

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

SEAN PUGSLEY,  
*Appellant*

v.

G1-10-334

BOSTON POLICE DEPARTMENT,  
*Respondent*

&

HUMAN RESOURCES DIVISION,  
*Respondent*

Appearance for Appellant:

Joseph L. Sulman, Esq.  
Law Office of Joseph L. Sulman,  
185 Devonshire Street, Suite 502  
Boston, MA 02110

Appearance for Boston Police Department:

Nicole Taub, Esq.  
Boston Police Department  
One Schroeder Plaza  
Boston, MA 02120

Appearance for HRD:

Andrew L. Levrault, Esq.  
Human Resources Division  
One Ashburton Place: Room 207  
Boston, MA 02108

Commissioner:

Cynthia A. Ittleman<sup>1</sup>

**DECISION SUMMARY**

The Appellant filed a bypass appeal challenging the validity of the Boston Police Department to request a female selective certification, in addition to the “main” certification, from which to appoint police officers and the validity of the issuance of a female selective certification by the state’s Human Resources Division. In so doing, the Appellant averred that, but for the female certification, he would have been at least considered for appointment. The Appellant also averred that both the Boston Police Department and HRD made significant errors in the hiring process, which he avers caused him to be aggrieved. The Appellant was the first candidate on the eligible list

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Jared Varo in preparing this decision.

below numerous veterans who had statutory preferences. In addition, given his placement on the eligible list, the Appellant's name did not appear on the "main" certification issued by HRD to the Boston Police Department. Pending this decision, the Appellant filed a claim of discrimination at MCAD, which he later withdrew to file a civil action. The Superior Court ruled in favor of the Boston Police Department and the Appellant appealed. The Supreme Judicial Court decided that the Appellant has no standing in these regards. The instant appeal is denied based on the same reasons stated in the Supreme Judicial Court's decision.

## DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), Sean Pugsley ("Mr. Pugsley" or "Appellant"), filed an appeal at the Civil Service Commission ("Commission") on December 7, 2011, regarding the decision of the Boston Police Department ("BPD" or "Appointing Authority") to bypass him for appointment to the position of Police Officer, and the actions of the state's Human Resources Division ("HRD")(collectively referring to BPD and HRD as "Respondents") relating thereto.

A pre-hearing conference was held on January 4, 2011. The Respondents separately filed motions for summary decision. The Appellant filed two memoranda related to the motions and HRD filed a response to one of the Appellant's memoranda. The Appellant waived certain of his initial claims, rendering HRD's motion and part of BPD's motion moot. The Appellant's remaining claim is that he was bypassed for appointment as a result of unlawful and unjustified use of a gender specific Personnel Administrator Rule ("PAR").<sup>08</sup> selective certification approved by HRD and employed by BPD to select female candidates for appointment who had received lower examination scores than he did. The Respondents further urged summary disposition of the appeal on the grounds that the appeal is untimely, the Appellant is not aggrieved as required by G.L. c. 31, s. 2(b), the Appellant waived his right of appeal by bringing a civil suit in court against the Respondents alleging discrimination and violation of his civil rights, and

the gender-specific selective certification complies with applicable civil service law. A hearing on the motions was held on August 1, 2011. On November 3, 2011, the Commission denied both motions. The Appellant had argued that, given the ratio of candidates to attrition in the hiring process, but for the gender certification, he would have been reached for consideration. The Commission ruled, “These ratios, while not necessarily conclusive, do warrant the inference that, had BPD continued down the main certification rather than the female certification to acquire the additional 28 candidates eventually hired, it likely would have reached Mr. Pugsley’s name, which was about 85 places further down the eligible list. Mr. Pugsley has made a satisfactory showing of his status as an aggrieved person to have standing to press this appeal.” Decision on Motions, p. 16. The Commission also ruled that there were errors on the part of both Respondents in the hiring process and, with that in mind, the Commission opened an investigation and the appeal was stayed pending the conclusion of the investigation (I-11-319).

On October 18, 2012, the Commission issued its Investigation Findings and Conclusion<sup>2</sup>, finding that the Respondents’ failings were isolated, not systemic, and were, for the most part, accidental. The investigation made no findings as to the specific effect of the Respondents’ actions upon the defendant, leaving that determination for full hearing.

