

COMMONWEALTH OF MASSACHUSETTS

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

BRIAN McCARTHY,
Appellant

v.

G1-21-173

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Pro Se
Brian McCarthy

Appearance for Respondent:

Omar Bennani, Esq.
Boston Police Department
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT’S MOTION TO DISMISS

On September 20, 2021, the Appellant, Brian McCarthy (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Police Department (BPD) to bypass him for original appointment as a Boston police officer. On October 26, 2021, I held a remote pre-hearing conference which was attended by the Appellant and counsel for the BPD. The parties stipulated to the following:

- A. On March 23, 2019, the Appellant took the civil service examination for police officer and received a score between 94 and 96.
- B. An eligible list was established for Boston police officer.
- C. On January 15, 2021, Certification No. 07505 was issued to the BPD by the state’s Human Resources Division (HRD).

- D. The Appellant was ranked 65th on the certification.
- E. The BPD appointed 105 candidates from the certification, 82 of whom were ranked below the Appellant.
- F. The BPD notified the Appellant of the reasons for bypass on July 21, 2021 and the Appellant filed a timely appeal with the Commission on September 20, 2021.

At the pre-hearing, the Appellant reported that he is 40 years old and resides in Dorchester. He graduated from high school and obtained a bachelor's degree in criminal justice. He has been employed as an electrician for approximately 18 years. In what he describes as the worst mistake of his life, the Appellant was charged with OUI, approximately 15 years ago, on December 10, 2006. Upon the advice of his attorney, who the Appellant claims has subsequently been disbarred, he went to trial and was found guilty of OUI.

According to the BPD, the Appellant, based on his guilty conviction of OUI, which carries a potential sentence of up to 2 ½ years of imprisonment, is prohibited from obtaining a license to carry a firearm under G.L. c. 90, § 24, which excludes any person who has been convicted of a misdemeanor punishable by imprisonment for more than 2 years. Further, according to the BPD, it is the Department's policy to bypass any applicant who is statutorily prohibited from obtaining a LTC.

Counsel for the BPD indicated that, on the day prior to the pre-hearing conference, BPD had been contacted by an attorney indicating that he may be representing the Appellant to assist him with having the misdemeanor conviction expunged from the Appellant's record. The Appellant confirmed that he had spoken with an attorney in this regard. According to the BPD, if the Appellant were to have his misdemeanor conviction expunged in the near future, they would consider the possibility of filing a Joint Request for 310 relief with the Commission.

Consistent with the conversation at the pre-hearing, I ordered the following:

- I. If the Appellant retained counsel regarding this appeal with the Commission, counsel should, forthwith, file a Notice of Appearance with the Commission.
- II. On or before February 1, 2022, the Appellant should report to the Commission regarding whether he has been successful in having the OUI conviction expunged from his criminal record.
- III. If he had, the parties should report to the Commission if they will be filing a joint request for 310 relief.
- IV. If not, the BPD would have 30 days thereafter to file a motion to dismiss the Appellant's appeal and the Appellant would have 30 days thereafter to file a reply / opposition.

On February 4, 2022, the Appellant reported that he had not initiated any action in court to have the above-referenced conviction expunged. On March 3, 2022, the BPD filed a motion to dismiss the Appellant's appeal, arguing that the Appellant's appeal must be dismissed "where it is the Department's policy to bypass any applicant who is prohibited from obtaining a License to Carry, and where, pursuant to M.G.L. c. 140, § 129B (1)(i)(B), the Appellant is statutorily prohibited from obtaining a License to Carry a firearm due to his OUI conviction."

On April 4, 2022, the Appellant emailed the Commission seeking an additional 60-90 days to have his OUI conviction expunged. On April 8, 2022, I informed the BPD that it had 30 days to amend its motion to dismiss with an affidavit from an appropriate BPD official regarding the BPD's policy which prohibits the appointment of any candidate ineligible to obtain a LTC; for how long this policy has been in place and a sworn statement that, while this policy has been in place, no such candidate has been appointed (i.e. – by allowing the police officer to "carry on the badge").

On May 20, 2022, the BPD submitted the requested affidavit from a sergeant detective in the Recruit Investigations Unit stating that this policy has been in place since 2018 and that no candidate appointed since 2018 had a statutory disqualifier in regard to a LTC. On May 22, 2022, I sent an email to the Appellant stating:

“Mr. McCarthy:

A decision regarding this matter will be issued by the Commission within the next thirty days; sent to the parties via email; and posted to the Commission’s website.

