

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

BRIAN PERRY,
Appellant

v.

G1-11-237

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

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

Appearance for Respondent:

Sheila B. Gallagher, Esq.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman^{1,2}

DECISION

Pursuant to G.L. c. 31, §2(b), Mr. Perry, Brian Perry (Mr. Perry) contests the decision of the Boston Police Department (Department) to bypass him for original appointment to the position of Boston police officer. A full hearing was held over two (2) days on October 24, 2011 and November 30, 2011. All witnesses, with the exception of Mr. Perry, were sequestered. Both parties submitted post-hearing briefs in the form of proposed decisions.

¹ This case was heard by Commissioner Daniel Henderson, whose term expired before drafting a decision. Pursuant to 801 CMR 1.00(11)(e), this case was reassigned to Commissioner Christopher Bowman, who reviewed the CD of the hearing, the notes of Commissioner Henderson, and exhibits, and drafted a decision.

² The Commission acknowledges the assistance of Law Clerk Meredith Havard in preparing this decision.

FINDINGS OF FACT:

Eleven (11) exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

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

For Mr. Perry:

- Brian Perry, Appellant;
- Rebecca Lohmar;
- Jacqueline Burke;
- Officer Daniel Griffin;
- Officer Sean Pero;
- Matthew Gerard;

I make the following findings of fact:

1. At the time of the bypass, Mr. Perry was twenty-eight (28) years old. He currently resides in Dorchester, Massachusetts with his parents, brother and sister. He is currently employed by Federal Express, where he has worked for six (6) years. Mr. Perry also volunteers for the Dorchester Hockey League and the Cedar Grove baseball league. (Exhibit 2 and Testimony of Appellant)
2. On April 25, 2009, Mr. Perry took and passed a civil service examination for the position of police officer. He received a score of 99. As a result of passing the examination, his name was placed on an eligible list of candidates for Boston police officer on March 16, 2010. (Stipulated Facts)
3. On January 6, 2011, the Department requisitioned a Certification from the state's Human Resources Division (HRD) seeking the names of eligible individuals to appoint forty-five (45) police officers. (Stipulated Fact)

4. On January 24, 2011, HRD sent Certification No. 203604 to the Department. Mr. Perry's name appeared on page 17 of the Certification. The Department eventually appointed forty-five (45) individuals from this Certification, eleven (11) of whom were ranked below Mr. Perry, thus constituting a bypass which is the subject of this appeal. (Stipulated Facts)
5. On February 15, 2011, Mr. Perry completed a Student Officer Application and submitted it to the Department. (Exhibit 2)
6. Detective Wayne Williams was the officer assigned to investigate Mr. Perry's background. By accessing Mr. Perry's Board of Probation Record, Detective Williams discovered that, in 2005, Mr. Perry had been arrested for assault and battery with a dangerous weapon (a beer bottle) and resisting arrest. (Testimony of Wayne Williams and Exhibit 5)
7. The charge of assault and battery with a dangerous weapon was dismissed upon the request of the Commonwealth. (Exhibit 7)
8. The charge of resisting arrest was dismissed upon the request of the Probation Department after twenty (20) hours of community service was completed. (Exhibit 7)
9. As part of his investigation, Detective Williams reviewed the police report and booking sheet associated with Mr. Perry's charges. (Testimony of Wayne Williams and Exhibit 3)
10. The police report narrative regarding the November 24, 2005 incident states, in its entirety:

“About 01:30 AM Officers Pusey and Lam in the H202A Unit while in the parking lot at 500 Geneva Avenue. Officer Pusey observed a while later ID as (Brian Perry DOB#[redacted]) hit a (sic) another white male later ID as [redacted] with a beer bottle over his head. Officer observed the victim felled (sic) to the ground with other people holding the suspect back. Officers went over to the suspect who was walking away from the scene. Officer informed suspect that he was under arrest and to put his hands behind his back. Suspect states ‘Fuck You, Your’s (sic) not arresting me’. Suspect took off running across Dorchester Ave and down Park Street. Officers run (sic) after suspect who stop (sic) after a brief foot chased (sic). Suspect stop (sic) turned in a fighting mode with his hands folded. Suspect states for the second times (sic) ‘Your’s (sic) not arresting me’. Officers Pussey and Lam was (sic) able to gain control of the suspect and placed him under arrest. Victim suffer (sic) what EMT’s called serious head injures (sic). Victim was taking (sic) to Boston Medical Center

