

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200

Boston, MA 02114

NAYR PINA,

Appellant,

G1-22-040

v.

BOSTON POLICE DEPARTMENT,

Respondent.

Appearance for Appellant:

James Gilden, Esq.

173 N Main St

Sharon, MA 02067-1230

Appearance for Respondent:

Joseph McClellan, Esq.

Boston Police Department

Office of the Legal Advisor

One Schroeder Plaza

Boston, MA 02120

Commissioner:

Shawn C. Dooley

SUMMARY OF DECISION

The Commission affirmed the decision of the Boston Police Department to bypass the Appellant for appointment as a police officer based on her failure to be forthcoming with BPD investigators during the application and review process as well as the numerous past and continuing relationships with known criminals / gang members.

DECISION

On September 23, 2022, the Appellant, Nayr Pina (Appellant), pursuant to the provisions of G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from a decision by the Boston Police Department (Department or BPD) to bypass the Appellant for original

appointment to the position of Boston police officer.¹ The Appellant timely appealed the Department's decision to the Commission and a remote pre-hearing conference was held via videoconference (Webex) on November 15, 2022. I held an in-person full hearing at the offices of the Commission on February 7, 2023. The hearing was recorded via Webex.² On March 15, 2023, the parties filed proposed decisions. For the reasons set forth below, Ms. Pina's appeal is denied.

FINDINGS OF FACT

The Appellant entered one exhibit into evidence (Bates Stamp A001) and the Respondent entered 16 exhibits into evidence (numbered 1-16, Bates Stamp R001 – R0208). Based on the documents submitted and the testimony of the following witnesses:

Called by the BPD:

- Detective Anthony Cutone (Detective Cutone), Recruit Investigation Unit (RIU), Boston Police Department
- Deputy Superintendent Eddy Chrispin (Deputy Superintendent Chrispin), Boston Police Department

Called by the Appellant:

- Nayr Pina, Appellant

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

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.01, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

² A link to the audio/video recording was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing

Appellant's Background

1. The Appellant is a 30-year-old, single parent. She is the sole supporter of a 7-year-old daughter. She resides in the City of Boston but was raised and educated in Everett. She graduated from high school and subsequently attended a beauty school. (*Appellant Exhibit 1*).
2. The Appellant has been employed at a beauty salon since 2012 which is owned by the Appellant's mother. Although the Appellant has desired to become a police officer for many years, she attended beauty school at the encouragement of her mother so she could take over the mother's business at some future time. (*Appellant Exhibit 1*)
3. In addition to her full-time beautician job, the Appellant works part-time as a bartender. (*Testimony of Appellant*)
4. The Appellant's business and personal references were all positive. In addition, her credit score is excellent. (*Respondent Exhibit 3*)
5. The Appellant has no criminal record. (*Respondent Exhibit 3*)
6. The Appellant's driving history (*Respondent Exhibit 3*) includes:
 - 2019 – Surchargeable accident
 - 2019 – Improper turn (warning)
 - 2019 – Windows obstructed (warning)
 - 2018 – Speeding (responsible)
 - 2015 – Failure to obey sign (responsible)
 - 2014 – Surchargeable accident
 - 2012 – Equipment violation (responsible)
 - 2012 – Speeding (responsible)
 - 2010 – Surchargeable accident
 - Appellant completed a NSC class in 2012

7. The Appellant's school disciplinary record includes 15 incidents of suspensions or detentions.³ (Respondent Exhibit 3).

Application / Review Process

8. The Appellant took and passed the civil service examination for police officer on July 1, 2021. The state's Human Resources Division (HRD) established an eligible list of candidates for Boston police officer. On September 1, 2021, HRD sent Certification No. 08099 to the Department. The Appellant was ranked 61 among those candidates willing to accept appointment. Of the candidates selected for appointment by the Department, 110 were ranked below the Appellant. (Stipulated Facts)

9. The Appellant completed her application to the Department on or around October 25, 2021. (*Respondent Exhibit 1*).

10. The Appellant signed an attestation on page 50 of the application, stating, "I have read each question asked of me and understood each question. My statements in this form and any attachments/documents submitted in support of my application are true and correct to the best of my knowledge and belief and are made in good faith." (*Respondent Exhibit 1*)

11. Detective Anthony Cutone was assigned to review the Appellant's application and conduct the background investigation. During a review of police incident reports involving the Appellant, Det. Cutone discovered what he considered discrepancies related to the Appellant's disciplinary history in high school and her relationship form. (*Testimony of Det. Cutone*)

³ The Appellant stated when questioned about the suspensions that all but one of these were "in school "suspensions" and therefore she did not think of them as actual suspensions, which is why she did not include mention of them in her application.

