

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

ROY V. MORRIS, JR.

Appellant

v.

CASE NO: G1-13-173

BRAINTREE POLICE DEPARTMENT,

Respondent

Appearance for Appellant:

F. Robert Houlihan, Esq.
Houlihan, Kraft & Cardinal
229 Harvard Street
Brookline, MA 02446

Appearance for Respondent:

Timothy D. Zessin, Esq.
Kopelman and Paige, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

Commissioner:

Paul M. Stein

DECISION

The Appellant, Roy V. Morris, Jr., duly appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31, §2(b), from the decision of the Town of Braintree (Braintree), as delegated authority of the Personnel Administrator of the Massachusetts Human Resources Division (HRD), to bypass Mr. Morris for original appointment to the position of Police Officer with the Braintree Police Department (BPD). A full hearing was held on November 7, 2013, at the offices of the Commission and was digitally recorded. Thirty-five (35) exhibits were entered into evidence. BPD called two witnesses and Mr. Morris called one witness and testified on his own behalf. The witnesses were sequestered. Both parties subsequently submitted proposed decisions.

FINDINGS OF FACT

Based upon the Exhibits and the testimony of the Appellant, BPD Police Chief Russell Jenkins, BPD Sgt. Tim Cohoon and Federal Reserve Bank Sgt. William Moss, and inferences reasonably drawn from that evidence as I find credible, I make the following findings of fact:

The Appellant's Background

1. Roy V. Morris, Jr., is a single, black male who currently resides in Braintree. He grew up in Randolph, graduated in 1992 from Sacred Heart High School in Weymouth and attended one semester at Fitchburg State College. (*Exhs. 4, 5, 12; Testimony of Appellant*)

2. Mr. Morris left college primarily to earn money, working multiple jobs, to support his parents as they went through a difficult divorce that, eventually, required him to take primary responsibility to manage the finances, eventually taking over the mortgage on their home in Randolph after his mother (who had been neglecting the payments) put the loan on the brink of foreclosure. When the mortgage payments eventually became more than he could handle (due to increases in the interest rate), he was forced to sell the house. This upset his mother who tried to stop the sale by, among other things, taking out a restraining order on her son which was promptly vacated. (*Exhs. 4, 5, 12 & 17; Testimony of Appellant*)

3. Mr. Morris's employment history includes over twelve years in law enforcement work:

- Six years (2000 – 2006) as an Auxiliary Police Officer with the Randolph Auxiliary Police Department. He performed basic patrol and traffic functions and served as the department's Firearms Instructor. During this time, he completed a Basic Reserve Police Academy. He still helps train Auxiliary Police Officers in firearms use.
- One year (2000 – 2001) as a Public Safety Officer for Pinkerton/Mt. Ida College, where he handled access control, parking violations and security.

- Four years (2000 – 2004) with Naratoone Security as a Boston Special Police Officer. His duties involved regular police duties that had “lots of similarities” to the duties of a municipal police officer, including patrolling properties, with a partner, under contract by Naratoone, primarily housing projects in the Dorchester and Roxbury areas. These duties included handling trespassing, drug crimes, property damage, shootings, assaults, crowd control and domestic complaints, as well as occasionally handling “off-property” crimes. His duties included writing reports and testifying in court. His reports have been used in evidence in court cases in Roxbury and Dorchester District Court and in the Boston Housing Court.
- Ten years (2004 to present) for the Federal Reserve Bank in Boston, as a Federal Law Enforcement/Firearms Maintenance Officer. His duties include access control, fixed and roving posts, crowd control and protection of the bank, its tenants (including two foreign consulates) and the employees of the building from security risks and disturbances as needed. He also serves as an Armorer, with responsibility for firearms security and training.

(Exhs. 4, 5, 12, 32 & 35; Testimony of Appellant, Chief Jenkins & Sgt. Moss)

Prior 2012 Hiring Cycle

4. On April 30, 2011, Mr. Morris took and passed the civil service examination for Police Officer and his name was placed on the eligible list established November 1, 2011. *(Exh. 1)*

5. On or about August 30, 2012, Mr. Morris completed an Application for Employment for appointment as a BPD Police Officer in connection with a hiring process at that time. *(Exhs. 5 & 33)*

6. On or about September 23, 2012, BPD Officer Peter Gillis completed a background investigation of Mr. Morris. Officer Gillis interviewed nine law enforcement officers who had known, supervised and/or worked with Mr. Morris, all of whom provided consistently stellar reports, praising him, among other things, for his integrity, “near perfect attendance” record, and his reputation as a “sound decision-maker”. Interviews with personal references produced similarly favorable reports. Officer Gillis concluded:

[S]imilar traits were repeatedly given when describing Roy Morris. He was described as an extremely hard worker, one who is dependable, level headed and very dedicated to his job as a Federal Law Enforcement Officer.

