

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

CHRISTOPHER O'ROURKE,
Appellant

v.

CASE NO: G1-13-57

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

John J. Greene, Esq.
15 Foster Street
Quincy, MA 02169

Appearance for Respondent:

Meryum Khan
Attorney, Boston Police Department
1 Schroeder Plaza
Braintree, MA 02120

Commissioner:

Paul M. Stein¹

DECISION

Pursuant to G.L.c.31, §2(b), the Appellant, Mr. Christopher O'Rourke (hereinafter "Appellant" or "Mr. O'Rourke") appealed to the Civil Service Commission (hereinafter "Commission") on March 12, 2013, claiming that he was unlawfully bypassed for original appointment to the Boston Police Department (hereinafter "BPD"). The Commission held a prehearing on April 21, 2013 and a full hearing on July 17, 2013. Neither party requested a public hearing so the hearing was deemed private. The witnesses were not sequestered. The hearing was digitally recorded and the parties were provided with a CD of the hearing. The Commission received proposed decisions on August 16, 2013.

¹ The Commission acknowledges the assistance of Law Clerk Hannah Filkins in the drafting of this decision.

FINDINGS OF FACT

Seventeen (17) Joint Exhibits were entered into the record. Based on these exhibits, the testimony of the following witnesses:

Called by BPD:

- Wayne Williams, Detective BPD
- Norma Ayala, Sergeant Detective BPD, Commander of Recruit Investigations

Mr. O'Rourke called no witnesses and he did not testify on his behalf.

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences therefrom, a preponderance of the credible evidence establishes the following findings of fact:

1. Mr. O'Rourke is a current resident of South Boston, Massachusetts. He is presently employed as a bartender at Gypsy Bar. (Exhibit 1)
2. Mr. O'Rourke graduated from Don Bosco Technical High School in Hollis/Brookline New Hampshire in 1997. (Exhibit 1)
3. Mr. O'Rourke has primarily worked in the nightclub industry as a bartender. He applied to two other non-civil service law enforcement agencies in 2010, Bridgewater State University and Bunker Hill Community College. Mr. O'Rourke was not chosen for either position. (Exhibit 1)
4. Mr. O'Rourke took the Civil Service Exam on April 30, 2011. (Bypass Stipulated Facts)
5. On April 26, 2012 and June 28, 2012 the Human Resource Department (hereinafter "HRD") sent certification to the appointing authority. Mr. O'Rourke was ranked 27th among those willing to accept employment. (Bypass Stipulated Facts)
6. Mr. O'Rourke completed his Boston Police Department Student Officer Application on June 2, 2012. (Exhibit 1)

7. Detective Wayne Williams (hereinafter “Detective Williams) was the assigned to conduct the candidate investigation of Mr. O’Rourke. (Testimony of Wayne Williams; Testimony of Norma Ayala)
8. On May 30, 2012, Detective Williams spoke with three of Mr. O’Rourke’s neighbors as part of his investigation. All of Mr. O’Rourke neighbors had positive comments about his potential to be a BPD Officer. (Exhibit 1)
9. On May 31, 2012, Detective Williams spoke with Michael Montesano, General Manager of Gypsy Bar to discuss Mr. O’Rourke’s work history. As his supervisor, Mr. Montesano expressed that Mr. O’Rourke would be an excellent candidate for the police force. (Exhibit 1)
10. Detective Williams also interviewed Mr. O’Rourke’s previous employers, Edward Padden, of Neponset Circle Auto Body and William Guerra, of Paradise Rock Club both had positive reviews regarding his employment. (Exhibit 1)
11. On June 22, 2012, Detective Williams conducted a home inspection of Mr. O’Rourke’s residence, located at 64 East Broadway Street Apartment #2, South Boston, MA 02127. There were no issues or concerns with regard to his residence, Detective Williams noted the house was “neat, clean, and orderly”. (Exhibit 1)
12. Mr. O’Rourke presented the following as proof of residency: Nation Grid, NSTAR, COMCAST, and Sprint statements. (Exhibit 1)
13. By memo dated June 22, 2012, Detective Williams submitted a summary of his background investigation of recruit applicant, Mr. O’Rourke, to Robin W. Hunt, Director, Employment Services Unit, Sergeant Detective Norma Ayala, Commander, Recruit Investigations Unit, and Sergeant Detective Robin DeMarco, Recruit Investigations Unit.

