

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

JOSEPH WELLS,
Appellant

v.

Case No.: G1-12-122

**BOSTON POLICE
DEPARTMENT,**
Respondent

DECISION

The Civil Service Commission (Commission) voted at an executive session on June 13, 2013 to acknowledge receipt of the Recommended Decision of the Administrative Law Magistrate dated April 12, 2013. After careful review and consideration, the Commission voted to adopt the findings of fact and the Recommended Decision of the Magistrate therein. A copy of the Magistrate's Recommended Decision is enclosed herewith. The Appellant's appeal is hereby ***dismissed.***

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on June 13, 2013.

A true record. Attest.



Christopher C. Bowman
Chairman

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 to:

James Gilden, Esq. (for Appellant)

Amanda Wall, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Joseph Wells,
Appellant

v.

Docket No. G1-12-122
DALA No. CS-12-493

Boston Police Department,
Respondent

Appearance for Appellant:

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Sharon, MA 02067

Appearance for Respondent:

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Administrative Magistrate:

Maria A. Imparato, Esq.

SUMMARY OF RECOMMENDED DECISION

The Boston Police Department has demonstrated reasonable justification for the bypass of the Appellant for original appointment as a police officer, after doing a reasonably thorough investigation of his background, because he had recently been discharged from a public safety position after receiving progressive discipline for reasons that speak directly to his lack of good judgment.

RECOMMENDED DECISION

Joseph Wells filed a timely appeal under M.G.L. c. 31, s. 2(b) of the decision of the Boston Police Department (BPD) to bypass him for original appointment to the position of police officer.

I held a hearing on September 11, 2012 at the office of the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA.

I admitted documents into evidence. (Exs. 1 – 10.) Detective Kenneth Westhaver of the BPD Recruit Investigation Unit (RIU) and Robin Hunt, BPD Director of Human Resources (HR) testified on behalf of the BPD. Joseph Wells testified on his own behalf and offered the testimony of Mohammad Taha, a former security officer at Simmons College, and now a Sergeant in the Columbia Point Housing Projects special police force, and Alexander Navarez, a police officer at the Mass. College of Art. The witnesses were sequestered.

The record closed on January 28, 2013 with the filing of post-hearing briefs by both parties.

FINDINGS OF FACT

1. Joseph Wells's name appeared on certification list #202233 in 2011. (Ex. 2.)
2. Mr. Wells was previously admitted to the Boston Police Academy in 2006 (class 45-06), but resigned after 3 days citing his mother's ill health as the reason. (Ex. 2.)
3. On September 24, 2011, Mr. Wells signed and submitted a Student Officer Application to the BPD. (Ex. 1.)
4. Detective Kenneth Westhaver of the BPD Recruit Investigative Unit (RIU) was assigned to perform a background check on Mr. Wells. Detective Westhaver checked Mr. Wells's driving history and criminal record. He interviewed Mr. Wells and made a home visit. He called Mr. Wells's prior employers at Spaulding Rehab Hospital, Simmons College, the Department of Mental Health, and the Boston Public Health Commission. He contacted Mr. Wells's references. He allowed Mr. Wells to respond in writing to all of the allegations of substandard behavior at Simmons. Detective Westhaver put his

findings into a report for Robin Hunt, the BPD HR Director. (Testimony, Westhaver; Exs. 2, 9.)

5. Detective Westhaver noticed a red flag in Mr. Wells's application; he had been terminated from his job as a Sergeant in the Simmons College public safety division after receiving progressive discipline. Detective Westhaver spoke with Lt. Gilman, at Simmons, who gave Mr. Wells a good reference. Detective Westhaver also spoke with someone from the Simmons HR department who indicated that Mr. Wells had been terminated after a series of progressive discipline including "performance feedback, then oral warning followed by a written warning and then a final written warning which included a statement that said that any further infractions could lead to being terminated. Following that letter another incident occurred which led to his termination." (Exs. 1, 2; Testimony, Westhaver.)
6. The unwritten policy of the BPD is to automatically exclude from consideration any applicant who has been terminated from a public safety job. (Testimony, Westhaver, Hunt.)
7. Mr. Wells began working at Simmons College in March 2008. (Ex. 1, p. 12A.) He received a good performance review in December 2008 when he was rated as "consistently meets expectations." During the evaluation period from August 2008 to September 2009, Mr. Wells's performance review was less stellar. He was rated by Chief Gerald Chaulk as "mostly meets expectations" in three categories; "consistently meets expectations" in four categories, and "exceeds expectations" in one category. The narrative assessment includes the opinion that "Sgt. Wells appears to confuse constructive criticism with personal criticism." (Ex. 3.)