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<sup>2</sup> Please note that some numbers provided in the original investigation have since been found to be inaccurate. All numbers provided in this decision reflect the most reliable sources available to the commission.

A full hearing was held on June 5, 2013.<sup>3</sup> The hearing was digitally recorded and copies of the recording were provided to the parties.<sup>4</sup> The parties submitted post-hearing briefs.

## **FINDINGS OF FACT**

Twenty-one (21) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of:

*For BPD:*

- Daniel Linskey, Superintendent in Chief, BPD
- Robin Hunt, Director of Human Resources, BPD

*For HRD:*

- Regina Caggiano, Deputy Director, HRD Civil Service Unit and Organizational Development

*For the Appellant:*

- Sean Pugsley, Appellant;

and taking administrative notice of all matters filed in the case, including, without limitation, all documents submitted relating to the Respondents' motions for summary decision, the Commission's Ruling on Motions for Summary Decision, the investigation and Findings and Conclusion of the investigation; as well as pertinent statutes, caselaw<sup>5</sup>, regulations, guidelines and policies; stipulations; and post-hearing briefs; and drawing

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<sup>3</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

<sup>4</sup> If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. Although the Commission recorded the hearings in this case, the parties engaged a stenographer who recorded and transcribed the recordings of the proceedings and agreed that the stenographer's recordings and transcriptions would constitute the official record of the hearings.

<sup>5</sup> Pertinent caselaw includes the complaint filed by the Appellant at the Massachusetts Commission Against Discrimination ("MCAD"), the Superior court decision on the Appellant's civil complaint for alleged discrimination and violation of his civil rights, and the decision of the Supreme Judicial Court in its de novo review of the Superior Court's decision. See Discussion, *infra*.

reasonable inferences from the credible evidence; a preponderance of the credible evidence establishes as follows:

1. The Appellant is a resident of Dorchester in the City of Boston, Massachusetts. He is and has been for many years a correction officer at the Suffolk County Sheriff's Department. He has had experience working with female inmates. (Testimony of the Appellant; Decision on Motions for Summary Decisions ("Decisions on Motions"))
2. The Appellant took and passed the 2008 open competitive examination for Police Officer administered by HRD and received a score of 103, which placed him on a November 1, 2008 eligible list, first among non-veterans who were Boston residents but below 189<sup>6</sup> other candidates, mainly, Boston-resident veterans (with statutory preference over resident non-veterans), as well as any other statutory preference. (Testimony of the Appellant, Ms. Caggiano; Ex. 1; Decision on Motions; Administrative Notice)
3. The November 1, 2008 eligible list expired on October 31, 2010, except that certain candidates on that list who had also taken a subsequent examination administered by HRD in 2009 could appear on the subsequent eligible list if they passed the 2009 exam. The Appellant did not take the 2009 examination and his eligibility for appointment as a Police Officer expired on October 31, 2010. (Testimony of the Appellant, Ms. Caggiano; Decision on Motions)

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<sup>6</sup> There is some discrepancy in Mr. Pugsley's place on the eligible list. Exhibit 1, as it appears before this Commission, shows the Appellant's name as the 190<sup>th</sup> name on the eligible list, although there many tie groups in between. While the Appellant's post-hearing brief also puts his name in the 190<sup>th</sup> position, HRD's post-hearing brief places him at 189<sup>th</sup>, and the Appointing Authority's post-hearing brief places him at 214<sup>th</sup>. In so doing, all parties' post-hearing briefs cite Exhibit 1. I am unsure how these discrepancies have arisen but I find that even if he had the most favorable position, this decision would not be affected.