14. Included in the memo were portions of Mr. O'Rourke's Board of Parole (hereinafter "BOP") history and driving record. (Exhibit 1)

15. Mr. O'Rourke's BOP contained the following criminal history:

- a. 5/24/07: Operating Under the Influence – *Not Guilty*
- b. 7/15/05: Operating after suspended license – *Dismissed*
- c. 11/30/01: Assault and Battery – *Dismissed*
- d. 8/29/00: Operating Negligently – *Dismissed*
- e. 10/27/98: Affray - *Dismissed*
- f. 10/27/98: Assault and Battery – *Dismissed*
- g. 10/14/97: Minor Transporting Alcohol – *Pre-Trial Probation (11/25/97)*
- h. 10/14/97: True Name Violation - *supra*
- i. 06/18/96: Minor Transporting Alcohol – *Dismissed*
- j. 06/18/96: Trespassing – *Dismissed on 25 hours community service*

16. Mr. O'Rourke's driving history contained in part, the following:

- a. 10/20/07: Surchargeable Accident – Brighton
- b. 9/10/07: Reinstate Chemical Test Refusal Fee Paid
- c. 3/26/07: Failure to Stop – Boston
- d. 4/10/05: Speeding – Norwood
- e. 7/14/05: Reinstated Warrant Fee Paid
- f. 10/04/04: Suspension Pend Reinstatement Warrant
- g. 5/10/04: Warrant Dorchester
- h. 08/05/03: No Liability Policy – Dorchester
- i. 08/05/03: Registration Suspend/Revoked – Dorchester

- j. 9/30/03: Expiration Warrant RLS
- k. 9/22/03: Suspension Warrant Indefinite
- l. 9/22/03: Warrant Dorchester District
- m. 5/03/02 Suspension Pend Reinstatement Fee Payment Default
- n. 5/03/02: Expiration Payment Default – Dorchester
- o. 1/18/02: Suspension Payment Default Indefinite

*Note: Additional driver history.

17. Following recruit investigations, a “Round Table” discussion is conducted in order to see which candidates should move on to the next phase of the hiring process. (Testimony of Norma Ayala)
18. The recruit investigators are not present during “Round Table” discussions. Members of the “Round Table” use the investigator’s report in their decision making process. (Testimony of Norma Ayala)
19. The “Round Table” looks as the summary as an overall assessment of the candidate. In Mr. O’Rourke’s case, Sergeant Detective Ayala, (hereinafter “Sgt. Detective Ayala”) noted that there was a pattern of poor judgment. (Testimony of Norma Ayala)
20. Detective Williams included in his summary that two of Mr. O’Rourke’s arraignments occurred more than ten (10) years ago, and that a number of the arraignments were dismissed. (Exhibit 3)
21. Even though, a majority of Mr. O’Rourke’s BOP history stemmed from his early twenties², the 2007 charge indicated that the pattern of poor judgment continued into Mr. O’Rourke’s early thirties. (Testimony of Norma Ayala)

² Sgt. Detective Ayala indicated that if the charges found on an applicant’s BOP occurred while they were very young and there had been no recent history, the round table would take that into consideration.

22. The presence of alcohol related charges are “Red Flags” in recruit investigations as well as “Round Table” discussions. (Testimony of Norma Ayala)
23. Mr. O’Rourke has been arrested four (4) times, most recently in 2007 in connection to a DWI, which he was found not guilty. (Exhibit 3)
24. Given that a number of Mr. O’Rourke’s charges were either related to, or possibly incident to the consumption of alcohol, the panel had cause for concern. (Testimony of Norma Ayala)
25. Sgt. Detective Ayala distinguished that even if the charges do not directly reference alcohol, the circumstances surrounding the incidence may call into question the presence of alcohol. For example, both of the assault and battery charges indicated that the fights began respectively at 1:28AM, and 9:45PM, outside of nightclubs/bars on Boylston Street. (Exhibit 9; Exhibit 12; Testimony of Norma Ayala)
26. Mr. O’Rourke had true name, assault and battery, and affray charges that could possibly be related to the consumption of alcohol. (Exhibit 8,9, & 12; Testimony of Norma Ayala)
27. With regard to applicant’s driving history, Detective Williams noted that Mr. O’Rourke had an extensive driving history, but had not had an incident since October 20, 2007. (Exhibit 3)
28. On April 10, 2005, Mr. O’Rourke was pulled over for speeding in Norwood. Mr. O’Rourke produced a New Hampshire Registration for the vehicle but stated that he did not have his New Hampshire license with him. (Exhibit 15)
29. When the Officer asked Mr. O’Rourke if he had any identification, Mr. O’Rourke produced an expired Massachusetts driver’s license. (Exhibit 15)

