

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

DOMINGOS ROSA,
Appellant

v.

G1-13-70

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

James W. Simpson, Esq.
100 Concord Street, Suite 3B
Framingham, MA 01702

Appearance for Respondent:

Amanda E. Wall, Esq.
Boston Police Department
Office of the Legal Adviser
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Commissioner:

Paul M. Stein, Esq.

DECISION

The Appellant, Domingos Rosa, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, § 2(b), contesting the decision of the Boston Police Department (“BPD”) to bypass him for original appointment to the position of permanent, full-time Boston Police Officer. A pre-hearing conference was held at the offices of the Commission on April 9, 2013 and two (2) full hearings were held at the same location on July 9 and 25, 2013. The hearings were digitally recorded and both parties were provided with a CD of the hearing. On September 27, 2013, each party submitted a proposed decision.

FINDINGS OF FACT:

Sixteen (16)¹ exhibits were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Richard Henshaw, Detective, Boston Police Department;
- Norma Ayala, Sargent Detective, Boston Police Department;

Called by the Appellant:

- Domingos Rosa, Appellant;

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

1. The Appellant, Domingos Rosa, is thirty-one (31) years old and resides in Dorchester. He is originally from Cape Verde and is a naturalized citizen of the United States. (*Testimony of Appellant*)
2. Mr. Rosa obtained a diploma from John D. O'Bryant High School of Math/Science in 2001. Mr. Rosa received an Associate's degree in Criminal Justice from Quincy College in 2005. He attends UMass Boston, studying for a Bachelor's degree in Criminal Justice. (*Testimony of Appellant*)
3. Mr. Rosa served in the United States Marine Corps from 2001 to 2002, when he received an honorable discharge. The highest rank he attained was Lance Corporal E3. (*Exh. 1; Testimony of Appellant*)
4. During the period from 2005 through 2010, Mr. Rosa worked as a Correction Officer for the Suffolk County Sheriff's Department. In 2011, he worked for the Suffolk County Superior

¹ Exhibits 11 and 12 are included only for identification purposes.

Court Probation Department. He received glowing reviews from these employers. They characterized him as hardworking, amiable, and dependable. He also has worked for two private security companies and as a Tae Kwon Do instructor. (*Exhs 1 & 2*)

5. On April 25, 2012 and June 28, 2012, Mr. Rosa's name appeared 23rd on Certification No. 202869 from which the BPD ultimately appointed sixty-eight (68) permanent, full-time police officers, of whom fifty-two (52) were ranked below Mr. Rosa. (*Stipulated Facts*)
6. BPD Detective Richard Henshaw of the Recruit Investigation Unit (RIU) was assigned to conduct a thorough background investigation on Mr. Rosa. (*Exh. 2: Testimony of Det. Henshaw*)
7. Mr. Rosa's application and the background investigation revealed that Mr. Rosa previously had been offered employment as a BPD police officer and attended the Boston Police Academy on two prior occasions, first in 2008 and again in 2010. (*Exhs.1 & 2; Testimony of Det. Henshaw*)
8. In 2008, Mr. Rosa was dismissed from the Boston Police Academy for failing the Level 2 examinations. (*Exhs 1 & 2*)
9. On December 13, 2010, during his first day at his second enrollment in the Academy, Mr. Rosa was confronted by Police Officer "A", Jr. for failing to bring in his equipment for inspection. Officer "A" instructed Mr. Rosa to write a Boston Police Form 26 report ("Form 26") detailing his failure to follow instructions. Mr. Rosa wrote the Form 26. (*Exhs. 1, 2 & 6: Testimony of*)
10. The next day, December 14, 2010, Police Officer "B" approached Mr. Rosa, inquiring whether Mr. Rosa had brought in his equipment for inspection. Mr. Rosa replied that he had not. Officer "B" asserts that Mr. Rosa stated that "he was told by P.O. ["A"] he did not have

to bring them in.” Mr. Rosa asserts that he told Officer “B” that Officer “A” had “not told him that he had to bring in” his equipment, which Officer “A” contends he did not. Officer “B” instructed Mr. Rosa to write another Form 26, which he did. (Exhibits 6 and 7;

Testimony of Mr. Rosa)

11. On December 15, 2010, Officer “A” approached Mr. Rosa, asking Mr. Rosa whether he had lied to Officer “B” stating that that Officer “A” had told Mr. Rosa “not to” bring in his equipment for inspection. Mr. Rosa stated that he did not tell Officer “B” this, but that he had told Officer Welsh that that Officer Ezekiel did “not tell him to bring in” his equipment. Officer “A” asked Mr. Rosa who he was going to believe: an officer or a recruit. Mr. Rosa responded that Officer “A” was going to believe an officer. Mr. Rosa was again asked whether he lied to Officer “B” about Officer “A” telling him that he “did not have to bring in” his equipment. Mr. Rosa again stated that he did not lie. Mr. Rosa was asked a third time whether he had lied, and he was told to rethink his answer very carefully. Mr. Rosa then answered that he had lied. Officer “A” asked Mr. Rosa if he was lying about lying to which Mr. Rosa answered that he was. Officer “A” instructed Mr. Rosa to write another Form 26, which he did. (Exhibits, 6-8; Testimony of Mr. Rosa)

12. On December 22, 2010, Mr. Rosa was dismissed from the Academy for untruthfulness.

(Exhibit 3)

13. Mr. Rosa appealed to the Municipal Police Training Committee (“MPTC”). The MPTC conducted a hearing and changed the reason for dismissal from “Dismissal for Disciplinary Reasons” to “Dismissal for non-Disciplinary Reasons.” (Exhibit 13)

14. The MPTC reduced Mr. Rosa’s dismissal so that he would not be subject to a lifetime ban from eligibility for any subsequent police academy in Massachusetts. Sergeant Detective

Norma Ayala (“SD Ayala”), who was involved in the round table process of deciding Mr.