Based on his extensive training certificates and those interviewed . . . Morris is a dedicated and experienced officer . . . who has a serious interest in firearms and firearms training.

When visiting his place of employment at the Federal Reserve Bank, I had the opportunity to speak with Morris. His appearance was neat and professional, and he acted friendly and courteous manner. [sic] After speaking with him, it was clear that Morris takes pride in his job and interests in firearms, and has always wanted to work as a police officer for the town in which he resides. He was aware of the circumstances, which were brought about while living with his mother . . . who was at a point at which she was unable to help herself . . . All parties interviewed had nothing negative to say against Morris, and recommended him for a position as a police officer.

After reviewing all documents, and interviewing all references, I do not find any areas of concern.

(Exh. 12)

7. After an interview by a “Chief’s board” (a panel of BPD officers that included the former Police Chief as well as (now Chief) Jenkins, Mr. Morris “did not progress to the Mayor’s interview” and he was not selected for appointment. Having received no notice of his non-selection, he contacted the BPD and spoke to Sgt. Cohoon who informed him that the department was interested in a more “well-rounded officer”, namely, someone who was “officer friendly” and was not going to be too strict and rigid. Mr. Morris received no written notice of his non-selection, as would have been required by civil service law. I choose to infer, therefore, that only candidates ranked above him on the list were hired and he was not actually bypassed in that

hiring cycle, which would explain why he did not receive a written notice of non-selection. (*Exhs. 2 & 3; Testimony of Appellant, Chief Jenkins & Sgt. Cohoon*)

2013 Hiring Cycle Involved in this Appeal

8. On or about December 5, 2012, upon request from the BPD for a list of names to fill five additional vacancies for positions of BPD Police Officer, the Massachusetts Human Resources Division (HRD) issued Certification #00350 on which Mr. Morris name appeared as the highest ranked person who signed willing to accept an appointment at that time. (*Exhs. 1 & 3*)

9. On or about February 2, 2014, Mr. Morris completed a new Application for Employment, which showed substantially no material changes from his 2012 application. The application included a five paragraph typed essay entitled “Why I want to be a Police Officer”. No updated background investigation was conducted. (*Exhs. 4, 5 & 12*)

10. Over a two-week period in March and April, 2013, the BPD conducted interviews of Mr. Morris, along with eight other candidates ranked below him on the certification. A panel of six BPD officers, headed by Chief Jenkins, along with the BPD HR Director, met with each candidate for approximately 50 minutes, which was audio-video recorded. After offering a candidate an opportunity for unstructured introductory remarks, the panel followed a semi-structured format that included substantially, but not identical, questions about the candidate’s familiarity with the BPD, his assessment of his or her strengths and weakness, and presented five fact “scenarios” and asked the candidates: “What would you do?” in each situation. Candidates were often prompted with follow-up questions or information, some more than others. (*Exhs. 3, 17 through 31; Testimony of Chief Jenkins*)

11. The “scenarios” included five hypothetical situations, the first two of which the candidate was asked to answer as a civilian and the final three assumed that the candidate was a police officer.

- A. Restaurant Scenario - As a civilian, you observe a clearly intoxicated man at a restaurant in the company of a woman and a child. The man demands car keys from the woman who gives them to him and tells her he will beat the --- out of her when they get home.
- B. Mall Scenario – As a civilian in a shopping mall, you see a large man is struggling with a smaller man who is “screaming for help” and no one else is doing anything about it.
- C. Traffic Enforcement – Mayor tasked BPD to enforce traffic laws in your assigned area that you work on the midnight shift. You pull over a vehicle clocked by radar doing 55 in a 30 MPH zone. You recognize the operator as the BPD police union president.
- D. Sexual Harassment – A female officer tells you her sergeant is making sexual advances but doesn’t want to do anything about it for fear of being transferred or other retaliation.
- E. Jewelry Store – You respond to the scene of a break-in at a jewelry store with several other officers. You return to the store after going to your cruiser to get a notepad and notice that several pieces of jewelry that you saw on display earlier are now missing.

