

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

NICOLAS WOSNY,
Appellant,

v.

G1-13-69

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Michael Brodigan, Esq.
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Boston, MA 02109

Appearance for Respondent:

Amanda Wall, Esq.
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Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION

On March 13, 2013, the Appellant, Nicolas Wosny (“Mr. Wosny”), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (“Commission”) contesting the decision of the Boston Police Department (“Department”) to bypass him for original appointment to the position of permanent, full-time police officer. A pre-hearing conference was held at the Commission on April 9, 2013 and a full hearing was held at the same location on June 20, 2013. The witnesses were sequestered. The hearing was digitally recorded and the parties were provided with a CD of the hearing. The parties submitted proposed decisions.

¹ The Commission acknowledges the assistance of Law Clerk Kari-Ann E. Greene in preparing this decision.

FINDINGS OF FACT

Fourteen (14) exhibits were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Charisse Brittle-Powell, Detective, Boston Police Department;
- Robin Hunt, Director of Human Resources, Boston Police Department;

Called by Mr. Wosny:

- Nicolas Wosny, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law, and policies, and reasonable inferences therefrom, a preponderance of the credible evidence establishes the following findings of fact:

1. Mr. Wosny is a twenty-six (26) year old man, who resides in Allston. (Testimony of Mr. Wosny)
2. Mr. Wosny graduated from Xaverian Brothers High School in 2005. (Testimony of Mr. Wosny)
3. In April and June, 2012, Mr. Wosny's name appeared 7th on Certification No. 202869 from which the Department ultimately appointed sixty-eight (68) permanent, full-time police officers, sixty-eight (68) of whom were ranked below Mr. Wosny. (Stipulated Facts)
4. Detective Charisse Brittle-Powell ("Detective Brittle-Powell"), a Department investigator, was assigned to conduct a thorough background investigation of Mr. Wosny, the results of which were entered as Exhibit 2. (Exhibit 2 and Testimony of Detective Brittle-Powell)
5. While conducting her investigation, Detective Brittle-Powell discovered that Mr. Wosny served in the U.S. Marine Corps from 2005 to 2012, serving one (1) tour in Iraq and one (1)

tour in Afghanistan.² His decorations include an Afghanistan Campaign Medal, two (2) Armed Forces Reserve Medals “M” Device, two (2) Sea Service Deployment Ribbons, a Global War on Terrorism Service Medal, and a North Atlantic Treaty Organization Medal. (Exhibits 1 and 2)

6. On May 27, 2007, while in the Marine Corps, Mr. Wosny witnessed an incident where Marine recruits physically struck other recruits in the upper torso. Mr. Wosny failed to stop the incident or inform his superiors of the situation. As a result, Mr. Wosny was issued an Administrative Remark (1070) or a “page 11.” The page 11 discipline noted that Mr. Wosny was “eligible but not recommended for promotion” for the next quarter. Mr. Wosny was subsequently promoted during his remaining time in the Marine Corps. (Exhibit 11)
7. Detective Brittle-Powell further observed that on February 29, 2008 while home from the Marines, Mr. Wosny was involved in a car accident where he struck a telephone pole. Mr. Wosny was transported to Beth Israel Deaconess Medical Center (“Beth Israel”) for the minor injuries he suffered from the accident. (Exhibit 8 and Testimony of Detective Brittle-Powell)
8. Beth Israel medical records note that Mr. Wosny “appeared intoxicated.” The records further note that they kept Mr. Wosny for “observation until sober.” Under the title Treatment/Precautions, the records state that “You were driving under the influence of alcohol – seek help for your alcohol abuse.” Mr. Wosny’s blood alcohol content level was .242. The legal limit for driving at that time was .08. (Exhibit 9)

² It is evident that Mr. Wosny was in the Marine Reserves for a period of time, though it is not clear when this specifically was.

9. The background investigation revealed that Mr. Wosny had previously applied to the Department in 2010, in addition to previously applying to the Brookline Police Department and the MBTA Transit Police Department (“MBTA”), both also in 2010. (Exhibit 2)
10. In his 2010 applications to the Department and to Brookline Police Department (“Brookline”), Mr. Wosny answered the question “Have you ever operated a vehicle while under the influence of alcohol and/or drugs?” with “No.” He also answered the question “Have you ever been involved in an accident while drinking?” with “No.” (Exhibits 3 and 4)
11. Mr. Wosny further noted on his 2010 Department application that: “My fourth accident took place in 2008 while driving home after work. While driving down a side street I had to swerve to attempt to avoid hitting the animal that ran in front of my car, I cut the wheel and lost control of the car, and collided with a telephone pole, no other parties were involved, and no serious injuries were sustained.” As a result of this accident, Mr. Wosny was issued a written warning. (Exhibit 3)
12. On his 2010 Brookline application, Mr. Wosny answered “No” to the question “Have you ever been convicted of any criminal offense other than the exceptions listed in the instructions in section two below?” Section two (2) on the application elaborates “You are not required to furnish information about an arrest or disposition where there was no conviction.” (Exhibit4)
13. On December 31, 2010, Brookline notified Mr. Wosny that his application was no longer under consideration due to his position on the certification list. (Exhibit 4)
14. Sergeant Michael Rutledge (“Sergeant Rutledge”) of the MBTA was tasked with conducting a pre-employment background investigation on Mr. Wosny for Mr. Wosny’s MBTA police application. On January 27, 2011, Sergeant Rutledge contacted Mr. Wosny by telephone to

