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COMMONWEALTH OF MASSACHUSETTS

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SUPERIOR COURT
CIVIL ACTION NO. 08-3751-E

BOSTON POLICE DEPARTMENT

VS.

JUAN RODRIGUES & another¹

OCT. 27 2009

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

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**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

(sc)

Introduction

The plaintiff, Boston Police Department ("BPD"), seeks judicial review under G. L. c. 31, § 44 of the decision of defendant Massachusetts Civil Service Commission ("Commission") to allow the appeal of defendant Juan Rodrigues ("Rodrigues") of the BPD's decision to bypass him when hiring police officers. After hearing, and for the reasons set forth below, the BPD's motion for judgment on the pleadings is **ALLOWED** and the Commission's order to place Rodrigues at the top of the next certification list for appointment is **VACATED**.

Background

In June 2006, the BPD sought to hire nine full-time, Spanish-speaking police officers. Rodrigues' exam score placed him fourth on the certification list issued for this position, and he was the second applicant on the list to indicate that he would accept the job. Instead of appointing Rodrigues, the BPD sought approval from the Human Resources Division of the Civil Service Unit ("HRD") to bypass him. The HRD granted the BPD's request to bypass Rodrigues. In a letter dated

¹ Massachusetts Civil Service Commission

January 23, 2007, the HRD informed Rodrigues that he had been removed from the certification list for the position of Spanish-speaking police officer and the current eligible list.

The BPD sought to bypass Rodrigues after it determined that he was unsuitable for employment as a Boston Police Officer. This finding was based primarily on three grounds. First, Rodrigues received four non-judicial punishments while serving in the United States Marine Corps: he was disciplined for parking illegally in a superior officer's spot, carrying an identification badge with the incorrect rank, being disrespectful to a superior officer, and being tardy to a check-in.² The BPD concluded that these infractions caused Rodrigues to be demoted from lance corporal to private and to be ineligible to re-enlist in the Marine Corps.

In addition to these infractions, the BPD also discovered that Rodrigues was disciplined twice while employed by Federal Express. Sealed personnel records provided by Federal Express and submitted by Rodrigues along with his Student Officer Application ("Application") alerted the BPD to these disciplines. Federal Express disciplined Rodrigues on May 28, 2003, for being tardy a total of fifteen times in a year. Federal Express issued a second disciplinary notice to Rodrigues on August 12, 2003, for leaving bags of freight behind. The second disciplinary notice warned him that a third violation within the next twelve months could result in his termination. In spite of these disciplines issued by Federal Express, BPD determined that Rodrigues had answered "NO" when asked on his Application whether he had ever "[b]een disciplined by an employer for any reason?"³ Furthermore, when he signed his application, he swore "[t]hat each and every answer is full, true and correct in every respect" and "[t]hat I am aware that willfully withholding information or making

² In his Student Officer Application, Rodrigues disclosed the disciplinary action taken against him while in the Marine Corps.

³ Rodrigues signed his Application on December 9, 2005.

false statements on this application will be the basis of rejection of my application, or dismissal from the Boston Police Department and removal from the Civil Service List of eligibility.”

When Rodrigues’ Application was reviewed by the BPD’s hiring committee, its members collectively agreed that he was unfit to be a Boston police officer.⁴ Specifically, Edward Callahan (“Callahan”), the BPD’s Director of Human Resources, expressed concern with Rodrigues’ tardiness while employed with Federal Express and truthfulness in the application process. At the Commission hearing on September 25, 2007, Callahan testified that “tardiness is something [the BPD would] rather not deal with.” Callahan also stated that “[t]ruthfulness is a key element or dimension of an individual who serves as a police officer.” Norman Hill, the Commander of Recruit Investigations Unit, also testified that Rodrigues’ previous disciplines for tardiness, non-judicial punishment for disrespecting a superior, and nondisclosure of the disciplinary action taken by Federal Express troubled him when he reviewed Rodrigues’ Application. On these bases, the BPD sought approval from the HRD to bypass Rodrigues.⁵

After the HRD granted the BPD’s request to bypass, Rodrigues filed an appeal with the Commission under G. L. c. 31, § 2(b). The Commission held an evidentiary hearing on September 25, 2007. On July 31, 2008, the Commission determined that “[t]he reasons submitted by the [BPD] and approved by HRD were not sufficient based on a preponderance of the evidence presented” at

⁴ BPD’s hiring committee, known as the “Roundtable,” consists of the Commander of Recruit Investigations Unit, the Director of Human Resources, a Deputy Superintendent from Internal Affairs and an attorney from the Legal Advisor’s Office.