4. The Appellant is now older than 40 and ineligible to take another examination for appointment to the position of Police Officer in Boston. (Testimony of the Appellant; Decision on Motions)
5. In March and April of 2010, the BPD requisitioned four certifications from HRD for appointment of approximately 100 entry-level police officers for the December 2010 Police Academy. One requisition sought to appoint 24 officers from the “main” certification. The other three requisitions sought selective certifications under PAR.08(4) for candidates with special qualifications, including a certification for 10 female candidates and 2 language certifications (for 10 Cape Verdean speakers and 10 Haitian Creole speakers) for a total of 54 positions.<sup>7</sup> The Appellant does not challenge the language certifications. Approximately one-third of the available positions would be filled by participants in the Cadet program. (Testimony of Linskey, Ms. Caggiano, Hunt; Ex. 2; Decision on Motions)<sup>8</sup>
6. BPD habitually requests longer Certifications than are required by the 2n+1 formula required by PAR.09 requiring consideration of two times the number of vacancies to be filled, plus one. By email dated April 12, 2010 from Ms. Hunt to HRD, the BPD specifically requested “additional names *well beyond* the 2N+1

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<sup>7</sup> BPD’s requisition of PAR.08 language certifications was based on the data provided about the population of the City of Boston and the need to have officers on duty capable of communicating directly with citizens, without the need for an interpreter, which adds complications to the ability of the BPD to respond in certain situations. (Decision on Motions)

<sup>8</sup> As noted in Pugsley v Police Department of Boston, et al, SJC-11740, n. 6 (July 31, 2015), “Statute 1978. c. 174, as amended by St. 1979, c. 560, and St. 1984, c. 277, permits the department to place a number of qualified Boston police cadets (up to thirty-five or one-third of an academy class, whichever is greater) into each academy class without certification from an eligibility list prepared under G. L. c. 31 by the division [HRD]. These cadets would therefore be eligible for selection prior to any consideration of the selective or main certification lists. See generally G. L. c. 147, § 21A (appointment, qualifications, compensation, status, and retirement and pensions of police cadets).”

formula ... that way, we will not have to re-requisition additional names a month into processing depending on how many sign. ...” (Ex. 4)(emphasis in original)

Though these requests are not always granted, BPD requests more names because of the attrition rate among candidates. (Testimony of Hunt, Caggiano) The older the exam, the more likely it is that HRD will issue a Certification for more than 2N+1. (Testimony of Caggiano)

7. HRD has guidelines that were in effect at the relevant time, entitled “Human Resources Division Civil Service Unit, Selective Certifications, Descriptions and Questionnaires” (the “HRD Guidelines”). The section of the HRD Guidelines entitled “Gender-Based Selective Certification” contained a sample of the questionnaire, entitled “Human Resources Division/Request for Gender-Based Selective Certification” (the “HRD Questionnaire”), required to be completed by an appointing authority that seeks to requisition a gender-based selective certification, as well as the following guidance:

“Massachusetts General Laws, Chapter 31, Section 21, provides that the Personnel Administrator may limit eligibility for appointment to any civil service position to either male or female persons if the duties and responsibilities clearly and unequivocally so require. **Requests for such gender-based selective certifications are carefully reviewed by both the Human Resources Division (HRD) and the Massachusetts Commission Against Discrimination (MCAD) to ensure that such certification is valid and job-related.**

To initiate HRD review of a gender-based selective certification request, the appointing authority must file a completed gender-based selective certification questionnaire, a copy of which is included here, documenting such need. **The completed questionnaire is then analyzed by HRD, and, if the request appears to be justified, the request is forwarded to MCAD for its review.** Once MCAD approves the request, HRD will issue a selective certification. If the request is denied by either agency, the appointing authority will be so notified.

Selective certifications have, in the past, been requested and approved for female police officers so that municipalities will have sufficient shift coverage to ensure

privacy rights of clients within such categories as rape crisis intervention, transportation of female prisoners and search of female prisoners. **In these cases, the formula used to determine the validity of the request is that a municipal department is allowed one female police officer per shift plus one additional female officer on each shift as a reserve for vacation and sick leave accommodations.”**

(Ex. 3)(emphasis added)<sup>9</sup> HRD views the formula mentioned in the last sentence of this document above as a minimum number of female officers for a small Police Department. HRD also considers other factors, such as the number of arrests by the police department and the personnel make-up of the department in making determinations about requests for such certifications. (Testimony of Caggiano)

