

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MICHAEL NOBLE,
Appellant

CASE NO. G1-11-129

v.

**MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY POLICE DEPARTMENT,**
Respondent

Attorney for the Appellant:

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Commissioner:

Paul M. Stein¹

DECISION

The Appellant, Michael Noble, appeals to the Massachusetts Civil Service Commission (Commission) pursuant to the provisions of G.L.c.31, §2(b) from the action of the Massachusetts Bay Transportation Authority Transit Police Department (MBTA Police Department), which bypassed him for original appointment to the position of MBTA Police Officer. The Commission held a full evidentiary hearing on October 7, 2011. The hearing was digitally recorded and copies of the recording were provided to both parties. Fifteen (15) exhibits were entered into evidence. The witnesses were not sequestered and the Appellant did not testify. Both parties submitted post-hearing proposed decisions.

¹ The Commission acknowledges the assistance of Law Clerk Ashley Francisque in the preparation of this decision.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, the testimony of Detective Daniel Spas, Officer Thomas O'Connor and Deputy Chief Russell Jenkins as well as inferences reasonably drawn from the evidence, I make the following findings of fact:

1. Michael Noble (Mr. Noble) applied for original appointment as a Police Officer with the MBTA Police Department and signed the certification as willing to accept appointment.

(Exhibits 2, 3 and 9)

2. Mr. Noble submitted an application dated May 4, 2010. *(Exhibit 3)*

3. Upon Mr. Noble's May 4, 2010 application, Officer Thomas O'Connor (Officer O'Connor), an MBTA Police Officer assigned to conduct background checks on applicants, was assigned to conduct a background check on Mr. Noble. *(Testimony of Chief O'Connor)*

4. Before the MBTA Police Department investigators engage in a background check, the MBTA Police Department gets the consent of the applicant. *(Exhibit 10)*

5. The applicant voluntarily signs a release authorizing and requesting that:

Every person, firm, company, corporation, governmental agency, Court, association, or institution having control of any documents, records and other information pertaining to me, furnish the MBTA Transit Police Department any such information, including documents, records, files regarding charges or complaints filed against me, formal or informal, pending or closed or any other pertinent data, and to permit the MBTA Transit Police department or any of its agents or representatives to inspect, or any other pertinent data, and to permit the MBTA Transit Police Department or any of its agents or representatives to inspect and make copies of such documents, records and other information.

(Exhibit 10)

6. During his initial background investigation, Officer O'Connor determined that Mr. Noble had a poor driving record that contained four speeding tickets, a suspended license and a recent warning from the harbormaster in Plymouth for creating a wake in a no wake zone. *(Testimony*

of Officer O'Connor and Deputy Chief Jenkins)

7. During that investigation, Officer O'Connor also learned that Mr. Noble was involved in an incident on or about the first week of June 2010, during the application process, where he was observed going between 50-60 mph on a motorcycle on a residential street with a posted limit of 30 mph. *(Testimony of Officer O'Connor)*

8. Deputy Chief Russell Jenkins (Deputy Chief Jenkins), of the Braintree Police Department, observed this incident and gave Mr. Noble a verbal warning. He also reported the incident to the MBTA Police Department. *(Testimony of Officer O'Connor, Deputy Chief Jenkins and Exhibit 4)*

9. Following the receipt of the information, Officer O'Connor contacted Mr. Noble to ask him about the incident. In an email, Mr. Noble denied that he was going over the posted speed limit and stated that he just accelerated fast. *(Testimony of Officer O'Connor and Exhibit 6)*

10. During Mr. Noble's subsequent application process, however, he changed the speed he was travelling from no more than 30 mph to between 30 and 50 mph. *(Exhibit 7)*

11. Officer O'Connor discussed the facts with his supervisor, Detective Daniel Spas (Detective Spas), and it was decided that because of Mr. Noble's poor driving record, the incident involving Deputy Jenkins and Mr. Noble's untruthfulness regarding the incident, that Officer O'Connor would contact Mr. Noble to give him the opportunity to withdraw from the process of original appointment or be bypassed. Officer O'Connor contacted Mr. Noble around the first week of July 2010. *(Testimony of Officer O'Connor)*

12. On July 12, 2010, Mr. Noble sent an email to Officer O'Connor withdrawing from consideration for original appointment. *(Exhibit 8)*