(Exhs. 29 through 31)

12. After completing the oral interview, each candidate was given 30 minutes to prepare a handwritten exercise on the two greatest challenges facing law enforcement. *(Exhs.*

13. Each panelist took handwritten notes, except Chief Jenkins who did not take notes. No numerical or other scoring method was used to separately rank a candidate’s answers or overall performance at the interview. On April 26, 2013, the interview panel reconvened and discussed the candidates “as a group” before reaching a “unanimous” consensus on the five candidates to

be recommended for appointment, three of whom were called “exceptional”. They also ranked two “good” (but “not as strong as the top five”), one of those being Mr. Morris. When it became known that the other “good” candidate had been untruthful during his interview, he was removed from consideration. (*Exhs. 3, 17 through 31; Testimony of Chief Jenkins & Sgt. Cohoon*)

14. Typed memoranda were introduced containing comments of each interview panelist which I infer were taken from the handwritten notes made by most panel members during the interviews and then transcribed into a narrative form. These typed notes include critique of the candidate’s written exercise that the candidates prepared after leaving oral interview room, and some of the narrative contains comparative analysis of the five candidates. Thus, these notes clearly are not verbatim, contemporaneous records of the interviews, but compiled and edited at some point after all the interviews had been completed. (*Exhs. 17 through 31*)

15. By letter dated May 3, 2013, Chief Jenkins presented the list of the five recommended candidates, plus Mr. Morris, to Braintree Mayor Sullivan, who is the appointing authority, stating the specific reason for his recommendations. Chief Jenkins stated to Mayor Sullivan that “each Interview Team member” had “separately” ranked the candidates (although this had not, in fact, been the case). (*Exhs. 2 & 3; Testimony of Appellant & Chief Jenkins*)

16. Chief Jenkins’s letter to Mayor Sullivan noted that Mr. Morris was the first ranked candidate on the list and provided the following assessment of Mr. Morris:

- 40 year old black male. He is single with no children. . . . Roy is a Federal Law Enforcement Officer with the Federal Reserve Bank Located in Boston. He is a certified firearms instructor. His references (personal and professional) were all positive.
- Has limited scholastic qualifications and has appeared to have struggled as a student.
- Had some difficulty in the interview. Did not appear to have a solid comprehension of the questions asked. Frequently asked for questions to be repeated. Roy has a very shy, reserved demeanor and admittedly has trouble speaking “in front of large groups”. He did not demonstrate that he understood the concept of discretion in police work.

- Persistent in his quest to become a police officer. He has been taking the test for 15 years. He previously came before the Chief's board and did not progress to Mayor's interview (2012).
- Background investigator Peter Gillis conducted a thorough background of the candidate in 2012. Gillis writes, "He was described as an extremely hard worker, one who is dependable, level headed and very dedicated to his job."

Chief Jenkins also described the reasons for recommending the five candidates, other than Mr. Morris, which will be specifically addressed in further findings below. (*Exh. 3*)

17. Mayor Sullivan met with each of the six candidates, and accepted the recommendation to hire the five candidates recommended by Chief Jenkins. No record was made of the Mayor's interviews and he did not testify at the Commission hearing. Chief Jenkins drafted and sent the letter notifying Mr. Morris of his bypass, which relied solely on the following "feedback of the Police Interview Panel" from 2012 and 2013:

- The concerns from 2012 interview process: "an inability to display that you understood or grasped the concept of discretion. . . . In the first situational question, the differences in the circumstances and attitudes of the people involved in the motor vehicle infraction were not considered in your decision to issue a citation or a warning. . . . Even after it was explained, your responses were generally the same: anyone who is speeding would be getting a ticket unless they could demonstrate a legitimate emergency. . . . The Police Panel expressed concern that a candidate who appears inflexible and sees situations through a 'black and white' lens, does not exhibit the qualities suitable to be a police officer.

"You seemed to be confused several times with the facts presented in the scenarios, and consistently asked clarification questions in scenarios where most interviewees did not. For example, in the question where you (as a civilian) witness two men 'assisting' a reluctant woman into the backseat of the car, you asked many questions concerning the physical environment of the situation rather than simply explaining to the panel what your actions would be. When you finally answered the question your response was sufficient, however, you had difficulty with the decision-making process with limited information. . . . Police officers also must be able to . . . bring the 'big picture' into view and must be able to reduce those facts into written reports, which other parties will rely upon. . . . Based on your confused responses and difficulty following the fact pattern presented, the panel was of the opinion that you may not possess the skills necessary to be an effective police officer."
- The concerns from the 2013 interview process: "Your performance again shows an inability to display that you understood or grasped the concept of discretion. . . . you consistently had difficulty making decision [sic] while including all factors presented. . . . You again had trouble following and understanding several of the follow-up

questions. . . .In the first situational question, you still had much difficulty in considering all factors to properly use discretion. This was an area of concern in your first interview. . . .[T]his discretion was explained to you. After it was explained, you changed your responses (i.e. from giving your aunt a ticket to giving her a warning) but still did not convey to the panel that you understood the concept. . . . The Police Interview Panel expressed concern that a candidate who appears inflexible and one who cannot make independent decisions, does not exhibit the qualities suited to be a police officer.”