8. In accordance with HRD requirements, on or about March 12, 2010, BPD submitted a completed HRD Questionnaire to support its request for a selective female certification. In support thereof, BPD indicates that female BPD Officers are responsible for, among other duties, gender specific duties involving both female victims and offenders, which include frisking and transporting female suspects, and interviewing and interacting with citizens in sensitive areas of sexual assault and crimes against children. Although some of these functions are not strictly required by law, there is a very strong preference for female officers to perform these tasks. If there are no female officers available to perform female specific duties, female officers will be pulled from other assignments to perform the task. (Testimony of Linskey)
9. BPD Rules and Procedures, Rule 318, provides, in part,  
  
“ ... Section 9 FEMALES: All female prisoners, after being booked in accordance with the rules and procedures of the Department, shall be sent

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<sup>9</sup> HRD has since made changes to this document effecting the highlighted provisions. (Ex. 21)



as soon as possible to the Suffolk county Jail in a Department vehicle. Female prisoners shall be searched by a female Boston Police Officer. If no female police officer is available, the prisoner shall be transported to the Suffolk County Jail to be searched. ...

Female prisoners in police custody shall not be confined in a cell within a cell-block at any station house. Whenever the temporary detention of a female prisoner is necessary, she shall be placed in a detention room, when one is available, or in a secured room to be held under guard. ...”

(Ex. 12)

10. BPD Rules and Procedures, Rule 318C, Care and Custody of Female

Prisoners, provides, in part,

“ ... AVAILABILITY: District D-4 shall be open at all times for the housing of female prisoners. ...

SEARCHES: In accordance with the provisions of Rule 318 §§ 4&9, all female prisoners shall be subject to a custodial inventory search of their person and property at the time that they are booked.

The Duty Supervisor at the District of arrest or detainment and the Duty Supervisor at District D-4 are responsible for ensuring that the procedures outlined in Rule 318D, Strip Search and Body Cavity Search Procedures, are strictly adhered to for all prisoner in their custody or under their control. ...

Duty Supervisors shall ensure that all reasonable efforts are made for female prisoners to arrange for bail prior to making arrangements to transport such prisoners to district D-4. ...”

(Ex. 13)

11. BPD Rules and Procedures, Rule 318D, Strip Search, Visual Body Cavity Search, and Body Cavity Search Procedures, provides, in part,

“ ... The search will be performed by an officer who is the SAME GENDER as the prisoner, and will be conducted in an area that affords COMPLETE PRIVACY. ...”

(Ex. 14)

12. Pursuant to G.L. c. 41, s. 97B provides, in part,

“ ... a victim of rape who is female shall, whenever possible, be interviewed initially by a woman police officer. ...”

(Id.)

13. BPD did not include any information in the HRD Questionnaire that identified the current number of female officers by duty assignment, although it indicated that

- the number of female victims and suspects had increased. Although the proportion of arrests had not changed dramatically over the previous five (5) years, the number of female victims of aggravated assault had increased from 1,200 to 1,696 (+41%) from 2008 to 2009. In addition, BPD reported that the number of female victims of criminal assault had increased 3% from 2005 to 2009, including 55% spike (3,116 to 4,389) from 2008 to 2009. (Decision on Motions)
14. BPD operates 11 separate police districts. This translates into approximately 19 or 20 female patrol officers per police district, 3 or 4 detectives, and 2 to 3 superior officers, or about 13% of the force. BPD's total sworn strength at the time of the requisition was 2,137 officers, 284 of whom were female. (Testimony of Linskey, Hunt; Ex. 6; Decision on Motions)
  15. The HRD Questionnaire in effect at the pertinent time stated that the "information is submitted to HRD and MCAD in documentation of this request for a gender-based selective certification." (Ex. 3) "Prior to any limitation of appointment or promotion, [HRD] shall submit in writing to the Massachusetts commission against discrimination [MCAD] **a request for its recommendation** on such proposed limitations." (G.L. c. 31, s. 21(emphasis added); Decision on Motions; Findings and Conclusion of Investigation)
  16. BPD's requests for selective certifications were received by the HRD Civil Service Unit on March 12, 2010 at 2:19 PM and were approved the same day. (Ex. 2) The person who approved the request has since retired. Ms. Caggiano, a witness at the full hearing, was not involved in the approval of the selective

gender certification at issue here but for approximately one decade before this certification, Ms. Caggiano was in charge of certifications. (Testimony of Caggiano)