If, for any reason, you do not want this decision to issue, but, rather, you wish to withdraw, you should notify me of that forthwith.”

The Appellant did not reply to this email.

Summary Decision Standard

When a party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he or she is entitled to prevail as a matter of law, the party may move, with or without supporting affidavits, for summary decision on the claim or defense. 801 CMR 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law—i.e., "viewing the evidence in the light most favorable to the non-moving party", the substantial and credible evidence established that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case", and has not rebutted this evidence by "plausibly suggesting" the existence of "specific facts" to raise "above the speculative level" the existence of a material factual dispute requiring an evidentiary hearing. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). Accord Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249 (2008). See also Iannacchino v. Ford Motor Company, 451

Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss).

Applicable Civil Service Law

Section 2(b) of G.L. c. 31 authorizes appeals to the Commission by persons aggrieved by certain actions or inactions by the state’s Human Resources Division (HRD) or, in certain cases, by appointing authorities to whom HRD has delegated its authority, and which actions have abridged their rights under civil service laws. The statute provides:

*No person shall be deemed to be aggrieved . . . unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator [HRD] was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status. Id. (*emphasis added*)*

Chapter 310 of the Acts of 1993 prescribes the discretionary authority granted to the Commission to remediate a violation of civil service law:

*If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights. (*emphasis added*)*

The fundamental mission of Massachusetts civil service law is to enforce “basic merit principles” described in Chapter 31, which command, among other things, “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. A mechanism for ensuring adherence to basic merit principles

in hiring and promotion is the process of conducting regular competitive qualifying examinations, open to all qualified applicants, and establishing current eligible lists of successful applicants from which civil service appointments are to be made based on the requisition by an appointing authority of a “certification” which ranks the candidates according to their scores on the qualifying examination, along with certain statutory credits and preferences. G.L. c. 31, §§ 6 through 11, 16 through 27. In general, each position must be filled by selecting one of the top three most highly ranked candidates who indicate they are willing to accept the appointment, which is known as the “2n+1” formula. G.L. c. 31, § 27; PAR.09.

In order to deviate from the rank order of preferred hiring, and appoint a person “other than the qualified person whose name appears highest”, an appointing authority must provide written reasons – positive or negative, or both – consistent with basic merit principles, to affirmatively justify bypassing a lower ranked candidate in favor of a more highly ranked one. G.L. c. 31, §§ 1 and 27; PAR.08. A person who is bypassed may appeal that decision under G.L. c. 31, § 2(b) for a de novo review by the Commission to determine whether the bypass decision was based on a “reasonably thorough review” of the background and qualifications of the candidates’ fitness to perform the duties of the position and was “reasonably justified”. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688 (2012), citing Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006). And cases cited; Beverly v. Civil Service Comm’n 78 Mass. App. Ct. 182 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

Analysis

There is no dispute that the Appellant, based on an OUI conviction from fifteen years ago, is currently prohibited from obtaining a license to carry a firearm in Massachusetts. Also, as shown by the affidavit submitted by the BPD, the BPD, since at least 2018, has a practice of not appointing candidates to police officer who are prohibited from carrying a firearm. Given the undisputed facts here, and the reasonableness of the BPD practice in these circumstances¹, the Appellant, even when the facts are viewed most favorable to him, has no reasonable chance of prevailing. For this reason, the BPD's motion to dismiss the Appellant's appeal is allowed.

I did consider the Appellant's most recent request, now made over 60 days ago, to provide him with an additional 60-90 days to have his conviction expunged. With the commendable cooperation of the BPD, the Appellant has already been provided with sufficient time to initiate such an action in court and there is no evidence that he has done so.

Conclusion

For all of the above reasons, the Appellant's appeal under Docket No. G1-21-173 is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

¹ To be clear, the Commission expresses no opinion herein on the reasonableness of a policy that would automatically disqualify from civil service appointment a candidate statutorily deemed ineligible for a firearm identification card or a license to carry firearms where that candidate is assiduously pursuing relief either from a court of competent jurisdiction or the Massachusetts Firearms Licensing Review Board, pursuant to G.L. c. 140, § 130B. Here, the BPD provided the Appellant with ample opportunity to address this issue.

By a vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on June 15, 2022.

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:
Brian McCarthy (Appellant)
Omar Bennani, Esq. (for Respondent)