

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

FRANCISCO RIVERA-HERNANDEZ,

Appellant

v.

BOSTON POLICE DEPARTMENT,

Respondent

Docket Number:

G1-23-154

Appearance for Appellant:

James Gilden, Esq.
173 North Main St
Sharon, MA, 02067-1230

Appearance for Respondent:

Omar Bennani, Esq.
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Office of the Legal Advisor
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Commissioner:

Angela C. McConney¹

SUMMARY OF DECISION

The Commission affirmed the decision of the Boston Police Department to bypass a candidate due to his driving history and mandated attendance at remedial driving courses.

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Francisco Rivera-Hernandez (Mr. Rivera-Hernandez or Appellant), appealed to the Civil Service Commission (Commission) the July 21, 2023 decision of the Boston Police Department (Department or BPD), to bypass him for original appointment to the position of Police Officer in the Department. As reasons therefor, the

¹ The Commission acknowledges the assistance of Law Clerk Isabella Andrade with the preparation of this decision.

Department cited Mr. Rivera-Hernandez's lengthy driving record.

At the remote September 19, 2023 pre-hearing conference, the Chair ordered the Respondent to submit the driving histories of successful candidates with two or more surchargeable accidents or two or more moving violations in the past ten years.

On November 28, 2023, I conducted a full in-person full evidentiary hearing at the offices of the Commission, located at 100 Cambridge Street, Boston.² The hearing was recorded via Webex. The parties submitted post hearing briefs.

After careful review of the evidence, I reopened the matter and requested that the Respondent submit the driving histories as previously ordered at the September 19, 2023 prehearing conference. I reduced the time frame to seven years upon the Respondent's request. Upon receipt, I thoroughly reviewed the driving histories and gave the parties the opportunity to present further written argument based on the additional evidence. The parties filed supplemental briefs, whereupon the record closed.

FINDING OF FACT

Six exhibits were submitted into evidence (Exhibits 1-6). I admitted the Stipulation of Facts as Exhibit 7, and the driving records of the successful candidates as Exhibit 8. The parties further stipulated to the authenticity of Mr. Rivera-Hernandez' driving record, including his National Safety Council (NSC) courses and criminal charges. Based upon the documents entered into evidence and the testimony of:

Called by Department:

- Deputy Director of Human Resources Teori Shaw-Boyce, Boston Police Department

² The Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. §§ 1.01 et seq. (Formal Rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence

- Detective Anthony Cutone, Recruit Investigations Unit, Boston Police Department

Called by Appellant:

Francisco Rivera Hernandez, Appellant

and taking administrative notice of all pleadings filed in this case, plus pertinent rules, statutes, regulations, case law and policies, and drawing reasonable inferences from the credible evidence,

I make the following findings of fact:

1. Mr. Rivera-Hernandez is a Boston resident and a graduate of Boston public schools. (Exhibit 4)
2. Mr. Rivera-Hernandez served six years in the U.S. Army as a military policeman. Honorably discharged, he was employed by several security companies as an armed security guard. He now works as a correctional officer for the Suffolk County Sheriff's Department. (Exhibit 4)
3. Mr. Rivera-Hernandez passed the civil service examination June 12, 2021. (Stipulated Facts)
4. On July 1, 2022, the state's Human Resources Division (HRD) established an eligible list of candidates for the position of Boston Police Officer. On September 1, 2022, HRD issued Certification No. 08848, from which the Department could appoint one hundred (100) vacancies. The Department requested additional names on October 5 and November 25, 2022. On January 11, 2023, the Department requested additional names to fill 80 more vacancies. Mr. Rivera-Hernandez ranked 85th on the certification. (Stipulated Facts)
5. In September of 2022, Mr. Rivera-Hernandez submitted his Recruit Officer Application to the Boston Police Department. (Exhibit 1; Testimony of Appellant)
6. The Recruit Investigations Unit assigned Det. Anthony Cutone to conduct Mr.

Rivera-Hernandez' background investigation. The detective reviewed Mr. Rivera-Hernandez' criminal history, driving history, employment history, education, and personal references.

(Testimony of Shaw-Boyce; Testimony of Det. Cutone)

7. Massachusetts motorists are required to complete a National Safety Council (NSC) driver re-training program if they are found to be responsible for three or more surchargeable motor vehicle events within a two-year period. (Administrative Notice)

8. It is Department policy that candidates who have undergone an NSC course within three years of application may not be considered for the position of permanent full-time police officer. After the three-year lookback window is past, the roundtable may consider such a candidate for the position, examining whether the NSC course had a remedial effect, and if there are later RMV driving history entries. (Testimony of Shaw-Boyce, Testimony of Det. Cutone)

9. In the Application, Mr. Rivera-Hernandez responded to driving history inquiries that he had received two written warnings, three citations and had been in three motor vehicle accidents. (Exhibits 1 and 2)

10. However, the Registry of Motor Vehicles (RMV) driving history documented four motor vehicle accidents and several more driving infractions. (Exhibits 1 and 2)

11. On August 1, 2014, the Appellant was involved in a surchargeable motor vehicle accident, where it was determined that he was more than fifty percent (50%) at fault. He claimed that another vehicle struck him on the side. (Exhibit 2; Testimony of Appellant)

12. On May 9, 2015, the Appellant was involved in a surchargeable motor vehicle accident, where it was determined that he was more than fifty percent (50%) at fault. (Exhibit 2; Testimony of Appellant)

13. On December 4, 2015, the Appellant was involved in a surchargeable motor

vehicle accident, where it was determined that he was more than fifty percent (50%) at fault.