17. HRD did not submit BPD's request for a special female certification to MCAD because MCAD had not responded to previous such requests.<sup>10</sup> (Testimony of Caggiano; Decision on Motions; Findings and Conclusion of Investigation)
18. On April 16, 2010, HRD issued the main certification # 290999, containing the first 113 names from the eligible list from which to appoint 24 permanent full time BPD Police Officers from the 49 highest on the list willing to accept an appointment. The Appellant's name did not appear on this Certification because his name was too far down on the eligible list. (Ex. 7, Certification 290999)
19. On April 16, 2010, HRD also issued Certification # 207159 containing the names of all 273 females on the active eligible list from which to appoint 10 female officers from the first 21 highest who were willing to accept appointment. HRD attributed its inclusion of the entire list of females for this Certification to computer error. Further, by mistake, HRD also sent card notifications to all 273 female candidates, informing them of the opportunity to go to the BPD to sign the Certification if they are interested in the position. (Testimony of Caggiano, Ex. 5)
20. Of the 113 persons on the main Certification #290999, 76 persons signed willing to accept employment, if it was offered, for one of the 24 available positions. After completing background investigations and drug screening, conditional

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<sup>10</sup> As noted in the Findings and Conclusion of Investigation, HRD has since taken steps to address this matter.

- offers of employment were made to 19 candidates, subject to further satisfactory completion of a medical screening, psychological evaluations and the Physical Abilities Test (“PAT”). Of the candidates who received conditional offers, 9 entered the Police Academy class that began in December 2010. (Testimony of Caggiano; Ex. 7; Decision on Motions)
21. Of the 273 names on the selective female Certification #207159, 191 persons signed willing to accept employment, if offered. After completing background investigations and drug screening, conditional offers were made to 75 candidates, subject to further satisfactory completion of a medical screening, psychological evaluations and the PAT. Of the candidates who received conditional offers, 28 entered the Police Academy class that began in December 2010. (Testimony of Caggiano, Hunt; Ex.5; Decision on Motions)
  22. In addition, 19 of 40 candidates from the Cape Verdean language selective Certification #207160 received conditional offers of employment and 10 entered the December Police Academy; 12 of 55 candidates from the Haitian Creole language selective Certification #207138 received conditional offers of employment and 8 entered the December 2010 Police Academy. In addition, 28 candidates who had served as Boston Police Cadets also entered the December 2010 Academy. (Testimony of Hunt; Ex. 7; Decision on Motions)
  23. In making these appointments, the BPD reached the lowest scoring applicants on the list of 113 names on the main Certification #290999 but had not exhausted those who had statutory preferences, for example, as veterans, and reached the

- 234<sup>th</sup> lowest ranked candidate on the female Certification #207159. (Ex. 5; Administrative Notice)
24. At some point during this process, BPD re-evaluated its need for additional female officers and continued recruitment from Certification #207159, the female certification. BPD did not wish to request a new certification as they believed it would cause significant delay and the December Police Academy would have to be delayed by several months in order to complete the extensive testing and background checks for new candidates. Significant delay may require that candidates be re-investigated, a process which takes still further time and resources. BPD did not wish to hire from any additions to the main Certification because they felt that they specifically needed more female officers. (Testimony of Hunt)
25. After BPD had made the appointments to the December 2010 Police Academy class, HRD inquired why BPD had hired 28 additional female police officers, 18 more than the 10 female officers authorized to be hired by the selective female Certification #207159. On January 19, 2011, BPD explained in a letter to HRD that BPD had experienced an increased need for additional female police officers due to an unspecified “number of police officers leaving the force coupled with a continuous need for female officers to carry out gender-specific job related tasks.” (Ex. 10) Attached to the letter was a recent strength report indicating the low numbers and percentages of female officers in the BPD. The letter also states that, “...[t]he female certification was the most likely and accessible certification to hire additional officers from, as HRD inadvertently sent postcards out to the

entire female list. Therefore we already had many additional names on hold after signing the list. ...” (Id.)

