

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 979-1900

ELIZA LOPES,
Appellant

v.

BOSTON POLICE DEPARTMENT,
Respondent

G1-17-209

Appearance for Appellant:

Appellant, *pro se*

Appearance for Respondent:

Ian Keefe, Esq.¹
Assistant Corporation Counsel
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Cynthia Ittleman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), Ms. Eliza Lopes (Appellant), appealed the decision of the Boston Police Department (Respondent or the BPD) to bypass her for original appointment to the position full-time police officer. The Appellant filed the instant appeal on October 13, 2017. The Civil Service Commission (Commission) held a prehearing conference in the case on October 31, 2017 at the Commission's office in Boston. The Commission conducted

¹ At the time of the hearing in this case, the Respondent was represented by Jaclyn Zawada, Esq., who has since left the Boston Police Department.

a full hearing² in the case at the same location on February 6, 2018. The witnesses were sequestered. The hearing was digitally recorded and the parties were each sent a CD of the proceeding.³ The parties submitted post-hearing briefs in March 2018. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Thirteen (13) were entered into evidence at the hearing: Respondent's Exhibits (R.Exs.) 1 through 4 and Appellant's Exhibits (A.Exs.) 1 through 7 and post-hearing in response to my request at the hearing, the Respondent produced Respondent's Exhibits 5 and 6. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Detective (Dt.) Karen VanDyke, Recruit Investigations Unit (RIU) BPD
- Nancy Driscoll, then-Director of Human Resources, BPD

Called by the Appellant:

- Eliza Lopes, Appellant

and taking administrative notice of all matters filed in the case; pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following:

² The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

³ 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 the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

1. The Appellant is a life-long resident of Boston. She has two children. She graduated from a community college in Boston with an associate's degree in criminal justice and was be graduate from a university in Boston with a bachelor's degree at the time of this appeal. While in college fulltime, the Appellant had been working for six (6) years both as a mental health associate in an educational center for children with disabilities and as a supervisor at a chain store pharmacy. When the Appellant filed this appeal, she was in her mid-twenties. She obtained a driver's license in March 2016. She did not obtain a driver's license sooner because public transit previously met her needs. (Testimony of Appellant)
2. When the BPD would like to hire police officers, it contacts the state's Human Resources Division (HRD) to request a list of individuals who took and passed the most recent civil service exam. Individuals on that Certification are notified to sign the Certification to express their interest in being considered for the position of police officer with the BPD. After doing so, the recruit applicants attend an orientation conducted by the BPD Recruit Investigations Unit (RIU). (Testimony of Driscoll and VanDyke)
3. At the orientation, recruit applicants are each given a copy of the application. Detectives and supervisors from the RIU review the application page by page with the recruit applicants. (Testimony of VanDyke)
4. Det. VanDyke has been on the BPD force more than twenty (20) years. In 2017, she was assigned to the RIU, where her responsibilities included conducting background investigations of recruit applicants for the position of police officer. (Testimony of VanDyke)⁴

⁴ Det. VanDyke realized she knew who the Appellant was because the Appellant is the mother of her good friend's son's child. However, Det/ VanDyke did not know the Appellant socially. (Testimony of VanDyke)

5. The Appellant took and passed the civil service exam. She signed the Certification as willing to accept employment as a police officer at BPD in March 2017. (Testimony of the Appellant; A.Ex. 7)
6. As part of the BPD 2017 hiring process for the position of police officer, the RIU, including Det. VanDyke, conducted the orientation, which the Appellant attended. (Testimony of VanDyke and the Appellant)
7. When the RIU reviews the student officer application at the orientation, the recruit applicants are able to ask any questions they have. (Testimony of VanDyke)
8. The RIU also reviews a list of exclusions and time frame guidelines with the applicants at the orientation. During the 2017 orientation, a detective read that document aloud to the recruit applicants, including the Appellant. (Testimony of VanDyke and Appellant; R.Ex. 1)
9. The exclusions and time frame guidelines include reasons an applicant may be bypassed. (Testimony of VanDyke; R.Ex. 1) One of the reasons an applicant may be bypassed is that the applicant has attended a driver safety class through the National Safety Council (NSC) within the last five (5) years. (Testimony of VanDyke; R.Ex. 1)
10. The Registry of Motor Vehicles (RMV) requires a driver to attend an NSC based on certain events in that driver's driving history in order to avoid suspension of the driver's license. (Testimony of VanDyke; R.Exs. 1 and 3) For example, if a driver has three (3) surchargeable events, that is, three (3) events in which the driver is found at fault within two (2) years, the driver must attend an NSC class or his or her license will be suspended. (Testimony of VanDyke; R.Exs. 1 and 3)