13. On November 29, 2010, Mr. Noble reapplied for original appointment. *(Exhibit 9)*

14. Officer O'Connor was again assigned to complete a background check of Mr. Noble.
(Testimony of Officer O'Connor)

15. Officer O'Connor first attained an updated version of Mr. Noble's driving record.
(Testimony of Officer O'Connor and Exhibit 5)

16. The record showed that on June 28, 2010, during his candidacy and prior to contact with Officer O'Connor about withdrawing, Mr. Noble had received another ticket for a speeding violation in Virginia. *(Testimony of Officer O'Connor and Exhibit 5)*

17. Mr. Noble was informed in his meeting with the Professional Standards Department at the MBTA Police Department that they must inform the MBTA Police Department if anything in their application changes during the process. *(Testimony of Officer O'Connor)*

18. Question number 17 and 18 on the application specifically asks about in-state and out-of-state motor vehicle infractions that the applicant has on his or her record. *(Exhibit 3 and 9)*

19. When asked about the speeding incident, Mr. Noble alleged that he had received the speeding ticket on a long drive from Virginia to Massachusetts and upon his arrival in Massachusetts, he went to sleep and that because he had already been contacted about withdrawing, he did not report the ticket. *(Exhibit 14)*

20. Because the incident happened approximately one week before he was contacted about withdrawing and two weeks before his notice of withdrawal, Officer O'Connor determined that Mr. Noble was being untruthful about his reason for not reporting the ticket. *(Testimony of O'Connor, Exhibit 14 and Exhibit 6)*

21. In further investigation of Mr. Noble's background, Officer O'Connor contacted the Nashua New Hampshire Police Department since Mr. Noble had applied there for a position as a police officer and was rejected. *(Testimony of Chief O'Connor)*

22. The official in charge of the recruit application process in Nashua informed Officer O'Connor that they had declined to hire Mr. Noble and that during the oral examination section of Nashua's recruit evaluation process, Mr. Noble had informed his interviewers that he was forced to change schools from Braintree High School because of a serious incident. (*Testimony of Chief O'Connor and Exhibit 15*)

23. Officer O'Connor determined that Mr. Noble had been untruthful on question number 9 on both applications when he answered "no" to the question: "Have you been dismissed, censured, suspended or expelled from any school, college or university?" (*Testimony of O'Connor, Exhibit 3 and Exhibit 9*)

24. Through his conversation with the Nashua Police and information obtained from police reports in Braintree and Halifax, Officer O'Connor also determined that Mr. Noble had been untruthful in answering "no" to the question: "Have you ever been in a fight while under the influence of alcohol?" (*Testimony of Chief O'Connor, Exhibit 3 and Exhibit 9*)

25. Officer O'Connor contacted the Nashua Police Department to confirm the facts that he had learned in his investigation and was specifically told that Mr. Noble had stated that he was suspended from Braintree High School following a juvenile court case where he was arrested for indecent assault when he was thirteen years old after drinking and clowning around with his friends. (*Testimony of Chief O'Connor and Exhibit 15*)

26. The MBTA Police Department, on the strength of the evidence that Mr. Noble had been untruthful on several parts of his application and throughout the application process determined that Mr. Noble should be bypassed for original appointment. (*Testimony of Spas*)

27. Detective Spas drafted a bypass letter on May 9, 2011 and Chief Paul McMillan signed that letter. (*Testimony of Spas and Exhibit 1*)

CONCLUSION

Applicable Legal Standards

This appeal involves a bypass for original appointment. This process is governed by 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.”

Rule PAR.08(3) of the Personnel Administration Rules, promulgated by HRD to implement this statutory requirement, provides:

“A bypass will not be permitted without a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed . . . shall later be admissible as reason for selection or bypass in any proceedings before . . . or the Civil Service Commission...”

Ordinarily, candidates are considered in the order of their place on the certification, which creates a ranking based on their scores on the competitive qualifying examination administered by HRD, along with certain statutory preferences. In order to deviate from this paradigm, an appointing authority must show specific reasons – either positive or negative, or both, consistent with basic merit principles, that affirmatively justify picking a lower ranked candidate. G.L.c. 31, §1, §27. See, e.g., 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); Mayor of Revere v. Civil Serv. Comm’n, 31 Mass. App. Ct. 315, 321n.11, 326 (1991). See also, MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635(1995), rev.den.,423 Mass.1106(1996) (personnel administrator [then DPA, now HRD] (and Commission oversight) in bypass means not only “formally to receive bypass reasons” but to evaluate them “in accordance with [all] basic merit principles”).

