

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

OMAR MARTINEZ,
Appellant

v.

G1-18-031

CITY OF CHELSEA,
Respondent

Appearance for Appellant:

Michael A. Manzi, Esq.
Rick Seccareccio, Esq.
177 Market Street
Lowell, MA 01852

Appearance for Respondent:

Strephon Treadway, Esq.
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City of Chelsea Law Department
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Chelsea, MA 02150

Commissioner:

Christopher C. Bowman

DECISION

On March 1, 2018, the Appellant, Omar Martinez (Mr. Martinez), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), challenging the decision of the Chelsea Police Department (CPD) to bypass him for original appointment to the civil service position of permanent full-time police officer. I held a pre-hearing conference at the offices of the Commission on April 24, 2018, followed by a full hearing on June 12, 2018 at the

same location.¹ The full hearing was digitally recorded and both parties received a CD of the proceeding.² Both parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Nineteen (19) exhibits were entered into evidence at the hearing. Following the hearing, at my request, the City of Chelsea produced four additional documents which I marked as post-hearing (PH) Exhibits 1-4. Based on the documents submitted, the testimony of the following witnesses:

Called by the City of Chelsea:

- Sergeant David Flibotte, CPD;
- Detective Rosalba Medina, CPD;
- Captain Thomas Dunn, BPD;

Called by Mr. Martinez:

- LP, Appellant's former wife;
- MC, Mother of Appellant's son;
- Omar Martinez, Appellant;
- RB, Appellant's friend;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences therefrom, I make the following findings of fact:

1. Mr. Martinez is thirty-three (33) years-old. He is divorced, has one child and lives in Chelsea, MA. (Testimony of Mr. Martinez and RB)

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² 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. Martinez graduated from Chelsea High School in 2002. He received an associates degree in automotive technology from Benjamin Franklin Institute of Technology in Boston, MA in 2007. (Testimony of Mr. Martinez, Exhibit PH 1)
3. Mr. Martinez is currently employed by an auto glass company. (Testimony of Mr. Martinez, Exhibit PH 1)
4. In 2017, Mr. Martinez took the civil service examination for police officer and received a score of 95. (Stipulated Fact)
5. In January 2018, Mr. Martinez's name appeared on Certification No. 05160, ranked first among those willing to accept appointment as a Chelsea Police Officer. (Stipulated Fact and Exhibit 1)
6. The City ultimately appointment three (3) candidates from Certification No. 05160, all of whom were ranked below Mr. Martinez. (Stipulated Fact)
7. On February 13, 2018, the City notified the state's Human Resources Division (HRD) of the reasons for bypassing Mr. Martinez. The reasons for bypass included: a) In 2009-2010, Mr. Martinez had been subject to three (3) restraining orders; b) In 2010, Mr. Martinez was stopped for speeding where Troopers clocked him at 95 to 100 MPH while it was snowing; c) in 2011, Mr. Matinez was involved in a physical fight; d) involvement in a 2011 motor vehicle stop; e) two (2) physical confrontations in 2014; and f) a statement from his ex-wife that Mr. Martinez offered to continue helping her with immigration-related issues in exchange for sex. (Exhibit 18)
8. HRD approved the reasons for bypass on April 26, 2018. (PH Exhibit 3)

Restraining Orders

9. On May 4, 2009 MC, the mother of Mr. Martinez's son, applied for an Abuse Prevention Order against Mr. Martinez alleging that "On Friday, May 1, 2009, he had called me private threatening me saying that he was gonna fuck me up and cut my throaght [sic] when he saw me." MC further alleged that "He also said that he is going to do everything in his power to make my life a living hell" and that "I am conserned [sic] with my childs safety and mine. He has put his hands on me in the past..." and finally that "I haven't stayed at my home because I am scared." (Exhibit 4)
10. A restraining order issued against Mr. Martinez on May 4, 2009, and on May 18, 2009 the order was vacated at MC's request. (Exhibit 4 and Testimony of MC)
11. At the hearing on the instant matter, Mr. Martinez denied the allegations related to May 4, 2009 Abuse Prevention Order. (Testimony of Mr. Martinez)
12. At the hearing in the instant matter, MC testified that she lied in her affidavit regarding the May 4, 2009 restraining order in an effort to manipulate Mr. Martinez into staying with her. (Testimony of MC)
13. On December 17, 2009, MC applied for an Abuse Prevention Order against Mr. Martinez alleging that "he was in my face calling me names not caring who was around. I don't feel safe around him he scares me to the point where I get very depressed and can't eat or think right" and that "He is to [sic] aggressive with his words and the way he approaches me when we argue" and finally "...he scares me to death and I can't live with the fact that he can do as he pleases and me not be able to do anything about it." A restraining order issued against Mr. Martinez on December 17, 2009 and expired on December 31, 2009. (Exhibit 5 and testimony of MC)

