incident involving his firearm but he did not disclose on the application that he had also been reprimanded, stating that he had forgotten about the reprimand. Therefore, Mr. Lancaster was explicitly disciplined twice at RPD. Further, the RPD counseled Mr. Lancaster on five (5) occasions⁷ during his tenure there, including counseling on two (2) different occasions when he failed to appear in court as scheduled. The Appellant’s failure to disclose one discipline and the five (5) incidents for which he was counseled at the RPD provide the Respondent with reasonable justification for bypassing him.

Finally, as the bypass letter to the Appellant indicates, Mr. Lancaster withheld pertinent information about his driving history. Section 9, (Driver’s License Information), Part C, Question 4 asks, “[a]s an operator, have you ever been involved in an automobile crash in any state?” Yes/No. If the candidate checked “Yes”, there was a line underneath it with the word “Number” next to where the applicant was to indicate how many automobile crashes he or she had had and, further below, there were instructions to the applicant to explain each such crash. Mr. Lancaster checked “Yes”, indicating that he had been in two crashes and provided an

⁷ The three (3) of the five (5) incidents for which Mr. Lancaster was counseled include: one (1) car accident, one (1) use of force and one (1) improper police action.

explanation of each on a separate piece of paper. The incidents he mentioned occurred off-duty, not when he was on-duty at the RPD. However, the Appellant had also been in two (2) on-duty accidents in Richmond that he failed to report. Mr. Lancaster did not mention these accidents on his BPD application because he claims he was told that accidents on-duty would not appear on his personal driving history. The Commission does not find Mr. Lancaster's argument persuasive on this point. The language of Part C, Question 4 of the application is clear: "as an operator" would encompass car crashes both on-duty and off-duty, whether they appeared on an individual's driving record or not. Mr. Lancaster was certainly aware of the two (2) on-duty accidents in which he was involved and yet he did not report them on his application when asked. Therefore, the Respondent had reasonable justification to bypass the Appellant based on his failure to report his two (2) on-duty car accidents in addition to his off-duty accidents.

Conclusion

For the above-stated reasons, Mr. Lancaster's appeal under Docket No. G1-15-72 is hereby *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on November 12, 2015.

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 to:

David Brody, Esq. (for Appellant)

Peter M. Geraghty, Esq. (for Respondent)

John Marra, Esq. (HRD)