

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DON M. TRAN,
Appellant
v.

G1-14-69

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Pro Se
Don Tran

Appearance for Respondent:

Meryum Khan, Esq.
Boston Police Department
One Schroeder Plaza
Boston, MA, 02120

Commissioner:

Paul M. Stein¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Don Tran (hereinafter “Mr. Tran” or “Appellant”), appealed to the Civil Service Commission (“Commission”) on March 18, 2014, from the decision of the Boston Police Department, the Appointing Authority (hereinafter “BPD” or “Respondent”), to bypass him for appointment to the position of police officer with the BPD. The Appellant filed a timely appeal. A pre-hearing conference was held on April 8, 2014 and a full hearing was held on May 20, 2014 at the offices of the Commission. The hearing was digitally recorded. The Commission received a post-hearing proposed decision from BPD on July 11, 2014. For the reasons stated herein, the appeal is allowed.

¹ The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

FINDINGS OF FACT:

The Respondent entered twelve (12) exhibits into evidence at the hearing. The Appellant entered an additional five (5) exhibits. Based on these exhibits and the testimony of the following witnesses:

For BPD:

- Nora Baston, BPD Deputy Superintendent
- Ian Mackenzie, Director of Occupational Health Services
- Andrew Brown, Psychiatrist
- Donald Seckler, Clinical Psychologist

For the Appellant:

- Don M. Tran, Appellant;

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

1. Mr. Tran is thirty-eight (38) years old and resides in Dorchester with his wife and one of his two children. He works installing flooring on a part-time basis and presently serves in the U.S. Navy Reserves. (*Testimony of Tran; Exhibit 8*)
2. Mr. Tran is from a Vietnamese family that came to the United States in 1980 after living briefly in the Philippines. His parents were unable to care for him and he was raised by relatives as their informal foster child. Mr. Tran attended Madison Park High School, but did not graduate. He later received a GED online from the University School in

Bridgeport, Connecticut. He has approximately fifty credits from Marion Court College
(*Exhibit 9*)

3. Mr. Tran enlisted with the U.S. Navy in October, 2008, and was honorably discharged in July, 2012. He attained the rank of E4, Petty Officer Third Class. (*Exhibit 2; Testimony of Tran*)
4. In November, 2011, while in Vietnam he had an incident which caused him to become worried that he had become extremely fatigued and worried that he had contracted a serious and contagious disease. He felt weak and repeatedly sought medical attention. He was informed that he did not have any contagious disease, but Mr. Tran continued to suffer from fatigue and muscle aches and saw more doctors. One doctor suggested that Mr. Tran may have lupus and had sent him to a lupus specialist. The lupus specialist, however, informed Mr. Tran he did not have lupus and so Mr. Tran was forced to see other doctors. Eventually, on or about June 3, 2013, Mr. Tran was diagnosed with severe sleep apnea on June 3, 2013. (*Exhibit 2; Exhibits 13-15; Testimony of Tran*)
5. Mr. Tran took the civil service exam for police officer on April 30, 2011. He scored an 83. BPD requested a certification from the state's Human Resources Division ("HRD") on May 10, 2013. HRD sent Certification No. 00743 to BPD on June 1, 2013. Mr. Tran appeared forty-eighth (48th) of those willing to accept employment. (*Stipulated Facts*)
6. Mr. Tran filled out the application in June 2012 and subsequently passed the background investigation. He was sent a conditional offer of employment for the position of Boston police officer on July 17, 2013 contingent upon passing the medical screening, which included a psychological evaluation. (*Testimony of Tran; Exhibit 3*)

7. BPD had previously submitted a psychological screening plan to HRD which was approved by HRD. (*Exhibits 11 and 12*)
8. Police officer candidates must pass medical examinations, including a psychological evaluation. A candidate who has a Category A medical condition may not be considered for appointment. A candidate with a Category B condition may be further considered for appointment as long as the condition is not of sufficient severity to prevent the candidate from performing the essential functions of a police officer without posing a significant risk to the safety and health of him/herself or another. These categories are described in HRD's Physician's Guide Initial-Hire Medical Standards. (*HRD's Initial-Hire Medical Standards*)
9. For psychiatric purposes, Category A medical conditions include: disorders of behavior, anxiety disorders, disorders of thought, disorders of mood, and disorders of personality. Category B medical conditions includes: "a history of any psychiatric condition, behavior disorder, or substance abuse problem not covered in Category A. Such history shall be evaluated based on that individual's history, current status, prognosis and ability to respond to the stressors of the job." Category B also covers "any other psychiatric condition that results in an individual not being able to perform as a police officer." (*HRD's Initial-Hire Medical Standards, p. 16*)
10. The psychological screening is a three step process. Phase I is testing. Candidates take the Minnesota Multiphasic Personality Inventory–2RF ("MMPI-2-RF"), and the Personality Assessment Inventory ("PAI"). These tests are scored using a proprietary computer program and are not intended to serve as the sole determining factor for assessing a candidate's psychiatric condition. (*Exhs. 4 & 5; Testimony of Dr. Seckler*)

