

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

ALBERT RIVA,
Appellant,

v.

G1-07-283

BOSTON POLICE DEPARTMENT,
Respondent.

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Albert Riva (hereafter "Riva" or "Appellant") seeks review of the Personnel Administrator's (Human Resources Division "HRD") decision to accept the reasons of the Boston Police Department (hereafter "Appointing Authority" or "BPD"), bypassing him for original appointment to the position of police officer.

A pre-hearing was held on October 18, 2007 and a full hearing was held on February 6, 2008 at the offices of the Civil Service Commission. Three tapes were made of the hearing.

FINDINGS OF FACT:

Twelve (12) exhibits were entered into evidence at the hearing. Based on the exhibits submitted at the hearing and the testimony of the following witnesses:

Called By the Appointing Authority:

- Robin Hunt, Human Resources Director, Boston Police Department;
- Zelma Greenstein, Nurse Practitioner, Boston Medical Center;
- Roberta Mullan, Director of Occupational Health Services, Boston Police Department;

Called by the Appellant:

- Joseph Corso, Personnel Director; Property and Construction Management, City of Boston;
- Maura Flynn, Captain, Boston Police Department;
- John Devine, police officer, Boston Police Department;
- Edward Murphy, retired sergeant, Boston Municipal Police Department;
- Albert Riva, Appellant;

I make the following findings of fact:

1. The Appellant, a longtime resident of Boston, is a 46-year old male who previously served as a municipal police officer employed by the Boston Municipal Police Department (hereinafter “BMPD”) prior to his position being abolished on December 31, 2006. (See Twenty-Seven Former Boston Municipal Police Officers, Sergeants and Lieutenants v. City of Boston, CSC Case Numbers D1-07-05 through D1-07-31, (2007)). He has a bachelor’s degree in criminal justice. (Testimony of Appellant)

2. On June 25, 2007, the Appellant's name appeared at the top of Certification # 70048 for the position of police officer by virtue of his prior employment with the Boston Municipal Police Department. (Exhibit 1, Bypass Letter sent to Sally McNeely by Robin W. Hunt)
3. On August 11, 2006, the Appellant signed his Student Officer Application and submitted it to the Boston Police Department and a background investigation was undertaken by Detective Robert Tabb. (Exhibit 2, Student Officer Application, and Testimony of Robin Hunt)
4. Robin Hunt, Director of the Boston Police Department's Human Resources Division, testified that the result of the background investigation was presented to a Department hiring committee during a "roundtable" discussion, which typically involves the Commander of Recruit Investigations, the Director of Human Resources, a Deputy Superintendent from Internal Affairs, and an attorney from the Legal Advisor's Office. (Testimony of Robin Hunt)
5. Robin Hunt, as the Director of Human Resources, was a member of the roundtable discussion involving the Appellant. All members of the roundtable initially agreed that the Appellant would be passed through the medical portion of the application. The roundtable subsequently determined that the Appellant made statements during his medical appointment that rendered him unsuitable to be a Boston police officer. (Testimony of Robin Hunt)

Statements Made at Medical Appointment

6. On October 20, 2006, the Appellant met with Nurse Practitioner Zelma Greenstein (hereafter referred to as "NP Greenstein") for his pre-employment physical at Boston Police Headquarters (Testimony of Robin Hunt and NP Greenstein)
7. NP Greenstein testified that recruits complete a medical history form before she meets with them. As part of the pre-employment physical, NP Greenstein reviews the form with each

recruit candidate and may ask questions for further clarification. (Testimony of NP Greenstein and exhibit 3)

