

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

FRANKLIN ORTIZ,
Appellant

v.

G1-12-107

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Stephen J. Delamere, Esq.
839 Washington Street
Stoughton, MA 02072

Appearance for Respondent:

Nicole Taub, Esq.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to G.L. c. 31, §2(b), Franklin Ortiz (Mr. Ortiz) contests the decision of the Boston Police Department (Department) to bypass him for original appointment to the position of Boston police officer. Mr. Ortiz filed an appeal with the Civil Service Commission (Commission) on March 19, 2012. A pre-hearing was held on May 8, 2012 and a full hearing was held on July 19, 2012. All witnesses, with the exception of Mr. Ortiz, were sequestered. The full hearing was digitally recorded and both parties received a CD of the proceeding. The

parties submitted post-hearing briefs in the form of proposed decisions on September 20, 2012 (Department) and September 21, 2012 (Mr. Ortiz).

FINDINGS OF FACT:

Fifteen (15) exhibits were entered into evidence. Based on the documents submitted and the testimony of the following witnesses:

For the Department:

- Detective Wayne Williams, Boston Police Department;
- Robin Hunt, Director, Human Resources, Boston Police Department;

For Mr. Ortiz:

- Franklin Ortiz, Appellant;
- Sergeant Detective Thomas J. O’Leary, Boston Police Department;

I make the following findings of fact:

1. Mr. Ortiz is twenty-eight (28) years old. He was born in the Dominican Republic. When he was twelve (12) years old, his family, including three (3) older sisters, moved to the United States. Mr. Ortiz did not speak English at the time. Mr. Ortiz initially attended Hyde Park High School where he was robbed at knife point. In 1998, his parents purchased a home in Jamaica Plain and he transferred to Brighton High School. His parents are hard-working, religious individuals who tried to steer him away from gangs in the surrounding neighborhoods. (Testimony of Mr. Ortiz)
2. On January 4, 2002, while Mr. Ortiz was a senior in high school, he, along with his male cousin and a male friend, were walking down Wyman Street toward Centre Street in Jamaica Plain. (Testimony of Mr. Ortiz)
3. Two (2) Boston police officers patrolling the area stopped Mr. Ortiz and the two (2) other males, told them that they were investigating robberies in the area and asked them each for

identification. After the three (3) males showed their identification, the police officers told them that they were “good kids” and to move along. (Testimony of Mr. Ortiz)

4. Shortly after the police officers left the area, Mr. Ortiz’s friend and cousin tried to steal a car while Mr. Ortiz stood next to the car. (Testimony of Mr. Ortiz)
5. At 7:55 P.M., the same two (2) police officers who had stopped the three (3) males earlier, received a dispatch regarding three suspects “casing cars” on Wyman Street. (Exhibit 6)
6. When the two police officers pulled up to where Mr. Ortiz was standing, Mr. Ortiz asked, “Have you seen my friends?” to which one of the police officers responded “Yes, they’re sitting in the car you’re standing by.” (Exhibit 6)
7. The two (2) police officers observed one (1) of the males sitting in the driver’s seat of the car with a small black handle screwdriver in his possession. The police officers also observed the other male sitting in the passenger seat in possession of a long orange screwdriver. The police officers observed extensive damage to the car’s ignition. (Exhibit 6)
8. Mr. Ortiz (and the two others) was arrested and charged with three offenses: possession of burglarious tools; knowingly receiving stolen property (a motor vehicle); and breaking and entering in the nighttime with an intent to commit a felony. (Exhibit 7)
9. Mr. Ortiz, his cousin and his friend, accompanied by their parents, went to the home of the car’s owner, apologized and agreed to pay for any damages. (Testimony of Mr. Ortiz)
10. On March 25, 2002, Mr. Ortiz admitted to sufficient facts regarding the possession of burglarious tools charge. The case was continued without a finding until September 25, 2002, during which time Mr. Ortiz was required to perform forty (40) hours of community service. After performing the required community service, the case was dismissed. (Exhibit 7)