garner further information about the car accident in which Mr. Wosny was involved in 2008.

At first, Mr. Wosny denied that alcohol was involved in the incident. Sergeant Rutledge informed Mr. Wosny that he was going to obtain the medical and lab records from the night of the incident. Sergeant Rutledge further informed Mr. Wosny that should the records indicate that he had alcohol in his bloodstream, the MBTA Police would bypass him for not being truthful and forthcoming. Mr. Wosny then told Sergeant Rutledge that he had taken Nyquil that evening and that may show up in the lab work. Mr. Wosny told Sergeant Rutledge that he may have had one or two drinks the night of the accident. (Exhibit 7 and Testimony of Sergeant Rutledge)

15. On January 28, 2011, Mr. Wosny emailed the MBTA Police notifying them that he was withdrawing his application. In his email message, Mr. Wosny wrote, concerning the car accident in 2008, that “I was not drinking and did not drink that night.” (Exhibit 6)

16. Concurrently, on his 2012 application to the Boston Department, Mr. Wosny answered the question “Have you ever been involved in a motor vehicle accident while drinking?” with “Yes.” In support of his answer, Mr. Wosny states that,

In 2008 I was asked to stay late at work and help clean up and accomplish various maintenance jobs around the bar. While working after close I consumed a few alcoholic drinks. Unfortunately, I proceeded to drive home. While driving down a side street I had to swerve to avoid hitting an animal that ran in front of my car, I cut the wheel and due to the alcohol and being tired from working till the early morning I lost control of the car, and collided with a telephone pole. No other parties were involved, and no serious injuries were sustained. (Exhibit 1)

17. An additional question, not present in the 2010 application, was added to the 2012 application: “Have you ever operated a vehicle while under the influence of alcohol and/or drugs.” Mr. Wosny answered this question, “Yes.” Mr. Wosny answered further stating: “In 2008 I was asked to stay late at work and help clean up and accomplish various maintenance

jobs around the bar. While working after close I consumed a few alcoholic drinks.

Unfortunately, I proceeded to drive home.” (Exhibit 1)

18. In his 2012 Department application, Mr. Wosny also wrote that he was arrested while tailgating in 2009 at a Patriots’ game at Gillette Stadium for allegedly procuring alcohol for a minor. The case was dismissed before arraignment and Mr. Wosny received a Letter of Disinvite from Gillette Stadium, barring him from attending future events at the stadium. (Exhibits 1 and 10; Testimony of Mr. Wosny)
19. Detective Brittle-Powell, of the Boston Police Department, contacted Mr. Wosny’s neighbors and employment supervisors and inquired into Mr. Wosny’s character. Mr. Wosny’s past supervisors described him as highly dependable with a strong work ethic. He was described as calm under pressure and as having an impeccable attendance history. Mr. Wosny’s neighbors describe him as having good judgment and character, having a good ability to handle crises and disputes. (Exhibit 14 and Testimony of Detective Brittle-Powell)
20. On January 14, 2013, the Department sent Mr. Wosny a bypass letter. Firstly, the Department stated that the reason for the bypass was Mr. Wosny’s contradictory responses between his 2010 applications and 2012 Department application with regard to the operation of a vehicle under the influence of alcohol. A second reason was Mr. Wosny’s arrest and Disinvite from Gillette Stadium. A final reason for Mr. Wosny’s bypass was his page 11 military discipline, which the Department notes “placed [Mr. Wosny] on restriction for one month and [made] Mr. Wosny unable to be promoted to the next rank for a period of time.” (Exhibit 12)
21. Mr. Wosny filed this appeal with the Commission on March 13, 2013.

DISCUSSION

Applicable Law

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Comm'rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971) (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See City of Beverly v. Civil Serv. Comm'n, 78 Mass.App.Ct. 182, 189 (2010). “In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev. den., 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). Further, “[t]he commission does not act without regard to the previous decision of the appointing authority, but rather decides whether 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.” Id. at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev. den., 390 Mass. 1102 (1983)).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification”

shown. Beverly at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone as a new... officer than in disciplining an existing tenured one.” See City of Attleboro v. Mass. Civil Serv. Comm’n, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly at 191. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Id. (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)).