The Appellant's associations:

12. The Appellant was in a romantic relationship with PS between 2015 and March 2018
(Respondent Exhibit 1)
13. Prior to and after ending his relationship with the appellant, PS has an extensive criminal history; he has 40 adult arraignments and cases for Trafficking Cocaine, Possession of a Firearm, Possession of Ammunition, and Possession to Distribute Class D. *(Respondent Exhibit 11)*
14. PS did not have pending criminal charges when he was in a relationship with the Appellant.
(Testimony of the Appellant; Respondent Exhibit 1).
15. The Appellant acknowledges that she dated "SS" on at least two occasions over a period of approximately a month. On August 30, 2020, the Appellant called the Boston Police to report that her "ex-boyfriend" (SS) assaulted her at her home. *(Testimony of the Appellant and Boston Police Record)*
16. SS also has an extensive criminal history beginning in 2011 through 2021; he has been charged with: assault and larceny from a person, discharging of a firearm w/in 500 feet of a building, carrying firearm w/o a license, carrying a loaded firearm w/o a license. *(Respondent Exhibit 11)*
17. In July 2021, the Appellant rented a car and loaned it to an individual named TB. *(Testimony of the Appellant)*
18. TB was a friend of the Appellant, whom she had known for approximately 2 years and she gave him permission to use the rental vehicle so he could pick up party supplies. She did not list him as a driver in the rental agreement. *(Testimony of Appellant)*

19. TB used the rental car and was involved in a pursuit with MA state police. The incident report states that TB was in possession of the car for an entire week. (*Respondent Exhibit 14*).
20. TB also has a criminal record with over 70 entries dating from 2008 through 2021. He has been charged with destruction of property, threatening, and possession with intent to distribute class D substances. (*Testimony of Detective Cutone, Respondent Exhibit 11*)
21. Detective Cutone's investigation also revealed that the Appellant visited KC, an inmate at MCI Concord correctional facility, serving a sentence for armed assault with intent to murder. (*Respondent Exhibit 6*).
22. Detective Cutone obtained phone and visitation records that showed that the Appellant visited KC seven separate times in 2021 and had phone conversations with him 151 times between the period of August 2021 and February 2022. (*Respondent Exhibit 6*).
23. The Appellant testified that she knows KC as a childhood friend and acknowledges visiting and talking to him over the phone. (*Testimony of Detective Cutone, Respondent Exhibit 13*).

The Appellant's Discretionary Interview

24. Detective Cutone and Detective Onishuk conducted a discretionary interview with the Appellant on February 16, 2022. (*Respondent Exhibit 13*)
25. Detective Cutone reminded the Appellant of the statement she signed, stating that her answers would be truthful and honest to the best of her ability. (*Respondent Exhibit 13*)
26. During the interview, the following exchange occurred:
 - Q. And this is KC the one that you're visiting?
 - A. Yes. Well, I haven't been to visit him, but when I was.
 - Q. When was the last time you visited him in prison?
 - A. I think I haven't seen him in like a year. He's been in Shirley for a little bit. I haven't gone to Shirley, and even after that I haven't gone to Concord in a while.
 - Q. Okay. And do you -- so when you call someone at -- in prison --
 - A. I can't call him.
 - Q. They call you?

A. Yeah.
(*Id.*)

27. Det. Cutone obtained visitation records that showed that in 2021, the Appellant visited KC seven separate times in his correctional facility. The most recent time being August 26, 2021 – less than 6 months prior to the interview. (*Respondent Exhibit 6*).
28. The Appellant did visit KC seven times during 2021, driving an hour in total to the facility each time and spending at least 30 minutes with him each time. (*Testimony of the Appellant*).
29. The Appellant described KC as a "nice kid" during her discretionary interview. (*Respondent Exhibit 13*).