14. Mr. Martinez denies the allegations related to the December 17, 2009 Abuse Prevention Order. At the hearing in the instant matter, MC testified that she lied to obtain the December 17, 2009 restraining order in an effort to manipulate Mr. Martinez into staying with her.
(Testimony of Mr. Martinez and MC)
15. On May 14, 2010, MC called Chelsea Police reporting that Mr. Martinez was on his way to her home and had threatened her. According to the police report, Mr. Martinez wanted to continue a telephone argument at her home. At the hearing MC did not recall police officers appearing at her home in response to her call. (Testimony of MC and Exhibits 6 and 7)
16. On May 14, 2010, MC applied for a third Abuse Prevention Order against Mr. Martinez in connection with the same incident as the May 14, 2010 police call. According to her May 14, 2010 application, in response to her telling Mr. Martinez that she would not let him in her home, “he said we will see about that so I told him that if he showed that I would call the cops and he said good, so tell them that when they get there to look for me in the river because that was where he was going to put me after he killed me.” MC further alleged that “He scares me to the point that I don’t want to be in my home when hes mad because he is unpredictable when he is upset.” (Exhibit 6)
17. MC’s allegations resulted in a third restraining order issued on May 14, 2010 and extended on May 17, 2010 until May 17, 2011. (Exhibit 6)
18. At the instant hearing, Mr. Martinez denied the allegations related to the May 14, 2010 Abuse Prevention Order; although he was present at the hearing on the extension of the restraining order, he did not then deny the allegations of abuse. (Testimony of Mr. Martinez)

19. At the instant hearing, MC testified that she lied to obtain the May 14, 2010 restraining order and its extension in an effort to keep Mr. Martinez away from her and her new boyfriend.
(Testimony of MC)
20. The May 14, 2010 threats also resulted in criminal charges against Mr. Martinez of threat to commit a crime. Mr. Martinez defaulted on one of his court dates for these charges. The criminal charges were dismissed on May 27, 2011 on payment of costs. (Exhibits 7, 6, and 3, and testimony of Sgt. Flibotte)
21. In connection with Mr. Martinez' applications to become a Chelsea police officer, MC provided a statement regarding her 2009 and 2010 restraining orders against Mr. Martinez. In the statement she said that "I write this letter to offer an explanation to the events that occurred with the father of my son, Omar Martinez in 2009 & 2010 that led to me filing for restraining orders....I can now say that we were both at fault for our mistakes, I should never have filed those restraining orders as I too was a contributing factor, but I let my frustration, anger and vindictiveness get the best of me." (Exhibit 8)

2010 Speeding

22. On January 27, 2010, criminal charges of negligent operation of a motor vehicle issued against Mr. Martinez stemming from a January 2, 2010 incident on Route 93 in Woburn. On that date, Martinez was driving over 95 miles per hour in light snow on a wet roadway and changing lanes without signaling in a manner that required other drivers to swerve to avoid a possible crash. The charges were continued without a finding, and Mr. Martinez was required to attend the State Courts Against Road Rage and Brains at Risk programs.
(Exhibits 9 and 3, and testimony of Sgt. Flibotte and Mr. Martinez)

2011 Physical Altercation

23. On April 13, 2011 criminal charges of assault and battery with a dangerous weapon, malicious destruction of property, and disorderly conduct issued against Mr. Martinez based on an incident occurring at Kelly's Roast Beef in Revere on February 24, 2011. In his application for the criminal complaint, a State Trooper wrote that "I spoke to each of the witnesses. They all told me the same thing. They state that [private citizen] was standing at the window waiting for food and was attacked. [Witness] further told me that she believed that the two men were looking for 'trouble'. None of the witnesses saw or heard [private citizen] do anything that would have provoked the attack. The witnesses stated that he [private citizen] was punched several times and thrown through the door. Once on the ground he was kicked in the head repeatedly by both men. The witnesses then stated that both men got in the van and drove away." These charges were dismissed on August 9, 2012 on payment of fees. (Exhibit 11 and 3)
24. Mr. Martinez testified that the April 13, 2011 incident at Kelly's Roast Beef was a case of him defending his sister from sexual harassment, and himself from an attack, by an intoxicated patron who would not leave her alone after Martinez repeatedly tried to get him to do so. Mr. Martinez' sister submitted an affidavit the day of the hearing corroborating Mr. Martinez' testimony. Mr. Martinez testified that, when questioned by police soon after this incident, he told an officer that he had been responding to a derogatory comment about his sister and that he did not recall what the comment was. Mr. Martinez admits that he left the person with whom he fought unconscious on the pavement and did not call police.
- (Testimony of Mr. Martinez and RB and Exhibit A)