8. NP Greenstein testified that she does not review a recruit's medical records or student officer applications because she does not have access to these documents. She emphasized that her role was only to conduct pre-screening employment physicals. Additionally, NP Greenstein does not contact former employers or the workers' compensation office. (Testimony of NP Greenstein)
9. During this meeting, the Appellant discussed with NP Greenstein any medical conditions he disclosed on his medical history form. NP Greenstein also reviewed with the Appellant the injuries he sustained while working as a Boston Municipal Police Officer. (Testimony of NP Greenstein)
10. In regard to a 2001 injury listed on his medical history form, NP Greenstein testified that the Appellant told her that he "milked his injury," for about two weeks. When discussing the injury he sustained, the Appellant told NP Greenstein that he was put on light duty for a wrist sprain. (Testimony of NP Greenstein and Exhibit 3A).
11. According to NP Greenstein, the Appellant also discussed another injury he had sustained while working as a Boston Municipal Police Officer in 1992.¹ The Appellant informed NP Greenstein that he had fallen at home before going to work one day back in 1992. Later that same day, the Appellant became involved in an altercation at work where he injured his knee again. The Appellant told NP Greenstein that the second injury consisted of an abrasion to his knee. The Appellant told NP Greenstein that although the injury to his knee began in the

¹ During the physical examination, Mr. Riva placed the injury as having occurred in 1992, but the evidence introduced at the hearing before the Commission established that the only knee injury for which Mr. Riva received medical treatment occurred on April 21, 1993. There is no record of Mr. Riva receiving any medical treatment for a knee injury at any time during 1992 and the exact date of the injury is not relevant.

incident at his home, he figured that he would let “the city pay for it, when he got injured 4at work that same day.” (Testimony of NP Greenstein and Exhibit 3A)

12. NP Greenstein testified that when the Appellant made these statements, she stepped out of her office and relayed what was said to Roberta Mullan, Director of Occupational Health Services for the Boston Police Department. She also recorded her conversations with the Appellant on what she described as “soap notes.” (Testimony of NP Greenstein , Exhibits 3 and 3A)
13. NP Greenstein testified that “soap notes” are notes that enable medical personnel to further describe a medical condition or injury. (Exhibit 3A and Testimony of NP Greenstein)
14. NP Greenstein recorded the Appellant’s statements in her “soap notes” and provided a copy to Ms. Mullan. (Testimony of NP Greenstein and Exhibit 3A)
15. NP Greenstein testified that she could not speculate what the Appellant meant by his statement, but she indicated that in her twenty-one (21) years with the Department, no other recruit candidate had made a similar statement to her. (Testimony of NP Greenstein)
16. NP Greenstein was a good witness and her testimony was highly credible. She had a good recall of her interaction with the Appellant in 2006, she never sought to overreach in her answers, and her testimony before the Commission was consistent with the notes she had made at the time. This witness had no ulterior motive. I find that the Appellant did indeed make those statements to NP Greenstein. (Testimony, demeanor of NP Greenstein)
17. On the day of the Appellant’s medical examination, Ms. Mullan was working at Boston Police Headquarters. She has worked for the Boston Police Department for thirty- four (34) year and is currently the Director of the Occupational Health Services Unit. In this position

she is involved in administering pre-employment screening appointment, drug tests and fitness for duty evaluations. (Testimony of Roberta Mullan)

18. Ms. Mullan testified that recruits are sent to Occupational Health Services after the roundtable reviews the recruit's application. (Testimony of Ms. Mullan)
19. Ms. Mullan testified that she learned from NP Greenstein that the Appellant stated that he had "milked" light duty when he injured his wrist in 2001, and that he had "got the city to pay for it" when he injured his knee in 1992. (Testimony of Ms. Mullan)
20. Ms. Mullan testified that she asked NP Greenstein to document her conversation with the Appellant. According to Ms. Mullan, NP Greenstein provided her with a copy of her "soap notes." At some point, Ms. Mullan met with Ms. Hunt to discuss the Appellant's statements. (Testimony of Ms. Mullan)
21. Ms. Mullan testified that she drafted a memorandum about the information she had learned from NP Greenstein. Ms. Mullan provided the memorandum to Ms. Hunt and ultimately the roundtable was reconvened to discuss the Appellant's statements. (Exhibit 4 and Testimony of Ms. Mullan)
22. When asked whether she had reviewed the Appellant's discharge notes from Dr. Stein, Ms. Mullan indicated that she did not examine the Appellant's medical records but had reviewed NP Greenstein's "soap notes." (Testimony of Ms. Mullan)
23. When asked whether she knew the extent of the Appellant's injuries, Ms. Mullan indicated that she was aware that he had scraped his knee but did not know about the altercation the Appellant became involved in at work. (Testimony of Ms. Mullan)
24. When questioned whether there was proof that the Appellant had "milked" light duty, Ms. Mullan stated that, in her opinion, the Appellant, through his statements to NP Greenstein,

had *implied* that could have returned to full duty earlier than he did. (Testimony of Ms. Mullan)

