

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

JOSEPH A. LOSANO,
Appellant

v.

G-02-72

TOWN OF SWAMPSCOTT,
Respondent

Appellant's Attorney:

Pro Se
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Swampscott, MA 01907
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Respondent's Attorney:

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Commissioner:

Donald R. Marquis

DECISION ON RESPONDENT'S MOTION TO DISMISS

Procedural Background

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Joseph A. Losano, (hereafter "Losano" or Appellant") seeks review of the action of the state's Human Resources Division (hereafter "HRD") accepting reasons proffered by the Respondent, the Town of Swampscott (hereafter "Appointing Authority", or "Town") for permanently removing his name from the certification list for appointment as a reserve police officer in the Swampscott Police Department. The Appellant filed a timely appeal with the Commission.

The Town's above-referenced request to HRD to remove the Appellant's name from the eligibility list came shortly after the Commission denied the Appellant's bypass appeal in which he appealed the Town's decision to bypass him for original appointment as a reserve police officer. (See Losano v. Town of Swampscott, 14 MCSR 163 (2001)).

After a series of continuances, a pre-hearing conference (regarding the Appellant's appeal of HRD's decision to remove him from the eligibility list) was eventually conducted before the Commission on April 21, 2005. At the pre-hearing conference, the Town filed a Motion to Dismiss. The Pro Se Appellant filed an Answer with the Commission on April 29, 2005 which was copied to the Town. On May 2, 2005, counsel for the Town sent a letter to the Commission, which was copied to the Appellant, clarifying the date upon which the Town adopted the provisions of G.L. c. 31, §58A, as the incorrect date was contained in the Town's Motion to Dismiss.

Factual Background

Sometime in 1999, the Appellant took and passed a civil service examination for the position of police officer. Sometime in 2001, the Town of Swampscott requested a certification list from HRD to fill eleven reserve police officer positions in the Swampscott Police Department. The Appellant was ranked second on this list. The Town did not select the Appellant for appointment leading the Appellant to file a bypass appeal with the Commission. A full hearing was held before the Commission on the Appellant's bypass appeal on May 11, 2001. On September 20, 2001, the Commission issued a decision upholding the Town's decision to bypass the Appellant for appointment as a reserve police officer. Among the Findings of Fact on pages 2 and 3 of the Commission's September 20, 2001 decision were:

- “Finding of Fact #4: Officer Waters interviewed (a man named) Louis Williams about an incident in which it was alleged that the Appellant pointed a handgun in the direction of Louis Williams;
- Finding of Fact #5: The Appellant denied pointing the handgun at Williams. He stated that he was carrying the weapon from his truck to the house;
- Finding of Fact #6: Officer Waters, Sgt. Bartrom and Capt. Madigan interviewed the Appellant. It was determined that a restraining order, (209A) was issued on January 20, 1995;
- Finding of Fact #7: While the restraining order was in force, the Appellant approached the complainant’s (sic) mother, who was in the store where he worked. The complainant was shopping with her mother but was not near her when this happened;
- Finding of Fact #8: This incident was minor and non-combative in nature, but was a violation of the restraining order;
- Finding of Fact #9: After being told that because of the restraining order that because of the restraining order he would not be accepted by the Massachusetts State Police, the Appellant applied for a position with the New Hampshire State Police...;
- Finding of Fact #10: When asked by (a New Hampshire Trooper) if he had been involved in many fights while growing up, the Appellant responded that he had. When asked if anyone had been injured, he responded, “some people were severely hurt”;
- Finding of Fact #11: (The Trooper) asked the Appellant if he had been in a fight, “where he actually bit a portion of someone’s ear off?” The Appellant responded, “that might have happened”;
- Finding of Fact #12: (The Trooper) noted that the Appellant’s demeanor was cocky and he had a smile on his face while saying, “no one messed with me”;
- Finding of Fact #13: A criminal complaint was brought in the Lynn District Court for an Assault and Battery with a Dangerous Weapon on Louis Williams. The Complaint was dismissed at the request of the Commonwealth;
- Finding of Fact #14: (Swampscott Police) Chief revoked the Appellant’s license to carry a firearm;
- Finding of Fact #15: After an appeal by the Appellant to the District Court, the Court upheld the revocation of the Appellant’s license to carry a firearm.”

Based on the above-referenced Findings of Fact, the Commission, in denying the Appellant's bypass appeal, concluded, in part, that, "the investigation completed by the New Hampshire State Police was comprehensive, leaving no question unanswered. This report destroyed the appellant's chances of appointment... With regard to Losano's character, (the Trooper) had reservation. His investigation depicts an individual not in touch with reality. When asked about any fights he may had and any injuries he may have inflicted (sic), the Appellant expressed no remorse and instead seemed to take pride in that the fact that he imposed damage to another person." (See Page 4 of September 21, 2001 Commission Decision)

In the interim, the Appellant took the next civil service examination for the position of police officer, administered by HRD on April 28, 2001. This list was established by HRD on September 1, 2001 and would expire on October 31, 2003. On November 27, 2001, the Town requested that HRD permanently remove the Appellant's name from the certification list for appointment as a reserve police officer in the Swampscott Police Department pursuant to Personnel Administration Rules .09(2).