(Exhibit 2; Testimony of Appellant)

14. As a result of these incidents, the RMV required Mr. Rivera-Hernandez to take an NSC course in 2016.³ (Exhibits 3 and 4; Testimony of Appellant)

15. On June 29, 2017, Mr. Rivera-Hernandez was found Responsible for unsafe operation of a motor vehicle and an equipment violation. (Exhibit 2; Testimony of Appellant)

16. On August 17, 2017, Mr. Rivera-Hernandez was involved in a surchargeable motor vehicle accident wherein he was he was more than fifty percent (50%) at fault. (Exhibit 2; Testimony of Appellant)

17. On November 2, 2017, the RMV suspended Mr. Rivera-Hernandez's driver's license for failure to pay outstanding fines. (Exhibit 2; Testimony of Appellant)

18. On November 26, 2017, Mr. Rivera-Hernandez was found Responsible for a Number Plate Violation and Operating a Motor Vehicle with a Suspended License. (Exhibit 2; Testimony of Appellant)

19. In order to keep his driver's license valid, Mr. Rivera-Hernandez had to take two NSC Courses during calendar year 2017. (Exhibits 3 and 4; Testimony of Appellant)

20. On April 18, 2018, the Appellant was involved in a surchargeable motor vehicle accident, where he was determined to be more than fifty percent (50%) at fault. (Exhibit 2; Testimony of Appellant)

21. After the April 18, 2018 motor vehicle accident, Mr. Rivera-Hernandez had to

³ <https://www.nsc.org/safety-training/defensive-driving/nsc-defensive-driving-courses/nsc-state-certified-defensive-driving-courses/massachusetts-ddc/massachusetts-rmv-approved-defensive-driving-cours>

take a NSC course in 2018 in order to maintain his driver's license. (Exhibits 3 and 4; Testimony of Appellant)

22. On April 12, 2022, Mr. Rivera-Hernandez received warnings for operating with a passenger child under eight in the vehicle without a car seat, and speeding. (Exhibits 3 and 4; Testimony of Appellant).

23. The Department convened a roundtable with representatives from Human Resources, the Legal Department and Internal Affairs to review candidates' applications. Det. Cutone presented the December 6, 2022 Privileged and Confidential Memorandum (PCM), containing a summary of Mr. Rivera- Hernandez's background investigation to the roundtable. (Testimony of Cutone, Testimony of Shaw-Boyce)

24. After the detective left the room, the roundtable deliberated on Mr. Rivera-Hernandez' application. They reviewed his four surchargeable accidents, his driving infractions and that the fact that the four NSC courses in a two-year period (2016 and 2018) had no remedial effect on his driving. Mr. Rivera-Hernandez had been stopped as recently as April 2022 for speeding. (Testimony of Shaw-Boyce, Testimony of Cutone)

25. Upon review and discussion, the roundtable concluded that Mr. Rivera-Hernandez's application should not proceed due to the concern that Mr. Rivera-Hernandez would not operate a police cruiser safely, reliably and without incident. The roundtable concluded that his driving record rendered Mr. Rivera-Hernandez unsuitable to perform one of the most essential job duties of a Boston police officer. (Testimony of Shaw-Boyce, Testimony of Det. Cutone)

26. In a July 21, 2023 notice enclosing his appeal rights, the Department notified Mr. Rivera-Hernandez of his bypass. As reasons therefor, the Department cited "its significant

concern with your driving history, conformance to laws and ability to safely operate a motor vehicle.” (Exhibit 5)

27. Mr. Rivera-Hernandez filed a timely appeal with the Commission. (Exhibit 5)

28. Within the hiring cycle, the Department extended conditional officers to thirteen candidates with two or more surchargeable motor vehicular accidents or two or more moving violations. (Exhibit 6).

29. Of those thirteen candidates, nine were ranked lower than Mr. Rivera-Hernandez. Of those nine candidates, only one had more surchargeable vehicular accidents, namely three. (Exhibit 6)

30. No successful candidate equaled Mr. Rivera-Hernandez in the number of surchargeable vehicle accidents and NSC courses. The sole successful candidate with a comparable number of surchargeable accidents (four) ranked above Mr. Rivera-Hernandez. (Exhibit 6)

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). See also *Brookline v. Alston*, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

Original and promotional 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).