26. In approximately twenty-five (25)% of the certifications HRD issues in response to requisitions to appoint law enforcement officers, appointing authorities make more appointments than afforded by their certifications, which HRD addresses by obtaining additional information from the appointing authority as needed.

(Testimony of Caggiano)

27. On December 7, 2010, the Appellant filed the instant appeal. (Administrative Notice)

28. Following the Decision on Motions, the Commission opened an investigation of the Respondents’ Selective Certification practices. This Investigation’s Findings and Conclusion indicates that there were technical deficiencies in the selection process but they were isolated incidents, not systemic problems. The Respondents have assured the Commission that they are taking action to prevent these issues from reoccurring. Further, the Findings and Conclusion of the Investigation did not preclude an argument by the Appellant that the technical deficiencies were unfair specifically as applied to him. (CSC Docket No. I-11-319).

## DISCUSSION

### *Related Litigation*

In addition to the Decision on the Motions in this case and the investigation opened following the Decision on the Motions, similar matters have been litigated in other fora. During the instant appeal, the Appellant filed a complaint at MCAD alleging

that the Respondents' conduct was discriminatory and violated his civil rights. However, he withdrew the complaint at MCAD and filed a civil action in Superior Court. Pugsley v HRD, BPD et al, Suffolk Superior Court, C.A. No. 11-2083G. On September 6, 2013, the Court granted BPD's Motion for Summary Judgment and denied the Appellant's Motion for Summary Judgment, finding that the BPD established that the preferential treatment of female candidates was justified.

The Supreme Judicial Court granted the Appellant's request for direct appellate review. Pugsley v Police Department of Boston, et al, 472 Mass. 367 (2015). The Court rejected the Appellant's argument that the ratio of candidates on an eligible list to the number of candidates hired made his hiring likely if not for the gender specific certification, ruling that the Appellant lacked standing and vacated the decision of the Superior Court and remanded the cases for entry of judgment of dismissal. The Court wrote, "The Civil Service Commission's decision ... from which the plaintiff draws his ratio argument, is part of the record before us, as are the selective certifications used by the department and multiple affidavits that outline the department's and the division's respective procedures. Sufficient facts are reflected in that record for this court to consider standing as part of our de novo review of an appeal from summary judgement." Pugsley v Police Department of Boston, et al, at 373 (citations omitted). Further, the Court held, "[v]iewing all inferences in the light most favorable to the plaintiff, we cannot conclude, in the absence of articulated facts or controlling authority, that the alleged injury is sufficiently concrete and imminent as to confer proper standing on the plaintiff." Id. Even though the court found that the Appellant lacked standing there, it used the opportunity to "comment briefly on the use of the BFOQ [bona fide

occupational qualification] exception by the department in the circumstances presented here.” Id. Specifically, the Court noted,

“Here, the department essentially argues that its use of a female selective certification was justified by the statistical disparity between the number of female Boston police officers and the number of female suspects and female victims that come into contact with law enforcement. While we recognize the need for and the importance of diversified, professional, police departments, the use of statistical disparities, without more, will generally be insufficient to support a [bona fide occupational qualification]. We leave it in the first instance to the Massachusetts Commission Against Discrimination to particularize the showing necessary for engaging in such discriminatory hiring through the BFOQ process.” Id., at 374-75 (footnotes omitted).

The BPD brought the Supreme Judicial Court’s decision to the Commission’s attention, arguing that the Court’s decision warrants denying the instant appeal and the Appellant submitted an opposing statement in that regard. I take administrative notice of these submissions.

At or about the time of the instant appeal, another male BPD candidate filed a complaint at the MCAD concerning the same gender certification in 2010 of which the Appellant here complains. The Appellant here notified the Commission that MCAD had found probable cause in this other discrimination complaint, averring that this finding by MCAD supported the Appellant’s civil service appeal. The BPD submitted an opposing statement in that regard. Following the Supreme Judicial Court’s decision in Pugsley v Police Department of Boston, et al, 472 Mass. 367 (2015) and other MCAD proceedings in the case before it, MCAD issued an order that the complainant there lacked standing. MCAD and Toomey v. Boston Police Department, MCAD Docket No. 10-BEM 03305 (December 10, 2015). I take administrative notice of these matters.



