

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

LENCOL MONTEIRO,
Appellant

v.

G1-06-184

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

Pro Se
Lencol Monteiro

Respondent's Attorney:

Tsuyoshi Fukuda, Esq.
Office of the Legal Advisor
Boston Police Department
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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Lencol Monteiro (hereafter "Monteiro" or Appellant") seeks review of the Personnel Administrator's decision to accept the reasons of the Boston Police Department (hereafter "Appointing Authority", "City" or "BPD"), bypassing him for original appointment to the position of police officer. A full hearing was held on March 21, 2007 at the offices of the Civil Service Commission. One tape was made of the hearing.

FINDINGS OF FACT:

Five (5) Joint exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Robin Hunt, Human Resources Director, Boston Police Department;
- Deputy Superintendent Marie Donahue; Boston Police Department;

For the Appellant:

- Lencol Monteiro, Appellant;

I make the following findings of fact:

1. The Appellant is a twenty-nine (29) year old male from Boston. He graduated from South Boston High School in 1991. (Testimony of Appellant; Exhibit 4)
2. The Appellant is single and has two children. (Testimony of Appellant)
3. The Appellant has been employed by Barnes and Noble for the past seven years. He has served as the Assistant Manager at the Barnes and Noble Store at Bunker Hill Community College for two of the past seven years. (Testimony of Appellant; Exhibit 4)
4. The Appellant took an open examination for the position of police officer on April 4, 2005. (Stipulated Fact)
5. On December 14, 2005, the Appellant's name appeared on Certification 251240 for the position of Cape Verdean Creole-speaking police officer for the Boston Police Department. (Stipulated Fact)

6. The Boston Police Department filled nine (9) police officer positions from Certification 251240. Two (2) of the candidates selected for appointment were ranked below the Appellant on the above-referenced Certification. (Stipulated Facts)
7. On May 19, 2006, the Boston Police Department notified the state's Human Resources Division (HRD) that it was bypassing the Appellant for appointment for the following reasons: a) "In August of 2000, Mr. Monteiro was arrested by the Boston Police Department's Drug Control Unit and charged with "Gaming". The Drug Unit had set-up a surveillance of a group of young people after citizen complaints of drug selling at George and Woodward Ave. The individuals arrested along with Mr. Monteiro had a quantity of crack cocaine in their possession; b) In April of 2000, Mr. Monteiro was arrested and charged with "Possession of a Class D substance-Marijuana". Mr. Monteiro had been arrested and initially charged with a number of felony cases. At the time of his arrest, Mr. Monteiro was in possession of 3 bags of marijuana. Later it had been determined that Mr. Monteiro had not been the suspect in the felony cases." (Exhibit 1; Testimony of Hunt & Donahue)

August 2000 Gaming Arrest

8. Exhibit 2 is the Boston Police Department incident report regarding the above-referenced August 2000 arrest for gaming. According to the police officer who completed the incident report, officers assigned to the drug control unit set up a surveillance of a Boston neighborhood as a result of numerous citizen complaints. According to the incident report, the Appellant and four other individuals were observed taking turns rolling dice and exchanging currency. The police report goes on to state, "about 8:50 P.M. (a motor vehicle) pulled up to the group and (an

individual who is not the Appellant) was then observed taking items out of his mouth believed to be crack cocaine and handing them to the operator of the motor vehicle...After taking the items into his left hand (the individual who is not the Appellant) was observed giving (another individual who is not the Appellant) an unk(known) amount of currency.” (Exhibit 2)

9. According to the above-referenced incident report, the motor vehicle referenced above was stopped by police and officers recovered crack cocaine from the driver of the vehicle who was arrested. Police subsequently returned to the scene where the Appellant and four others had been under surveillance. Upon their return, one of the individuals (not the Appellant) dropped from his hand a plastic bag which was believed to contain crack cocaine. All five of the individuals under surveillance, including the Appellant, were placed under arrest. The Appellant was charged with gaming. (Exhibit 2)
10. There is no dispute that the gaming charges against the Appellant were eventually dismissed.
11. BPD Deputy Superintendent Marie Donahue, who formerly oversaw the BPD’s Bureau of Internal Investigations, was a member of the roundtable team assembled to review the Appellant’s employment application. She testified at the hearing before the Commission. In regard to the above-referenced incident, Ms. Donahue testified that members of the roundtable team were very concerned that the Appellant was associating with drug dealers and believed, at a minimum, that the Appellant exercised poor judgment when he chose to associate with the individuals selling crack cocaine. (Testimony of Donahue)