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 Serv. Comm’n*, 483 Mass. 461, 474-78 (2019); *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

An action to bypass a candidate is justified when it is “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.” *City of Cambridge*, 43 Mass. App. Ct. at 304, quoting *Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928); *Commissioners of Civil Service v. Municipal Court of the City of Boston*, 359 Mass. 211, 214 (1971). *City of Cambridge* further states, “[i]n the task of selecting employees of skill and integrity, appointing authorities are invested with broad discretion.” *Id.* at 304. The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. *Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 824-826 (2006). In doing so, the Commission owes substantial deference to the

appointing authority's exercise of judgment in determining whether there was “reasonable justification” shown. *City of Beverly v. Civil Service Comm’n*, 78 Mass. App. Ct. 182, 188 (2010). That “deference is especially appropriate with respect to the hiring of police officers.” *Id.* 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.” *Arria*, 16 Mass. App. Ct. at 334. See *Commissioners of Civil Service v. Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975) and *Leominster v. Stratton*, 58 Mass. App. Ct. at 727-728.

ANALYSIS

By a preponderance of the evidence, I find that the Department had reasonable justification to bypass Mr. Rivera-Hernandez based on his negative driving history. Mr. Rivera-Hernandez’s numerous violations, driving infractions and multiple NSC courses, which failed to cure his behavior, gave the Department a reasonable justification for the bypass.

At the time the of the 2022 roundtable, the Department engaged in the policy that mandated automatic exclusion for any candidate who had undergone an NSC course within the preceding three years. Outside the three-year lookback window, the Department has the discretion to consider Mr. Rivera-Hernandez’ history and whether the NSC course had remedied the driving behavior.

The Commission has adjudged that a candidate’s driving history should be considered in context and given appropriate consideration when the candidate operates a motor vehicle for a living. See, e.g., *Stylien v. Boston Police Dep’t*, 31 MCSR 154 (2018); 31 MCSR 209 (2018). The Commission may decide whether there is a nexus among the candidate’s prior poor conduct,

the position applied for and the candidate's current abilities. *Morgan v. Boston Police Dep't*, 33 MCSR 131 (2020). The BPD may consider an applicant's whole driving record because the operation of a police cruiser is an essential job duty for police officers.

Here, there is nexus between Mr. Rivera-Hernandez's driving history and the position applied for. Tracking an individual's progress post-NSC courses is also something given considerable weight to measure if an applicant has learned from their mistakes and demonstrated growth.

Mr. Rivera-Hernandez has attended four NSC courses because of his five surchargeable motor vehicle accidents, in which he was found at least 50% at fault. After the last NSC course in 2018, Mr. Rivera-Hernandez had further infractions: two warnings for having a Child under Eight in the Vehicle without a Car Seat and for speeding.

Mr. Rivera-Hernandez's September 22, 2022 Application was inconsistent with his RMV driving history. On the Application, he disclosed that he had been involved in three surchargeable automobile accidents. However, the RMV record documented four surchargeable motor vehicle accidents, for which he was found more than 50% responsible. Mr. Rivera-Hernandez testified that he erred because he did not have a copy of his driving record with him when he was filling out the application. Even if I were to accord to Mr. Rivera-Hernandez the benefit of the doubt, the Department is entitled to conclude that the number of mistakes, in combination with the lack of attention to detail, is an unacceptable character trait for a police officer.

Mr. Rivera-Hernandez testified that most of his driving infractions occurred due to external forces outside of his control. However, Det. Cutone and Dep. Director Shaw-Boyce testified that his application stood out because of the number of moving violations, the number of

NSC courses, and the seriousness of post-NSC course violations. Even so, the Department did not automatically bypass him, but placed his application hold to re-assess his candidacy at a later date in after assessing other candidates in the hiring cycle.

In comparison with the successful candidates' driving histories, no one presented a driving history comparable to that of Mr. Rivera-Hernandez in the hiring cycle.

Of the selected candidates, thirteen were found to have two surchargeable accidents. Of the selected candidates ranked below him, only one candidate had more than two surchargeable vehicle accident, namely three. The only candidate that had a comparable number of NSC courses (four) was ranked above Mr. Rivera-Hernandez (71st place), and only had a single surchargeable accident. The only candidate with a similar number of surchargeable accidents (four) was ranked above Mr. Rivera-Hernandez (61st place), and had no history of NSC courses.

When the roundtable deemed Mr. Rivera-Hernandez's driving record one of the worst in the applicant pool, it was fatal to his application. The ability to operate a police vehicle is a critical job function for police officers, and the Commission has consistently upheld that poor driving records are reasonable justification for bypass. *McGrath v. Lowell*, 22 MCSR 560 (2009); *Jones v. Boston Police Dep't*, 22 MCSR (2008).

The Commission is compelled to affirm the Department's decision, notwithstanding Mr. Rivera-Hernandez's positive qualities as a military policeman and his commendable service as a Suffolk County correctional officer.

CONCLUSION

Accordingly, the Boston Police Department's decision to bypass Francisco Rivera-Hernandez for the position of police officer is affirmed. The appeal filed under Docket No. G1-23-154 is hereby *denied*.

CIVIL SERVICE COMMISSION

/s/ *Angela C. McConney*

Angela C. McConney, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) on December 5, 2024.

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 C.M.R. § 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. 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)

Omar Bennani, Esq. (for Respondent)