Candidates are entitled to be adequately, fairly and equivalently considered. Evidence of undue political influence is one relevant factor, but it is not the only measure of unjustified decision-making by an appointing authority. The Commission has construed its obligation to prohibit the bypass of an Officer McCue where it finds that “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.” Borelli v. MBTA, 1 MCSR 6 (1988). See, Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (An Appointing Authority must proffer objectively legitimate reasons for the bypass)

The task of the Commission hearing a bypass appeal is “to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority. . . . Reasonable justification in this context means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’ ” E.g., Brackett v. Civil Serv. Comm’n, 447 Mass. 233, 543 (2006) and cases cited. In performing this function:

“[T]he commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after conducting] ‘a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer’ . . . For the commission, the question is . . . ‘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.’ ” (emphasis added)

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003) (affirming Commission’s decision to reject appointing authority’s proof of officer’s failed polygraph test and prior domestic abuse orders and crediting officer’s exculpatory testimony rebutting that evidence) cf. Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to find appointing authority’s justification unreasonable); Cambridge v. Civil

Serv. Comm'n, 43 Mass. App. Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (same). See generally, Villare v. North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995); Bielawski v. Personnel Admin'r, 422 Mass. 459, 466 (1996) (discussing need for de novo fact finding before a “disinterested” Commissioner in context of procedural due process.)

The “preponderance of the evidence test” requires the Commission to conclude that an appointing authority established, through substantial, credible evidence presented to the Commission, that the reasons assigned for the bypass of an Officer McCue were “more probably than not sound and sufficient.” Mayor of Revere v. Civil Serv. Comm'n, 31 Mass. App. Ct. 315, 321, (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, (1928) (*emphasis added*) The Commission must take account of all credible evidence in the 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)

It is the purview of the hearing officer to determine the credibility of the testimony presented through the witnesses who appear before the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also, Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

Especially when it comes to an applicant for a sensitive public safety position, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown . . . Absent proof that the [appointing authority] acted unreasonably . . . the commission is bound to defer to the [appointing authority’s] exercise of its judgment” that “it was unwilling to bear the risk” of hiring the candidate for such a sensitive position. Id., 78 Mass.App Ct. at 190-91. See also, Reading v. Civil Serv. Comm’n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914,(2004) (rescript opinion); Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 303-305 (1997); Massachusetts Dep’t of Corrections v. Anderson, Suffolk Sup. Ct., No. 2009-0290 (Memorandum of Decision dated February 10, 2010), reversing Anderson v. Department of Correction, 21 MCSR 647, 688 (2008). This principle is particularly apt when the applicant is under consideration for a promotion to a superior position.

Justification for Bypass

Applying these principles to the facts of this appeal, the MBTA Police Department, by a preponderance of the evidence, has shown that it had reasonable justification for bypassing Mr. Noble for appointment as an MBTA Police Officer. Mr. Noble’s untruthfulness was enough reason for the MBTA Police Department not to consider him for the position.

Throughout the application process, Mr. Noble made untruthful statements and omitted facts. The background investigation, led by Officer O’Connor, revealed several incidents which Mr. Noble failed to disclose on his application. Two of these incidents were speeding incidents and one of the incidents involved Deputy Chief Jenkins issuing a warning to Mr. Noble for speeding while operating a motorcycle in a residential neighborhood with a speed limit of 30 mph. This incident occurred when Mr. Noble first applied for the police officer position with the MBTA

Police Department. When questioned about the motorcycle incident, at first Mr. Noble told Officer O'Connor that he was driving at the speed limit; however, he changed this statement saying he was driving between 30 to 50 mph. This led Officer O'Connor to question Mr. Noble's truthfulness regarding the matter. Mr. Noble also received a speeding ticket in Virginia about which he failed to inform the MBTA Police Department. He never mentioned either incident to the MBTA Police Department even though he was advised during the application process that he must disclose any changes in his application. This matter occurred before he withdrew his first application. Therefore, he had a duty to disclose the information. It was not until he reapplied that this information was revealed, and, then, only after Officer O'Connor asked him about it. Mr. Noble stated that he did not believe he had to disclose such information because he had already withdrawn by the time the incident occurred. Officer O'Connor testified that the speeding incident occurred two weeks before Mr. Noble withdrew his first application.