30. A check with the RMV revealed that Mr. O'Rourke's license status was suspended in Massachusetts as of 10/04/04 pending a reinstatement fee. The vehicle registration was active and his license status in New Hampshire was active. (Exhibit 15) (A reasonable inference can be made that Mr. O'Rourke was driving with both New Hampshire and Massachusetts's licenses for a period of time.)
31. On July 15, 2005 Mr. O'Rourke was found responsible for the speeding violation. However, the other charges (1) not being in possession of his license and (2) operating a motor vehicle under a suspended license were dismissed upon payment of court costs/restitution. (Exhibit 14)
32. Mr. O'Rourke's was arrested on March 26, 2007 at 12:25AM, following a motor vehicle stop at the intersection of Arlington and Columbus. The officer made the following observations:
- a. Strong odor of an intoxicating beverage emitting from his breath, and eyes were bloodshot. (Exhibit16)
 - b. Failed to recite alphabet on two attempts, despite acknowledging he knew the alphabet. (Exhibit16)
 - c. Asked to do the nine-step, heel to toe test, cited trouble walking due to present knee injury and couldn't perform test as a result of the injury. (Exhibit16)
 - d. Refused the BAC. (Exhibit16)
 - e. Informed the officer he had consumed "two beers all night". (Exhibit16)
33. Mr. O'Rourke was found not guilty with regard to the above named DWI charge. ()
34. In giving proper weight to the recruit investigation summary, the panel decided to bypass Mr. O'Rourke. (Testimony of Norma Ayala)

35. By letter dated, January 14, 2013, from Robin W. Hunt, Mr. O'Rourke was informed of BPD's decision to bypass him for appointment as a Boston Police Officer. (Exhibit 2)
36. The letter cited to the Department's concerns regarding both Mr. O'Rourke's BOP history as well as extensive driving history. The Department noted that although a number of the charges were dismissed, the volume of incidents shows a pattern of troubling behavior. Additionally, given that there were multiple alcohol related incidents and e motor vehicle incidents, the Department had concerns regarding Mr. O'Rourke's judgment and overall suitability to become a police officer. (Exhibit 2)
37. BPD selected sixty-eight (68) candidates for appointment, amongst those seventeen (17) were ranked below Mr. O'Rourke. (Bypass Stipulated Facts)
38. Mr. O'Rourke filed this timely appeal with the Commission on, March 12, 2013.

APPLICABLE STANDARD OF REVIEW

Bypass appeals for original appointment are governed by G.L.c.31, Section 27:

"If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest."

The task of the Commission is "to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority. . . . Reasonable justification in this context 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.' " E.g., Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 543 (2006) and cases cited. In performing this function:

"[T]he commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after conducting] 'a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review

of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer' . . . For the commission, the question is . . . '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.' " (emphasis added)

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003) (affirming Commission's decision to reject appointing authority's proof of officer's failed polygraph test and prior domestic abuse orders and crediting officer's exculpatory testimony rebutting that evidence) cf. Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to find appointing authority's justification unreasonable); Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (same). See generally, Villare v. North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995); Bielawski v. Personnel Admin'r, 422 Mass. 459, 466 (1996) (discussing need for de novo fact finding before a "disinterested" Commissioner in context of procedural due process.)

The "preponderance of the evidence test" requires the Commission to conclude that an appointing authority established, through substantial, credible evidence presented to the Commission, that the reasons assigned for the bypass of an Officer McCue were "more probably than not sound and sufficient." Mayor of Revere v. Civil Serv. Comm'n, 31 Mass. App. Ct. 315, 321, (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, (1928) (emphasis added) The Commission must take account of all credible evidence in the record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, (2001)

It is the purview of the hearing officer to determine the credibility of the testimony presented through the witnesses who appear before the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads

with great reluctance.” E.g., Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also, Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

Especially when it comes to an applicant for a sensitive public safety position, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown . . . Absent proof that the [appointing authority] acted unreasonably . . . the commission is bound to defer to the [appointing authority’s] exercise of its judgment” that “it was unwilling to bear the risk” of hiring the candidate for such a sensitive position. Id., 78 Mass.App Ct. at 190-91. See also, Reading v. Civil Serv. Comm’n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914,(2004) (rescript opinion); Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 303-305 (1997); Massachusetts Dep’t of Corrections v. Anderson, Suffolk Sup. Ct., No. 2009-0290 (Memorandum of Decision dated February 10, 2010), reversing Anderson v. Department of Correction, 21 MCSR 647, 688 (2008).