11. The other two charges (knowingly receiving stolen property and breaking and entering in the nighttime with an intent to commit a felony) were dismissed. (Exhibit 7)
12. Due to an apparent data-entry error at the time, Mr. Ortiz's "BOP" Report erroneously stated that two (2) of the charges against him (possession of burglarious tools *and* knowingly receiving stolen property) were continued without a finding, as opposed to one (1) charge. (Exhibits 2 and 3)
13. On May 24, 2002, Mr. Ortiz graduated from Brighton High School. (Testimony of Mr. Ortiz and Exhibit 1)
14. In March 2003, Mr. Ortiz was attending a baby shower in Roslindale with his friend, Quirico Romero. As Mr. Ortiz and Mr. Romero were leaving the event, there was an argument between a person not admitted to the party and another party-goer. The person not admitted to the party pulled out a gun and fired a shot into the air. Mr. Ortiz and Mr. Romero ran toward Mr. Ortiz's car when two (2) more shots were fired. (Testimony of Mr. Ortiz)
15. Mr. Ortiz told Mr. Romero that it was not safe on the street and to hide in a fenced yard. Once inside the yard, Mr. Romero told Mr. Ortiz that he had been shot. Mr. Ortiz didn't believe Mr. Romero until Mr. Romero took off his shirt and Mr. Ortiz saw a hole in Mr. Romero's chest and blood pouring out of the wound. (Testimony of Mr. Ortiz)
16. Mr. Ortiz called 911 for assistance. Mr. Romero stumbled out of the yard onto the next street. Mr. Ortiz stayed with Mr. Romero and directed the emergency personnel to their location. Mr. Romero was taken to Brigham and Women's Hospital by ambulance. (Testimony of Mr. Ortiz)
17. Mr. Ortiz returned to his car and drove to the hospital to check on Mr. Romero. Mr. Romero subsequently died from his injuries. (Testimony of Mr. Ortiz)

18. At the hospital, Mr. Ortiz met Boston Police Sergeant Detective Thomas O’Leary. Sergeant O’Leary was assigned to the Homicide Unit investigating the murder and was at the hospital to identify and question witnesses. (Testimony of Mr. Ortiz and Sergeant O’Leary)
19. Sergeant O’Leary has been employed by the Department for twenty-eight (28) years. He is assigned to “Area B2” in Roxbury and has been a sergeant since 1991. He worked in the Homicide Unit from 1993 to 1998. (Testimony of Sergeant O’Leary)
20. Of the twenty (20) or thirty (30) potential witnesses at the hospital that night, Mr. Ortiz was the only person who agreed to come to the Department’s homicide unit and identify the person who shot Mr. Romero. (Testimony of Sergeant O’Leary)
21. Mr. Ortiz went through a photo array and identified the person who shot Mr. Romero. Mr. Romero also testified before a Grand Jury and then during two (2) trials as the first trial ended in a hung jury. The second trial resulted in a first degree murder conviction. (Testimony of Sergeant O’Leary)
22. Subsequent to these events, Sergeant O’Leary became a mentor to Mr. Ortiz, encouraging Mr. Ortiz to consider a career in law enforcement. The two men have developed a close relationship and Sergeant O’Leary testified that Mr. Ortiz “is like a son to me.” (Testimony of Sergeant O’Leary)
23. Mr. Ortiz enrolled at Bunker Hill Community College in 2006 and received an Associates degree in criminal justice in 2008. He has also taken courses at Boston University Metropolitan College. (Testimony of Mr. Ortiz and Exhibit 1)
24. From 2006 to 2008, Mr. Ortiz served as a Public Safety Officer for Boston University Medical Center. Since 2008, he has served as a Correction Officer with the Suffolk County Sheriff’s Office. (Exhibit 1)

