

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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

KHIRY TODD,
Appellant

G1-23-099

v.

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

James Gilden, Esq.
173 N. Main St
Sharon, MA 02067

Appearance for Respondent:

Omar Bennani, Esq.
Assistant Corporation Counsel
Boston Police Department
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Commissioner:

Shawn C. Dooley

Summary of Decision

The Commission denied the bypass appeal of a candidate seeking appointment as a police officer, concluding that the Boston Police Department had reasonable justification to bypass him based upon multiple accusations of domestic violence and restraining orders as well as having exhibited poor judgment in his past interactions with law enforcement.

DECISION

On July 14, 2023, the Appellant, Khiry Todd (Appellant), filed a timely appeal with the Civil Service Commission (Commission), pursuant to G.L. c. 31, § 2(b). The appeal challenged the decision of the Boston Police Department (Department) to bypass the Appellant for appointment as a permanent, full-time police officer. The Commission held a remote pre-hearing

conference on August 15, 2023. On November 1, 2023, I conducted an in-person full hearing. The hearing was recorded via the Webex videoconferencing platform, and copies were provided to the parties.¹ Both parties filed Proposed Decisions. For the reasons set forth below, the Appellant's appeal is denied.

FINDINGS OF FACT

The Department submitted into evidence 12 exhibits (Exhibits 1-12; R0001-R0102). The Appellant did not submit any exhibits into evidence. Based on the documents submitted and the testimony of the following witnesses:

Called by the Department:

- Detective Craig Wozniak, Recruit Investigations Unit, Boston Police Department
- Teori Shaw-Boyce, Deputy Director of Human Resources, Boston Police Department

Called by the Appellant

- TZ, Appellant's fiancée
- KZ, the mother of the Appellant's fiancée
- Khiry Todd, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from other credible evidence, a preponderance of evidence establishes the following facts:

1. The Appellant, Khiry Todd, is a life-long Massachusetts resident, born and raised in Lynn.

¹ A link to the audio/video recording was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

He lives with his fiancée, TZ, and their three children. (*Exhibits 1 and 11; Testimony of Appellant*)

2. The Appellant, who currently resides in Salem, MA, graduated from high school in 2010 and, at the time of the hearing, was enrolled in a County Sheriff Department's Academy. (*Exhibits 1 and 11; Testimony of Appellant*)
3. The Appellant is a professional boxer. He has a professional record of 12 wins (10 by knock out) and one loss. (*Exhibits 1 and 11; Testimony of Appellant*)
4. On March 17, 2022, the Appellant took and passed the civil service examination for police officer administered by the state's Human Resources Division (HRD). His name was placed on the eligible list for police officer established on July 1, 2022. (*Stipulated Facts*)
5. On September 1, 2022, HRD issued Certification #08848 to the Boston Police Department. (*Stipulated Facts*)
6. The Appellant's name appeared in a tie group for the 77th rank on Certification # 08848. (*Stipulated Facts*)
7. On October 5, 2022, November 25, 2022, and January 11, 2023, at the Department's request, HRD provided additional names to the BPD. (*Stipulated Fact*)
8. On December 2, 2022, the Department requested the number of vacancies be increased to 180.
9. The Appellant began an "on-again / off-again" dating relationship with his current partner, TZ, around 14 or 15 years ago while they were both in high school. (*Testimony of TZ*)
10. At some point in 2018, TZ and the Appellant "split up" while the Appellant was in Colorado to further his boxing career. (*Testimony of TZ; Testimony of Appellant*)

11. On July 12, 2018, an incident occurred wherein the Appellant, who had returned from Colorado, confronted TZ and a man who she was with at Nahant Beach after observing him with TZ and his two children. The police were called by an unknown person(s). (*Testimony of TZ; Testimony of Appellant; Exhibit 4*)
12. One day later, on July 13, 2018, TZ filed a complaint for an Abuse Restraining Order (209A) against the Appellant, alleging in her affidavit that the Appellant "...attempted to fight [the man TZ was with at the beach] while I tried breaking it up. He showed up at my house later on with his sister who then fought me. This puts me in fear because in the past we have had physical altercations when arguing and things have escalated to phones being smashed and pushing [and] shoving." (*Exhibit 4*)
13. An *ex parte* hearing was scheduled for July 13, 2018 at Lynn District Court and the abuse restraining order was denied after TZ failed to appear. (*Exhibit 4*)
14. On September 6, 2018, TZ's mother, KZ, filed a separate complaint for an Abuse Prevention Order in Lynn District Court against the Appellant. In her affidavit, KZ alleged that "Khiry Todd came to my home yesterday... As in the past he has refused to leave my house [and] has verbally [and] physically assaulted me... Before the cops came Khiry called my house [and] threatened to send his mother to come over [and] 'f*** me up'. I am afraid of him he has knocked me down in the past when I ask him to leave. If I attempt to close my door when I am asking him not to come in he holds the door. In the past he threatens me. I am in great fear of him". (*Exhibit 3*)
15. KZ describes the alleged 2018 assault as occurring when the Appellant physically pushed her after she tried to shut the door. (*Testimony of KZ*)