### *Applicable Civil Service Statutes and Rules*

The fundamental purpose of the civil service system 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.” Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001), citing Cambridge v. Civil Serv. Comm’n., 43 Mass.App.Ct. 300, 304 (1997). “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.” G.L. c. 31, § 1. 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. Cambridge at 304.

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.” Cambridge at 304. 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).

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, 332 (1983). *See* Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189 190-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 824-826 (2006). The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in appointing candidates. Beverly citing Cambridge at 305, and cases cited.

With regard to selection by an appointing authority of a candidate from a certification, G.L. c. 31, s. 27 provides, in part,

“ If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator.”  
Id.

With regard to candidates who assert that they have been wrongly bypassed in favor of a candidate ranked lower than him or her on a certification, G.L. c. 31, § 2(b) authorizes the Commission “ ... [t]o hear and decide appeals by a person aggrieved by any decision,

action, or failure to act by the administrator ....” Id. Section 2(b) also provides that “[n]o person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status.” Id. Further, section 2(b) requires that the Commission’s decisions on appeals brought thereunder be based on a preponderance of the evidence. A “preponderance of the evidence test requires 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 Comm’n, 31 Mass.App.Ct. 315 (1991).

HRD is statutorily authorized to establish gender certifications. Specifically, G.L. c. 31, s. 21 provides, in part,

“The administrator may limit eligibility for any examination for an original appointment to either male or female persons if the appointing authority requests such limitation in its requisition. Both male and female persons shall be presumed to be eligible for a promotional appointment to any civil service position; provided, however, that the administrator may limit such eligibility to either male or female persons if the duties and responsibilities of such position require special physical or medical standards or require custody or care of a person of a particular sex. Prior to any such limitation of appointment or promotion, the administrator shall submit in writing to the Massachusetts commission against discrimination a request for its recommendations on such proposed limitations.”  
Id.

PAR.08(6) adds, “[i]f a requisition is made calling for persons having special qualifications in addition to the general qualifications tested by an examination, the

[HRD] administrator may issue a selective certification of the names of such persons from the appropriate eligible list.” Id.

In relatively recent history, the Commission has denied appeals challenging a female certification. *See Skeehan v Boston Police Department*, 11 MCSR 36 (1998)(appellant did not establish sufficient inconsistencies between the reasons provided for the selective certification and the legal authority therefor to undermine the certification reviewed by HRD and MCAD and the appellant would not have been reached without the female selective certification); Norton v. Chicopee Police Department, 11 MCSR 10 (1998)(the appointing authority was justified in using a female selective certification since there was only one female officer and the certification was part of a broader affirmative action plan); and Boorack v. Pembroke Police Department, 10 MCSR 57 (1997)(candidates have a reasonable expectation that they will be selected from a list but not a property interest therein; the appellant would not have been reached if a female candidate had not been hired because he was sixth on the certification to fill two vacancies). However, in Brackett v. MBTA, 15 MCSR 9 (2002)(on remand), the Commission found that the Respondent had not established past discrimination, which is necessary under PAR.10, to support a female selective certification. In Boston Police Department v. Choukas, Superior Court, SUCV 96-06895 (December 9, 1997, *modified sub nom Choukas v. Boston Police Department*, 48 Mass.App.Ct. 1116 (Docket No. 98-P-476; January 24, 2000)(Table), the Court concurred with the Superior Court, found that HRD and MCAD had “approved” the certification, the Commission lacked jurisdiction

in the matter, and set aside the Commission's decision that held that the use of a female selective certification was improper and had granted the Appellant relief.<sup>11</sup>

#### *BPD's Argument*

The BPD argues that the ruling of the Supreme Judicial Court in Pugsley v Police Department of Boston, *supra*, supports its repeated assertions that the Appellant has no standing. Prior to the Supreme Judicial Court's ruling, the BPD argued that even if it had requested additional names from the eligible list be added to the main certification, the Appellant was too far down to have been reached as not even all of the veterans on the eligible list had been reached. The BPD also argued that the incidents of which the Appellant complains are merely technical defects in the hiring process that did not harm the Appellant. Further, the BPD asserts that its intent was to hire female candidates and thus it would not have hired additional officers from an extended main certification, even if it had requested additional female candidates and was denied as it had a real and present need for female officers. It noted that the number of female officers was not representative of the community. In addition, it noted that there were a variety of jobs for which women are preferred or required (pursuant to BPD policy), and that this need was increased by a rise in the number of female suspects and victims.