“Several times in the interview you again asked for the questions to be repeated and consistently asked clarification questions in scenarios where most interviewees did not. . . . Police officers must make decisions and take action with limited information. . . . Police officers also must be able to connect a series of disparate facts together in order to bring the ‘big picture’ in to view and must be able to reduce those facts into written reports, which other parties will reply upon. . . . Based on your confused responses and difficulty following the fact pattern presented, the panel was of the opinion that you may not possess the skills necessary to be an effective police officer.”

“Your written essay was extremely short, two paragraphs, 107 words, contained grammatical and context errors, and did not convey a thoughtful response to the question. Each successful candidate displayed a proficiency in writing skills and was able to thoughtfully convey their message. . . . Based on your inability to display a proficiency in writing skills, the panel was of the opinion that you may not possess the skills necessary to be an effective police officer.”

Chief Jenkins letter then described the “facts” supporting the successful candidates, which will also be addressed in further findings below concerning these candidates. (*Exhs. 2 & 17*)

18. The application and background information on the other successful candidates contained personal and private information that was redacted pursuant to the Commission’s privacy policy. These documents also contained relevant, but negative information about some of the candidates, so each of the candidates was referred to in the testimony by a letter designation and the documentation and evidence that identifies these candidates by name is treated as confidential. The successful candidates, also referred to by letter designation in this Decision, are:

Candidate A – A 32 year-old single white male employed as a CPA at Price Waterhouse with no prior law enforcement experience. He is a 2005 graduate of Braintree High School, where he was the Student Council President, and earned a college degree in business from

Stonehill College in 2009. One of four candidates tied for third on the civil service list, Candidate A was one of the top three candidates ranked as “exceptional” and called a “superstar.” (*Exhs. 6, 11, 20, 26 & 31; Testimony of Sgt. Cohoon*)

Candidate B – A 23 year-old single white male who lives at home, graduated from Braintree High School in 2007, received a college degree in Criminal Justice from Bridgewater State College in 2011, and was employed as a security officer for Securitas USA. He had “washed out” of the Correction Officer’s Academy, but the background investigator found extenuating circumstances and did not consider this an area of concern. He had a “deer in the headlights look” as he entered the interview room and was “extremely nervous” and “a bit overwhelmed sitting in front of an interview panel of six police supervisors.” Sgt. Cohoon attributed his “underwhelming” interview performance to his “limited life experience”. Another discounted his “poor to fair interpersonal skills”, “overall poor interview performance” and “stumbling with his answers”, because “the young man just had a bad interview”. He showed “no discretion in the situational speeding question [“Traffic Enforcement” scenario], stating that he ‘would issue anyone a ticket’ ” [even the Police Chief and the Mayor]. Deputy Chief Foster stated: “He either didn’t understand discretion or sees things in black and white.” Only after repeatedly being prompted with suggestions on how he might just give a written warning did he change his answer. His writing sample was two paragraphs (about 150 words), somewhat repetitive in nature and awkwardly expressed (e.g., “where there is drugs there is gangs”) Also tied for third on the civil service list, he was ranked fourth out of the five recommended candidates. (*Exhs. 7, 14, 18, 24 & 30; Testimony of Sgt. Cohoon*)

Candidate C – a 27 year-old single, white female and lifelong resident of Braintree where she currently lives with her parents, earned a college degree in Criminal Justice in 2010 from UMass-Boston, and works as a Boston University Police Officer. She was described by Chief Jenkins in his letter to Mayor Sullivan as demonstrating “excellent interpersonal skills in the oral interview” and “answered most of the questions exceptionally well”. The notes of the interviewers, however, indicated that her answer to the “Jewelry Store” scenario was “inadequate” because she would not have reported the matter to a supervisor, saying “everyone is entitled to a mistake”, although, according to the interview panel member, the scenario clearly implied that it was “more probable than not a Fellow Police Officer stole merchandise” [diamond rings] after responding to the breaking and entering call. She suggested that, even if the officer admitted to the theft, she would try to understand why they did it and probably tell them to put it back and leave it at that unless it happened again. In answering the “Traffic Enforcement” scenario, she did not initially understand that the lawbreaker was a fellow officer, and when that was clarified, said she would handle it by telling him: “You put me in a bad situation” and let him go with a verbal warning to “keep it down.” Also tied for third on the civil service list, she was ranked one of the top three “exceptionally” rated “superstars.” (*Exhs. 8, 15, 21, 25 & 30; Testimony of Sgt. Cohoon*)

