

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

DAVID LILLY,
Appellant,

v.

G1-07-48

BOSTON POLICE DEPARTMENT,
Respondent.

Appellant's Attorney:

Stephen J. Delamere, Esq.
Law office of Stephen J. Delamere, P.C.
839 Washington St.
Stoughton, MA 02072

Respondent's Attorney:

Tara L. Chisholm, Esq.
Boston Police Department
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, David Lilly (hereafter "Lilly" or "Appellant") seeks review of the Personnel Administrator's (HRD) decision to accept the reasons of the Boston Police Department (hereafter "Appointing Authority" or "BPD"), bypassing him for original appointment to the position of police officer. A pre-hearing was held on April 26, 2007 and a full hearing was held on January 2, 2008 at the offices of the Civil Service Commission. Two tapes were made of the hearing.

FINDINGS OF FACT:

Six exhibits were entered into evidence at the hearing. Based on the exhibits submitted at the hearing and the testimony of the following witnesses:

For the Appointing Authority:

- Edward P. Callahan, former Human Resources Director, Boston Police Department;
- Norman J. Hill, Jr., Department Supervisor, former Commander of the Recruit Investigations Unit;

For the Appellant:

- David Lilly, Appellant;

I make the following findings of fact:

1. The Appellant is a thirty-two (32) year old individual from Brighton. He graduated from UMASS Boston with a degree in history and geography. (Testimony of Appellant)
2. The Appellant is currently a substitute teacher for the Barnstable public school system. (Testimony of Appellant)
3. The Appellant took an open examination for the position of police officer in 2005. (Stipulated Fact)
4. On June 20, 2006, the Appellant's name appeared on Certification 260616 for the position of police officer for the BPD. (Stipulated Facts)
5. The BPD filled 60 police officer positions from Certification 260616. Fifty-two (52) of the candidates selected for appointment were ranked below the Appellant on the above-referenced Certification. (Stipulated Facts).
6. The BPD notified the Human Resources Division ("HRD") that it was bypassing the Appellant for appointment because he had pleaded guilty to the criminal charge of Assault and Battery.¹ (Letter dated November 27, 2006 and January 18, 2007).

¹ The City initially concluded, mistakenly, that the assault and battery in this case was considered a felony rather than a misdemeanor, which would automatically disqualify the Appellant from serving as a police officer. The City subsequently discovered this error and sent a corrected notice to HRD. The Appellant, subsequent to this bypass, submitted another application for the position of police officer with BPD. Now aware that the criminal charge in question related to a misdemeanor, which does not automatically disqualify an individual from serving as a police

7. All BPD recruit applications, including the background investigations, are reviewed by a “roundtable” consisting of several members including, Edward Callahan, then-Director of Human Resources for the BPD, and Sergeant Detective Norman Hill, then-Commander of the Recruit Investigations Unit. (Testimony of Hill)
8. In the 2007 roundtable discussion, the roundtable discovered that the Appellant pleaded guilty to Assault and Battery, a misdemeanor. The roundtable decided to bypass the Appellant, after a thorough investigation, based on the totality of the circumstances, including the severity of the Appellant’s sentence for assault and battery of two years supervised probation, restitution, and a one-year suspended sentence in the House of Correction. (Exhibit 3C, Testimony of Hill)

May 19, 1999: Appellant’s Guilty Plea

10. Exhibit 3A is a copy of an October 5, 1998, Boston Police Department Incident Report regarding a fight at a bar in Brighton, MA. (Exhibit 3A)
11. According to the above-referenced Incident Report, two Boston police officers responded to a call at about 2:01 a.m. Again according to the Incident Report, a witness stated that the Appellant struck one John Doe² with a beer bottle, causing him to fall to the floor, splitting the back of his head and causing a severe laceration to his tongue. (Exhibit 3A)
12. During his testimony before the Commission, the Appellant acknowledged that he was involved in the fight at a bar on October 5, 1998, but he disputed the above-referenced account by the witness. Specifically, the Appellant stated that he fought in self-defense,

officer, the City, conducted a more thorough background investigation regarding the underlying events relating to the misdemeanor. Based on this investigation, the BPD once again decided to bypass the Appellant. However, the Appellant did not file a subsequent bypass appeal with the Commission regarding the most recent bypass. At the full hearing regarding this matter, I ruled that I would hear testimony regarding the reasons for both related bypasses and that the decision rendered by the Commission under Docket No. G1-07-48 would pertain collectively to both bypasses.