16. On September 6, 2018, the court issued the abuse prevention order requested by KZ with a finding that there was a substantial likelihood of immediate danger of abuse and an order to surrender all firearms and FID cards. (*Exhibit 3*)
17. The Appellant did not surrender his License to Carry (LTC) or his firearms, as required by the abuse prevention order. In addition, the Lynn Police Department failed to suspend his LTC per the court order. (*Exhibits 3 and 8; Testimony of Appellant*)
18. On September 19, 2018, KZ's Abuse Prevention Order was extended after the Appellant failed to appear for the hearing. The hearing was rescheduled for October 3, 2018. The Appellant was served on September 22, 2018. (*Exhibits 3 and 8*)
19. On October 3, 2018, a hearing was held in Lynn District Court. Both KZ and the Appellant were present and the Abuse Prevention Order was extended for one year. The Appellant was served at the hearing. (*Exhibit 3*)
20. One year later, on October 3, 2019, KZ's Abuse Prevention Order was vacated after neither party was present for the extension hearing. (*Exhibit 3*)
21. On June 11, 2020, TZ filed a second complaint for an Abuse Prevention Order against the Appellant in Lynn District Court. In her affidavit, TZ stated: "We got into a fight last night and he was physical towards me, he has made threats to me. And this is not the first time this has happened. We have broken up in the past and he has followed me places. I don't want to press charges I just don't want him to be able to come to my house or place of work...". A temporary abuse prevention order was issued on June 11, 2020 and expired on July 8, 2020. (*Exhibit 2*)
22. On January 3, 2022, TZ called the Salem Police to report a domestic situation. She told the responding officer that she and the Appellant "had gotten into a heated verbal argument

earlier in the day” and that the Appellant “displays very aggressive behavior and she is unable to gain control of the situation.” She also told the officers that the situation had been escalating recently and “due to the manner of escalation she is afraid things will only get worse.” (*Exhibit 10*)

23. TZ stated to the officers that the altercation was only verbal and she refused medical attention. (*Testimony of TZ; Exhibit 10*)
24. The Salem Police advised TZ how to obtain a restraining order and, per the reporting officer, TZ “assured [him] that she was doing so after filing the report.” TZ did not in fact file for a restraining order after this incident. (*Exhibit 10*)
25. The Salem Police, however, filed a suspected child neglect (or “51A”) report with the Department of Children and Families (DCF) on behalf of the children in the household. (*Exhibit 10*)²
26. KZ and the Appellant now have a good relationship and KZ describes the Appellant as “an excellent father.” (*Testimony of KZ*)
27. At the hearing, KZ testified that there had been no other violence in the past (contradicting statements she made in the restraining order). She further went on to say that the Appellant had grown up quite a bit since then and deserved a second chance. (*Testimony of KZ*)
28. On June 15, 2022, the Appellant filed an application for a License to Carry (“LTC”) with the Lynn Police Department. (*Exhibits 7 and 8; Testimony of Appellant*)
29. In August of 2022, the Appellant requested to meet with the Lynn Police Department to discuss his LTC Application. Lt. Paul Cotter of the Lynn Police Department met with the Appellant and spoke with him about his application. As documented in his report, the

² There is no information in this record as to DCF’s disposition of the 51A report.

Appellant told Lt. Cotter that he required an LTC in order to be hired by a county Sheriff's Department. Lt. Cotter asked the Appellant "...if there have been or were any other incidents [besides the restraining orders listed on the application] or police reports that [he] would find domestic related or anything else between him and his girlfriend..." to which the Appellant stated that there were no other issues. (*Exhibit 8*)

30. At some point during the Lynn Police Department's investigation into the Appellant's suitability for an LTC, the Appellant submitted affidavits in support of his suitability from both KZ and TZ. (*Exhibits 5, 6, and 7*)
31. A few days after their meeting, Lt. Cotter ran the Appellant through "COPLINK" and discovered the January 2022 report that the Appellant had not disclosed to him involving the Appellant and TZ where it was alleged that the Appellant "displays very aggressive behavior". (*Exhibits 8, 10, and 11*)
32. The report also detailed that the Appellant was arrested after police discovered that there was an active warrant for his arrest. Lt. Cotter noted in his report: "Based on this report it would appear that Todd lied to me in our meeting when he stated there were no other issues nor any other police reports I would find on him." (*Exhibits 8, 9, and 10*)
33. Lt. Cotter followed up with Officer Dino LoConte of the Salem Police Department, who responded to the domestic incident in January and was also present for the Appellant's arrest. Officer LoConte wrote to Lt. Cotter that "During the interaction in which Mr. Todd was arrested he was extremely uncooperative." There was no mention of the Appellant being uncooperative in the police report, which stated that the Appellant was taken into custody "without incident." (*Exhibits 8, 9, and 10*)
34. On November 20, 2022, the Lynn Police Department denied the Appellant's LTC application