Candidate D – A 32-year old, married white male, with a law degree who aspired to become a prosecutor but wound up as a criminal defense attorney. One interviewer noted that “[a]s with most of the interviewees, [Candidate D] used no discretion in the situational speeding question [Traffic Enforcement” scenario].” He was one of the four candidate tied for third on the civil service list and one of the three “superstars” ranked “exceptional” in Chief Jenkins letter to Mayor Sullivan. (*Exhs. 9, 16, 22, 28 and 30*)

Candidate E – A 25 year-old single, white male who currently lives in Braintree with his parents, currently works as a bank protection officer and previously worked for four years as a Brinks Armored Truck Driver. He is a 2006 Braintree High School graduate who played varsity football. He “knows a lot of Braintree police officers” by name and was acquainted with some of the interview panelists through his participation at youth camp in 1999. In 2001, he received his college degree in Criminal Justice from Curry College. His written exercise was a two paragraph statement that was characterized as “neatly written” and “above average”. (*Exhs. 10, 13, 19, 27 & 31; Testimony of Sgt. Cohoon*)

19. The background investigations disclosed negative information about several of the successful candidates.

- One candidate possessed a criminal/driving history that involved questionable, and potentially untruthful behavior in a 2010 hit-and-run incident, a college disciplinary record and admitted marijuana and alcohol abuse in college. The background investigator made a thorough review of the hit-and-run incident, and reported a number of inconsistencies in the candidate’s version of the accident as described in his application and interview (he said he left because he thought the vehicle he hit was driving off) as compared to the report of the State Trooper who investigated the accident. The State Police Trooper said the candidate had started to “fib” about the incident before he admitted the truth and apologized. The investigator tracked down the owner of the vehicle who reported that her son, who was driving the car, had been standing outside the disabled vehicle and that the candidate made eye contact with him as he drove off. The candidate’s explanation “still does not sit well” with one of the interview panelists, who believed the candidate failed to take responsibility for his actions. Another interview

panelist noted the candidate had changed his story, first telling the State Trooper he had not consumed alcohol but then admitting he was coming from a party and had “one or two beers”. (He passed the sobriety test). Deputy Chief Foster dismissed the incident to “immaturity”. Two interviewers made no mention of it in their notes.

- The background investigator called another candidate’s history of speeding tickets and accidents on file with ten (10) law enforcement agencies in Massachusetts, Florida and Vermont an “area of concern”.
- Another candidate had a “well-documented” history of alcohol abuse and related misconduct and he was questioned about whether he met the requirements for a residency preference since he had moved to Dedham while in college. Sgt. Cohoon though the candidate “didn’t have a chance” due to his history of alcohol abuse, but he had been sober for a year, took “full responsibility” for his shortcomings, and impressed the panel with his motivation and exceptional responses to the situational questions that were “among the best” of all the candidates.

(Exhs. 6 through 31)

20. The narrative interview notes about Mr. Morris include a statement that he “did not interview very well” and “demonstrated poor to fair interpersonal skills”. When asked for his worst trait, he responded that it was “public speaking”, which prompted a panel member to compliment him and comment he was “OK with six”, to which Mr. Morris responded jovially that he meant an auditorium of people. Sgt. Cohoon “had hoped he would perform better.” His answers to the law enforcement situational questions were mostly described as “well”, “good” or “adequate” but one panelist said he “stumbled through” the questions, needed them repeated more than anyone else, and Deputy Chief Foster wrote that Mr. Morris answered the two citizen

situational questions “inadequately” because he said would intervene personally in both the Restaurant Scenario (to keep the intoxicated man from driving) and the Mall Scenario (to try to break up the fight), rather than call the police right away. His answer to the Traffic Enforcement Scenario was criticized because he “still doesn’t grasp the concept of discretion”. His handwritten exercise was not “disqualifying” (according to Chief Jenkins’ testimony), and addressed “genuine problems” (underfunding of law enforcement agencies and community engagement) according to Deputy Chief Foster’s narrative notes, but were “a very short two paragraphs” which two other panelists noted contained several grammatical and typographical errors. One panelist found Mr. Morris “an acceptable candidate” but “other applicants have demonstrated superior writing and analytical skills” during their interviews. Mr. Morris was not personally acquainted with any BPD officers, but did research the BPD website prior to his interview. (*Exhs. 17 & 29; Testimony of Appellant, Chief Jenkins and Sgt. Cohoon*)