² The name of the victim has been changed as a matter of confidentiality.

that Mr. Doe instigated the confrontation by “shouldering” him, and that Mr. Doe appeared very drunk and confrontational. According to the Appellant, the Appellant “asked him what his problem was” and then Mr. Doe hit him. Again according to the Appellant, the Appellant then backed up and Mr. Doe came to hit him again, so the Appellant hit him with his fists. The two then “jostled,” and the Appellant fell on top of him as they both fell to the ground. Following this fight, the Appellant testified that he then left the bar without knowing at the time the extent of Mr. Doe’s injuries.

(Testimony of Appellant)

13. The Appellant pleading guilty to assault and battery and he was: 1) sentenced to a one-year suspended sentence in the House of Correction; 2) ordered to 2 years of supervised probation; and 3) ordered to pay restitution to the victim. (Exhibit 3A)
14. The Appellant also settled a civil suit brought by Mr. Doe. (Testimony of Appellant)
15. Deputy Superintendent Hill, who was then Commander of the Recruit Investigations Unit, testified that he personally “tore the [Appellant’s] file apart” as part of a thorough investigation, given a prior error made by the BPD regarding whether or not the crime involved was a misdemeanor. (See footnote 1) (Testimony of Hill)
16. Deputy Superintendent Hill testified that he couldn’t recall of any candidate ever being appointed to the position of police officer who had received such a relatively stiff penalty for a misdemeanor conviction, such as the Appellant had received. (Testimony of Hill)
17. Although the BPD has selected candidates in the past for the position of police officer whom had been convicted of misdemeanor charges, Deputy Superintendent Hill testified that he recommended against the Appellant’s appointment given the severity of the

sentence imposed and the severe nature of the injuries inflicted upon the victim in the above-referenced incident. (Testimony of Hill)

18. The Appellant's testimony before the Commission was not consistent. When asked during cross-examination why he never reported the above-referenced altercation to the police if in fact he was the victim and not Mr. Doe, he replied that it was an "altercation between men." Pressed further for the reason he did not inform the police in light of Mr. Doe's injuries, the Appellant responded that he had not known the extent of Mr. Doe's injuries. However, when asked by this Commissioner if and when his uncle, who was at the bar the evening of the fight, informed him of the victim's condition, the Appellant replied that his uncle informed him of the severity of the victim's injuries the next day. When asked whether, in retrospect, the Appellant regretted what happened that evening and whether he would now behave in a different fashion, the Appellant showed no remorse and stated that he would have acted in the same manner. (Testimony and Demeanor of Appellant)

CONCLUSION

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that

bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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). However, 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. City of Cambridge, 43 Mass. App. Ct. at 304.

I do not doubt the Appellant’s sincere desire to serve the City of Boston as a police officer. Unfortunately for the Appellant, however, his background provides the City of Boston with reasonable justification for bypassing him for employment as a police officer. In 1998, the Appellant was admittedly involved in a bar fight which resulted in severe injuries to another individual and ultimately resulted in the Appellant pleading guilty to Assault and Battery, for which he was sentenced to a one-year suspended sentence and two years of supervised probation.

The Appellant's testimony before the Commission regarding the fight that resulted in criminal charges was not credible and was inconsistent. The Appellant testified that he did not go to the police immediately after this fight partly because he did not know the extent of Mr. Doe's injuries. However, later in his testimony the Appellant testified that the day after the fight, his uncle, who had been at the bar, reported to the Appellant the extent of Mr. Doe's injuries and the Appellant still failed to file a report with the local police department. In addition, it was troubling to see that the Appellant showed no remorse for the fight that happened on October 5, 1998, and gave the impression that he would have repeated his actions because he believed he was acting in self-defense.

Mr. Doe sued the Appellant and the Appellant never filed a cross-complaint or sued Mr. Doe, which, if it was indeed self-defense, does not make sense. Moreover, it is not the role of the Commission to determine if the Appellant was indeed guilty of assault and battery on the night in question. That issue was already settled by the Appellant's guilty plea in West Roxbury District Court.

After considering all of the testimony and evidence in the record, I conclude that the BPD established just cause, by a preponderance of the credible evidence, for bypassing the Appellant for selection as a police officer in the City of Boston and there is no evidence of inappropriate motivations or objectives that would warrant the Commission's intervention in this matter.

For all of the above reasons, the appeal under Docket No. G1-07-48 is hereby

dismissed.

Civil Service Commission

Christopher C. Bowman
Chairman

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman-YES; Guerin, Commissioner – YES; Henderson, Commissioner – NO; Marquis, Commissioner – YES; and Taylor, Commissioner - YES) on January 31, 2008.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 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:

Stephen J. Delamere, Esq. (for Appellant)

Tara L. Chisholm, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)