11. The BPD bypassed applicants for the position of police officer who had attended an NSC in the 2017 hiring cycle in which the Appellant applied for the position and in other hiring cycles within the prior five (5) years. (Testimony of VanDyke and Driscoll)
12. The Appellant filled out an application for employment with the BPD and submitted to the BPD, having signed part of the application on March 18, 2017 and part on March 19, 2017. Questions on page 31 of the application, concerning the applicant's driver history, asked if the candidate had been in any car accidents and, if so, how many. The same page of the application indicated that if the applicant answered "yes" to these questions, they are required to explain what happened there or on a separate piece of paper. (A.Ex. 7)⁵
13. Detective Bryan Rivers was assigned to conduct the Appellant's background investigation, which he completed in time for the April 2017 roundtable. (Testimony of Driscoll; R.Ex. 2)⁶
14. At the time of Det. Rivers' background investigation of the Appellant, he checked the RMV record for the Appellant on April 5, 2017. The Appellant's driver history only reflected her surchargeable accident of May 1, 2016. (Testimony of Det. VanDyke and Appellant; R.Ex. 2)
15. Det. Rivers presented his background investigation of the Appellant at the round table in April 2017. (Testimony of Driscoll; R.Ex. 2)
16. The background investigation of each applicant for the position of police officer is summarized by the detective assigned in a privileged and confidential memorandum (PCM). Members of the round table discuss each applicant before a determination is

⁵ The parties dispute whether the Appellant submitted the required explanation.

⁶ The BPD did not call Det. Rivers as a witness.

made as to whether the applicant will move forward, the applicant will be bypassed, or other action will be taken. (Testimony of Driscoll)

17. The round table for the Appellant's consideration consisted of Ms. Driscoll; Dep. Supt. Jeffrey Walcott, who oversaw the RIU; Det. Rivers; Det. Rivers' supervisor; a member of the Office of the Legal Advisor; and the BPD Diversity Officer. The roundtable decided that the Appellant would move forward in the hiring process. (Testimony of Driscoll; R.Ex. 2)
18. By letter dated May 3, 2017, shortly after the round table meeting and determination that the Appellant would move forward in the hiring process, the RMV informed the Appellant that because she had three (3) motor vehicle accidents wherein she was found at fault, her driver's license would be suspended on August 1, 2017 unless she attended an NSC class. (Testimony of Appellant and Driscoll; A.Ex. 6)
19. The Appellant did not provide the May 3, 2017 RMV letter to the Department or otherwise inform the BPD that she was required to attend the NSC class. The Appellant and other applicants were told at the initial orientation session for candidates that having to take the NSC class would exclude candidates from further consideration. In addition, the Appellant knew that drivers with three (3) surchargeable accidents within two (2) years in their driver history are required to attend the NSC course. Nonetheless, the Appellant concluded that she did not need to report the fact that she had been required to attend the NSC course while she was being considered for employment at the BPD. The Appellant believed that taking the NSC course during the BPD application process should not be used against her and that it would not interfere with being a police officer. (Testimony of Appellant)

20. The Appellant completed an NSC class on or about July 10, 2017. She did not tell Det. Rivers or anyone else at the BPD about having taken the NSC class. (Testimony of Appellant; R.Ex. 3)
21. By email messages on September 1 and 5, 2017, the BPD informed the Appellant about uniforms and books required for the BPD Academy Class 57-17, requiring the Appellant to log in to the new hires portal to review policies and benefits and the requirement to complete an ethics course, indicating that the BPD had extended a conditional offer of employment to the Appellant and that she had taken and passed the PAT, medical exam and psychological exam. (A.Exs. 2, 3 and 4; Administrative Notice)
22. On or about September 5, 2017, Det. VanDyke and other detectives from the RIU were instructed to check the criminal and driver histories of the recruits like the Appellant to determine whether there was any new information that the BPD should be aware of prior to the start of the police academy on September 11, 2017. (Testimony of VanDyke and Driscoll)
23. According to the Appellant's driver history, the Appellant completed an NSC class on or about July 10, 2017. Det. VanDyke noted that this information could possibly prevent the Appellant from entering the police academy. (Testimony of VanDyke: R.Ex. 3)
24. As of September 5, 2017, the Appellant's driver history also reflected three surchargeable accidents: one (1) on May 1, 2016; one (1) on December 25, 2016, and one (1) on January 22, 2017. (Testimony of VanDyke; R.Ex. 3)
25. The Appellant was found at fault for the May 1, 2016 accident, which occurred approximately two (2) months after the Appellant obtained her driver's license. The