#### *The Appellant's Argument*

The Appellant argues that the procedural mistakes, including BPD's failure to obtain approval for the second round of consideration of female candidates and HRD's failure to submit the BPD's gender certification request to MCAD, were significant enough to constitute unfairness to the Appellant. The Appellant also attacked the basis

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<sup>11</sup> There is no indication in the Choukas decisions whether the gender certification was issued under PAR.08 or PAR.10, which may involve different analyses.

for the female certification, arguing that the BPD failed to prove any real need for female officers. Indeed, the Appellant stated that as a Sheriff's Department correction officer, he has performed many duties involving female detainees. Finally, the Appellant maintained that he would have been reached had the BPD selected additional candidates for the main certification from the eligible list and that he would then have been selected.

#### *HRD's Argument*

While HRD does not argue that it approved BPD's decision to continue hiring from Certification #207159, it argues that it did approve after the fact and that the hiring of additional females was justified by BPD's low (13%) number of female officers and increased female victims and arrestees. HRD acknowledges that by clerical error or administrative oversight it mistakenly issued the certification with all 273 female candidates listed on it, instead of the appropriate 2N+1 number, and that by clerical error or administrative oversight it mistakenly issued notification cards to all 273 female candidates on the gender certification. However, it has not been established that these are on-going practices and HRD states that it has taken appropriate action to ensure that these incidents do not recur. HRD avers that it did not contact MCAD about the gender certification here because MCAD had not responded to prior requests for MCAD's recommendations in these regards. However, HRD states that it is working to address this matter as well.

#### *Analysis*

In the Commission's Decision on Motions for Summary Decision, the Commission found that the Appellant had standing to assert the instant appeal in that the Appellant had established sufficient indicia that had it not been for the gender

certification requested by the BPD and issued by HRD, he may have been reached for consideration by the BPD. However, after the extensive related litigation noted above, the Supreme Judicial Court ruled in Pugsley v Police Department of Boston, et al, *supra*, that the Appellant did not have standing to challenge the gender certification because his 214<sup>th</sup> position on the eligible list rendered it unlikely that his name would ever have been reached by the BPD if the gender certification had not been issued. The Court rendered this decision noting that it had the record of this Commission before it, which would have included the Commission's Decision on Motions. Nothing entered into the Commission's record thereafter as noted herein provides pause to question the applicability of the Supreme Judicial Court's decision in the Pugsley case before it to the Appellant's case here. Accordingly, the Appellant is not aggrieved as required in the instant forum and he lacks standing to pursue his appeal. Although the Supreme Judicial Court found that the Appellant had no standing to challenge the gender certification, the Court offered certain comments on the process of issuing gender certifications which should be adhered to by the BPD and HRD but do not further affect this appeal. Having found here that the Appellant does not have standing, we do not address the merits of the appeal. Finally, after the Supreme Judicial Court issued its decision in Pugsley, and after further proceedings at MCAD in the similar Toomey case before it, MCAD issued an order providing that Mr. Toomey also had no standing, removing any remaining support that the MCAD's Toomey case may have afforded the Appellant here.

Conclusion

For the above-stated reasons, the Appellant's appeal under Docket No. G1-10-334 is hereby *dismissed*.

Civil Service Commission

/s/ Cynthia A. Ittleman

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Cynthia A. Ittleman  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein, and Tivnan, Commissioners) on February 18, 2016.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

Joseph L. Sulman, Esq. (for Appellant)  
Nicole Taub, Esq. (for BPD)  
Andrew L. Levrault, Esq. (for HRD)