

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Decision mailed: 4/23/10
Civil Service Commission 03

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

JEFFREY MORAN,
Appellant

v.

TOWN OF AUBURN,
Respondent

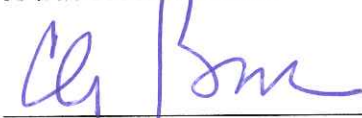
Case No.: G1-08-42

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on April 22, 2010 to acknowledge receipt of the revised report of the Administrative Law Magistrate dated March 2, 2010. The original report was received on June 5, 2009. The Respondent submitted comments thereto on July 7, 2009. By a 4-1 vote, the Commission voted to adopt the findings of fact and the revised recommended decision of the Magistrate therein. A copy of the Magistrate's revised report is enclosed herewith. The Appellant's appeal is hereby *denied*.

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman - Yes; Henderson, Commissioner - No; Marquis, Commissioner - Yes; Stein, Commissioner - Yes; and Taylor, Commissioner - Yes) on April 22, 2010.

A true record. Attest.



Christopher C. Bowman
Chairman

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 to:

Jeffrey Moran (Appellant)
Nicholas Anastasopoulos, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
ACTING CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-727-7060
FAX: 617-727-7248

March 2, 2010

Angela C. McConney
General Counsel
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Jeff Moran v. Town of Auburn
DALA Docket No. CS-08-317

Dear Ms. McConney:

Enclosed please find the revised Recommended Decision for the above referenced matter. If you have any questions, feel free to contact me.

Sincerely,


Richard C. Heidlage, Esq.
Acting Chief Administrative Magistrate

Enclosure

RECEIVED
2010 MAR -3 P 1:06
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals
98 North Washington Street, 4th floor
Boston Massachusetts 02114
617-727-7060 www.mass.gov/dala

Jeffrey Moran,
Appellant

Docket No. CS-08-317
(G1-08-42)

v.

Town of Auburn,
Appointing Authority

Appearance for Appellant:

Jeffrey Moran, for himself
40 Warren Road
Auburn, MA 01501

Appearance for Appointing Authority:

Nicholas Anastasopoulos, Esq.
Mirick O'Connell
1700 West Park Drive
Westborough, MA 01581

Administrative Magistrate:

Bonney Cashin, Esq.

RECOMMENDED DECISION

Introduction

Jeffery Moran appeals the decision of the Commonwealth's Human Resources Division to accept the request of the Town of Auburn to have his name removed from the list of eligible candidates for the position of permanent police officer. Mr. Moran appeals under the provisions of G.L. c. 31, § 2 (b).

I held a hearing at the Division of Administrative Law Appeals on May 15, 2008. I declared the hearing to be private because neither party requested in writing that the hearing be public. Mr. Moran testified on his own behalf. Sergeant Jeffery Lourie and

RECEIVED
2008 MAR -3 P 1:07
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

Chief Andrew J. Sluckis, Jr. of the Auburn Police Department testified for the Town. I entered 16 exhibits into evidence.¹ There are two cassette tapes of the hearing.

The Town filed a proposed decision on June 16, 2008, after which the record closed. Mr. Moran did not submit closing papers.

Findings of Fact

Based on the evidence in the record and on an assessment of the credibility of the witnesses who appeared before me, I make the following findings of fact:

A. Background

1. In December 2007, the Auburn Police Department had 8 permanent full-time police officer positions to fill. (Exhibit 1).

2. The Town requested and received an eligibility list from the Human Resources Division, Certification No. 271135; Mr. Moran's name appeared on the eligibility list. (Exhibit 1).

3. Chief Sluckis conducted an orientation session with all applicants at the Auburn Police Station. (Sluckis Test.).

4. As part of the application materials, Chief Sluckis provided all applicants with a welcome letter, which stated in part: "I insist that you be candid and completely truthful when filling out your applications and when you meet with investigators and command staff officers...I understand that there may be experiences in your past that may not portray you in a positive way however, I demand that you be truthful in your answers about everything." (Exhibit 2).

5. Mr. Moran attended the orientation. (Exhibit 12).

¹ The Town provided an exhibit list that identifies 15 exhibits. During the hearing Exhibit 11, which consists of two letters, was renamed as Exhibit 11A and Exhibit 11B.

6. Mr. Moran submitted an application for employment as a permanent full-time police officer with the Town dated December 17, 2007. (Exhibit 3).