Additionally, Mr. Noble failed to disclose that he had attended Braintree High School on his application and that he was suspended twice and eventually forced to change schools because of alleged criminal conduct. During the background investigation, Officer O'Connor received this information from the Nashua, New Hampshire Police Department since Mr. Noble had applied to the department and was rejected. This furthered the MBTA Police Department's belief that Mr. Noble would not be a suitable candidate for the position of Police Officer. Due to Mr. Noble's untruthfulness, the MBTA Police Department decided to bypass Mr. Noble.

The MBTA Police Department use of Mr. Noble's suspension from Braintree High School which caused him to change schools was properly considered as another instance of his untruthfulness. Though the reason for the suspension was not claimed to be a factor in bypassing him, a police department is not prohibited from using information it has obtained solely to find

out if an applicant was truthful when they applied for a Police Officer position in the department.² The Appellant's contention that the contents of his school records was absolutely privileged is without legal foundation. See Interim Order on Motion to Reconsider Motion In Limine, dated September 13, 2010 [Interim Order]. See also Bynes v. School Committee of Boston, 411 Mass. 264, 266-269 (1991) (employer not prohibited from using criminal history information obtained from third party)

The MBTA Police Department sought to proffer evidence that Mr. Noble lied to the Nashua Police Department in order to minimize the nature of the offense involved that resulted in his suspension from school. By Interim Order, this evidence was excluded unless corroborated by a percipient witness. No such witness was called and the evidence does not sufficiently prove this one instance of alleged untruthfulness.

The MBTA Police Department also used Mr. Noble's poor driving record to justify why he was bypassed during the application process. Although this is a valid reason to bypass an applicant, it was not explicitly stated in Mr. Noble's bypass letter, which the Personnel Administration Rules require when bypassing a candidate for a civil service position. Since the letter does not specifically give Mr. Noble's driving record as the cause for his bypass, the Commission cannot take this into consideration. However, Mr. Noble's untruthfulness is enough to satisfy the reason for his bypass.

The fact that Mr. Noble did not testify on his own behalf must also be taken into account. Due to the fact that the MBTA Police Department established, by a preponderance of evidence

² The Commission granted Mr. Noble's Motion to Strike the school records unless information was redacted regarding certain substantive facts about the criminal offense in the school records that was not probative on the issue of untruthfulness, and the MBTA Police Department complied with that ruling, over objection and filed redacted copies of the school records. Mr. Noble thereafter moved to Strike the redacted records, claiming that the redactions did not comply with this Commissioner's ruling, because, while the redacted copies had excised the content of the matter redacted the document showed that redactions had been made. The MBTA's objection to the order to redact is overruled as moot. Mr. Nobles Motion to Strike is denied as without merit. .

an adverse case of untruthfulness against Mr. Noble, a negative inference can be drawn that Mr. Noble's testimony would have gone against his own interest. See Scanlon v. Massachusetts Dep't of Correction, 22 MCSR 431 (2009), citing Commonwealth v. Figueroa, 413 Mass. 193, 199 (1992). See also Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 826-27 (2006) (negative inference may be drawn against the appellant when he claimed 5th Amendment privilege against self-incrimination and refused to testify at a disciplinary hearing before the Appointing Authority)

In sum, because the evidence established sufficient reason to find Mr. Noble untruthful in the application process, the MBTA Police Department was justified to bypass him as a candidate for Police Officer. Being truthful is an important characteristic that an officer must have in order to fulfill his duties. An Appointing Authority has the right to take disciplinary action against an officer, even as far as to terminate him or her when the officer has shown "a demonstrated willingness to fudge the truth in exigent circumstances" because "[p]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer." See Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2004); citing Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303, rev.den., 428 Mass. 1102 (1997).

For the reasons stated above, the appeal of the Appellant, Michael Noble, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein, Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on August 23, 2012.

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:

Galen Gilbert, Esq. (For Appellant)

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