by ambulance 33 for further treatments. Officers spoke with several female witness (sic) who states (sic) that victim [name redacted] was in the bar grabbing and touching the witness (sic) ass and other private parts. [Name redacted] states that the victim put his hands [redaction in original] and states, "I want get in there". To be further investigated by C-11 detective." (Exhibit 3)

11. After reviewing the incident report, Detective Williams spoke with both arresting officers.

Officer Pusey told Detective Williams that he remembered the incident well, confirmed the information in the incident report and added that Mr. Perry had told him that night that he was only "defending the honor of a girl." Officer Pusey told Detective Williams that he remembered going to Dorchester District Court regarding this matter at which time the victim failed to appear. Officer Pusey told Detective Williams that the assault and battery with a dangerous weapon charge was then dropped and the resisting arrest charge was dismissed upon the completion of community service. In a separate conversation, Officer Lam confirmed the details of the incident report, but did not recall the court disposition.

(Testimony of Wayne Williams and Exhibit 8)

12. Detective Williams also conducted a home interview with Mr. Perry, where he asked Mr.

Perry about the incident. (Testimony of Wayne Williams)

13. The Department also granted Mr. Perry a discretionary interview to address the incident which led to his arrest, which was attended by Sergeant Detective Catherine Doherty, Deputy Superintendent Michael Cox and Detective Williams. As part of the interview, he denied ever striking another individual over the head with a bottle or running away from the police officers when they tried to arrest him.(Exhibit 10)³

14. As part of its traditional hiring process, the Department convenes a "roundtable" of police officials, to review the candidates under consideration. Typically, the roundtable includes

³ The DVD of the discretionary interview was entered as Exhibit 10, played at the hearing before the Commission and reviewed by this Commissioner.

the Commander of Recruit Investigations, the Director of Human Resources, a Deputy Superintendent from Internal Affairs, an attorney from the Legal Advisor's office, and, on occasion, the detective who investigated the applicant. (Testimony of Robin Hunt)

15. As part of its review, the roundtable considers a candidate's entire background, including, but not limited to, the applicant's criminal history, driver history, military history, employment history, residency, etc. (Testimony of Robin Hunt)

16. During the roundtable discussion of Mr. Perry, significant questions and reservations arose as to how Mr. Perry had conducted himself during the 2005 incident for which he was arrested. Members of the roundtable reviewed the police report, booking sheet and court docket. Members of the roundtable were very concerned about the facts detailed in the incident report including the statement that Mr. Perry ran away from police after being told he was under arrest. (Testimony of Robin Hunt)

17. Members of the roundtable were surprised that Mr. Perry denied any involvement in the 2005 incident and that this denial led the Department to question his veracity. (Testimony of Robin Hunt)

18. In a letter to Mr. Perry dated June 9, 2011, the Department informed Mr. Perry that he was being bypassed because of: 1) his actions in November 2005 which led to his arrest; and 2) questions about his veracity due to his denials about the incident. (Exhibit 1) This appeal followed.

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). 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, or even suggest, that the Department's decision to bypass Mr. Perry was based on overtones of political bias or objectives unrelated to basic merit principles.

Thus, the issue before the Commission is whether the Department "conducted an impartial and reasonably thorough review that confirmed that there appeared to be a credible basis for the allegations" which resulted in the decision to bypass Mr. Perry. Beverly The Department does *not* have the burden of proving that its primary reason for bypassing Mr. Perry – his 2005 arrest – is true. (See Boston Police Dep't v. Walker and Mass. Civ. Serv. Comm'n, No. 09-5097, Suffolk Super. Court (2010) citing Beverly at 190.

A preponderance of evidence here shows that the Department did indeed conduct an impartial and reasonably thorough review of the allegations against Mr. Perry that provided a credible basis for the allegations against him.