7. The police department has a hiring process policy in effect, which provides that untruthfulness is grounds for immediate disqualification. (Exhibit 15).

8. Chief Sluckis assigned Sergeant Lourie to conduct a background investigation of Mr. Moran. (Lourie Test.; Exhibit 10).

9. Sergeant Lourie conducted the investigation, which included obtaining information on Mr. Moran's driving, criminal, and credit histories. (Exhibit 10; Lourie Test.).

10. On January 4, 2008, during an interview conducted by Sergeant Lourie and Lieutenant Eileen Harrigan, Mr. Moran responded to the questions in the Personal History Statement. (Exhibit 5; Exhibit 10; Lourie Test.).

11. His responses were recorded on the form and he had an opportunity to review them. (Lourie Test.).

12. Mr. Moran also completed the same Personal History Statement on his own. (Exhibit 6).

13. Mr. Moran signed and dated each copy of the form acknowledging that false or misleading responses to the questions would result in disqualification from the hiring process or termination from employment and affirming that the information was true and accurate to the best of his knowledge. (Exhibit 5; Exhibit 6.).

14. Mr. Moran's answers to the questions numbered 20, 37, 45, and 73 differed on each of the two forms. (Exhibit 5; Exhibit 6; Lourie Test.).

15. Based on Mr. Moran's responses and the results of his background investigation, Sergeant Lourie determined that Mr. Moran had not been honest during the application process. (Exhibit 10; Lourie Test.).

16. In a letter dated January 8, 2008, Chief Sluckis informed Mr. Moran that he had not been selected to advance to the next phase of the application process. (Exhibit 11B).

17. In a second letter dated January 8, 2008, Chief Sluckis requested that the Human Resources Division remove Mr. Moran's name from the eligibility list; and he provided a brief statement of reasons in support of his request. (Exhibit 11B).

18. Chief Sluckis also requested that the names of 19 other individuals be removed from the eligibility list or bypassed. (Exhibit 11B).

19. Mr. Moran filed an appeal with the Civil Service Commission on February 19, 2008.²

20. In a letter dated March 11, 2008, Chief Sluckis provided the Human Resources Division with a detailed statement of reasons why he requested that the Human Resources Division remove Mr. Moran's name from the eligibility list. (Exhibit 12).

21. In a letter dated March 20, 2008, the Human Resources Division accepted the Town's reasons for the removal of Mr. Moran's name from the eligibility list.

B. Mr. Moran's Driving History

22. In response to a question on his employment application that asked whether he had ever had his motor vehicle license suspended or revoked in any state, Mr. Moran answered "no." (Exhibit 3).

² Mr. Moran's appeal is in the record, although it was not offered as an exhibit at the hearing.

23. According to records obtained from the Registry of Motor Vehicles, Mr. Moran's license was suspended on May 14, 2001 and December 11, 2005 in connection with operating under the influence offenses. (Exhibit 7; Exhibit 10; Lourie Test.)

24. His license was also suspended on October 21, 1998, July 26, 1999, April 4, 2001, May 2, 2001 and December 11, 2005 for administrative reasons, including payment defaults. (Exhibit 7; Exhibit 10; Lourie Test.).

25. In response to a question on his employment application that asked Mr. Moran to identify any traffic citations, excluding parking, he received within the past seven years, Mr. Moran answered that he had received "possibly one or two speeding tickets." (Exhibit 3).

26. According to records obtained from the Registry of Motor Vehicles, at the time he completed his application, Mr. Moran had 15 motor vehicle offenses within the previous seven years, including four speeding offenses, one as recently as November 17, 2006. (Exhibit 7).

27. According to the police department's hiring policy, the chief of police may eliminate an applicant from consideration if he has had his driving privileges suspended, revoked or canceled within the five year period preceding the date of application; Mr. Moran's license was suspended on December 11, 2005, within the five year time period. (Exhibit 15).

28. Mr. Moran testified that his driving offenses occurred in the past and that his insurance company has given him an "A+" rating. (Moran Test.).³

29. The Town relied on Mr. Moran's adult driving record. (Exhibit 7).

³ A letter from Mr. Moran's insurance company and a copy of his merit rating board record is in the record of this appeal, although it was not offered as an exhibit at the hearing.

C. Mr. Moran's Criminal History

30. Question No. 73 on the Personal History Statement asks: "Is your name in a case file with any police department or law enforcement agency that you know of?" (Exhibit 5; Exhibit 6).

