

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT  
CIVIL ACTION  
NO. 08-02819-F

NOT E SENT  
02.12.10  
(10 PAGES)

S.G.  
W.T.  
R.B.  
J.G.D.

MASG.A.G.  
R.L.Q.JR

BOSTON POLICE DEPARTMENT,  
Plaintiff

v.

ALBERT RIVA and  
MASSACHUSETTS CIVIL SERVICE COMMISSION,  
Defendants

(LAT)

MEMORANDUM AND ORDERS ON THE CROSS-MOTIONS  
FOR JUDGMENT ON THE PLEADINGS PURSUANT TO MASS.  
R. CIV. P. 12(c) BY THE PLAINTIFF, BOSTON POLICE  
DEPARTMENT AND THE DEFENDANT, ALBERT RIVA

This matter came on for hearing on the cross-motions for Judgment on the Pleadings Pursuant to Mass. R. Civ. P. 12(c) by the plaintiff, Boston Police Department (BPD), and the defendant, Albert Riva (Riva).<sup>1</sup>

This civil action is an appeal brought by the plaintiff, BPD, under Ch. 30A, § 14 from a decision of the Civil Service Commission granting the appeal of the defendant, Riva. The BPD declined to appoint the defendant as a Boston Police Officer based on admissions made by the defendant, Riva, to a BPD Nurse.

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<sup>1</sup> The Massachusetts Civil Service Commission's role was primarily to adjudicate the dispute between the parties, is a nominal party here and has indicated that it will not otherwise participate any further in this matter. (See: docket entry no. 17).

Practitioner who was conducting a medical review as part of the BPD's physical and psychological screening components of the recruit application process.

The defendant, Riva, was first employed as a police officer with the Boston Municipal Police Department (BMPD) in 1983. The BMPD was abolished effective December 31, 2006. In March, 2007 and to the present, he has been employed as a police officer for the Boston Housing Authority Police Department.

In 2006, Riva was among the police officers employed by BMPD who sought a lateral transfer to the BPD prior to the abolishment of the BMPD on December 31, 2006. Riva was extended a conditional offer of employment by the BPD, subject to passing a medical and psychological examination.

In the defendant's physical health evaluation on October 20, 2006, Nurse Practitioner Greenstein met with the defendant and they discussed his past medical history. The defendant revealed his history, including a wrist injury and a knee injury.

When the defendant was discussing his wrist injury sustained in 2001, the defendant, Riva stated that the wrist injury kept him on light duty for a full month, but that he could have gone back to full duty work sooner. The defendant told Ms. Greenstein that he "milked" his injury so that he could stay on light duty for a full month.

Ms. Greenstein and the defendant, Riva, also discussed a

prior knee injury that Riva sustained in 1992 while working as a Boston Municipal Police Officer. Riva explained to Ms. Greenstein that he had fallen at home one morning before work and hurt his knee, but had gone to work anyways. While at work, Riva stated that he was involved in an altercation that resulted in an aggravation of the injury that he had suffered at home. Riva stated to Nurse Practitioner Greenstein that he decided to "let the city pay for [his injury]," and when he filed his worker's compensation form, he did not indicate that the injury was initially suffered in a fall at home.

As a result of these admissions to the nurse practitioner, Nurse Practitioner Zelma Greenstein (Ms. Greenstein) reported in writing the contents of those admissions which report came to the attention of Ms. Robin Hunt (Ms. Hunt), the Director of Human Resources for the BPD. After Ms. Hunt learned of the statements made by this defendant, Riva to the Nurse Practitioner, and after she spoke directly to Ms. Greenstein to clarify the information, Ms. Hunt reconvened the hiring committee, reported Riva's statements made to Ms. Greenstein, and the committee decided that the statements by the defendant, Riva, put his integrity in question. Ms. Hunt testified at the Civil Service Commission that when the applicant's integrity is in question, the BPD weighs the concern very carefully and considers it in their decision making.

On June 25, 2007, the defendant, Riva, was notified in writing that he had been officially bypassed for employment with the Boston Police Department.

The Civil Service Commission Hearing Officer, Christopher C. Bowman, found as a Finding of Fact (R,p. page 221, finding no. 16) that the appellant (the defendant here, Riva) did in fact make those statements concerning his wrist and knee injuries as testified to by Nurse Practitioner Greenstein and as contained in the documents admitted into evidence at the hearing. Ms. Greenstein testified and the documents admitted into evidence reflect that the defendant, Riva, did say:

- (1) that he "milked his wrist injury so he could stay on light duty for a full month," and
- (2) when he injured his knee at home, and then suffered an aggravation at work he decided to "let the City pay for [his injury]" and did not disclose that the injury was initially suffered in a fall at home.

These two statements having been made by Riva are corroborated by Ms. Greenstein's notes contemporaneously made during her meeting with Riva on October 20, 2006. (R,p. 087)

At the hearing under oath Riva denied ever saying in substance, "let the City pay for it." (R,p. 236, l. 8 to l. 17; p. 262, l. 5 to p. 263, l. 2).

The Civil Service Commission on May 22, 2008 reversed her decision of the appointing body, the BPD, allowed Mr. Riva's

appeal and ordered the following remedy:

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 (Human Resource Department) dated July 31, 2007 to bypass Mr. Riva.