based on him being an “unsuitable person”. In support of its decision, the Lynn Police Department cited the restraining orders and domestic violence issues that were identified in police reports. In addition, the Lynn Police stated that there were residency discrepancies, including the fact that both affidavits in support of the Appellant stated that he was living with his girlfriend at the time of the application and therefore was not a resident of the City of Lynn. (*Exhibit 7*)

35. Detective Craig Wozniak of the BPD’s Recruit Investigation Unit was assigned to perform the background investigation on the Appellant. (*Testimony of Det. Wozniak, Exhibit 11*)

36. Det. Wozniak called and left several messages for TZ but she never returned his calls.³
(*Testimony of Det. Wozniak*)

37. Det. Wozniak attempted to speak with KZ as well and did not receive a return phone call.
(*Testimony of Det. Wozniak*)

38. Det. Wozniak obtained the Lynn Police Department’s investigation regarding the Appellant’s LTC renewal including sworn affidavits from TZ and KZ in support of the Appellant.
(*Testimony of Det. Wozniak*)

39. KZ’s affidavit does not dispute or change the statements she made in the 2018 restraining order against the Appellant, but rather focused on his character and growth as a person and father. (*Exhibit 6*)

40. KZ affirmed that the physical altercation in 2018 occurred when she tried to shut the door. While KZ was in fear of the Appellant when the incident occurred in 2018, she has not been in fear of him since. (*Testimony of KZ*)

³ During testimony before the Commission, TZ stated that no one from the Boston Police Department reached out to her.

41. In TZ's affidavit to the Lynn Police Department regarding the Appellant's LTC application, she wrote that "[I] said what I felt like I needed to say in order for the temporary restraining order to be granted." She also wrote that she has "never been in fear of Khiry, he has also never been a threat to me."⁴ (*Exhibit 5*)
42. The Appellant was attending the Academy to become a Correction Officer with a County Sheriff's Office from December 2022 through January 2023. (*Testimony of Appellant; Exhibits 1 & 11*)
43. The Appellant states that he was terminated for missing part of one day of the Academy to interview with the Transit Police. His understanding was that he had permission to go to the interview as he had told his supervisor the day before that he was going to miss class due to the interview. (*Testimony of Appellant; Exhibit 11*)
44. On January 26, 2023, Boston Police Detective Craig Wozniak presented a Privileged and Confidential Memorandum (PCM), which contained a summary of his investigation of the Appellant's background to the Department's roundtable. (*Testimony of Det. Wozniak; Exhibit 11*)
45. This roundtable was comprised of designees from the Department's Internal Affairs Division, Human Resources Department, as well as a member of the Legal Advisor's Office. (*Exhibit 12; Testimony of Det. Wozniak, Testimony of Teori Shaw-Boyce*)
46. Following Det. Wozniak's presentation, the roundtable discussed the Appellant's background investigation and decided to bypass him. (*Testimony of Det. Wozniak*)

⁴ During testimony before the Commission, TZ recanted all statements she made in the restraining orders of physical abuse or violence. TZ stated that she took out the 2018 restraining order because it was implied by the police that if DCF were called in the future regarding her and the Appellant's altercation, filing a restraining order could be viewed positively by DCF in that TZ was being proactive in protecting her children.

47. The roundtable's decision was made based on the Appellant's work history, his judgment as exhibited in his interactions with law enforcement, and his prior history of restraining orders. The Department gives additional weight to restraining orders within the past seven years that are extended beyond a Temporary Restraining Order and so the extended restraining order obtained by KZ raised significant concerns. (*Testimony of Teori Shaw-Boyce*)
48. The Department was also concerned with the fact that the Appellant exhibited poor judgment in his interactions with law enforcement. (*Testimony of Teori Shaw-Boyce; Exhibit 12*)
49. On July 28, 2023, the Department bypassed the Appellant for employment as a Boston police officer based on his work history, judgment, and prior history involving restraining orders. (*Exhibit 12; Testimony of Teori Shaw-Boyce*)

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).

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).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. 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 Service Comm'n, 483 Mass. 461, 474-78 (2019); Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm'n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

"Reasonable justification . . . means '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'". Brackett v. Civil Service Comm'n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient").