8. Mr. Wells worked at Simmons under two Lieutenants. Lt. Vincent O'Connell was the Operations Lieutenant, and Lt. Gilman was the Administrative Lieutenant. By letter of July 20, 2009 from Lt. O'Connell, Mr. Wells was informed that he had failed to pass on certain information to the incoming shift. "Failure to do so in the future may result in disciplinary action up to and including termination." (Ex. 4.)
9. By letter of September 3, 2009, Lt. O'Connell issued a final written warning outlining what he believed were Mr. Wells's lapses in judgment on May 22, July 31, August 12 and August 15, 2009. On May 22, 2009, Mr. Wells signed himself up for a first responder class that cost two hundred dollars, "without seeking permission to attend or having the funds approved. The Command Staff has been very clear that no one is authorized to spend college money without prior approval." (Ex. 5.)
10. On July 31, 2009, during an investigation, Mr. Wells allowed an employee to change settings on someone's social networking account so that Mr. Wells could gain access. He also used information that he gathered as part of an investigation to contact a woman for personal reasons. "Using information you gained from a workplace investigation to contact a person for personal reasons was inappropriate behavior." (Ex. 5.)
11. On August 12, 2009, Mr. Wells detained a youngster who had been playing loud music on the computers. Mr. Wells requested the Boston Police Department to transport the child. Lt. O'Connell suggested to Mr. Wells that he "un-arrest" the child and release him to a parent, which is what Mr. Wells eventually did. Additionally, Mr. Wells used his cell phone, rather than his radio, to contact the dispatcher. Lt. O'Connell opined, "In the future you need to be very careful about how you handle these situations and take the totality of the circumstances into consideration in order to keep yourself safe. ... In the

future I expect you to use the radio and recorded phone lines for all professional correspondence.” (Ex. 5.)

12. On August 15, 2009, Mr. Wells bought a new tire for a cruiser in order to return the vehicle to service. “This was despite my request that you have it repaired. At no time were you granted authority or requested to buy a tire, yet you did it anyway.” (Ex. 5.)
13. The letter concludes, “Further infractions could lead to further disciplinary action up to and including termination.” (Ex. 5.)
14. By letter of February 3, 2010, Lt. O’Connell terminated Mr. Wells effective on that date. The letter does not state the reasons for the termination. (Ex. 6.)
15. The incident that resulted in Mr. Wells’s termination occurred in December 2009. Mr. Wells was the supervisor on the 11 – 7 shift. On the shift with him were a Dispatcher, and a public safety officer. When Mr. Wells went to dispatch 3½ hours into his shift, he found the Dispatcher throwing up. The Dispatcher is diabetic. He told Mr. Wells he did not want Mr. Wells to call EMS. Mr. Wells sent the Dispatcher home. (Testimony, Wells.)
16. Mr. Wells learned four weeks later that the Dispatcher had been drinking with a student and was drunk when Mr. Wells sent him home. (Testimony, Wells; Ex. 7.)
17. In January 2010, both Mr. Wells and the Dispatcher were put on administrative leave, and in February 2010, both Mr. Wells and the Dispatcher were terminated. (Testimony, Wells.)
18. Mr. Wells was told that the reasons for his termination were: 1) He did not notify his Lieutenant that he had sent the Dispatcher home; 2) He sent the Dispatcher home instead

of calling EMS; and 3) He did not call Unicco to clean up the area where the Dispatcher vomited. (Ex. 9.)

19. Mr. Wells produced a written response to each of Lt. O'Connell's allegations. (Ex. 9.)

20. Mr. Wells had no problems in his job at Simmons until the spring of 2009 when he raised issues of safety and issues about a police union. He believes he was targeted by Lt. O'Connell as a result. (Testimony, Wells.)

21. By letter of December 17, 2010, the Simmons College general counsel notified Mr. Wells and the Dispatcher that the decision to terminate Mr. Wells would not be reconsidered. She wrote to Mr. Wells, "The College appreciates [the Dispatcher's] point that you were not aware of his drinking with a student until after it occurred. The College's concern with your conduct that night was based on your responses to and reporting of the incident. Moreover, your misjudgments that night occurred after you had received written warnings in July and September 2009 about other actions that had also raised concerns about your judgment." (Ex. 7, 8.)

22. The BPD considered Mr. Wells's application at a round table discussion attended by Ms. Hunt in her capacity as Director of HR; the Commander of the RIU; the Commander of Internal Affairs; a representative of the Legal Advisor's office, and the Detective who performed the background check, in this case Detective Westhaver. (Testimony, Hunt.)