⁵ In its letter to the HRD seeking a bypass, the BPD stated its reasons as follows: “During his term of military service with the United States Marine Corps from 1996-2000, Mr. Rodrigues received four non-judicial punishments and was ultimately demoted. He is not eligible for re-enlistment in the U.S.M.C. While employed with Federal Express, Mr. Rodrigues was disciplined on at least two occasions. On page 2 of his Student Officer Application Form, Mr. Rodrigues answered “no” to the question “Have you ever been disciplined by an employer for any reason?””

the hearing, and "[a]ccordingly, the [BPD] did not have reasonable justification for bypassing" Rodrigues. The Commission ordered the HRD to place Rodrigues' name at the top of the next certification list for appointment to the position of permanent full-time police officer, until such time as he receives at least one consideration for the position of police officer.

In its decision, the Commission found that the four non-judicial punishments that Rodrigues received while in the Marine Corps were imposed by one sergeant and after three consecutive years of receiving no discipline. The Commission emphasized that these infractions occurred when Rodrigues was in his early twenties and were not serious. Additionally, the Commission determined that Rodrigues received an honorable discharge from the Marine Corps and is eligible to re-enlist in the military.

The Commission also found Rodrigues' testimony that he made a mistake when answering "NO" to the question "[h]ave you ever been disciplined by any employer for any reason" to be credible. It concluded that Rodrigues did not intend to withhold information from BPD and credited him for being forthcoming in his application and testimony at the hearing. Based on these facts, the Commission ruled that the BPD did not have reasonable justification to bypass Rodrigues. The BPD now seeks judicial review of the Commission's decision.

DISCUSSION

The role of the Civil Service Commission is to determine 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 action taken by the appointing authority." *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 303 (1997). A party aggrieved by a final decision of the

Commission may seek judicial review under G. L. c. 31, § 44. Pursuant to that statute, the court reviews "the commission's decision to determine if it violates any of the standards set forth in G. L. c. 30A, § 14(7), and cases construing those standards." *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 242 (2006). The court is "required to overturn commission decisions that are inconsistent with governing law." *Id.* Pursuant to G. L. c. 30A, § 14(7)(c), the court may overturn a Commission's decision if it is "based upon an error of law."

For the appointing authority's action to be reasonably justified, it must be based "upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *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). When political considerations or objectives unrelated to merit govern the appointing authority's personnel decision, the Commission may intervene. *Cambridge*, 43 Mass. App. Ct. at 304. The Commission does not have the authority, however, to "substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." *Id.* When selecting public employees based on skill and integrity, appointing authorities are afforded broad discretion. *Id.* at 304-305.

In the case at bar, the Commission erred as a matter of law in applying the reasonable justification standard. The BPD's bypass of Rodrigues was reasonably, even amply, justified. "Prior misconduct has frequently been a ground for not hiring or retaining a police officer." *Id.* at 305. The BPD's decision involved no "overtones of political control or objectives unrelated to merit standards." *Id.* at 304. Instead, it was based on Rodrigues' undisputed infractions for disrespecting a superior, breaking rules, tardiness, and slipshod work, as well as his failure to disclose on his

Application the disciplinary actions taken by two different employers. The Commission impermissibly substituted its judgment for that of the BPD when it determined that Rodrigues' four non-judicial punishments by the Marine Corps and two disciplines by Federal Express were not significant and that he mistakenly failed to disclose his disciplinary history on his Application. When an individual, such as Rodrigues, has displayed poor impulse control or been cited for prior misconduct, it is for the appointing authority, not the Commission, to decide whether to take on the risk inherent in hiring that individual. *Id* at 305.

The Commission counters that it was authorized to find the facts anew and, in doing so, determined that several of the "factual premises" relied on by the BPD did not exist. See *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727 (2003). While it is true that the BPD was incorrect in its assertion that Rodrigues was ineligible to re-enlist in the Marine Corps, the BPD's other reasons for bypassing him withstood the Commission's review. The Commission's validation of Rodrigues' *excuses* does not change the *facts*: he was disciplined six times by two different entities and then lied about his disciplinary history on his Application. In sum, there was reasonable justification for the action taken by the BPD here; in rejecting the appointing authority's reasons out of hand, the Commission overstepped its authority.

ORDER

For all the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that the BPD's motion for judgment on the pleadings be **ALLOWED** and that the Commission's order to place Rodrigues' name at the top of the next certification list for appointment to the position of permanent full-time police officer, until such time as Rodrigues receives at least one consideration for the position of police officer, be **VACATED**.

A handwritten signature in black ink, appearing to be "Linda E. Giles", written over a horizontal line.

Linda E. Giles,
Justice of the Superior Court

Dated: October 23, 2009