2011 Motor Vehicle Stop

25. On June 27, 2011 criminal charges of possession of ammunition without an FID card and possession of cocaine issued against Martinez stemming from an incident on Route 93 in Randolph. In his application for criminal charges State Trooper Scott Walker wrote that he found ammunition and cocaine in a family vehicle driven by Martinez and in which RB was a passenger. At the hearing, RB admitted to having a prior cocaine conviction in which the cocaine was packaged similarly to that in the June 27, 2011 case. The criminal charges against Martinez were dismissed on payment of costs on December 4, 2012. (Exhibits 12

2014 Incident

26. On February 8, 2014 Mr. Martinez suffered a significant facial injury during a fight in which he was not otherwise involved at a club in Chelsea. (Exhibit 14 and testimony of Mr. Martinez)

Allegations by Ex-Wife

27. Mr. Martinez and LP were married in 2010. At this time, LP had a pending application to obtain a Resident Alien Status (“green card”). The matter was still pending in 2016 when Mr. Martinez and LP separated. (Testimony of Mr. Martinez and LP)

28. As part of his investigation, Sgt. Flibotte arranged to interview LP. As Sergeant Flibotte and LP do not share a common language, Det. Medina interviewed her in Spanish on Sgt. Flibotte’s behalf. Det. Medina had previously interviewed LP at her workplace in connection with one of Mr. Martinez’ previous applications. This time Detective Medina interviewed LP by telephone in February, 2018. Det. Medina verified that she was speaking with LP who recalled their previous meeting. LP told Det. Medina that she and Mr. Martinez have a good

relationship and that their divorce was final in June of 2017. During the interview, LP told Detective Medina that Mr. Martinez came to her home in November of 2016 and asked to have sex with her. When she refused, according to Detective Medina, Mr. Martinez told LP that he would stop helping her with her immigration status if she did not have sex with him. Det. Medina further testified that LP told her that she told Mr. Martinez that she would rather not obtain a green card than to comply with his request. Detective Medina took notes of the conversation, immediately typed them, and provided the typed version to Sgt. Flibotte.³ This document was provided to counsel for Mr. Martinez. (Testimony of Det. Medina)

29. LP testified at the hearing that Mr. Martinez said, in the November 2016 exchange described above, that he wanted to repair their marriage. She denied that he mentioned sex. LP testified that Mr. Martinez told her that if she did not want to “resolve their situation,” “save the marriage,” or “continue their married relationship” then he would stop helping with her attempt to obtain a green card. LP testified that she told Mr. Martinez that she would rather not have her green card than to have it on the terms Mr. Martinez suggested. LP testified that in relating this incident to Detective Medina, she said that “if I had to be with him for the purpose of my documentation, then I didn’t want anything to do with it.” (Testimony of LP)
30. Mr. Martinez testified that he and LP did not discuss her appeal of her immigration status in November of 2016, although he admitted to trying to revive their marriage. (Testimony of Mr. Martinez)

Police Department’s Review

³ As a matter of general practice, Det. Medina destroys handwritten notes after writing reports, and the handwritten notes no longer exist.

31. Sergeant Flibotte produced a report on his background investigation for Captains Dunn and Batchelor who, along with Sgt. Flibotte, comprise the Oral Board of Review for candidates for police officer at the Chelsea Police Department. (Testimony of Sgt. Flibotte and Capt. Dunn, Sgt. Flibotte's report)
32. Captain Dunn believed Mr. Martinez's history, known to the Board from previous applications, was problematic due to his history of domestic violence restraining orders, but he was deeply troubled by the exchange reported by Detective Medina between Mr. Martinez and LP. For Captain Dunn this exchange raised the likelihood the Martinez might abuse the position of a police officer in a vulnerable community with many undocumented residents. Captain Dunn was also concerned that this exchange added further weight to previous evidence that Mr. Martinez had a propensity to abuse power over women. (Testimony of Captain Dunn and Exhibit 18)
33. Mr. Martinez was scheduled for an Oral Board of Review with Captains Dunn and Batchelor and Sergeant Flibotte. Upon reviewing Sgt. Flibotte's report on Mr. Martinez's candidacy in preparation for the meeting, Capt. Dunn canceled the Oral Board of Review meeting based on Mr. Martinez's prior conduct and on the exchange between him and LP reported by Detective Medina. Sergeant Flibotte notified Mr. Martinez that he would be bypassed. (Testimony of Capt. Dunn and Sgt. Flibotte)
34. Captain Dunn produced a recommendation for bypass of Mr. Martinez for Chief Brian Kyes of the Chelsea Police Department. Sgt. Flibotte sent this recommendation to the HRD, and the reasons given in it were approved by the HRD, which also sent Captain Dunn's recommendation to Mr. Martinez. (Testimony of Sgt. Flibotte and Capt. Dunn, Exhibit 18, and HRD letter dated April 26, 2018)