The governing statute, G.L. c. 31, gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary that the Commission find that the appointing authority acted "arbitrarily and capriciously." City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission ". . . cannot substitute its judgment about a *valid exercise of discretion based on merit or policy considerations* by an appointing authority" but, when there

are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission." *Id.* (*emphasis added*). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission's jurisdiction to enforce basic merit principles under civil service law).

Law enforcement officers are vested with considerable power and discretion and must be held to a high standard of conduct:

"Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities." Police Comm'r v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986).

Analysis

By a preponderance of the evidence, the BPD has shown that it had reasonable justification to bypass the Appellant for appointment as a Boston Police Officer based on concerns regarding domestic violence-related incidents, including one incident that involved a physical altercation with the mother of his fiancée, which resulted in the issuance of a one-year restraining order.

A series of prior Commission decisions demonstrate that the Commission takes issues surrounding domestic violence seriously and that they merit particularly strict scrutiny when any violence has been perpetrated by a police officer candidate. Police officers are held to a higher standard of conduct and proven acts of domestic violence are a valid reason for bypassing a candidate for appointment.

In 2018, the Appellant was named in two restraining orders. The most significant one, and the one I give the greatest weight to, was brought by his fiancée's mother and was extended for one year after a hearing. The fact that a judge, after hearing testimony from the alleged victim, as well as the Appellant, extended the order for a year is significant and justifiably raised serious concerns with members of the BPD's roundtable. The order was based on an affidavit that alleged that the Appellant "verbally and physically assaulted" his fiancée's mother, putting her in fear for her safety. The affidavit also stated that the Appellant had "knocked her down in the past." At the Commission's evidentiary hearing, this information was substantially corroborated by KZ and she confirmed that, on that day, the Appellant physically pushed her out of the doorway and she was then in fear. While she was supportive of the Appellant, is no longer in fear, and believes he has matured since this time, she did not dispute the events that occurred on the day that she applied for a restraining order. At the hearing, she stated that this was a one-time event and it took place at a stressful time for both the family and the Appellant as they were all grieving the recent death of KZ's sister. While I appreciate that she is now supportive of the Appellant, the fact remains that he did make physical contact with her and put her in fear. This alone justifies BPD's bypass of the Appellant.

The remaining three accusations of domestic violence are more challenging to address as the alleged victim, the Appellant's fiancée, has now recanted her statements surrounding these incidents. Given the complexities surrounding cases of domestic violence, the recency and frequency of these accusations, and the overall seriousness of the allegations (although now recanted), all three of these incidents remain significant when looking at the Appellant's overall suitability to be appointed as a Boston Police Officer and the BPD was justified in considering

them when deciding whether to bypass the Appellant for appointment.⁵ Further, the BPD was justified in its concern that the Appellant failed to disclose all of these incidents in his Lynn LTC and BPD recruit applications.

Police officers are often called to homes where alleged abuse is occurring. Particularly against that backdrop, the BPD is on firm ground bypassing a candidate for appointment who has a history of domestic violence. To ensure clarity, I did consider that no criminal charges were filed against the Appellant for any of these alleged incidents. His serious misconduct, however, is a valid reason to bypass him for the position of police officer, regardless of whether they resulted in criminal charges.

These allegations are sufficient to provide reasonable justification for BPD's bypass. Reasonable justification means that, after an impartial and reasonably thorough review, there is a credible basis to believe allegations of misconduct that present legitimate doubts about the Appellant's suitability to serve in the sensitive job of a BPD police officer. BPD met this standard. Based on the affidavits in support of these restraining orders, the orders entered by a judge (including a one-year extension), and KZ's own testimony that the Appellant pushed her, enough adverse evidence has been adduced to satisfy the reasonable justification standard. Given the multiple instances and the recency of these events, the Boston Police Department had ample reason to conclude that the Appellant had a history of misconduct that presented "legitimate doubt" about his present suitability for appointment.

⁵ Given that, standing alone, the one-year restraining order against the Appellant, along with the underlying misconduct against the mother of his fiancée, is a sufficient reason to bypass the Appellant for appointment, I need not assess the credibility of the Appellant's fiancée, whose testimony before the Commission directly contradicted her sworn affidavits at the time.

Finally, by contrast, I find the Appellant's explanation and reasoning surrounding his dismissal from the Sheriff's Academy to be honest and compelling. While I understand the academy may have a no excuse absentee policy, the excuse of miscommunication in regard to interviewing for another police-related position is plausible. Given that the Sheriff's Office refused to give specific reasons for termination, one is unable to give weight to the dismissal beyond the fact that the Appellant was let go by another law enforcement agency during the hiring process.

Conclusion

For all of the above stated reasons, the appeal of Khiry Todd under Docket No. G1-23-099 is *denied*.

Civil Service Commission

/s/ Shawn C. Dooley
Shawn C. Dooley
Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein, & Tivnan, Commissioners) on March 7, 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 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-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)