25. Mr. Ortiz's supervisor at Boston University Medical Center described Mr. Ortiz as "punctual, reliable, performs all tasks, requires little supervision, and knowledgeable." Mr. Ortiz's supervisor at the Suffolk County Sheriff's Office described him in similar terms. (Exhibit 2)
26. In 2007, Mr. Ortiz got married. He has a four (4) year-old son. He is currently separated from his wife. (Testimony of Mr. Ortiz)
27. In 2009, Mr. Ortiz took the civil service examination for Boston police officer and received a score of 97. As a result, his name was placed on an eligible list of candidates on March 16, 2010. (Stipulated Facts)
28. On August 9, 2011, Mr. Ortiz was issued a License to Carry a Firearm by the Boston Police Department. There are no restrictions on the license, which expires in 2016. (Exhibit 2)
29. On August 19, 2011, the Department requested a Certification from the state's Human Resources Division (HRD) from which it eventually made seventy-six (76) conditional offers of employment. (Stipulated Facts)
30. Mr. Ortiz's name appeared high enough on the Certification to be within the statutory "2n + 1" formula and be considered for employment. (Stipulated Facts)
31. On September 23, 2011, Mr. Ortiz completed an application for employment with the Department. (Exhibit 1)
32. Boston Police Detective Wayne Williams was assigned to complete a background investigation regarding Mr. Ortiz's candidacy. (Exhibit 2 and Testimony of Detective Williams)
33. At the outset of his investigation, Detective Williams ran a "BOP" request, which indicated, erroneously, that two (2) felony charges (receiving stolen property and possession of burglarious tools) against Mr. Ortiz were continued without a finding (CWOFF) in 2002.

Knowing that a felony *conviction* was an automatic, statutory disqualifier for police officers, Detective Williams spoke with his supervisor to ensure that a CWOFF regarding a felony charge was not a disqualifier. He was told that it was not and was instructed to proceed with the background investigation. (Testimony of Detective Williams)

34. Detective Williams proceeded with the investigation by reviewing the January 4, 2002 police incident report, interviewing Mr. Ortiz, and reviewing a letter written by Mr. Ortiz which had Mr. Ortiz's court docket sheet attached to it. (Testimony of Detective Williams)
35. The letter from Mr. Ortiz and the court docket sheet both indicate, contrary to the BOP report, that only the charge of possession of burglarious tools was continued without a finding while the other two (2) charges were dismissed outright. (Exhibits 5 and 7)
36. Detective Williams also interviewed prior employers, references and neighbors as part of his background investigation of Mr. Ortiz. (Testimony of Detective Williams)
37. At the conclusion of his investigation, Detective Williams prepared a summary of his investigation. Relying on the erroneous BOP report, Detective Williams's summary stated that two charges against Mr. Ortiz (receiving stolen property and possession of burglarious tools) were continued without a finding. (Exhibit 2)
38. The summary prepared by Detective Williams contains no information regarding Mr. Ortiz's role as a witness in a Department-led murder investigation that resulted in a murder conviction. (Exhibit 2)
39. Robin Hunt is the Director of Human Resources for the Department. She has held that position since 2005 and has worked for the Department since 1999. She reports to Edward Callahan, the Department's Bureau Chief for Administration and Technology. (Testimony of Ms. Hunt)

40. Ms. Hunt has oversight responsibility for all aspects of the Department's hiring process. She has participated in fifteen (15) hiring rounds during her tenure as the Director of Human Resources. After the background investigation is completed, the Department convenes a "roundtable" of Department officials to review the candidates under consideration.

(Testimony of Ms. Hunt)

41. I take administrative notice of the fact that, prior to convening a roundtable, the Department opts to conduct a "discretionary interview" of certain candidates to address questions that have arisen during the background investigation. There is no evidence that Mr. Ortiz was granted a discretionary interview here and I infer that he was not.

42. The roundtable regarding this hiring cycle convened on October 27, 2011 and was attended by Ms. Hunt; Deputy Superintendent Michael Cox, Commander of Internal Affairs; Captain Doherty, Commander of Recruit Investigations; Detective Wayne Williams; and Attorney Sheila Gallagher, labor counsel. (Testimony of Ms. Hunt)

43. The roundtable erroneously believed that Mr. Ortiz had two (2) felony charges against him continued without a finding. Ms. Hunt did not learn until after Mr. Ortiz filed an appeal with the Commission that only one (1) charge (possession of burglarious tools) was continued without a finding while the other two charges were dismissed outright. (Testimony of Ms. Hunt)

44. After reviewing the summary and attachment submitted by Detective Williams, the roundtable had concerns that Mr. Ortiz had exercised poor judgment in regard to the January 2002 incident. Specifically, they were concerned that Mr. Ortiz decided to stay in the area while his friends attempted to break into a vehicle. They concluded that Mr. Ortiz attempted

to evade police detection by asking officers if they had seen his friends, who were in the vehicle that he was standing next to. (Testimony of Ms. Hunt)

