

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

Patrick Wallace,
Appellant

v.

G1-07-162

Beverly Police Dept., Appointing Authority and
Human Resources Division,
Respondent

Appellant's Attorney:

Galen Gilbert, Atty.
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Appointing Authority's Attorney:

Robert A. Munroe, Atty.
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Respondent's Attorney:

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Commissioner:

Daniel M. Henderson

**DECISION ON APPELLANT'S MOTION FOR SUMMARY
DECISION**

On May 1, 2007, the Appellant, Patrick Wallace (hereafter "Appellant") appealed the decision of the Human Resources Division's (hereafter "HRD") approval of the City of Beverly Police Department (hereafter "Department") as Appointing Authority's stated reasons for bypassing him for appointment to the position of reserve

police officer and seeking relief pursuant to G.L. c. 31, § 2(b). The matter was called for a Full Hearing at the offices of the Civil Services Commission on November 5, 2007. On that day, the Appellant submitted a Motion in Limine in conjunction with his previously filed Motion for Summary Decision. These motions requested the exclusion from evidence of any statements attributed to the Appellant during his interview by the City, during the selection process for appointment. The Appellant based this request on the ground that the Appellant's and the other candidates' interviews were unrecorded. The Appellant claims that the unrecorded statements attributed to him, and relied on by the Department, as the basis for his bypass for appointment, are unprovable or unreliable. The Appellant further claims that the reliance on unrecorded and therefore unreliable statements as a reason for bypass is a violation of "Basic merit principals" mandated for use in the selection of candidates, as defined in G.L. c. 31, §1. A hearing was held on the Motion in Limine and the Motion for Summary Decision, on November 5, 2007, 2007. During argument on the motions, reference was made to: the several documents attached (A-D) to the Motion for Summary Decision, HRD's document packet (dated July 19, 2007) in response to a request for production, the Department's Answers to Interrogatories (dated August 3, 2007) and the Commission's docket-case file on this appeal. One audio tape was made of the hearing. No witnesses testified.

At the hearing on November 5, 2007, the Appellant filed a written waiver of his right to a Full Hearing on the merits of his appeal and instead elected to rely on the Commission's decision on the two motions as final. The Appellant agreed that if his Motion for Summary Decision is denied that his appeal would consequently be dismissed by the Commission. At the conclusion of the hearing the Department and HRD were

allowed ten (10) days to file a written opposition to the Appellant's motions. Thereafter the Appellant was allowed an additional five (5) days to respond to the opposition and thereafter the Department and HRD were allowed an additional five (5) days to file a subsequent opposition.

Factual Background

1. The Appellant filed an appeal at the Civil Service Commission on May 1, 2007 of his bypass by the Department for appointment as a permanent reserve police officer.
2. Discovery was pursued by the Appellant to be provided by the Department and HRD.
3. A Pre-Hearing Conference was held on this matter at the Civil Service Commission, on July 17, 2007.
4. On August 10, 2007 a notice was sent to the parties, by the Civil Service Commission for a Full Hearing, scheduled for November 5, 2007.
5. On October 31, 2007, the Appellant filed a request to cancel the scheduled Full Hearing. The grounds for the Appellant's request were his claim of his inability to pay attorney fees for a Full Hearing. The Appellant also filed a Motion for Summary Decision with his request to cancel. The Appellant requested that a Commission decision on the Motion for Summary Decision replace a Full Hearing on the merits and subsequent decision. The Appellant proposed to rest his entire case on the outcome of the Motion for Summary Decision, without the necessity of a Full Hearing.