The Commission is also mindful of the standard of conduct expected of officers of the law. “An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Serv. Comm’n, 38 Mass. App. Ct. 473, 474 (1995). “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

The Parties’ Positions

The Department argues that its decision to bypass Mr. Wosny was reasonably justified. Mr. Wosny provided contradictory responses in his 2010 and 2012 Department applications concerning whether or not he had been involved in an accident while drinking. In 2010, he answered in the negative but in 2012 he changed his answer to affirm that he had been involved in an accident while drinking. Additionally, while applying to the MBTA, Mr. Wosny informed Sergeant Rutledge that he had taken Nyquil the night of the accident in 2008, before stating that he consumed a few beers before again asserting that he had only taken Nyquil. Mr. Wosny’s

blood alcohol content level was .242 the night of the accident, indicating that he had, in fact, been drinking that night. Moreover, the Department argues that in his Brookline application, Mr. Wosny failed to appropriately answer whether he had ever been arrested for the violation of a criminal offense, as he had been arrested for the incident at Gillette stadium. Furthermore, the Department cites Mr. Wosny's receiving a page 11 discipline while in the military as a serious concern with his judgment. Therefore, the Department avers, based on the Department's policy against hiring someone whose judgment and truthfulness are a serious concern, it was justified in bypassing Mr. Wosny.

Mr. Wosny argues that he should not have been bypassed. He contends that he was truthful in his 2012 application with the Department and that this truthfulness should not be held against him. Mr. Wosny acknowledges that there is a discrepancy between his 2010 applications and 2012 application but he contends that his contradictory responses are due to his being open and honest in his 2012 application. Moreover, Mr. Wosny asserts that his neighbors and supervisors only had positive remarks, indicating his good character.

Analysis

I find all the witnesses to be truthful in their testimony at the Commission. Mr. Wosny was untruthful in his 2010 applications to the Department, Brookline, and the MBTA. He stated that he had not been involved in a car accident while drinking, when, in fact, he had done so in 2008, when he hit a telephone pole and had a blood alcohol content level of .242. When questioned by Sergeant Rutledge about this incident, Mr. Wosny stated that he taken Nyquil that night, then stated he had a couple beers, but then backtracked, claiming to have only taken Nyquil. As Mr. Wosny had clearly consumed alcohol the day of the incident, it is evident that he

was untruthful on his 2010 applications to the police departments and that he was untruthful in his statements to Sergeant Rutledge.

However, Mr. Wosny was truthful in his 2012 application to the Department. Nevertheless, it has only been two years since his untruthful statements in his 2010 applications and, as such, it is reasonable for the Department to conclude that Mr. Wosny's untruthfulness is still a serious concern and a valid reason for currently bypassing him here.

The Department argues that Mr. Wosny failed to respond appropriately to the Brookline application question concerning past criminal arrests. However, the application notes that an individual is not required to furnish information on such an arrest if he has not been convicted. Mr. Wosny's case regarding an incident at Gillette Stadium was dismissed and did not result in a conviction. Therefore, Mr. Wosny was not required to respond affirmatively to this question, and the Department cannot use his response as a reason for bypass.

Furthermore, the Department argues that Mr. Wosny received a page 11 discipline for witnessing and failing to stop a hazing incident while in the military. The Department clearly does not have a proper understanding of what this page 11 discipline entailed. The Department states that Mr. Wosny was placed on restriction for one month and that he was unable to be promoted to the next rank for a period of time. Both of these statements are false. There is no evidence that Mr. Wosny was placed on restriction for any period of time. Moreover, the page 11 discipline merely states that Mr. Wosny is not recommended for promotion, not that he is unable to be promoted. Mr. Wosny is a decorated veteran with two tours under his belt and was subsequently promoted after the page 11 discipline. Due to all of these facts, the Department's argument concerning this page 11 discipline does not hold and does not constitute a valid reason for bypass. Thus, the only valid reason the Department has to bypass Mr. Wosny is his

untruthfulness in his 2010 applications. A preponderance of the credible evidence establishes that Mr. Wosny was untruthful in his 2010 applications. Truthfulness is crucial for police officers and for police officer candidates.

CONCLUSION

For the reasons stated herein, the Department had reasonable justification to bypass Mr. Wosny. Therefore, Mr. Wosny's appeal filed under Docket No. G1-13-69 is hereby *denied*.

Civil Service Commission

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on August 8, 2013.

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)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

Michael Brodigan, Esq. (for Appellant)

Amanda Wall, Esq. (for Respondent)