21. Mr. Morris presented at the Commission hearing as a soft-spoken, but articulate witness who was attentive and responsive to questions on direct and cross-examination, as well as questions posed by this Commissioner. My review of the audio-video recording of his 2013 interview conveyed the same impression. I saw no evidence of his “poor” interpersonal skills, misunderstanding or “stumbling” over the questions or repeatedly needing questions to be clarified or repeated. Rather, it was the panel that would pose follow-up questions, as it did with most candidates, changing the scenario fact patterns, and asking how those additional facts might change his answers. (*Exh. 29; Testimony of Appellant*)

22. In particular, the panel devoted considerable time with Mr. Morris on such follow-up questions about the Traffic Enforcement Scenario. Mr. Morris gave an initial response to the effect that would ask for a license and make sure the officer was aware that he was speeding 55

in a 25 MPH residential area and, unless some “emergency” was involved, he would give his fellow officer a ticket. Asked what he would do if it was his aunt, he gave the same response. A lengthy colloquy then ensued as to whether Mr. Morris could provide any examples from his experience in which he had to exercise discretion. His responses included an example in which he had cleared a contractor who came to the Federal Reserve Bank with a large knife which would ordinarily be confiscated as contraband after the individual gave a credible explanation of why he needed the knife to perform the work he was there to do. He also provided an example of how he treated trespassers on HUD property when he worked as a Special Boston Police Officer, indicating that, for first offenders, he would not make an arrest or issue a summons, but give a verbal warning and counsel that “ next time, please stay on the other side of the street.” After about ten minutes of questioning on this subject was when Mr. Morris “changed” his answers and said, after further reflection, a written warning would probably suffice in the case of his union president and his aunt. (*Exhs. 17 & 31*)

23. Mr. Morris’s 2012 interview was not put into evidence. He did remember posing questions in the situational exercises, but not because he didn’t understand the scenarios. He asked about facts that he knew from training and experience could be important to assessing a situation and deciding how to act. For example, in a scenario that involved seeing two men forcing a woman into a vehicle, he wanted to know if there were other people around, as that would influence whether he would first put in a call to the police or could ask another bystander to do it while he took action to intervene. (*Testimony of Appellant*)

24. Sgt. William Moss was then Mr. Morris’s direct supervisor at the Federal Reserve Bank and had extensive first-hand knowledge of his performance. Sgt. Moss gave Mr. Morris an unqualified assessment as one of the best officers on the Federal Reserve Bank police force. His

was “meticulous”, always went “by the book”, and was an “excellent teacher”. Sgt. Moss trusted Mr. Morris to handle any situation and would often choose him to be his “go to” person in a potentially sticky situation. He also had first-hand knowledge of Mr. Morris’s report writing ability which he also rated “top notch” and “right on point”. He explained that Federal Reserve Bank police officers received annual refresher training, which includes a component on report-writing, which emphasizes the importance of being simple and factual, sticking to the “who, what, where and when” without unnecessary elaboration. (*Testimony of Sgt. Moss*)

25. Sgt. Moss also explained that the Federal Reserve Bank in Boston did not have a lock-up to secure a person taken into custody and that, although he didn’t know the details, historically, the bank had transported such persons to the BPD. Although he had never personally encountered any issues with the BPD, He remembered that his former supervisor at the bank had some conflict with the BPD. (*Testimony of Sgt. Moss*)

CONCLUSION

Applicable Standard of Review

The authority to bypass a candidate for permanent appointment to a civil service position derives from 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.”

An appointing authority’s discretion to pick among qualified candidates for civil service appointments who have met the requirements for the position by taking and passing a civil service competitive examination is not absolute and is subject to review by the Commission. The appointing authority’s reasons for “bypassing” a candidate higher on the list in favor of hiring a lower ranked candidate must be “reasonably justified”, based on a “thorough review” and

supported by a preponderance of the evidence, when weighed by an unprejudiced mind, guided by common sense, and correct rules of law. See, e.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited; Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182 (2010); 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). See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991) (“discretionary acts of public officials . . . must yield to the statutory command that [they] produce ‘sound and sufficient’ reasons” consistent with basic merit principles and protected from arbitrary and capricious actions); See generally Barry v. Town of Lexington, 21 MCSR 589, 597 (2008) citing Sabourin v. Town of Natick, 18 MCSR 79 (2005) (civil service test score is the baseline tool for relative ability, knowledge and skills under basic merit principles)