6. On November 2, 2007, the Appellant's request to cancel the Full Hearing, treated as a motion to continue, was denied by the Commission, with the note that the Full Hearing remained as scheduled.
7. On November 5, 2007 the Full Hearing was called by the Commission to begin as scheduled, at 9:30 AM. The Appellant at that time filed a Motion in Limine. This Motion requested the exclusion from evidence any evidence pertaining to the Appellant's hiring interview in this bypass matter, since the interview was unrecorded. The Appellant claims that an unrecorded interview, devoid of any written notes to memorialize the content of the interview, denies the Appellant effective cross-examination and shields the Department from effective review of its bypass action by the Commission.
8. On November 5, 2007, at the Full Hearing, the Appellant renewed his request that he be allowed to rest his case without proceeding to a Full Hearing and to rely on the Commission's decision on his Motion for Summary Decision as a final determination of the appeal on its merits. The Appellant's attorney then filed a written waiver to this effect and the Department's attorney and HRD's attorney offered no objection to this manner of determination. The Commission then accepted this request and a hearing was held on the two motions. The parties were each allowed the opportunity to present oral argument on the Motion for Summary Decision and the Motion in Limine. At the conclusion of the hearing the Department and HRD were allowed ten (10) days to file a written opposition to the Appellant's motions. Thereafter the Appellant was allowed an additional five (5) days to respond to the opposition and thereafter the Department and HRD

- were allowed an additional five (5) days, if needed, to file a subsequent opposition.
9. The Appellant took an open competitive civil service examination, conducted by HRD in 2005, for the position of permanent reserve police officer, and passed said examination.
 10. On or about December 8, 2005, the Department made a requisition (Form 13) to HRD for a certified list of eligible candidates from that examination for the appointment of 13 positions of permanent reserve police officer.
 11. On or about January 18, 2006, HRD issued the Department certification #25-1293 of named candidates, with an instruction to select thirteen qualified candidates from the highest 27 willing to accept appointment.
 12. The Department then conducted background investigations of the candidates named on the certification list. The Department then disqualified 5 candidates as a result of the background investigations.
 13. The Department then, on or about April, 2006, conducted interviews of the twenty-two remaining candidates by an interview panel consisting of seven members. Interviews of candidates for appointment are part of the Department's routine hiring process. The Appellant was one of the twenty-two candidates interviewed by the panel.
 14. Eleven candidates of the twenty-two remaining were rejected by the Department as unqualified due to their performance during the Interviews.
 15. The Department has never taped any of their hiring interviews.
 16. No notes of the hiring interviews existed at the time of this hearing.

17. The Department did provide the Appellant with discovery. Specifically the Department provided Answers to his propounded Interrogatories that included the reasons for bypass of the Appellant, the name and title of each of the seven members of the Interview Panel and the ten questions asked of each of the interviewed candidates by the Interview Panel.
18. Eleven candidates were hired by the Department. The Department filed an Authorization of Employment Form (Form 14) with HRD for ten named candidates on June 22, 2006 and for one named candidate on March 27, 2007.
19. Five of the appointed candidates appeared lower on the certification list than did the name of the Appellant. Therefore, the Appellant was bypassed for appointment to the position of permanent reserve police officer.
20. The Department made selections of 11 candidates instead of 13 to fill the positions in its original requisition,
21. The Department did file with HRD reasons for the selections made and the reasons for the bypass of certain candidates (including the Appellant), by candidates lower on the certification # 25-1293. However, neither the Department nor HRD provided the Commission with the original statement of reasons asserted by the Department for the bypass of the Appellant.
22. Nuwanda Evans of HRD did send an e-mail message to the Department on July 11, 2006 referencing the Department's previous bypass reasons.. That e-mail listed the candidates' names, along with comments next to each name of the appointed and bypassed candidates. These comments referred to the adequacy of the stated reasons contained in the original statement of reasons filed by the