In its 5-page request to HRD seeking the permanent removal of the Appellant's name, the Town listed some of the reasons referenced in the above-referenced 2001 Commission decision on the Appellant's bypass appeal, including: 1) the incident involving Louis Williams and a handgun; 2) the revocation of the Appellant's license to carry a firearm; 3) the existence of a prior restraining order; and 4) the conclusion of the New Hampshire State Police after conducting a background investigation. The Town also listed additional reasons, not included in the Commission's decision, in its request to HRD including: 1) an incident involving the use of a police baton in 1991; 2) aggressive

and abusive conduct as a security guard at Filene's; and 3) the use of demeaning, homophobic language at the Swampscott police station in June 2001. (See November 27, 2001 to HRD from Town of Swampscott Board of Selectmen)

Arguments regarding whether or not appeal is now moot

In its Motion to Dismiss, the Town argues that the Appellant's appeal should be dismissed for two reasons. First, the town argues that the appeal is now moot as the Town adopted the provisions of G.L. c.31, § 58A in May 2003, which states that a person is not eligible to have his name certified for an original appointment to a police officer position if that person has reached the age of 32. Even accounting for a veteran exception, which extends the restriction for up to 4 years, the Town argues that the Appellant, who is now 39 years old, is now precluded from being certified for an original police officer appointment with the Town by Section 58A. Specifically, the Town argues that the only list now in question is the list generated as a result of the examination taken by the Appellant on April 28, 2001. Since that list expired on October 31, 2003, and the Appellant can not be certified on future lists due to Section 58A, the Town argues that there is no relief which can now be granted to the Appellant.

On this point, the Commission disagrees with the Town. Put simply, the Town is arguing that the Appellant is not entitled to any relief solely because his appeal has languished before the Commission. The Commission notes that at least one of the continuances granted regarding this appeal resulted from a request from the Town and another continuance was granted because the Appellant was called up for active duty in the military. To suggest that the Appellant is now precluded from relief solely because of the delays in processing this appeal is wrong and against equity and good conscience.

The Town is well-versed in civil service law and is undoubtedly aware that the Commission, pursuant to its powers inherent in Chapter 310 of the Acts of 1993, has the discretion to reactivate the list in question (which was generated before the Town adopted Section 58A), place the Appellant's name at the top of that list and require the Town to consider the Appellant for appointment when the next vacancy develops. The Town's Section 58A argument fails.

Arguments regarding Res Judicata

Assuming arguendo that the Appellant's appeal is not moot as a result of Section 58A, as the Commission has indeed concluded, the town argues that the appeal should still be dismissed as "at least two of the negative reasons upon which the Appellant's removal from the list were litigated between the parties in the initial bypass appeal before the Commission and were decided in the Town's favor". As such, the Town argues that the matter has already been litigated and decided by the Commission. Therefore, according to the Town, the Appellant should be estopped from attempting to relitigate those claims again before the Commission.

In his Answer to the Town's Motion to Dismiss, the Appellant argues that the action to permanently remove him from consideration as a police officer in Swampscott is "harsh" and a result of his legal action against the Town of Swampscott in federal court. According to the Appellant, his federal lawsuit against the Town involves his allegation that the Town filed a "false and misleading police report" regarding the incident involving Lou Williams, which was referenced in the Commission's above-referenced bypass decision. In regard to the Findings of Fact in the Commission's previous decision regarding the background investigation by the New Hampshire State Police, the

Appellant argues that the issue was “hardly spoken about” at the Commission hearing as “(Police Chief) Toomey stat(ed) that he would of (sic) hired me if it was not for the Williams incident.

The Appellant also notes in his Answer that, if hired, he would have been the first full-time minority police officer ever hired by the Town of Swampscott. Finally, the Appellant argues that, “if I have a chance for another hearing the Commission will clearly see that a vast majority of the negative reasons are false, misleading, and/or dismissed.”

PAR .09(2) Standard

PAR .09 (2) states in relevant part, “If an Appointing Authority concludes the appointment of a person whose name has been certified to it would be detrimental to the public interest, it may submit to the administrator a written statement giving in detail the specific reasons substantiating such a conclusion. The administrator shall review each such statement, and if he agrees, he shall remove the name of such person from the certification and shall not again certify the name of such person to such appointing authority for appointment to such position.”

Conclusion

The Town submitted to HRD a letter regarding reasons for permanently removing the Appellant from certification as a police officer in the Swampscott Police Department. At least two of those reasons – and a third related reason – were explicitly referenced as Findings of Fact in a previous Commission decision regarding a prior bypass appeal filed by the Appellant. Notwithstanding the Appellant’s assertion that the background investigation conducted by the New Hampshire State Police was “hardly spoken about”

at the previous Commission hearing, the conclusion of the Commissioner who served as hearing officer in that case makes it clear that he considered the conclusion of that investigation to be a primary reason for determining that the Town had reasonable justification for bypassing the Appellant. In fact, the Commissioner felt compelled to state in his written decision, “(The) investigation depicts an individual not in touch with reality”, harsh and unequivocal words, particularly when it pertains to an individual seeking to be entrusted with the duties and responsibilities of a police officer.

The above-referenced New Hampshire investigation, along with the entire prior Commission decision, were submitted by the Town to HRD to justify his removal from any future lists. The Commission concludes that the reasons outlined in the prior Commission decision sufficiently show that it would be detrimental to the public interest to include his name on future certification lists for police officer in the Swampscott Police Department and HRD’s decision to approve the Town’s decision was correct. Further, the Commission concurs with the Town that the Appellant is estopped from seeking to relitigate these matters before the Commission at another full hearing.

Conclusion

For the above reasons, the Town’s Motion to Dismiss is allowed and the Appellant’s appeal under Docket No. G-02-72 is hereby ***dismissed***.

Civil Service Commission

Donald R. Marquis, Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Bowman, Guerin, Marquis and Taylor, Commissioners) on February 8, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Joseph S. Fair, Esq.

Joseph A. Losano

John Marra, Esq. (HRD)