#### DISCUSSION

The standard of review that the Civil Service Commission is required to apply when a candidate appeals an appointing authority's action is "whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the actions taken by the appointing authority." Cambridge v. Civil Service Comm., 43 Mass. App. Ct. 300, 302 (1997). Justification in the context of review is defined as "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and the correct rules of law" Cambridge at 43 Mass. App. Ct. at 304. Police Department of Boston v. Collins, 48 Mass. App. Ct., 411 (2000).

Pursuant to ch. 31, § 44, the Superior Court has the authority to review decisions of the Civil Service Commission and the standard of review is set out in ch. 30A, § 14(7).

Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Ch. 30A, § 1(6). A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support. Cambridge at 43 Mass. App. Ct. 300, 303.

It is the Court's role in a ch. 30A, § 14(7) review to determine whether the substantial rights of a party may have been prejudiced because the agency decision is:

- (a) in excess of the statutory authority or jurisdiction of the agency;
- (b) in violation of constitutional provisions;
- (c) based on an error of law;
- (d) made upon unlawful procedure;
- (e) unsupported by substantial evidence;
- (f) unwarranted by facts found by the Court on the record as submitted; or
- (g) arbitrary or capricious or abuse of discretion or otherwise not in accordance with the law.

In the present case, the defendant, Riva, admitted in his statement to Nurse Practitioner Greenstein that he "milked" his previous wrist injury and failed to reveal a previous knee injury which was aggravated by an incident at work. The hearing officer found Nurse Practitioner Greenstein's testimony concerning these statements by the defendant, Riva, to be credible. (R.p. 221,

Finding No. 16). The plaintiff, Boston Police Department argues that these two statements by Riva unto themselves are sufficient for the appointing authority to sustain its burden of proving that there was reasonable justification for the actions taken by the appointing authority. The defendant, Riva, admitted to two dishonest acts which goes to the heart of the issue of his honesty and integrity.

The defendant is claiming that his statements about his wrist and knee injuries were false and not true and that the hearing officer found that the two statements by the defendant, Riva, were not true. It is not up to the BPD to prove that Riva's statements are true. The mere fact that he made them, as found by the hearing officer, is sufficient to sustain the appointing authority's action of bypassing Riva. "It is not within the authority of the Commission,...to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority... In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion." City of Cambridge, 43 Mass. App. Ct. at 304-305.. Here, the BPD was faced with two statements by the defendant, Riva, that went directly to the issue of his honesty and integrity. The Civil Service Commission found that Riva's two statements were not true and indicated that it was the burden of the BPD to prove that the

defendant's statements were true. Here, the Civil Service Commission, relying on evidence which it believes proves Riva's two statements were false and untrue, is requiring that he be appointed to the BPD. However, Riva was either telling the truth (admitting his fraud) to the Nurse Practitioner or was lying (about the two incidents). Either way justifies the discretionary decision of the appointing authority to bypass him. Prior misconduct has frequently been a ground for not hiring... a police officer." ...Measured in terms of an adequate reason, supported by credible...evidence, and the application of common sense, the decision of the Boston Police Department to bypass Riva was justified and hence not subject to correction by the Commission. Cambridge, 43 Mass. App. Ct. at 305.

In effect and assuming, as Riva claims, that his statements to the Nurse Practitioner were false and untrue, the present Civil Service Commission decision and order permits a prospective employee to lie or make false or untrue statements to his prospective employer and then on appeal to the Civil Service Commission to prove that his original false and untrue statements that he made to his prospective employer were in fact themselves lies or untrue statements, and then as a result thereof, the Boston Police Department would be ordered not to bypass him, to place him at the top of the list for future hires, be ordered not to consider his original untrue statements, made to the Nurse



Practitioner, and as a result he is to be considered a person of sufficient integrity so as to be appointed a Boston Police Officer ("at the top of the list for future hires"). As indicated above, "[it] is not within the authority of the Civil Service Commission to substitute its judgment about the valid exercise of discretion based on merit or policy considerations by an appointing authority... In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion." Cambridge, 43 Mass. App. Ct. at 304-305.

#### ORDERS

1. The Massachusetts Civil Service Commission's decision and orders entered on May 22, 2008 on this matter concerning the Boston Police Department and defendant, Albert Riva (Civil Service Docket No. G1-07-283) are ORDERED REVERSED and VACATED.

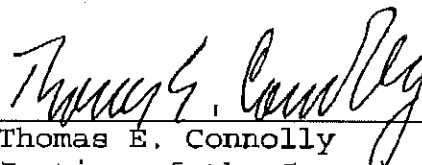
2. The Decision of the Appointing Authority, the Boston Police Department bypassing the defendant, Albert Riva for appointment as a Boston Police Officer is AFFIRMED.

3. The Motion of the Plaintiff, Boston Police Department for Judgment on the Pleadings Pursuant to Mass. R. Civ. P. 12(c) is ALLOWED.

4. The Motion of the Defendant, Albert Riva for Judgment on the Pleadings Pursuant to Mass. R. Civ. P. 12(c) is DENIED.

5. Judgment shall enter for the plaintiff, Boston Police Department, against the Defendants, Albert Riva and the Massachusetts Civil Service Commission.

By the Court,



Thomas E. Connolly  
Justice of the Superior Court

Date: February 12, 2010