CONCLUSION

Applying these applicable standards in the circumstances of the present case, the Commission finds that Boston Police Department was reasonably justified in its decision to bypass the Appellant for appointment. The volume of incidents on both Mr. O’Rourke’s BOP and driving record justify BPD’s conclusion about Mr. O’Rourke’s qualifications to be appointed to the position of a BPD police officer.

Based on reasonable inferences, BPD noticed a pattern of alcohol related incidences. Although a number of these incidences occurred nearly a decade prior to his pursuit of employment with the BPD, the BPD has reasonable justification to give some weight to this very lengthy record of incidents. With regard to Mr. O'Rourke's most recent OUI with a finding of not guilty, the BPD is entitled to look at the acquittal with an eye of caution, and to give reasonable weight to the facts of the incident as disclosed in the police reports prepared by the arresting officer and percipient witness. Mr. O'Rourke was pulled over at approximately 12:25AM. The officer noted that Mr. O'Rourke's eyes were bloodshot and there seemed to be the smell of an intoxicating beverage coming from his breath. Mr. O'Rourke refused to take the chemical but claimed he only had a few beers) can fairly raise an inference that alcohol at least was a factor leading up to this incident. His decision not to give any testimony at the Commission hearing warrants a similar adverse inference about his state of intoxication. See Scanlon v. Massachusetts Dep't of Correction, 22 MCSR 431 (2009), citing Commonwealth v. Figueroa, 413 Mass. 193, 199 (1992). See also Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 826-27 (2006) (negative inference may be drawn against the appellant when he claimed 5th Amendment privilege against self-incrimination and refused to testify at a disciplinary hearing before the Appointing Authority)

In addition, there were also two other assault and battery charges that occurred later in the evening outside of nightclub/bar venues. Although a considerable amount of time has passed since these incidents occurred, BPD is justified in recognizing that Mr. O'Rourke had issues related to alcohol from the time he was a minor to as recently as six (6) years ago. Given that BPD perceives alcohol related offenses to be red flags for a candidate, the BPD was justified in looking at Mr. O'Rourke's history in its entirety. The Commission is not inclined to second

guess the BPD or to override the BPD's sound judgment and legitimate concerns about this pattern of incidents or the weight they deserve in comparison with the positive attributes presented by the candidate.

Mr. O'Roarke's driving record also contained evidence of irresponsible behavior. Mr. O'Rourke has a number of defaults on fines and/ or tickets, a surcharge able accident, as well as license suspensions. The incident on October 4, 2004 in which Mr. O'Rourke was discovered to be operating under both New Hampshire and Massachusetts licenses is especially troubling. Collectively these incidences show not only poor judgment on Mr. O'Rourke's behalf but irresponsibility. Although a majority of these incidences were dismissed upon payment that does not negate the fact that the BPD had reasonable justification to consider the lengthy history of these incidents to infer that Mr. O'Rourke had a history of driving irresponsibly.

In sum, in light of Mr. O'Rourke's BOP and driving record, BPD met its burden to establish reasonable justification for its decision to bypass Mr. O'Rourke. Overall, the preponderance of the evidence supports the BPD's conclusion that the underlying pattern of risky behavior contained in the record provided reasonable justification for the BPD's decision to bypass Mr. O'Rourke, notwithstanding the dismissal of criminal charges against Mr. O'Rourke and the stale nature of some of them. Mr. O'Roarke provided no testimony or other persuasive evidence that detracts from this conclusion. Thus, in the circumstances of this case, the BPD met its burden of proof to show that the pattern of Mr. O'Roarke's past transgressions, which have extended over many years and into his adult life, and poor judgment demonstrated by many of those incidents, calls into question whether he is capable performing the requisite duties of a BPD officer. For the above stated findings of fact and conclusion, there is just cause for the bypass of the Appellant from the position of Boston police officer.

The appeal of the Appellant, Christopher J. O’Roarke in Docket No. G1 -13-57 is hereby
denied.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on September 19, 2013.

A True Record. Attest:

Commissioner

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 as stated below.

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 from the effective date specified in 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:

John J. Greene, Esq. (for the Appellant)
Meryum Khan (for the Respondent)