45. The roundtable was unaware that, subsequent to the 2002 incident, Mr. Ortiz served as a witness in a Department-led murder investigation that resulted in a murder conviction. (Testimony of Ms. Hunt)

46. During the last three (3) years, the Department has not appointed any individuals with a CWOFF regarding a *felony* charge. The Department has appointed individuals with a CWOFF for *misdemeanor* charges including: minor transporting alcohol, disorderly conduct and failure to disperse; and operating to endanger. (Exhibit 14)

47. Ms. Hunt does not recall any instance during her tenure as the Department's Director of Human Resources in which an individual with a CWOFF on a felony charge was appointed to the position of police officer. (Testimony of Ms. Hunt)

48. On January 23, 2012, the Department notified Mr. Ortiz that he was being bypassed. The bypass letter stated in relevant part that, "The Department has significant concerns over your criminal history. In January 2002, you were charged with B & E at night with intent to commit a felony, possession of burglarious tools and knowingly receiving stolen property (a motor vehicle). You received a Continued Without a Finding (CWOFF) disposition on both possession of burglarious tools and knowingly receiving stolen property (a motor vehicle). Therefore you admitted to sufficient facts in two felony charges." (Exhibit 13)

49. On March 19, 2012, Mr. Ortiz filed an appeal with the Commission. (Stipulated Fact)

50. On May 8, 2012, a pre-hearing conference was held at the offices of the Commission.

51. Subsequent to the pre-hearing conference, Mr. Ortiz had the state's Criminal Justice Information System update his "BOP" records.

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, § 1.

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge at 304. Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

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. Beverly. The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining

whether there was “reasonable justification” shown. Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates. Beverly citing Cambridge at 305, and cases cited.

ANALYSIS

There is no evidence to show that the Department’s decision to bypass Mr. Ortiz was based on overtones of political or personal bias.

The preponderance of the evidence, however, shows that the Department’s review of Mr. Ortiz was not reasonably thorough. Rather, the investigation relied on erroneous information and did not include other relevant information that should have been available to the Department’s roundtable -and Boston Police Commissioner Ed Davis- prior to bypassing Mr. Ortiz in favor of candidates ranked lower than him on the civil service Certification.

The roundtable of Department officials relied on an erroneous report which indicated that two (2) felony charges, including receiving stolen property (a motor vehicle) had been continued without a finding. As stated in the findings, this is not the case. That charge was dismissed outright and the only charge that was continued without a finding was the charge of possession of burglarious tools. In their post-hearing brief, the Department argues that it was entitled to rely on the BOP report which existed at the time. This argument may have some merit had Mr. Ortiz not informed the Department, in writing, of the correct disposition of those charges during the hiring process. Mr. Ortiz also attached the actual court docket sheet, which has the correct information, to his hand-written letter. Further, the Department’s own witness, Detective Williams, candidly acknowledged that he simply misread the court docket sheet that was provided to him by Mr. Ortiz.

The roundtable was also unaware that, subsequent to the 2002 incident, which occurred while Mr. Ortiz was in high school, he subsequently served as a witness in a Department-led murder investigation. At great risk to his own safety, Mr. Ortiz stepped forward and testified before a Grand Jury and then at two trials to identify the individual who murdered his friend. His testimony helped secure a murder conviction that resulted in a life sentence. The Department argues that the courageous actions of Mr. Ortiz are “not sufficient to outweigh the Department’s concerns” about the 2002 incident. The problem with that argument is that the roundtable was not even aware of this information and, thus, did not have the opportunity to determine what weight, if any, it should be given. While it is impossible to guarantee that a review panel is made aware of all aspects of a candidate’s background, it is inconceivable to me that the review panel was not armed with this information when making its hiring decision.

It is apparent that Mr. Ortiz, unlike some other candidates, was not granted a discretionary interview as part of the selection process. While this is not a fatal flaw and I do not rely on this in making my decision, such an interview clearly would have given the Department the opportunity to receive this information directly from Mr. Ortiz.