23. Mr. Wells's entire background was discussed at the round table discussion. The round table chose not to look beyond the fact that Mr. Wells had been terminated from his job at Simmons after receiving progressive discipline on the theory that past performance is a good indicator of future performance. But for his termination from Simmons, Mr. Wells would have advanced to the next step in the employment process. (Testimony, Hunt.)

CONCLUSION AND RECOMMENDATION

The Civil Service Commission, under M.G.L. c. 31, s. 2(b), is required “to find 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.” *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 303 (1997). Justified 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.” *Id.* at 304.

If the Commission finds by a preponderance of the evidence that there was just cause for an action against the Appellant, the Commission shall affirm the action of the Appointing Authority. *Town of Falmouth v. Civil Service Commission*, 61 Mass. App. Ct. 796, 800 (2004). The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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.” *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

The fundamental purpose of the Civil Service Commission is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” *City of Cambridge*, 43 Mass. App. Ct. at 304. “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” M.G.L. c. 31, s. 1.

Bypass cases are decided based on a preponderance of the evidence. A “preponderance

of the evidence test required the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” *Mayor of Revere v. Civil Service Commission*, 31 Mass. App. Ct. 315 (1991).

If an appointing authority is unwilling to bear the risks of hiring a candidate, absent proof that the appointing authority acted unreasonably, the Commission is bound to defer to the appointing authority’s exercise of its judgment. *City of Beverly v. Civil Service Commission*, 78 Mass. App. Ct. 182, 190-191 (2010).

In order to prevail on a bypass case, the Appellant must demonstrate that the reasons offered by the Appointing Authority were untrue, apply equally to the bypassed and selected candidate, are incapable of substantiation, or are a pretext for other, impermissible reasons. *Borelli v. MBTA*, 1 MCSR 6.

I conclude that the BPD has demonstrated by a preponderance of the evidence that it had reasonable justification for the bypass of the Appellant for original appointment as a police officer based on the fact that he had recently been discharged from his job at Simmons College after receiving progressive discipline for reasons that speak directly to his lack of good judgment. Although the Appellant has advanced a defense with respect to each allegation of poor judgment by Lt. O’Connell, the BPD is not required to prove that the Appellant did in fact engage in the misconduct that resulted in his discharge. *Id.*

The BPD reached its conclusion after a background investigation and an interview of the Appellant by the investigating Detective, including Mr. Wells’s written responses to the Simmons College allegations. The BPD roundtable meeting considered the Appellant’s entire background before deciding to bypass him.

There is nothing to suggest that the decision of the BPD demonstrates political considerations, favoritism or bias. The Appellant has not demonstrated that the reason for his bypass was untrue, applies equally to the bypassed candidate and a selected candidate, is incapable of substantiation or is a pretext for another impermissible reason.

Based on the theory that past performance is a good indicator of future performance, the BPD is not willing to bear the risk of hiring the Appellant after his recent termination for exercising poor judgment. This is not an unreasonable decision, and the Commission should defer to the BPD's exercise of judgment. I note, however, that the blanket policy of the BPD to automatically exclude from consideration any candidate who was ever terminated from a public safety position is not reasonable and is not consistent with basic merit principles. If the BPD had not performed a reasonably thorough investigation of the Appellant prior to bypassing him, I would not recommend that the bypass be upheld.

In two recent decisions of the Commission, the bypass of two candidates for original appointment as firefighters in the Springfield Fire Department was reversed where the Fire Department relied solely on its policy of permanently prohibiting the appointment of any candidate who has ever been convicted of a felony. See, *Gelson LaGuerre v. Springfield Fire Department*, G1-11-53, November 15, 2012; *Christopher Benevento v. Springfield Fire Department*, G1-11-69, November 15, 2012.

In these decisions, the Commission reasoned that it is necessary for an appointing authority to conduct a reasonably thorough review of an applicant before bypassing him, rather than relying on a blanket policy of exclusion, unless that exclusion is supported by statute.¹

¹ For instance, M.G.L. c. 41, s. 96A prohibits the hiring of a person as a police officer if s/he has been convicted of a felony. M.G.L. c. 31, s. 58 establishes some prohibitions related to the hiring of firefighters. M.G.L. c. 31, s. 50

In the instant case, however, the BPD conducted a reasonably thorough review of the Appellant prior to deciding to bypass him for appointment. I recommend that the Appellant's appeal be dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Maria A. Imparato
Administrative Magistrate

DATED:

prohibits the hiring of any person into a civil service position within one year of conviction of a crime except for certain specified offenses.