

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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

ABRAHAM NAZARIO, JR.,
Appellant

v.

G1-21-211

CITY OF NEW BEDFORD,
Respondent

Appearance for Appellant:

Pro Se
Abraham Nazario, Jr.

Appearance for Respondent:

Jennifer King, Esq.
Valerio Dominello & Hillman LLC
One University Avenue
Suite 300B
Westwood, MA 02090

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT’S MOTION FOR SUMMARY DECISION

On November 15, 2021, the Appellant, Abraham Nazario, Jr. (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of New Bedford (City) to bypass him for original appointment as a police officer in the City’s Police Department. The Appellant previously filed a bypass appeal with the Commission in 2020, but his appeal was dismissed based on a lack of prosecution.

On December 14, 2021, I held a remote pre-hearing conference which was attended by the Appellant, co-counsel for the Respondent, and the police lieutenant in charge of recruitment and training for the City’s Police Department. The parties stipulated to the following:

- A. On March 23, 2019, the Appellant took the civil service examination for police officer; the Appellant believes he received a score of 87.
- B. On September 1, 2019, the state's Human Resources Division (HRD) established the eligible list for New Bedford police officer.
- C. On April 7, 2021, HRD sent Certification No. 07716 to the City.
- D. The Appellant was ranked 36th on the certification and 17 candidates were appointed, one of whom was ranked below the Appellant.
- E. On September 16, 2021, the City notified the Appellant that he was being bypassed for appointment, listing the reasons for bypass.
- F. On November 15, 2021, the Appellant filed a timely appeal with the Commission.

Also at the pre-hearing, the Appellant reported that he is a 27-year-old Hispanic male who currently resides in Taunton, MA. He previously lived in New Bedford and graduated from New Bedford Vocational Technical High School. He has worked for the DYS facility in Taunton since February 2020.

The City reported that the Appellant was bypassed based on: a) being terminated from three prior employers for rule violations; and b) inconsistencies on his application. At the pre-hearing conference, the City also reported that the Appellant resigned from the New Bedford Police Cadet program while three performance-related matters were pending against him. The Respondent acknowledged at the pre-hearing conference that the Appellant has subsequently been re-hired by one of the employers that terminated him.

The Appellant reported that his name has recently appeared on certifications for police officer in the City of Taunton and the City of Brockton and that both cities had issued him a conditional offer of employment for police officer. I informed the Appellant that prior

Commission decisions have upheld the bypass of candidates solely for recent terminations from prior employers, let alone the additional alleged allegations regarding inconsistencies in his application and his recent separation from the City's police cadet program. For all of the above reasons, including that the Appellant appeared to be on the cusp of being appointed as a police officer in either Brockton or Taunton, I gave the Appellant one week to reconsider whether it would be in his best interest to pursue the instant appeal with the Commission, which will result in a published decision posted on the Commission's website.

I informed the parties that if the Appellant chose to pursue his appeal with the Commission or did not notify the Commission that he was withdrawing his appeal, the City would have 30 days to file a Motion for Summary Decision, arguing why, based on the undisputed facts and/or viewing the facts most favorable to the Appellant, the Appellant's appeal should be denied. The Appellant would have 30 days to file a reply, after which the Commission would issue a published decision. The Appellant did not notify the Commission that he wished to withdraw his appeal; the City filed a Motion for Summary Decision and the Appellant failed to file a reply.

Motion for 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, 635-636 (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 and Rules

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" 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. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Serv. Comm'n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996).

Original and promotional appointments of civil service employees are made from a list of candidates, called a "certification", wherein names are ranked in the order in which they appear on the applicable civil service "eligible list", using what is called the 2n+1 formula. G.L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. Boston Police Dep't v. Civil Service Comm'n, 483 Mass. 461, 474-78 (2019); Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm'n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

"Reasonable justification . . . means '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'". Brackett v. Civil Service Comm'n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient").

The governing statute, G.L. c. 31, gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary that the Commission find that the appointing authority acted "arbitrarily and capriciously." City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission ". . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority" but, when there are "*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*," then the occasion is appropriate for intervention by the commission." Id. (*emphasis added*). See

also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

Law enforcement officers are vested with considerable power and discretion and must be held to a high standard of conduct:

“Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.”

Police Comm’r v. Civil Service Comm’n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986).

Analysis

I have thoroughly reviewed the background investigation completed by the City’s Police Department which, along with all supporting documentation, was relied upon by the City in bypassing the Appellant. Even when viewing the evidence in the light most favorable to the Appellant, he has no reasonable expectation of prevailing in this appeal. As part of the background investigation, the Appellant acknowledged multiple performance-related issues with employers, including his time working in the City’s Police Department as a cadet. He also acknowledged to investigators that there were substantive inconsistencies in his application. Standing alone, these two undisputed issues, particularly given their recency, provided the City with reasonable justification for bypassing the Appellant for original appointment as a permanent, full-time police officer.

Nothing in this decision is meant to detract from the Appellant’s current or future application for employment where, based a de novo review and the passage of time, the Appellant may be an appropriate candidate for police officer.

Conclusion

The City's Motion for Summary Decision is allowed and the Appellant's appeal is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chair

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Stein and Tivnan, Commissioners) on April 7, 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:

Abraham Nazario, Jr. (Appellant)

Jennifer King, Esq. (for Respondent)