- Department. The comment next to the Appellant's name was-"expand bypass provide information used."(Emphasis added)
23. On November 21, 2006, the Department wrote to Nuwanda Evans HRD, stating reasons for the selections of candidates on certification # 25-1293. This letter listed the positive reasons for the selection of five named candidates, who were lower on the certification than the Appellant and who bypassed the Appellant for appointment. This letter did not make any reference to the Appellant by name.
24. On December 21, 2006, Nuwanda Evans wrote a letter to the Department in response to its November 21, 2006 letter. The letter stated in reference to the Appellant; "Patrick Wallace-bypass-the expanded information is not strong enough for bypass action". (Emphasis added)
25. Eleven out of seventeen candidates in 2003 and eleven out of twenty-two candidates in 2006 were bypassed by the Department for appointment, due to their interview performance.
26. On January 10, 2007, the Department did send a letter of "clarification" to Nuwanda Evans in response to her December 21, 2006 letter. This letter of clarification did provide additional information on three named candidates, other than the Appellant.
27. On January 10, 2007, the Department did send a second letter of "clarification" to Nuwanda Evans in response to her December 21, 2006 letter. This second letter of clarification did provide additional information on the Appellant as reasons for his bypass. The reasons given were; "Patrick Wallace-For clarification purposes, Mr. Wallace's interview answers indicated a propensity for untruthfulness and

unwillingness to explicitly perform the functions of a police officer. Mr. Wallace indicated he would lie and cover for other officers rather than report the truth. Therefore, it is determined he lacked the necessary character traits to be an effective police officer.”(Emphasis added)

28. Eleven candidates were hired by the Department. The Department filed the required Authorization of Employment Form (Form 14) with HRD for ten named candidates on June 22, 2006 and for one named candidate on March 27, 2007. The Authorization of Employment Forms (Form 14), dated June 22, 2006, for ten named candidates was signed by the Personnel Administrator, Paul Dietl. However the Form 14, dated March 27, 2007 for one named candidate was stamped “Approved Human Resources Division” and initialed. Therefore, the positive reasons for the appointment of the named candidates on the Form 14’s and one candidate contained in one of the January 10, 2007 letters were approved by the “administrator” of HRD as mandated by G.L. c.31 §2 (b). The negative reasons stated in the second January 10, 2007 letter, for the bypass of the Appellant were also approved by the “administrator”, as statutorily mandated.

Argument

The Appellant argues that the reliance by an Appointing Authority upon statements allegedly made by a candidate for appointment during an unrecorded hiring interview is a violation of basic merit principles and therefore an unacceptable reason for non-selection. The Appellant propounds a subsidiary argument: that the Appointing Authority has a duty to preserve such evidence since it has full control of the interview

and selection process. The Appellant asserts that, without recorded hiring interviews, the Department's selection process is shielded from effective review by the Commission.

The Appellant further asserts that the Civil Service Commission should create a rule prohibiting the Appointing Authority from employing such unrecorded interview statements as the basis for a justified bypass for appointment. It is assumed that the Appellant is also requesting that this newly created rule be effective and applicable in this instant case.

The Civil Service Commission has routinely admitted sworn, testimonial evidence at hearings, subject to cross-examination, to prove relevant prior events or statements. This admitted testimonial evidence may or may not be corroborated by other physical or testimonial evidence. The hearing officer has the opportunity at a hearing on the merits, to determine credibility of witnesses, resolve conflicts of countervailing evidence and assess the weight and/or probative value of the admitted evidence.

The Appellant here is requesting that the Commission preclude the admission of a certain type of evidence- testimony regarding the proof of unrecorded and unmemorialized statements at hiring interviews. This type of evidence, as stated above, has been customarily admitted and relied upon at Commission hearings, subject to cross-examination. The Commission is unwilling and unable to categorically predetermine the admissibility of evidence, in the manner proposed by the Appellant here. The Commission's position is firm despite agreeing with the Appellant's assertion that the type of evidence he is attempting to exclude is not the best type of evidence that could be used for proof of statements made during the hiring process.

This request calls for an action that is beyond the statutory authority of the Commission. Only the “administrator” has the authority pursuant to G.L. c.31§ 3, to “make and amend rules which shall regulate the recruitment, selection, training and employment of persons for civil service position(s)...” However, the Commission does have the authority to review and disapprove any proposed rule change by the administrator, pursuant to G.L. c.31 §2.