35. None of the three applicants hired by the City of Chelsea from certification 05160 has a Board of Probation record. The one 209A domestic violence prevention order issued against one of the three applicants hired from this requisition was issued on February 10, 2006 and was not extended. The application for that order does not involve any threats or physical contact. (209A application and order)

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. at 304. "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 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. 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).

Analysis

In Beverly, a candidate for police officer was bypassed for appointment because he was terminated from his previous employer for serious misconduct – the unauthorized access of the voicemail accounts of other employees. A three-person majority of the Commission concluded that the City "failed to prove that [the candidate] illegally accessed voicemails of employees the reason given for his bypass, and accordingly did not support the reason by the necessary preponderance of the evidence."

That decision was subsequently vacated by the Superior Court. Agreeing with the Superior Court, the Appeals Court stated, "Instead of focusing on whether the city had carried its burden of demonstrating a 'reasonable justification' the commission focused on whether the city had proven that [the candidate] in fact engaged in the misconduct. We believe the commission erred as a matter of law in placing such an added evidentiary burden on the city. In simple terms, neither [the candidate] nor the commission has presented a convincing argument that the

Legislature intended to force an appointing authority to hire a job applicant for such a sensitive position unless it is able to prove to the commission's satisfaction that the applicant in fact engaged in the serious alleged misconduct for which he was fired." Beverly at 190.

Applied here, the City, by a preponderance of the evidence, provided valid reasons for bypassing Mr. Martinez for appointment as a police officer. In regard to the restraining orders, I gave considerable weight to the fact that one (1) of those orders was extended for one (1) year after a hearing. Further, I did not find MC's testimony before the Commission to be credible. Not only did her testimony contradict her sworn affidavits, signed under the pains and penalties of perjury, but her testimony also differed from the statement she provided to the Department's investigators. Further, standing alone, the testimony at the Commission did not ring true to me, including one part of her testimony where she denied any knowledge of an encounter at her home with Mr. Martinez, even though the incident, including a statement from MC, was memorialized in a police incident report at the time.

The restraining order issued in 2006 against one of the candidates hired instead of Mr. Martinez does not undermine the CPD's reliance on Mr. Martinez' restraining orders. The other candidate's case is distinguishable in several respects. First, the single application includes no allegations of either physical violence or threats. Unlike the final order against Mr. Martinez, this order was not extended beyond the initial two week period following an ex parte hearing. Finally it occurred over three years before the first order issued against Mr. Martinez with no record of intervening misconduct.

Regarding Mr. Martinez' driving record, the City of Chelsea focused on an incident occurring on January 2, 2010 on Route 93 in Woburn. While Mr. Martinez testified regarding the ultimate disposition of the criminal charges resulting from the arrest and the reasons for his

conduct, he did not deny driving close to 100 mph in snowy conditions on a wet road and changing lanes without signaling causing other drivers to swerve to avoid crashing. The City was entitled to consider this in its decision to bypass Mr. Martinez.

In regard to the 2011 fight, Mr. Martinez admitted to leaving the other participant in the fight unconscious on the sidewalk. Mr. Martinez admitted to not calling the police or otherwise reporting either the fight or the other man's conduct toward his sister. Standing alone, Mr. Martinez' conduct in this incident could form a reasonable basis to bypass a candidate for police officer.

Finally, I credit, in its entirety, the testimony of Detective Medina regarding her phone interview with LP. Even, however, if I were to accept the testimony of LP, her version of events supports Captain Dunn's concern that Mr. Martinez has a tendency to abuse power over women.

Given the precedent-setting judicial decisions regarding the "substantial deference" due to Appointing Authorities when making appointments and because of the findings and conclusions above, the City was reasonably justified in bypassing Mr. Martinez for all of the reasons contained in the bypass letter.

Conclusion

The CPD's decision to bypass Mr. Martinez is affirmed and Mr. Martinez' appeal under Docket No. G1-18-031 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

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.

Notice:

Michael A. Manzi, Esq. (for Appellant)

Rick Seccareccio, Esq.

Strephon Treadway, Esq.(for Respondent)