The Department's Decision to Bypass the Appellant

30. On or about March 2022, Det. Cutone presented a Privileged and Confidential Memorandum (PCM), which contained a summary of his investigation of the Appellant's background to the roundtable. Thereafter, the roundtable reviewed Det. Cutone's PCM, discussed the Appellant's history and decided to bypass the Appellant. (*Respondent Exhibit 2, Testimony of Deputy Superintendent Chrispin*).
31. Deputy Superintendent Chrispin stated that the round table made the decision to bypass based on their conclusion that the Appellant lacked maturity and good judgment in associating with known criminals. They found her answers during the discretionary interview to be untruthful. (*Testimony of Deputy Superintendent Chrispin*).
32. The roundtable's decision to bypass the Appellant was memorialized in a bypass letter. The roundtable believed that the Appellant's untruthful statements reflected poorly on the Appellant's credibility and capacity for truthfulness, both of which are essential requirements to become a Boston police officer. (*Respondent Exhibit 2*).

33. On August 29, 2022, the Department sent a letter to the Appellant informing her of the Department's decision to bypass her for original appointment to the position of Boston police officer. (*Respondent Exhibit 2*).

APPLICABLE CIVIL SERVICE LAW

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 appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn 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).

Public safety officers are vested with considerable power and discretion and must be held to a high standard of conduct. See, e.g., Falmouth v. Civil Service Comm’n., 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-

305, rev. den., 428 Mass. 1102 (1997); Police Comm’r v. Civil Service Comm’n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986).

An Appointing Authority is well within its rights to bypass an individual for fudging the truth as part of an application for a civil service position. It is reasonable to infer that a person who does so in order to get a job will be inclined to lie on the job. See O’Brien v. Somerville, 25 MCSR 292 (2012). See also Minoie v. Town of Braintree, 27 MCSR 216 (2014); Polin v. Randolph, 23 MCSR 229 (2011).

However, providing incorrect or incomplete information on an employment application does not always equate to untruthfulness. “[L]abeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and [informed] review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety.” Kerr v. Boston Police Dep’t, 31 MCSR 35 (2018), citing Morley v. Boston Police Department, 29 MCSR 456 (2016). Moreover, a bypass letter is available for public inspection upon request, so the consequences to an applicant of charging him or her with untruthfulness can extend beyond the application process initially involved. See G.L. c. 31, § 27, ¶ 2. Thus, the serious consequences that flow from a finding that a law enforcement officer or applicant has violated the duty of truthfulness require that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. See, e.g., Boyd v. City of New Bedford, 29 MCSR 471 (2016); Morley v. Boston Police Dep’t, 29 MCSR 456 (2016); Lucas v. Boston Police Dep’t, 25 MCSR 420 (2012) (mistake about appellant’s characterization of past medical history).

Analysis

The Department has shown, by a preponderance of the evidence, reasonable justification for bypassing the Appellant for appointment as a police officer based on her continued associations with known criminals / gang members as well as her conflicting and less than forthcoming responses as part of the BPD's review process as described below.

Association with KC

The Appellant was asked when she last visited KC, an inmate at a correctional facility serving a multiyear sentence for armed assault with intent to murder. The Appellant responded, "I think I haven't seen him in like a year." In actuality it had been less than six months; as the Appellant visited KC seven times in 2021, most recently on August 26, 2021, as demonstrated by the visitor log. The Appellant testified that she told investigators she was "unsure of the exact time frame." This is also directly contradicted by the evidence in the record; the Appellant never stated she was unsure of the timeframe during the interview.

Further, the Appellant continued to maintain contact with KC despite his conviction of armed assault with intent to murder. The Appellant talked to KC on the phone over 150 times in a six-month period and visited him in person seven times. Despite his violent history and being convicted of attempted murder, the Appellant referred to KC as a "nice kid" during her discretionary interview. While it may be true that KC expressed kindness to her as an individual, it was inappropriate for the Appellant to describe him in this way in a professional setting given his conviction of a violent felony.

Association with SS

The Appellant also failed to disclose her romantic history with SS on her application. It is uncontested that the Appellant neglected to include him on her application, and Det. Cutone only

discovered the relationship through a police report. The Appellant stated that she did not consider her relationship with SS significant enough to constitute a relationship, and she only dated him twice over a month. There is no way to independently verify the actual length of the Appellant's relationship with SS. In the police report she filed, she stated that he was her former boyfriend. The Appellant also stated that she did not include this relationship because she thought she was told that only long-term relationships needed to be disclosed. The written application did not include a "three-year time frame," as asserted by the Appellant during her testimony. The Appellant could have erred on the side of caution and included the relationship in the spirit of full transparency. While the commission would conclude that the preponderance test was not met to show a relationship or knowledge of SS's criminal background, the Appellant has demonstrated a pattern of associating with criminals and members of gangs as well as downplaying negative aspects of her personal history in order to bolster her application.