11. Phase II consists of a thirty (30) minute clinical interview performed by a psychiatrist/doctorate level psychologist designated by the BPD . If no questions are raised by this process, the designated clinician will notify the BPD in writing that he found no psychiatric condition that would disqualify the candidate to be appointed as a police officer. Should questions arise during the interview process, these issues are explored, and a report is generated by the first level screener that is forwarded to a second opinion psychiatrist/doctorate level psychologist to further evaluate the applicant in Phase III of the process. The second-opinion clinician then makes a final recommendation to the BPD as to whether the candidate is disqualified for a Category A or Category B psychiatric condition.. (*Exhibits 4, 5, and 11; Testimony of Mackenzie*)
12. In this case, Dr. Andrew Brown was the first-level psychological screener. Dr. Brown is a consulting psychiatrist and has been assisting BPD since 2006. (*Testimony of Dr. Brown*)
13. Dr. Seckler is a clinical psychologist and has evaluated candidates as a first level screener for various police departments in Massachusetts since 1979. Dr. Seckler is the second level screener at BPD, the only department for which he was a second-level screener. (*Exhibits 7 and 8; Testimony of Mackenzie & Dr. Seckler*)
14. Mr. Tran met with Dr. Brown on September 5, 2013. Dr. Brown recommended that a second opinion evaluation be sought. (*Exhibit 8; Testimony of Dr. Brown*)
15. Dr. Brown recommended a second opinion evaluation primarily for two reasons. Dr. Brown was concerned that Mr. Tran had obsessional anxiety about contracting a serious disease as a result of the 2011 incident. Mr. Tran repeatedly spoke of feeling a “weakness,” and Dr. Brown believed that Mr. Tran’s obsession about his health led to “compromised capacity for reality testing.” [T]his applicant is highly vulnerable to

somatization, anxiety disorder, and affective disorder...” The second reason Dr. Brown recommended a second opinion were Mr. Tran’s responses to various items on BPD’s personal data questionnaire and the PAI. Mr. Tran endorsed thirty-seven (37) critical items on the PAI (placing him in the ninety-sixth [96th] percentile). This problem seems to stem from communication. English is not Mr. Tran’s first language so he may not have fully comprehended the questions being asked of him, nor could he explain to Dr. Brown adequately why he chose the answers that he did. (*Exhibit 8; Testimony of Dr. Brown*)

16. Dr. Brown is unsure if Mr. Tran’s communication problem is a cognitive issue or a cultural issue. (*Testimony of Dr. Brown*)

17. Mr. Tran met with Dr. Seckler for a second opinion evaluation in a one-hour clinical interview on October 20, 2013. (*Exhibit 9*)

18. Dr. Seckler’s report does not mention concerns over obsessional anxiety as Dr. Brown had, but he does reiterate concerns over whether Mr. Tran could communicate adequately. “Mr. Tran’s command of English is such that I have serious concerns that he would be able to function well in the police job.” Mr. Tran does not appear “to have sufficient command of the language to quickly understand what is being asked of him, and to craft cognitively sophisticated responses.” Dr. Seckler’s recommendation is: “Bypass. Mr. Tran ... does not appear to understand English well enough to process verbal interaction in ‘real time’ well enough to accurately track interactions of the sort that would characterize a police officer’s interaction with the public, or his understand of orders given him in complex situations.” Mr. Tran’s “verbal responses are also often incomplete or poorly crafted so as to seem odd or ‘off the mark’ in ways that limit meaningful conversation.” Dr. Seckler followed this in his report with “[s]ince strong

communication skills are a prerequisite of the police job, and the job cannot be modified to demand a lower level of communication skill, Mr. Tran should not be appointed to the police job at this time.” (*Exhibit 9; Testimony of Dr. Seckler*)

19. Eighty-three (83) candidates were selected for appointment, forty-eight (48) of whom were ranked below Mr. Tran. Mr. Tran was notified that he was bypassed on February 7, 2014. (*Stipulated Facts*)

20. The bypass letter sent to Mr. Tran dated February 7, 2014 stated that since the psychological screening indicated that he could not adequately perform the essential functions of the public safety position he was bypassed. (*Exhibit 1*)

21. Mr. Tran filed this appeal on March 18, 2014. (*Claim of Appeal*)

CONCLUSION

This appeal involves a bypass for original appointment from a civil service list, or “certification”. This process is governed by G.L.c.31, Section 27, which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest.”