12. During his testimony before the Commission, the Appellant offered what I conclude to be deliberately vague explanations regarding his actions on the night in question in August 2000. According to the Appellant, he was simply in the wrong place at the wrong time, waiting outside his cousin's house until his cousin returned home from work. Asked if he knew the other individuals standing on the sidewalk, the Appellant at one point stated, "that depends on your definition of knew." He eventually acknowledged on cross-examination that he had known these individuals for most of his life. Asked if anyone standing with him was gambling for money that night, the Appellant offered an equally unconvincing response stating, "not that I would have seen". (Testimony of Appellant)

April 2000 Arrest for Possession of Marijuana

13. There is no dispute that the Appellant was mistakenly arrested in April 2000 for felony charges related to rape and kidnapping. The arrest subsequently proved to be a case of mistaken identity and the arrest has understandably had a lasting impact on the Appellant who was clearly shaken by this nightmarish turn of events in his life. As this was a case of mistaken identity, the felony charges against the Appellant were promptly dismissed.

14. During the above-referenced April 2000 arrest, however, the police discovered three bags of marijuana in one of the Appellant's pant pockets and he was charged with possession of marijuana. As the evidence was obtained during an arrest later proven to be a case of mistaken identity, the possession charge was also dismissed.

15. The City, however, considered the fact that the Appellant was in the possession of marijuana as a negative factor contributing to his bypass for employment as a Boston police officer. (Exhibit 1; Testimony of Hunt and Donahue)
16. Deputy Superintendent Marie Donahue testified before the Commission that the City could not turn a “blind eye” to the fact that the Appellant was in possession of marijuana. Further, she testified that if this had been one isolated incident, it may not have been a disqualifying factor. However, according to Ms. Donahue, this incident, combined with the August 2000 incident in which the Appellant was associating with individuals arrested for selling crack cocaine, was seen as a limited, but troubling pattern connecting the Appellant to illegal drugs. Moreover, Ms. Donahue testified that the City was concerned that the events had occurred relatively recently.
(Testimony of Donahue)
17. During his testimony before the Commission, the Appellant testified that the pants he was wearing the night of his arrest belonged to his brother and that he (the Appellant) was unaware that there was 3 bags of marijuana in one of the pockets. Moreover, the Appellant testified that since the charges were dropped due to the issue of mistaken identity, the City should not be able to use this incident against him when assessing his fitness to serve as a Boston police officer. (Testimony of Appellant)
18. On June 6, 2006, the state’s Human Resource Division (HRD) approved the reasons proffered by the City in bypassing the Appellant. (Stipulated Fact)
19. On July 28, 2006, the Appellant filed a timely appeal with the Civil Service Commission regarding HRD’s decision. (Stipulated Fact; Exhibit 5)

CONCLUSION:

The role of the Civil Service Commission is to determine "whether 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, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A "preponderance of the evidence test requires the Commission to determine whether, on the 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). G.L. c. 31, § 43.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58

Mass. App. Ct. 726, 727-728 (2003). However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. City of Cambridge, 43 Mass. App. Ct. at 304.

Lencol Monteiro took and passed the civil service examination for the position of police officer. He scored high enough to rank among those individuals to be considered for appointment as a police officer to the Boston Police Department, no small feat for an applicant, such as the Appellant, who does not qualify for the absolute statutory preference afforded to veterans who take and pass the same exam. A long-time resident of Boston and a graduate of South Boston High School, the Appellant is a likeable, well-mannered man with a sincere desire to serve his community as a police officer.

Unfortunately, however, the Appellant was arrested for possession of marijuana in April 2000. Although those charges were dismissed, as they stemmed from another arrest which was a case of mistaken identity, the City rightfully considered the fact that the Appellant was in possession of three bags of marijuana as a negative factor when assessing his application for employment.

Moreover, Deputy Superintendent Marie Donahue, who oversaw the BPD's Internal Investigations Division at the time and was a member of the roundtable team assessing police officer applicants, credibly testified that had this been an isolated incident, it may not have been a disqualifying factor. According to Ms. Donahue, the BPD also considered that the Appellant had associated with individuals arrested for dealing crack cocaine in August 2000. Collectively, the two incidents formed what Ms. Donahue

characterized as a limited, but troubling pattern linking the Appellant to illegal drugs thus disqualifying him for appointment as a Boston police officer. The Commission agrees.

After considering all the testimony and evidence in the record, I conclude that the Boston Police Department had sound and sufficient reasons for bypassing the Appellant for selection as a police officer in the City of Boston and there is no evidence of inappropriate motivations or objectives that would warrant the Commission's intervention in this matter.

For all of the above reasons, the appeal under Docket No. G1-06-184 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Bowman, Guerin and Marquis, Commissioners [Taylor, Commissioner – Absent]) on March 28, 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 M.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:
Lencol Monteiro

Tsuyoshi Fukuda, Esq.
John Marra, Esq.