In reviewing a bypass decision, “[t]he commission’s primary concern is to ensure that the appointing authority’s action comports with ‘basic merit principles,’ as defined in G.L.c.31,§1.” Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) citing Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban , 434 Mass. 256, 259 (2001). In conducting this inquiry, the Commission “finds the facts afresh”, and is not limited to the evidence that was before the appointing authority. E.g., Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (appointing authority must proffer “objectively legitimate reasons” for the bypass); Borelli v. MBTA, 1 MCSR 6 (1988) (bypass improper if “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons”); MacHenry v. Civil Service Comm’n, 40 Mass.App.Ct. 632, 635 (1995), rev.den., 423

Mass. 1106 (1996) (noting duty to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”). See also Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65, 748 N.E.2d 455, 462 (2001) (“The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses . . . in accordance with basic merit principles. . . . [T]he commission acted well within its discretion.”); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (Commission must not substitute its judgment for a “valid” exercise of appointing authority discretion, but civil service law “gives the Commission some scope to evaluate the legal basis of the appointing authority’s action, even if based on a rational ground.”)

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001) In the event of a failure of proof, the commission has the power to reverse the bypass decision. Id. It is the function of the hearing officer to determine the credibility of evidence presented through witnesses who appear before the Commission. See Covell v. Department of Social Svcs., 439 Mass. 766, 787 (2003); Doherty v. Retirement Bd., 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988).

Summary of Conclusion

Applying these principles to the facts of the present appeal, the BPD has failed to prove that it had reasonable justification to bypass Mr. Morris for appointment as a BPD police officer in favor of other candidates who were ranked lower on the civil service certification. The

preponderance of the evidence showed that Mr. Morris had a well-documented record as a successful law enforcement professional who met all of the BPD's qualifications for the position and that the purported reasons stated by Braintree for selecting other candidates because of slightly better interviews were unfounded and does not provide a reasonable justification for denying him an appointment.

The Interview Process

Police departments and other public safety agencies are properly entitled, and often do, conduct interviews of potential candidates as part of the hiring process. Some degree of subjectivity is inherent (and permissible) in any interview procedure, but care must be taken to preserve a "level playing field" and "protect candidates from arbitrary action and undue subjectivity on the part of the interviewers", which is the lynch-pin to the basic merit principle of civil service law. E.g., Flynn v. Civil Service Comm'n, 15 Mass.App.Ct. 206, 208, rev.den., 388 Mass. 1105 (1983). The Commission's decisions have commented on a wide range of interview plans, some of which are commendable and some more problematic. Example of the former: Anthony v. Springfield, 23 MCSR 201 (2010), Gagnon v. Springfield, 23 MCSR 128 (2010); Boardman v. Beverly Fire Dep't, 11 MCSR 179 (1998). Examples of the latter: Monagle v. City of Medford, 23 MCSR 267 (2010); Mainini v. Town of Whitman, 20 MCSR 647, 651 (2007); Belanger v. Town of Ludlow, 20 MCSR 285 (2007); Horvath v. Town of Pembroke, 18 MCSR 212 (2005); Fairbanks v. Town of Oxford, 18 MCSR 167 (2005); Saborin v. Town of Natick, 18 MCSR 79 (2005); Sihpol v. Beverly Fire Dep't, 12 MCSR 72 (1999); Bannish v. Westfield Fire Dep't, 11 MCSR 157 (1998); Roberts v. Lynn Fire Dep't, 10 MCSR 133 (1997).

Here, to its credit, BPD did audio-video record the interviews, which provided a valuable and efficient aid to the Commission's consideration of this appeal. For the most part, candidates were

asked the same series of questions, although there were some material variances that are discussed below. However, BPD took few further steps to insure that the interview process was reasonably structured and capable of meaningful objective review. The panel was comprised of BPD personnel who used no independently assigned numerically-rated interview record but arrived at a “consensus” ranking of the candidates at a meeting led by Chief Jenkins weeks after all the interviews had been completed. Chief Jenkins, himself took no notes at the interviews. His testimony, as well as other evidence at the Commission hearing, demonstrated that Chief Jenkins’s recollections, the narratives of other panel members, as well as the summary provided to Braintree Mayor Sullivan (who was the actual “decision maker”) frequently did not comport with what the recorded interview record and other background investigation reports on the candidates clearly showed. There is no record whatsoever of the interviews conducted by Mayor Sullivan or of the Mayor’s assessment of any of the candidates.

In this regard, the number of potential red flags that appear in the record bear notice, including the age and racial disparity between Mr. Morris and the five selected candidates, the educational differences (a college degree is not a requirement for appointment as a municipal police officer) and the strong family ties that all but one of the selected candidates had to Braintree. Although there is not sufficient evidence for me to find that these factors actually entered into the decision-making process, the appearance of bias raised by these facts does underscore why civil service appointments based on unduly subjective assessment of interview performance must be discouraged.