Detective Wayne Williams, a veteran police officer with no personal stake in whether Mr. Perry is appointed, reviewed a Board of Probation report which showed that Mr. Perry was arrested in November 2005 for assault and battery with a dangerous weapon and resisting arrest.

Detective Williams then retrieved and reviewed the documents related to this arrest, including the police incident report and the court docket sheet, which showed that the assault and battery with a dangerous weapon charge was dismissed at the request of the Commonwealth and the resisting arrest charge was dismissed after Mr. Perry completed twenty (20) hours of community service. The police incident report offered a detailed account of the incident based on the personal observations of the police officers.

Detective Williams then personally spoke with both of the arresting officers, both of whom had an independent recollection of the incident in question. After speaking with the arresting officers, Detective Williams spoke directly with Mr. Perry.

After Detective Williams submitted his background investigation report to the Department, Mr. Perry was granted a discretionary interview, attended by Detective Williams and two (2) senior officials of the Department, at which time Mr. Perry was given an opportunity to explain what happened on the night in question in November 2005.

Ultimately, a roundtable of Department officials, after reviewing the entirety of Mr. Perry's background investigation, had significant concerns over Mr. Perry's arrest and the actions that led to his arrest. Further, they questioned Mr. Perry's veracity based on his denials at the discretionary interview.

Mr. Perry, who denies that he ever struck another individual with a beer bottle or resisted arrest, is asking the Commission to credit his testimony, and the testimony of other witnesses who testified before the Commission, over the arrest reports and the statements made by the arresting officers to Detective Williams. Based on a careful review of their testimony before the Commission, there are ample reasons for not doing so.

First, all of the witnesses who testified for Mr. Perry acknowledged their friendship with him.

Second, all but one of the witnesses testified that they were not with Mr. Perry at all relevant times on the night in question. Rather, most of Mr. Perry's witnesses acknowledged that they did not observe Mr. Perry at all relevant times. Although one witness, Mr. Gerard, testified that he was with Mr. Perry at all relevant times, and that he did not see Mr. Perry strike someone with a beer bottle, he also testified that that he and Mr. Pero, walked their female friends to their car.

All of the other witnesses stated that only Mr. Perry walked the females to their car before returning to where Mr. Gerard and Mr. Pero were waiting.

Third, there were inconsistencies in Mr. Perry's testimony before the Commission. Mr. Perry stated in his discretionary interview that he and the man who allegedly touched a female inappropriately were asked to leave by the bouncers of the nightclub stating, "they (the bouncers) asked us to leave the bar." During his testimony before the Commission, Mr. Perry testified that the bouncers asked the alleged victim to leave and that he (Mr. Perry) was not asked to leave the premises.

During the discretionary interview, Mr. Perry stated that he saw the alleged victim in the middle of a group, where various people were yelling and screaming at the victim upon leaving the bar. Mr. Perry then stated that he engaged in a shouting match with the victim. During his testimony before the Commission, Mr. Perry did not mention a shouting match outside of the nightclub. Rather, Mr. Perry testified that he walked outside of the nightclub and past a nearby establishment, the Blarney Stone, where it was chaotic. Mr. Perry also stated during the discretionary interview that there was a huge circle of people screaming at the alleged victim, but he stated that he was only watching from the sidewalk, which differs from his statements earlier in the interview. Also, during the discretionary interview, Mr. Perry stated that he had no idea what he was being charged with until he was released the next morning. During his testimony before the Commission, he testified that an officer *did* tell him why he was being arrested.

In summary, the Department conducted an impartial, reasonably thorough review of Mr. Perry's background. They were justified in relying on the police incident reports and the statements of the arresting officers in making a decision to bypass Mr. Perry for appointment as a

police officer and, for the reasons cited above, I do not credit the testimony of Mr. Perry and the other witnesses over those reports and statements.

For these reasons, Mr. Perry's appeal under Docket No. G1-11-237 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on September 20, 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:

John J. Greene, Esq. (for Appellant)
Sheila Gallgaher Esq. (for Appointing Authority)
John Marra, Esq. (HRD)