Rosa’s Department candidacy, states that her understanding of this dismissal is that Mr. Rosa does not have a lifetime ban from eligibility at other police academies, but that he is effectively banned from being eligible for the Department’s police academy.

15. The Department sent Mr. Rosa a bypass letter on January 13, 2013, citing him for “violations of Rule 102 s.23 (Truthfulness) and Academy Rule 3 (Integrity). (Exhibit 4)

CONCLUSION

Applicable Law

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brckett v. Civil Serv. Comm’n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Comm’rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971) (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 189 (2010) [Beverly]: “In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev. den., 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). Further, “[t]he commission does not act without regard to the previous

decision of the appointing authority, but rather decides whether 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.” Id. at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev. den., 390 Mass. 1102 (1983)).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. Beverly at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone as a new... officer than in disciplining an existing tenured one.” See City of Attleboro v. Mass. Civil Serv. Comm’n, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly at 191. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Id. (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)).

The Commission is also mindful of the standard of conduct expected of officers of the law. “An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Serv. Comm’n, 38 Mass. App. Ct. 473, 474 (1995). “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

The Parties' Positions

The Department argues that its decision to bypass Mr. Rosa was reasonably justified. Mr. Rosa had already attended the Academy twice, and was dismissed both times. His most recent dismissal resulted from being untruthful to his superiors. Mr. Rosa first told officers that he had not said that Officer "A" told him not to bring in his equipment. When questioned two more times, Mr. Rosa changed his statement to assert that Officer "A" had, in fact, said that to him. When questioned if his last statement was a lie, Mr. Rosa consented that it was. Mr. Rosa lied to officers, and then lied about lying. Therefore, the Department avers, based on the Department's policy against hiring someone who has been untruthful, it was justified in bypassing Mr. Rosa.

Mr. Rosa argues that he should not have been bypassed. He contends that he was only untruthful because he believed that is what his superiors wanted him to do. Mr. Rosa was truthful in his first two statements, and it was not until he was questioned a third time and was told to "rethink his answer" that he changed his statement and lied. Therefore, Mr. Rosa argues, he should not be bypassed for untruthfulness.

Analysis

I conclude the preponderance of evidence shows the underlying exchange between Mr. Rosa and Officer "B" did, in fact, occur as Mr. Rosa initially (and at the Commission hearing) explained – Mr. Rosa believed that he had said (or at least intended to have said) that Officer "A" he "did not tell him to bring in" his uniform, not that Officer "A" said "not to bring in" his uniform. I conclude, therefore, that Mr. Rosa believed that he was being truthful in his initial two responses when later questioned, but, after being asked to "think carefully", made what he believed to be a false statement and, then, retracted that falsehood upon further questioning.

The Police Academy is meant to instill an atmosphere of compliance and obedience. Recruit officers are expected to do as they are told and to not question lawful orders. Given the semantics surrounding the alleged statements, and the atmosphere in which Mr. Rosa was questioned, I can understand how Mr. Rosa might have been pressured into admitting to making a statement that he did not believe was truthful. I can also understand that the BPD is entitled to demand that recruits must know the distinction between the duty in a paramilitary organization to comply with a lawful, albeit apparently nonsensical order, and the fact that no superior can lawfully compel or induce a recruit to lie about his conduct as a police officer.

I do not doubt Mr. Rosa found himself in an uncomfortable situation and that succumbing to lying seemed to him, at the time, the safest course. The Municipal Training Council concluded, however, after an opportunity for a hearing, that the course Mr. Rosa chose was not acceptable conduct for a police recruit. While it is true that the BPD Roundtable did not fully revisit all of the facts involved, I find that, in this particular situation, the BPD's decision to bypass Mr. Rosa in reliance on the decision of the Municipal Training Council does amount to a reasonable justification based on the necessary thorough review required under the standards established in Beverly.

This conclusion does not go so far as to agree with the BPD that principles of issue preclusion mandate that Mr. Rosa be disqualified. I agree with the Appellant that the facts of the case do not meet the conditions for issue preclusion. See, e.g. Alba v. Raytheon Co., 441 Mass 836 (2004). Nevertheless, absent any indicia that the process which resulted in the decision of the Municipal Training Council was infected by improper motive or should be discounted as otherwise unreliable, under the mandate given to the Commission in Beverly, the BPD is entitled

to justify its bypass decision on the basis of that outcome, and it is not necessary or appropriate under Beverly to require proof that the Municipal Training Council made the “correct” decision.

For the reasons stated herein, the Department had reasonable justification to bypass Mr. Rosa. Therefore, Mr. Rosa’s appeal filed under Docket No. G1-13-70 is hereby *dismissed*.

Civil Service Commission

Paul M. Stein, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman and Stein, Commissioners; McDowell {absent}) on August 21, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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)(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 (30) 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.

Notice:

James W. Simpson, Esq. (for Appellant)
Amanda E. Wall, Esq. (for Respondent)
John Marra, Esq. (HRD)