Appellant caused the accident when she hit the gas pedal instead of the brake pedal and struck another vehicle. (Testimony of Appellant)

26. The Appellant was found at fault for the December 25, 2016 accident, which occurred approximately nine (9) months after she obtained her driver's license. The Appellant caused the accident when she swerved to avoid a car on her right and struck a car on her left. (Testimony of Appellant).

27. The Appellant was found at fault for the January 2017 accident, which occurred approximately ten (10) months after she obtained her driver's license. The Appellant caused the accident when she was following too closely and rear-ended a vehicle. (Testimony of Appellant)

28. Even though the Appellant was at fault for the accident that occurred on December 25, 2016, that accident was not entered into her driver history by the RMV until April 19, 2017. (Testimony of VanDyke; R.Ex. 3)

29. Even though the Appellant was at fault for the accident that occurred on January 22, 2017, that accident was not entered into her driver history by the RMV until May 2, 2017. (Testimony of VanDyke; R.Ex. 3)

30. Det. VanDyke told her supervisor, Sgt. Det. Sharon Dottin, that the Appellant had taken the NSC class in July 2017. (Testimony of VanDyke)

31. At the time, Det. VanDyke did not have a copy of the PCM Det. Rivers had written months earlier summarizing his background investigation of the Appellant. Det. VanDyke called Det. Rivers to let him know that the Appellant had attended an NSC class. (Testimony of VanDyke; R.Ex. 2) Det. Rivers informed Det. VanDyke that he did not have that information previously. (Testimony of VanDyke; R.Ex. 2)

32. On September 6, 2017, Sgt. Det. Dottin brought the added information about the Appellant's driver history to Ms. Driscoll. (Testimony of Driscoll)
33. Ms. Driscoll brought the added driver history information to Dep. Supt. Walcott. They reviewed the Appellant's driver history and determined that the Appellant would be bypassed based on the NSC class she attended two months prior. (Testimony of Driscoll; R.Ex. 3)
34. Even though the Appellant had taken the NSC course, there was an entry in her driver history indicating that her license renewal status was "nonrenew indefinite". (R.Ex. 3) The non-renewed status may be related to failure to pay excise tax or unpaid fines. (Testimony of VanDyke)
35. By a letter dated September 6, 2017, Ms. Driscoll informed the Appellant that the Appellant had been bypassed, citing certain details of her driving history "all of which reflect a pattern of poor judgment and blatant disregard for laws that govern motor vehicle use", noting that safe operation of a vehicle is an essential duty of a Boston police officer, that officers are "called upon to issue citations for motor vehicle infractions" that her driving history "reflects negatively on [the Appellant's] ability to complete this essential task", and that, for these reasons, the Appellant is ineligible for appointment "at this time". (R.Ex. 1) The bypass letter also indicated that the Appellant was bypassed for non-payment of fees. (Id.)
36. Candidates ranked lower than the Appellant on Certification 04401 were hired. (Stipulation)
37. The Appellant timely filed the instant appeal. (Administrative Notice)

Applicable Law

Upon an appeal of a bypass by a candidate for employment, 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 Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See City of Beverly v. Civil Serv. Comm'n, 78 Mass.App.Ct. 182, 189 (2010). In its review, the commission is to “find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). However, the commission’s work “is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). Further, the commission does not ignore the previous decision of the appointing authority, but rather “decides whether 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.” Id. at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

In deciding an appeal, the commission “owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” for the bypass. Beverly, 78 Mass.App.Ct. at 188. The Commission should not substitute its own

judgment for that of an appointing authority. Id. (citing Sch. Comm'n of Salem v. Civil Serv. Comm'n, 348 Mass. 696, 698-99 (1965)); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm'r of Health & Hosps. of Boston v. Civil Serv. Comm'n, 23 Mass.App.Ct. 410, 413 (1987)). Rather, the Commission is charged with ensuring that the system operates on “basic merit principles.” Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001).