Rule PAR.08(3) of the Personnel Administration Rules, promulgated by HRD to implement this statutory requirement, provides:

“A bypass will not be permitted without a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed . . . shall later be admissible as reason for selection or bypass in any proceedings before . . . or the Civil Service Commission...”

Candidates are ranked on the certification based on their scores on the competitive qualifying examination administered by HRD, along with certain statutory preferences. In order to bypass a more highly ranked candidate, an appointing authority has the burden of proving by a

preponderance of the evidence the specific reasons – either positive or negative, or both -- consistent with basic merit principles, that “reasonably justify” picking a lower ranked candidate. G.L.c. 31, §1, §27. See, e.g., Brackett 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.” Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928); Mayor of Revere v. Civil Serv. Comm’n, 31 Mass. App. Ct. 315, 321n.11, 326 (1991). See also, MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635(1995), rev.den., 423 Mass. 1106(1996) (bypass reason must be evaluated “in accordance with [all] basic merit principles”).

“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.” City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 187 (2010) (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 v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 188 (2010) [“Beverly”] 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, 78 Mass.App.Ct. 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)). While these principles afford an appointing authority reasonable discretion to screen out questionable candidates in favor of those more suitable, this discretion is not absolute or unreviewable. The essential issue being evaluated in a bypass appeal to the Commission remains whether or not the appointing authority has reasonable justification, under basic merit principles, to prefer a candidate whose performance on the civil service qualifying examination placed him lower than the bypassed candidate, thus skipping over the more highly ranked candidate for some valid reason.

Experts’ conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. See, e.g., Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, rev. den., 437 Mass (2002). As a corollary, when the fact-finder is presented with

conflicting expert evidence, the fact-finder may accept or reject all or parts of the opinions offered. See, e.g., Ward v. Commonwealth, 407 Mass. 434, 438 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73 (1891); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, rev.den., 409 Mass. 1104 (1991).

The role of a psychiatrist conducting a pre-employment evaluation for police officers in civil service communities is ... “narrowly circumscribed. [His] sole task [is] to determine whether [the candidate] [has] a psychiatric condition that [prevents him] from performing, even with reasonable accommodation, the essential functions of the job.” Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 694-95 (2012) [“Kavaleski”].

The Commission is entitled to discredit a psychiatrist’s assessment of a candidate even if the candidate offers no expert testimony of his own, but the Commission must provide a basis for the rejection in the record. Kavaleski, 463 Mass.. at 694,. citing Daniels v. Board of Registration in Medicine, 418 Mass. 380, 392 (1994) quoting Commonwealth v. DeMinico, 408 Mass. 230, 235 (1990) (“[t]he law should not, and does not, give the opinions of experts on either side of ... [a]n issue the benefit of conclusiveness, even if there are not contrary opinions introduced at the trial”).

Applying these principles to the facts of this appeal, the reasons provided for the BPD’s bypass of Mr. Tran have not been reasonably justified within the parameters of basic merit principles, generally, and the HRD medical standards, specifically. The stated reasons are based entirely upon unfounded conclusions in the psychiatric reports of Dr. Brown and Dr. Seckler that recommended he be bypassed due to his alleged “obsessional anxiety” about his health and his perceived poor command of the English language.

First, as to the issue of “obsessional anxiety”, the evidence established that, after Mr. Tran’s incident in 2011, he began to experience weakness, as well as muscle aches. Mr. Tran repeatedly sought medical help to explain this condition. Dr. Brown took this to mean that Mr. Tran was obsessed about his health. At the Commission hearing, however, Mr. Tran presented credible and convincing evidence to this Commissioner’s comprehension that showed his legitimate concern with his on-going medical symptoms. Unfortunately, it took several visits to multiple expert physicians before he was correctly diagnosed with severe sleep apnea. This is not evidence of even one instance of situation of “obsessional anxiety”, rather, there was a perfectly rational explanation for Mr. Tran’s continued requests for medical evaluation. Moreover, neither BPD expert was able to provide any credible explanation how just one isolated incident of “obsessional anxiety” in Mr. Tran’s past personal life, even if it had occurred, supports a conclusion that he was presently suffering from an on-going Category A or Category B psychiatric condition of any kind.