31. Mr. Moran answered "no," with the exception of Auburn when he was interviewed; however, he answered "yes" on the form he completed himself. (Exhibit 5; Exhibit 6; Lourie Test.).

32. The Town filed eight separate police incident reports from Auburn, Worcester, Shrewsbury, and Southbridge spanning April 8, 1995 to September 17, 2006 concerning Mr. Moran's conduct as an adult. (Exhibit 9).

33. According to records obtained from the Board of Probation as part of the background investigation, in 1998 Mr. Moran had a "continued without finding" disposition of a felony charge involving a counterfeit motor vehicle document in Worcester District Court and in 2001 another "continued without finding" disposition involving an operating under the influence of alcohol offense in Worcester District Court. (Exhibit 8).

34. In addition, in 1995 Mr. Moran was placed on probation for one year following a guilty finding on a misdemeanor assault and battery charge. (Exhibit 8).

35. The police department's hiring policy provides that a felony conviction is an automatic disqualifier. (Exhibit 15).

36. To question no. 12 on the Personal History Statement, which asks: "Have you ever stolen anything from your employer?" Mr. Moran answered: "no." (Exhibit 5; Exhibit 6).

37. According to records obtained from the Board of Probation as part of the background investigation, Mr. Moran was charged criminally in a larceny of \$1000.00 from a CVS pharmacy where he was employed at the time. (Exhibit 9; Exhibit 10).

38. Mr. Moran admitted that he took the money; and he later returned it. (Exhibit 9; Exhibit 10).

39. Mr. Moran does not dispute the accuracy of his criminal history; however, he testified that he was not convicted of any of the charges. (Moran Test.).

40. Under cross-examination, Mr. Moran acknowledged that he was found guilty of assault and battery in 1995. (Moran Test.).

41. Mr. Moran testified that his criminal history reflects events in the past, which he attributed to a troubled adolescence without a father present. (Moran Test.).

42. The Town relied on Mr. Moran's adult criminal record. (Exhibit 8).

C. Mr. Moran's Credit History and Financial Circumstances

43. Mr. Moran filed for bankruptcy under Chapter 7 in 1998; and his debt was discharged in 1999 and the matter dismissed in 2008. (Exhibit 10; Moran Test.).

44. A medical bill owed by Mr. Moran was referred to a collection agency. (Exhibit 10).

45. Mr. Moran testified that he is disputing the bill because he is not satisfied with the dental work performed. (Moran Test.).

46. At the time of his interview, Mr. Moran had not paid his federal or state income taxes on time for the previous seven years. (Exhibit 10).

D. Mr. Moran's Drug Use

47. Mr. Moran admitted that he snorted cocaine 5 times and smoked marijuana 10 times in the previous 5 to 10 years. (Exhibit 5; Exhibit 10; Moran Test.).

48. Mr. Moran acknowledged that he was honest about his illegal drug use because the Auburn Police Department probably would have found out about it. (Moran Test.).

E. Other Reasons

49. Mr. Moran failed to register with the selective service system until December 2007, a violation of federal law. (Exhibit 3; Exhibit 10).

50. The police department's hiring policy provides that such a failure to register is a discretionary disqualifier. (Exhibit 15).

51. Mr. Moran has a large tattoo on his right forearm, which would be visible if he were wearing a short-sleeve uniform shirt. (Exhibit 10; Exhibit 12).

52. The police department's hiring policy provides that such a visible tattoo is a discretionary disqualifier. (Exhibit 15).

53. Mr. Moran testified that he would have the tattoo removed. (Moran Test.)

Discussion

The evidence supports the decision of the Human Resources Division to accept the reasons proffered by the Town for seeking removal of Mr. Moran's name from the list of eligible candidates for permanent police officer. G.L. c. 31, § 27 provides that when an appointing authority, in this case the Town, seeks to appoint a candidate whose name appears lower on a certified list over another candidate whose name appears higher on the list, it must submit a statement of reasons to the personnel administrator in support of the

decision to “bypass” the individual whose name appears higher on the list. *Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 302 682 N.E. 2d 923, 924 (1997). When a bypass occurs, the candidate’s name remains on the list; and he or she remains eligible for a subsequent appointment while the list is in effect.