Further, the Department argues that, even if they had been presented with a complete and accurate description of Mr. Ortiz, they would have made the same decision because of their “longstanding practice” to bypass candidates with a CWOFF related to a felony charge. In fact, Ms. Hunt went a step further during her testimony and stated that the Department “does not consider” candidates who have CWOFFs related to a felony charge. While the Department reviewed its records to verify that they made no such appointments in the last three (3) years – and cited other Commission decisions to support this statement - I am not persuaded by their argument in this particular case. There is no written policy indicating that individuals with a

CWOF to a felony cannot be considered for employment by the Department. In fact, when Detective Williams inquired if a CWOF for a felony charge was an automatic disqualifier, he was told “no” and to proceed with the background investigation. Further, Ms. Hunt was equivocal in her testimony regarding how this practice was established and whether it would apply in all situations. This indicates that the Department is willing to consider such candidates on a case-by-case basis to determine if they should be appointed or bypassed. As referenced above, that consideration was flawed as the roundtable was presented with erroneous and incomplete information about Mr. Ortiz. For these reasons, Mr. Ortiz should be given the opportunity to be reconsidered as part of a complete, thorough, review process.

While I did not rely on this in reaching my conclusion, I am also concerned about another aspect of the hiring process here. It is the Boston Police Commissioner alone who has the authority to “appoint, establish and organize” the police force. St. 1962, c. 322, § 10. As such, the Police Commissioner is the “appointing authority” for civil service purposes. When initially asked during her testimony “who is the appointing authority?” [for the Boston Police Department], Ms. Hunt stated, “I am the representative for Edward Davis .. the Police Commissioner”. Ms. Hunt signed the letter to Mr. Ortiz indicating that he was being bypassed. Later, in response to my questions, Ms. Hunt confirmed that Commissioner Davis was indeed the appointing authority. When I asked her, however, if she had ever discussed with Commissioner Davis the “practice” of not appointing individuals with a CWOF related to a felony charge, Ms. Hunt stated that she had not. Further, she could not state with certainty that Commissioner Davis was even aware of this practice. This is more than a technicality. While Ms. Hunt is a consummate professional who performs her job well, neither she, nor the members of the roundtable, serve as the appointing authority. While nothing prevents the Police Commissioner,

as is common in many cities and towns, from utilizing a screening committee and investigators to gather information and make recommendations, the responsibility for police officer appointments ultimately rests solely with him.

There was no conclusive evidence to show that the Police Commissioner is aware of the Department's "practice" not to consider any candidate who has a CWOFF related to a felony charge. Further, even if the Commissioner has approved of such a practice, he would not have been presented with accurate and complete information regarding Mr. Ortiz to determine if it should apply here. It appears that nobody in the hiring process, from the investigator, to the members of the roundtable, to the Police Commissioner, was made aware of the courageous acts of Mr. Ortiz regarding his testimony in a murder trial.

Put another way, if the Police Commissioner had the benefit of a reasonably thorough investigation, which showed: that Mr. Ortiz had received a CWOFF on only one charge (while he was in high school); that Mr. Ortiz had stepped forward to testify in a Department-led murder investigation; that Mr. Ortiz had been mentored by a veteran Boston police officer; that Mr. Ortiz received an associates degree in criminal justice; that Mr. Ortiz had been issued a license to carry a firearm by the Department; and that Mr. Ortiz been employed for several years as a correction officer, would he have decided to bypass Mr. Ortiz in favor of lower-ranked candidates? That question can only be answered through a reconsideration of Mr. Ortiz's candidacy, which I believe is warranted here.

CONCLUSION

Mr. Ortiz's appeal under Docket No. G1-12-107 is hereby *allowed*.

Pursuant to the Commission's authority under Chapter 310 of the Acts of 1993, the state's Human Resources Division (HRD) is hereby ordered to place the name of Franklin Ortiz at the top of the next Certification for the position of permanent-full-time Boston police officer until such time as he is appointed or bypassed. If Mr. Ortiz is appointed, he shall receive a retroactive civil service seniority date, for civil service purposes only, the same as those appointed from Certification No. 202233. This retroactive seniority date is not meant to provide Mr. Ortiz with any additional compensation or other monetary benefits, including creditable service toward retirement.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on October 18, 2012.

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.

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:

Stephen Delamere, Esq. (for Appellant)
Nicole Taub, Esq. (for Respondent)
John Marra, Esq. (HRD)