Secondly, I certainly agree that Mr. Tran does not speak or write English with ease. Even Mr. Tran acknowledges that his command of English, not his native tongue, could be better and he aspires to improve it. However, as to Mr. Tran’s communication skills, neither Dr. Brown nor Dr. Seckler could opine as to whether Mr. Tran’s communication limitation was cognitive or cultural, much less that it was a disqualifying Category A or Category B psychiatric condition. It cannot be the realm of a psychologist to evaluate a candidate’s language proficiency or to decide to bypass a candidate as having a disqualifying “psychiatric condition” because the psychologist doubts that candidate speaks or writes English well enough to be a police officer. Having a strong grasp of English (either as a native or second language) and being able to communicate and process information quickly and efficiently may well be essential in police officers, but that

is a judgment for the Appointing Authority to make based on the assessment of a candidate during the thorough and rigorous pre-employment screening process that precedes a conditional offer of employment. The appropriate means for the BPD to assess an applicant's communications and language skills is through a discretionary interview. Here, Mr. Tran was granted a conditional offer by BPD after he successfully completed such a pre-employment investigation which included in-person evaluations as well as a complete inquiry of his background and distinguished Navy record, as a result of which BPD did not find him disqualified to serve based on a perceived concern about his language skills. He could not have received an offer of employment from the BPD if he did not meet all of its minimum qualifications, including a demonstrated acceptable level of communications skills. I also note that he successfully took and passed the prescribed written civil service examination for police officer.

BPD cites to numerous Superior Court and Appeals Court cases to argue that the Commission reached beyond its proper role in determining psychological bypass decisions. City of Boston v. Buckley, 61 Mass.App.Ct. 1117 (2004) (Rule 1:28 decision); Boston Police Department v. Munroe, 14 Mass.L.Rptr. 446 (2002); Boston Police Department v. Daniel Moriarty, SUCV2009-01987; Boston Police Department v. Savickas, SUCV2010-1237; Boston Police Department v. Chaves, SUCV2011-022. None of these cases are binding upon the Commission, they are distinguishable on their facts, and they are all superseded by the SJC's definitive 2012 decision in Kavaleski. As stated in Kavaleski, the sole task of the psychiatric medical evaluator is to determine whether the candidate has a specific psychiatric condition that prevents him from performing the essential functions of the job, even with reasonable accommodation. It is not the medical evaluator's job to determine whether the candidate

possesses all the other skills that would make a good police officer. Neither Dr. Brown nor Dr. Seckler opined in their reports or provided testimony that Mr. Tran had an identifiable disqualifying psychiatric condition that met the HRD standards set forth in Category A or Category B of the HRD standards. The preponderance of the credible evidence is simply insufficient to establish that Mr. Tran has any on-going psychiatric condition that presently prevents him from performing the essential functions of a BPD police officer.

RELIEF TO BE GRANTED

For all of the above reasons, BPD has not provided reasonable justification for its decision to disqualify Mr. Tran on psychiatric grounds for appointment as a police officer. The decision to bypass Mr. Tran is overturned and his appeal under Docket No. G1-14-69 is hereby *allowed*.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the state's Human Resources Division (HRD) or the BPD in its delegated capacity shall:

- Place the name of Don M. Tran at the top of any current or future Certification for the position of BPD Police Officer until he is appointed or bypassed.
- BPD may elect to require Mr. Tran to submit to an appropriate psychiatric medical screening in accordance with current BPD police either (1) in the ordinary course of the medical examination process or (2) immediately upon receipt of a certification in which his name appears, as a condition to further processing of his application for appointment. In either case, such screening shall be performed, de novo, by qualified professional(s) other than Dr. Brown and Dr. Seckler.
- If Mr. Tran is appointed as a BPD Police Officer, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 00743. This retroactive civil

service seniority date is not intended to provide Mr. Tran with any additional pay or benefits including creditable service toward retirement.

Civil Service Commission

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on July 24, 2014..

A true record. Attest:

Commissioner

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.

Notice:

Don Tran (Appellant)

Meryum Khan, Esq. (for Respondent)

John Marra, Esq. (HRD)