In sum, the BPD’s decision to bypass Mr. Morris was not a judgment that something in his record disqualified him from appointment, but depended entirely on an unduly subjective, relative assessment of his interview performance compared to others, an assessment that was conducted

weeks after the interviews had been conducted. With no negative “areas of concern” in his background to distinguish Mr. Morris from the lower ranked candidates (indeed, some candidates carried serious “areas of concern” in their background), a highly subjective rationale, based on interview performance alone, while not necessarily unacceptable, per se, is certainly problematic, especially when the circumstances suggest, such as they do here, at a minimum, a potential appearance of bias and therefore, should have warranted particular care to assure that the selection process is above reproach and consistent with basic merit principles that govern appointments made under civil service law.

Mr. Morris’s 2103 Interview Performance

Not only was the BPD’s reliance on an interview performance to distinguish which candidates make the cut and which do not problematic as a matter of process. In addition, in this case, the evidence also demonstrates that, on the merits, the purported shortcomings in Mr. Morris’s interview performance, as stated in his bypass letter, are simply unfounded.

First, the conclusion that Mr. Morris fumbled through the interview and “didn’t understand the concept of discretion” is not supported by the evidence in the record. In fact, it is clear from his initial responses to the Traffic Enforcement scenario that his primary standard for excusing a speeding violation was a justifiable emergency “excuse” – i.e., situational discretion – but it would not matter who the offender was. He also, when asked, provided clear and credible examples of how he has actually used discretion on the job of a police officer. While it may be true that, in the real world, as Chief Jenkins said, giving the police union president a ticket “will never happen”, I find no rational basis on which to denigrate Mr. Morris for professing that such a result is inconsistent with his core values. I find it far more problematic that the BPD would take the opposite view of one of its “superstars”, Candidate C, whose answer to the Jewelry Store

scenario showed no hesitation in excusing a fellow officer who had stolen jewelry and who would let the union president off, scolding him that she had no choice: “You put ME in a bad situation.” Furthermore, Mr. Morris’s “poor” answers were no different than those of selected Candidate A, whose poor interview performance was not disqualifying, but excused because of his “limited life experiences” and just a “bad interview”. Finally, as to stumbling through the questions, I found nothing in the audio/video record to support that conclusion. Mr. Morris is no more vulnerable to such criticism, and actually less vulnerable, than other candidates, all of whom, to some degree or another asked for clarification or even needed prompting to point out that they had misunderstood the fact pattern.

Second, I can find no rational basis for Mr. Morris’s handwritten exercise to distinguish his candidacy from the two candidates that, coincidentally, were ranked just slightly ahead of him, Candidate A or Candidate E, both of whom also submitted relatively short two paragraph statements, both of which could stand proof-reading. (Candidate A – “where there is drugs, there is gangs”; Candidate E – “Law enforcement will have to continue battle the drug trade . . .”). Moreover, no criticism was ever levied at Mr. Morris’s 2012 writing sample, and rightly so, as it was a thoughtful, cogent and carefully written essay.

Third, even assuming that issues with Mr. Morris’s discretion, interpersonal skills, or writing skills might be deemed to have legitimately surfaced during his interview, those entirely subjectively presented concerns do not stand up to the overwhelming objective evidence from Mr. Morris’s well-documented, unblemished twelve year history of employment in armed law enforcement positions that reveals no basis for criticism on any of those grounds. By singling out his interview performance and failing to fairly and thoroughly consider and explain its decision in light of the complete record available to the BPD that contained extensive

information (much of it drawn from his many years of actual experience as a police officer) that was highly complementary to Mr. Morris in all the areas of alleged concern, the BPD's decision was not reasonably based on the required "thorough review" needed to support a bypass decision under applicable civil service law.

For all of the above reasons, the appeal of the Appellant, Roy V. Morris, Jr., under Docket No. G1-13-173 is *allowed*

Relief to be Granted

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the name of the Appellant, Roy V. Morris, Jr., shall be placed at the top of all future certifications for original appointment to the position of Police Officer in the Braintree Police Department until he is selected for appointment or bypassed. If and when Mr. Morris is selected for appointment and commences employment as a Braintree Police Officer, his civil service records shall be retroactively adjusted to show, for civil service seniority purposes, as his starting date, the earliest Employment Date of the other persons employed from Certification 00350.

Civil Service Commission

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on December 11, 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)(1), 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:

F. Robert Houilhan, Esq.(for Appellant)
Timonty D. Zessin, Esq. [for Respondent]
John Marra, Esq. [HRD]