In this instance, the Town seeks to have Mr. Moran’s name removed altogether, a permanent bypass so to speak, and arguably a more significant action. There may be occasions when the reasons proffered by an appointing authority are sufficient to support a decision to bypass, but insufficient to remove a candidate’s name from the list. I face no such dilemma here, however. The Town’s reasons are sufficient to support the removal of Mr. Moran’s name from the eligibility list.

Mr. Moran’s “interest in [an] appointment is slight; Massachusetts law grants him at most the opportunity to be appointed if the [Town] is convinced of his qualifications.” *Upshaw v. McNamara*, 435 F.2d 1188, 1191 (1970). A candidate’s expectations are substantially diminished by the appointing authority’s ability to consider subjective factors in addition to a candidate’s written examination score. *Cuellar v. Boston Police Dept.*, Docket Nos. G-02-21, CS-06-183, Recommended Decision (June 27, 2006), *adopted by Final Decision*, 19 MCSR 260; *citing Burns v. Sullivan*, 619 F. 2d 99, 104 (1st Cir. 1980).

Consequently, it is well established that an appointment may be denied where there are reasonable grounds to regard the person’s “character or past conduct as rendering him unfit and unsuitable to perform the duties of the office.” *Comm’r of Metropolitan District Comm’n v. Director of Civil Service*, 348 Mass. 184, 193, 203 N.E. 2d 95, 101 (1964). Appointing authorities are afforded wide discretion when making

such an assessment of a candidate's character or conduct. *Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. at 304-305, 682 N.E. 2d at 926.

In this appeal, Mr. Moran tests whether the Town has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority. *Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. at 303, 682 N.E. 2d at 925. G.L. c. 31, § 2 (b) requires that a decision to remove an individual's name from an eligibility list must be supported by a preponderance of the evidence. In other words, the Town must establish that its reasons for requesting that Mr. Moran's name be removed from the list "were, more probably than not, sound and sufficient." *Mayor of Revere v. Civil Service Comm'n*, 31 Mass. App. Ct. 315, 321, 577 N.E. 2d 325, 329 (1991).

In addition, I note that Personnel Administration Rule, PAR .09 (2), concerning civil service appointments, provides that:

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.

The Town has demonstrated that Mr. Moran was untruthful on his employment application and his Personal History Statement. He was amply warned that complete honesty was expected throughout all aspects of the hiring process. Nonetheless, he was untruthful about his criminal history and his driving record. He failed to disclose a misdemeanor conviction, stealing from his employer, several license suspensions, and numerous driving offenses. He had no adequate explanation for his dishonesty.

In addition to his untruthfulness, the substance of the criminal and driving history that he attempted to cover up is significant. It is appropriate for the Town to have relied on Mr. Moran's entire Board of Probation record and not only on his conviction and admission to sufficient facts. While Mr. Moran attempted to pass off his history as the result of youthful indiscretion, the Town relied on his adult records. Some of the offenses are more recent. Coupled with his dishonesty, his history reveals a pattern of conduct utterly unsuited to a career in law enforcement. These facts alone provide reasonable justification for the Town's request that Mr. Moran be removed from the eligibility list as well as show that Mr. Moran's appointment would be detrimental to the public interest.


Indeed, the Civil Service Commission has upheld an appointing authority's request that a candidate's name be removed from the eligibility list in circumstances that are less serious than those presented here. In *Cuellar v. Boston Police Dept.*, removal from the eligibility list was upheld where the appellant was terminated from his technical position with the Boston Police Department for violating its procedures and for violating the terms of his firearms license. Removal from the eligibility list was also upheld in *Losano v. Swampscott*, Docket No. G-02-72, Decision on Respondent's Motion to Dismiss, 20 MCSR 97 (February 9, 2007), which presented serious offenses of a different nature than those presented here. In that decision the Commission allowed the town's motion and upheld removal from the eligibility list where an investigation revealed that the appellant had pointed a handgun at another individual, violated a restraining order, had a history of violent fighting, and had his license to carry a firearm revoked.

The Town has presented additional evidence as well of Moran's poor credit history, past drug use, and a failure to register with the selective service program. These additional infractions and offenses show a widespread disregard for the law.

Conclusion and Recommendation

Accordingly, for the foregoing reasons, I conclude that there exist sound and sufficient reasons for the Human Resources Division to remove Mr. Moran from the eligibility list. I recommend that the Civil Service Commission dismiss Mr. Moran's appeal.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Bonney Cashin
Administrative Magistrate

DATED:

JUN 05 2009