The Department argued in its opposition to the two motions that certain of Appellant’s unsworn allegations of fact are untrue and that Appellant’s reliance upon *Commonwealth v. Valerio Digiambattista*, 442 Mass. 423 (2004) is misplaced as said case does not hold that “unrecorded” confessions are to be excluded from evidence. The holding in that case does not exclude unrecorded confessions from admission into evidence but rather in criminal matters states “We also take this occasion to announce that, henceforth, the admission in evidence of any confession or statement of the defendant that is the product of an unrecorded custodial interrogation, or an unrecorded interrogation conducted at a place of detention, will entitle the defendant, on request, to a jury instruction concerning the need to evaluate that alleged statement or confession with particular caution.” (Emphasis added)

The Commission agrees with the Department’s argument and reading of the *Digiambattista* case (supra). Additionally the courts have traditionally afforded much greater protection for the individual’s rights in criminal cases as the criminal defendant’s personal liberty is in jeopardy due to potential incarceration. The Appellant’s rights in a civil service appointment are civil or administrative in nature, not criminal, consequently *Digiambattista* does not apply..

Here, on the date of a scheduled Full Hearing, the Appellant elected to rely on the determination of his motions as the final determination of the case rather than to proceed with the Full Hearing on the merits. The Appellant's attorney thereupon filed a written waiver of his right to a Full Hearing on the merits.

The Appellant filed a motion Pursuant to 801 CMR 1.01 s. 7(h), Motion for Summary Decision. This rule provides that, "When a party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the party may move with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues."

I find that at least one genuine issue of fact exists and that fact is tantamount to the entire case. The Department claims that the Appellant's answers to questions by the Interview Panel during his hiring interview: "indicated a propensity for untruthfulness and unwillingness to explicitly perform the functions of a police officer. Mr. Wallace indicated he would lie and cover for other officers rather than report the truth. Therefore, it is determined he lacked the necessary character traits to be an effective police officer." (Emphasis added). The Appellant, conversely, denies making any statement or answering any questions in a way, during the interview, that could be construed to indicate a propensity for untruthfulness and unwillingness to explicitly perform the functions of a police officer, as alleged by the Department.

This controverted fact is the ultimate fact to be determined on this appeal and could only be determined by a hearing with admitted documentary evidence and sworn

testimony, subject to cross-examination. That hearing would provide the opportunity for the hearing officer to weigh the countervailing evidence and evaluate the credibility of the witnesses in the process of determining this ultimate controverted fact. It is also important to note that the Department's use of the language: "*indicated a propensity*" suggests a reliance on an opinion, inference or conclusion drawn by the Department from other evidence, in making its decision to bypass the Appellant. If the Department had relied on an easily provable fact, for instance a criminal felony conviction, the Department's burden of persuasion or production would have been easier to meet. However, the Appellant's decision to rely on the outcome of this motions hearing as dispositive instead of proceeding to a Full Hearing erased a full opportunity for him to resolve this controversy in his favor.

At the hearing on November 5, 2007, the Appellant filed a written waiver of his right to a Full Hearing on the merits of his appeal and instead elected to rely on the Commission's decision on the two motions as final. The Appellant agreed that if his Motion for Summary Decision is denied that his appeal would consequently be dismissed by the Commission.

Therefore, The Appellant's Motion for Summary Decision and Motion in Limine are denied after hearing. Based on the denied motions and the Appellant's waiver of a Full Hearing on the merits, the appeal on Docket No. G1-07-162 is hereby ***dismissed***.

Due to the circumstances of this case the Commission has determined that the Appellant shall be allowed to file a motion for reconsideration within thirty (30) days of the receipt of this Commission decision and order.

Civil Service Commission

Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Taylor, Guerin and Marquis, Commissioners) on December 13, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice:

Robert A. Munroe, Atty.

Galen Gilbert, Atty.

John Marra, Atty. - HRD