25. When questioned whether there was proof that the Appellant had “got the city to pay for his 1992 injury,” Ms. Mullan again stated that the Appellant’s statements *implied* that he had somehow benefited from the system. She also indicated that the Appellant filed a worker’s compensation claim, but was not aware of what information was included in that application. (Testimony of Ms. Mullan)

26. Ms. Mullan testified that she felt no further investigation was warranted because the statements the Appellant made were a “malingered red flag” and very unusual to make to a prospective employer. (Testimony of Ms. Mullan)

27. The Appellant testified on his own behalf before the Commission, including testimony regarding the incidents that occurred in (possibly) 1993 and 2001.

Appellant’s testimony regarding the 1993 incident

28. Mr. Riva recounted that he had slipped at home and banged his knee before going into work years ago, this incident appears to have occurred in 1993. That same day at work he sustained another type of injury to that same knee. He received medical treatment. (Testimony of Appellant)

29. The Appellant testified that the first injury at home caused him pain but that it did not bruise, cut or scrape the knee. He said that he walked off the stiffness in his knee before going into work. When he reported for duty that morning, Officer Riva was not bleeding, he did not have a bruise, cut or scrape or other injury to his knee, and there was no tear in his uniform pants. The Appellant mentioned the first injury to his supervisor before beginning his shift, but he elected to work. (Testimony of Appellant)

30. It was almost half way through his shift when Riva responded to assist two of his colleagues who were struggling with a suspect. When Riva took the suspect to the ground, he tore his uniform pants and scraped his knee. He received treatment for this second injury at the expense of the City on April 21, 1993. (Testimony of Appellant, Devine and Exhibit 7)
31. After the second injury, the Appellant did not immediately seek treatment. He continued to work. His subsequent duties included accompanying and standing guard over the still violent suspect while he received medical treatment at the then-named Boston City Hospital. Riva transported the suspect to be processed after his medical treatment was over. Near the end of his shift, Riva returned to the same hospital and had his knee scrape cleansed and bandaged. (Testimony of Appellant, Devine and Exhibit 7)
32. Mr. Riva testified that he later treated with his own physician to have his nose examined when an injury to his nose manifested itself later. He did not notify his employer of this course of treatment, he did not request compensation for the time off, he did not seek medical expenses for the bill or any out-of-pocket expenses associated with the treatment. (Testimony of Appellant and Exhibit 7)
33. The Appellant's version of the struggle and arrest was supported by both documentary evidence and corroborating testimony. Mr. Riva introduced the 1993 incident reports and his colleague on that shift, John Devine, testified to his recollection of the events. Officer Devine is now a Boston Police Officer, having transferred over upon the abolishment of the BMPD. (Testimony of Appellant, Officer Devine and Exhibit 7)
34. I find that the Appellant did not receive any medical treatment or lose any time from work as a result of his banging his knee at home on April 21, 1993. (Testimony of Appellant)

35. I find that the Appellant did not defraud the City through receiving medical treatment for an off-duty injury that he claimed occurred on-duty. Rather, I find that the Appellant was injured on duty on April 21, 1993 and that he was treated for that injury.

Appellant's testimony regarding the 2001 incident

36. The Appellant testified that he was placed on light duty after he was injured on September 16, 2001, just 5 days after the attacks against our country on September 11, 2001. Every law enforcement agency in the country was on an elevated alert status, including the Boston Municipal Police Department, whose officers were routinely ordered to work double shifts in the months after September 11, 2001. This left Officer Riva not only frustrated that he could not serve when called, but it also denied him significant overtime opportunities that he testified he would have taken. (Testimony of Joseph Corso and Appellant and Exhibits 5, 9, 10 and 12)

37. The Appellant was examined in the emergency department of the Boston Medical Center on September 16, 2001 and placed on light duty for 5 days. He was given a follow-up appointment for the next day at the Hand Clinic. On September 17, 2001 he was examined by Dr. Stein, an orthopedic surgeon, who diagnosed a ligament tear in his right hand and placed his return to full duty at 2-4 weeks away. (Testimony of Appellant and Exhibit 9)