The deference that the Commission owes to the appointing authority is “especially appropriate” in respect to the hiring of police officers. Beverly, 78 Mass.App.Ct. at 188. The Commission is mindful of the standard of conduct expected of officers of the law. *See* Dumeus v. Boston Police Dep't, 24 MCSR 124 (2014) (finding that a police officer must be a model of good citizenship). An officer of the law “carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Serv. 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).

The role of the Commission, while very important, is limited in scope to deciding 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 Serv. Comm'n, 43 Mass.App.Ct. 300, 303 (1997); *see also* City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 408, 411 (2000); McIsaac v. Civil Serv. Comm'n, 38 Mass.App.Ct. 473, 476 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 332, 334 (1983). An action is “justified” when it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” City of Cambridge, 43 Mass.App.Ct. at

304, quoting Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 262 Mass. 477, 482 (1928); *see also* Comm'rs of Civil Serv. v. Mun. Court of the City of Boston, 359 Mass. 211, 214 (1971). The Commission's role is not to substitute its judgment for that of the Appointing Authority. City of Cambridge, 43 Mass.App.Ct., at 305; Sch. Comm. of Salem v. Civil Serv. Comm'n, 348 Mass. 696, 699 (1965).

In making its decision, the Commission must focus on the fundamental purposes of the civil service system: guarding against political considerations, favoritism, and bias in governmental employee decisions. City of Cambridge, 43 Mass.App.Ct., at 304-305 (citations omitted).

Analysis

The BPD has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant based on her driving record. The Appellant appears to be a bright and accomplished person, for example, having worked two (2) jobs at the same time for six (6) years while successfully completing an associate's degree in criminal justice well on her way to completing a bachelor's degree, raising a family, and ably representing herself at the Commission proceedings. Indeed, there is no evidence in the record that the BPD found her work and education history objectionable or inadequate. However, the BPD did find significant concerns with the Appellant's driver history. Its concerns in that regard are well-established. While driver history records can sometimes require interpretation to assess their gravity and significance, there are different issues in this case. The Appellant obtained her driver's license approximately a year prior to applying to the BPD for employment as a police officer. Within ten (10) months after she obtained her license, the Appellant was involved in three (3) accidents, in each of which she was found to be at fault. The Appellant does not dispute that she was involved in these accidents and was found at fault for them.

The parties dispute whether the Appellant disclosed the three (3) accidents for which she was found at fault. At the time of the recruit investigation, the RIU officer checked the RMV records and reported seeing only one (the earliest) accident. However, in her application, the Appellant reported that she had been in three (3) accidents. The Appellant alleges that she included with her application the required explanation of the accidents on a separate piece of paper. The BPD reports that its copy of the Appellant's application does not include the explanation. The BPD then issued the Appellant a conditional offer of employment. However, in September 2017, shortly prior to the beginning of the recruit academy for this class, the BPD assigned officers the task of updating the recruits' criminal records and drivers history. It was during this update that it became known that the Appellant had been required to take, and did take, the NSC for having had three (3) surchargeable accidents within two (2) years. Three (3) weeks after submitting her application to the BPD, the RMV had notified the Appellant that her license would be suspended unless she attended the NCS course. The Appellant attended the NSC course in July and told no one at the BPD.

The Appellant had been informed at the initial orientation that being required to take the NSC course would trigger an exclusion from further consideration. Further, it is an essential and frequent function of a police officer to drive police vehicles and to do so safely, not infrequently, under emergency circumstances. This information provided reasonable justification for the bypass.

The Appellant argues that it was unfair for the BPD to bypass her after going through the hiring process, right before the academy was to begin. However, that occurred in part because the Appellant failed to disclose to the BPD that she was required to take the NSC class. The Appellant further asserts that the wording of the bypass letter is technically inaccurate, stating,

for example, that her driver's license was suspended and/or revoked. At the hearing, the BPD acknowledged that the Appellant's driver's license was not suspended because she had avoided that by taking the NSC course. The acknowledgment does not change the fact that the Appellant was required to take the NSC course because of her driving record.

I find no bias or other inappropriate motive in the record concerning the BPD decision to bypass the Appellant.

Conclusion

For all of the foregoing reasons, the Appellant's appeal, docketed G1-17-209, 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 19, 2020.

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:

Eliza Lopes (Appellant)

Ian Keefe, Esq. (for Respondent)