Association with TB

The Appellant rented a car through a rental agency and loaned it to TB, an individual previously charged with numerous violent felonies. The Appellant failed to list any other driver on the rental application and instead chose to loan her car to TB despite his criminal history. TB was subsequently involved in a motor vehicle pursuit with the MA State Police using the car the Appellant loaned him. The Appellant was either willfully ignorant or negligent in lending her rental vehicle to TB. It is also worth noting that the Appellant testified that she loaned TB the vehicle so that he could gather party supplies. Yet, the incident report located by Det. Cutone states that T.B. was in possession of the car for a full week.

The Appellant's stated reason for engaging in long-term car rentals during a period of time that she owned a car that was in good working order also raises the question of truthfulness.

I did not credit the Appellant's stated reasoning to the rental of the vehicle(s). The Appellant stated that her lease was "way over mileage" and therefore she rented a car several times a month when she had to travel a lot. One of the rentals she stated she had for a couple of weeks, but this is the same vehicle she loaned to TB. This does not further her narrative that she needed this rental car to prevent accruing excess mileage on her leased vehicle from a fiscal or logistical standpoint, and calls into question the true motive behind the rental(s).

Association with PS

The Appellant had a long-term relationship with PS and he is also father of her child. PS has an extensive criminal record with approximately 40 instances noted in his CORI report. While none of these instances occurred during the time that they were actively together, it does give additional weight to the concern that the Appellant has consistently associated with known criminals with significant history.

Further, the Appellant only disclosed one suspension from her educational record on her written application. She later provided a written explanation for the event, stating, "Freshman year of high school I was suspended because of an altercation that happened in school." The Appellant's disciplinary history is far more extensive than what she provided in her application. The Appellant had 43 separate disciplinary issues while enrolled in high school, roughly ten of which were either in-school suspensions or instances where the Appellant was sent home. The Appellant testified that she was confused about her disciplinary history, and she considered the other disciplinary events as "minor" and did not include them. She further clarified that she viewed the other disciplinary events as "detentions" rather than suspensions. Yet, the Appellant's school record notes multiple instances where she was suspended and separate instances where she received detention. The application clearly asks if the applicant has had any disciplinary

action taken at any institution and the appellant responded in the negative. While the appellant may have genuinely confused the different types of suspensions, it is clear that there were numerous additional instances of disciplinary action being taken that she neglected to include. Therefore, the Appellant was not fully transparent and forthcoming when completing her written application.

The Appellant has shown a pattern of immaturity and lack of judgment in associating with individuals with an extensive criminal history and, in one instance, providing them aid under questionable circumstances. The fact that the Appellant has continued to associate with known criminals throughout the application process to become a police officer and has been less than forthcoming about these associations during this process calls into question her ability to distance herself from known criminals if she were to become a police officer.

Each of these relationships, standing alone, would not be sufficient grounds to question the Appellant's judgment. Yet, the recency and frequency of the Appellant's relationships with individuals with extensive criminal history is significant in their totality. While the Appellant explained that some of her questionable friendships and romantic relationships were due to the fact that she grew up in this community and she was simply a victim of circumstance based upon where she was raised, one must consider skeptically deliberate choices made, by a person seeking to become a law enforcement officer, to continue potentially problematic relationships and associations. The Appellant's actions, in their totality, demonstrate that she continues to make poor judgments and calls into question her ability to completely separate from these associations if she were to become a police officer.

Deputy Superintendent Chrispin did state that while the aforementioned issues showed immaturity and lack of good judgement at present, if a significant amount of time had elapsed in

which the Appellant changed this pattern of behavior and distanced herself from ongoing associations with criminals, she might be able to be reconsidered for a position with the Boston Police Department in the future. I concur.

Conclusion

For all of the above stated reasons, the appeal of Nayr Pina under Docket No. G1-22-141 is ***denied.***

Civil Service Commission

/s/ Shawn C. Dooley
Shawn C. Dooley
Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein, & Tivnan, Commissioners) on June 1, 2023.

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)(1), 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 to:
James Gilden, Esq. (for Appellant)
Joseph McClellan, Esq. (for Respondent)