38. The Appellant returned to the Hand Clinic as ordered on October 1, 2001 and was informed he had an additional month of recovery before he could be cleared for full-duty. On Monday, November 5, 2001 the Appellant was again examined by Dr. Stein and cleared for full-duty. (Testimony of Appellant and Exhibit 9)

39. The Appellant appeared at all of the medical appointments on his own time and the payroll records support the Appellant's testimony that he was not compensated for the time he spent

being treated for his injury (although he was entitled to such compensation) and that he lost no time from work as a result of this injury. (Testimony of Appellant and Exhibits 10, 11 and 12)

40. The Appellant's light duty was mandated by the applicable collective bargaining agreement at the time. The Appellant was the first employee put on light-duty as it was part of a new collective bargaining agreement. The restrictive light-duty policy required Mr. Riva to work the same shift albeit 5 days a week instead of the usual 4 on and 2 off schedule and he was not allowed to work any overtime (Testimony of Joseph Corso and Appellant and Exhibit 6).

41. The testimony of Mr. Riva, backed by his wage and attendance records, supports the Appellant's position that he did everything he could to get off of light-duty and get back to full-duty as quickly as possible. (Testimony of Appellant and Exhibits 5, 8, 9, 10 and 12)

42. Most revealing of Mr. Riva's intentions are his actions on the morning of November 5, 2001. That day he appeared at 9:30 A.M. at the office of the physician recommended by the City in the hope of receiving clearance to return to full-duty. He did this on his own time, and after working the overnight shift. Upon receiving his clearance to return to full-duty, he went directly to his employer. The Appellant then worked a double shift that day, then worked thirteen consecutive days -often overtime or doubles during that period. (Testimony of Appellant and Exhibits 5, 9, 10 and 12)

43. I find that the Appellant was cleared to return to full-duty on November 5, 2001 and he did not remain on light-duty longer than he could or should have under the light-duty policy.

Bypass Reasons Proffered by the City to HRD

44. In its June 25, 2007 letter to HRD outlining its reasons for bypassing the Appellant, the City states in relevant part, "During [his medical appointment], Mr. Riva admitted to having

sustained an injury at home when he fell down a flight of stairs and then ‘...got the City to pay for it.’ Additionally, Mr. Riva indicated that he had “milked” an injured wrist in 2001, by staying on light duty longer than was necessary. Regarding this situation, Ms. Mullan notes in her report: “In my opinion, it appears that he openly admitted to defrauding the City of Boston by extending the partial disability time of a claimed injury and in addition to that claim an injury as work related that he actually sustained at home. Given this situation, it is the opinion of the Boston Police Department, that Mr. Riva is entirely unsuitable for appointment as a Boston Police Officer.” (Exhibit 1)

CONCLUSION

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.” City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). 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). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but 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.” Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. City of Cambridge, 43 Mass. App. Ct. at 304.

Mr. Riva, age 46, a long-time resident of the City of Boston, worked as a municipal police officer for the BMPD for over 23 years and appears to have had an unblemished work record.

The Appointing Authority seeks to bypass Mr. Riva because he “admitted to having sustained an injury at home when he fell down a flight of stairs and then “got the City to pay for it” and because he is alleged to have “ “milked” an injured wrist in 2001.”

The testimony of the Appellant, supported by the documentary evidence in this case, establishes that Mr. Riva did not defraud the City by receiving medical treatment for an off-duty injury that he claimed occurred on-duty in 1993. Rather, the Appellant was injured on duty on April 21, 1993 and he was treated for that injury. In regard to the 2001 injury, the testimony of the Appellant, supported by the documentary evidence in this case, establishes that the Appellant did not remain on light-duty longer than he could or should have under the light-duty policy. Notwithstanding the above-referenced conclusions, the Appellant did, in 2007, as part of a

medical screening process for the Boston Police Department, make the statements attributed to him by a nurse practitioner who interviewed him. The Appellant told the nurse practitioner that he “milked his injury” in 2001 for about two weeks. In referencing the 1993 incident where he had injured his knee at home before injuring it at work again, the Appellant did tell the same nurse practitioner that he would make “the city pay for it,” referring to the injury that occurred at home.

After a careful review of all the testimony and documentary evidence in this case, I conclude that Mr. Riva, age 46, made the above-referenced statements to the nurse practitioner in an ill-advised attempt to make light of any prior injuries that he believed could potentially hurt his chances of becoming a Boston police officer. These statements raised the concern of the nurse practitioner and ultimately caused the Boston Police Department to bypass him. Thus, the narrow question before the Commission is whether the Boston Police Department had reasonable justification to bypass the Appellant based solely on the statements in question.

Years of Commission decisions, including dozens authored by this Commissioner, have well-established that all Appointing Authorities, including the Boston Police Department, have wide latitude when it comes to choosing which individuals should be issued a badge and a gun and entrusted to serve the City as a police officer in the most dangerous of situations. See Hart v. Boston Police Department, 19 MCSR 397 (2006) (bypass of candidate because of issue related to psychological screening upheld); Gerbutavich v. Boston Police Department, 20 MCSR 139 (2007) (bypass of candidate because of a DWI conviction upheld); Monteiro v. Boston Police Department, 20 MCSR 230 (2007) (bypass of candidate because he had been arrested for possession of marijuana upheld); Nahim v. Boston Police Department, 20 MCSR 232 (2007) (bypass of candidate because of poor driving record and prior criminal charges upheld); Croteau

v. Boston Police Department, 20 MCSR 242 (2007) (bypass of a candidate who previously had a one-year restraining order upheld); Crosby v. Boston Police Department, 20 MCSR 288 (2007) (bypass of candidate whose background included assault and battery charges and a 209A restraining order upheld); Alexandre v. Boston Police Department, 20 MCSR 309 (2007) (bypass of candidate who had violated a 209A restraining order upheld); Brimley v. Boston Police Department, 20 MCSR 313 (2007) (bypass of candidate for history of poor judgment including missed court appearance upheld); Torres v. Boston Police Department, 20 MCSR 327 (2007) (bypass of candidate with history of multiple incidents of domestic violence upheld); Allen v. Boston Police Department, 21 MCSR 45 (2008) (bypass of former Boston Municipal Police Officer where a background check revealed three charges of domestic violence upheld); Lilly v. Boston Police Department, 21 MCSR 49 (2008) (bypass of candidate involved in a bar fight that resulted in guilty plea of assault and battery upheld); McKeown v. Boston Police Department, 21 MCSR 51 (2008) (bypass of former Boston Municipal Police officer with a poor attendance record upheld); Escobar v. Boston Police Department, CSC Case Nos. G1-05-214 & G1-06-93 (2008) (bypass of candidate for untruthfulness upheld).

In the instant matter, however, the Boston Police Department has not provided sound and sufficient reasons to bypass the Appellant, who appears to have a 23-year unblemished career in law enforcement as a former police officer with the Boston Municipal Police Department. The City's decision to bypass the Appellant is based on its conclusion that he "openly admitted to defrauding the City of Boston..." (emphasis added) The findings of fact, made by this Commissioner with the benefit of more information than was available to the City, including the Appellant's unrefuted testimony and documentary evidence regarding what actually occurred in

1993 and 2001, provide a far more accurate and contextual account of the alleged admission to “defrauding” the City.

For all of the above reasons, the appeal under Docket No. G1-07-283 is hereby *allowed*.

Pursuant to its powers of equitable relief inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts and Resolves of 1993, the Commission hereby orders the Human Resources Division to take the following action:

The name of Albert Riva shall be placed at the top of the current or next certification list for original appointment to the position of Police Officer in the Boston Police Department and at the top of any subsequent list until such time as he has received an opportunity for consideration for selection and the Boston Police Department may not use the reasons as stated in the letter from HRD dated July 31, 2007 to bypass Mr. Riva.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson and Taylor, Commissioners [Marquis – Absent]) on May 22, 2008.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. The motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission’s order or decision.

Notice:

Joseph G. Donnellan, Esq. (for Appellant)
Sheila Gallagher, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)