

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

NUIAS DAVEIGA,
Appellant

v.

G1-12-69

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

James W. Gilden, Esq.
173 North Main Street
Sharon, MA 02067

Appearance for Respondent:

Amanda E. Wall, Esq.
Boston Police Department
Office of the Legal Adviser
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION

On February 24, 2012, the Appellant, Nuias DaVeiga (“Mr. DaVeiga”), 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 Boston Police Officer. A pre-hearing conference was held at the offices of the Commission on April 17, 2012 and a full hearing was held at the same location on June 20, 2012. The hearing was digitally recorded and both 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:

Eight (8) exhibits were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Catherine Doherty, Sergeant Detective, Boston Police Department;
- Robin Hunt, Director of Human Resources, Boston Police Department;

Called by the Appellant:

- Nuais DaVeiga, Appellant;
- Steven Topazio, Esq.;

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

1. Mr. DaVeiga is a thirty-three (33) year old single parent of one child; he resides in
Dorchester and is originally from the Republic of Cape Verde. (Testimony of Mr. DaVeiga)
2. Mr. DaVeiga graduated from Brighton High School in 1997. Mr. DeVeiga then graduated
from Mount Ida College, where he received a degree in Criminal Justice, in 2002.
(Testimony of Mr. DaVeiga)
3. After graduation, Mr. DaVeiga worked as a domestic violence victim advocate for the
Suffolk County District Attorney and as a constituent representative for the city of
Dorchester. Following this employment, Mr. DaVeiga worked at the Log School Family
Education Center as a mentor and driver. Mr. DaVeiga then worked for the City of Boston,
firstly in Inspectional Services as a clerk and secondly in Boston Public Schools as a school
police officer. Mr. DaVeiga went on to work with the Essex County Sheriff's Department as
a reserve correction officer, with the U.S. Security Associates as an armed Boston Special

Police Officer, and with Cerebral Palsy of Massachusetts, Inc. as a caretaker. Mr. DaVeiga is currently employed by the Massachusetts Department of Mental Health as a campus police officer. (Testimony of Mr. DaVeiga)

4. On August 25, 2011, following a previous case, G1-11-17, through a joint motion for relief, the Commission directed the Department to place Mr. DaVeiga at the top of future certifications for the position of permanent, full-time police officer within the Department until he should be selected or bypassed. (Exhibit 7)
5. On September 29, 2011, Mr. DaVeiga was ranked first (1st) on Certification No. 202233 from which the Department ultimately appointed twenty nine (29) permanent, full-time police officers, twenty nine (29) of whom were ranked below Mr. DaVeiga. (Stipulated Facts)
6. All conditional offers of employment for this hiring cycle needed to be made on or before October 31, 2011. (Testimony of Hunt)
7. All recruit applicants are prescreened to gather information about their backgrounds prior to any interviews taking place. The prescreening includes running each applicant's Board of Probation ("BOP") history to determine if they have a criminal history. (Testimony of Doherty)
8. The Department's investigator conducted Mr. DaVeiga's BOP history or record and became aware that Mr. DaVeiga had two open criminal cases, one for motor vehicle insurance fraud and one for attempt to commit a crime. (Testimony of Doherty and Exhibit 2)
9. Mr. DaVeiga inquired of the investigator whether the open criminal cases would affect his police officer candidacy and was informed that he should be fine. (Testimony of DaVeiga)
10. Police officer applicants with open criminal cases are made aware of the existence of those cases and they are given the option to either withdraw from the process or, if the case is

resolved before the background investigations are completed, they are given the option to provide documentation showing that the case has been closed. It is the practice and policy of the Department to not consider or process any candidate who has an open criminal matter because the Department does not know the outcome of the criminal case as it is undetermined. (Testimony of Doherty)

11. Catherine Doherty (“Doherty”) is a Sergeant Detective for the Department and was a commander in the Recruit Investigations Unit at the time Mr. DaVeiga was on Certification No. 202233 in 2011. She is tasked with overseeing the background investigations of police officer applicants and appears to be very knowledgeable in this regard. After receiving Mr. DaVeiga’s BOP history or record, Doherty had several discussions with Mr. DaVeiga regarding his open criminal matters in which she explained to him that his background investigation would not be processed any further until the criminal matters were closed. Doherty explained that Mr. DaVeiga needed to provide the proper documentation from the court indicating that his cases had closed, and that when this happened, his background investigation would continue. Doherty is unsure whether Mr. DaVeiga was notified that the deadline for the Department to make conditional offers of employment was October 31, 2011. (Testimony of Doherty)

12. On August 1, 2011, Mr. DaVeiga, represented by attorney Steven Topazio (“Topazio”), was ordered by the Dorchester District Court to pay a fine of \$1000, which he did the following day, and to be placed on pretrial probation until November 1, 2011 for motor vehicle insurance fraud. He was also placed on pretrial probation until November 1, 2011 for his attempt to commit a crime. Pretrial probation is not a final disposition because the matter could be placed back on the trial list if the defendant re-offends before the pretrial probation

period is over, regardless of the terms of probation. Topazio did not move to have Mr.

DaVeiga's pretrial probation terminated before November 1, 2011. Mr. DaVeiga's criminal cases were continued without a finding and dismissed after probation, which ended November 1, 2011.(Testimony of Topazio and Exhibit 8)

13. Mr. DaVeiga asserts that since he paid the fine and complied with the pretrial probation his case was closed. Although Mr. DaVeiga states that he hand-delivered certified documentation to Department on October 4, 2011, indicating that his case had been closed, the documentation he provided the Commission is dated February 15, 2012 and the Department denies ever receiving such documentation. (Testimony of DaVeiga and Exhibit 8)

14. Doherty states that she never received documentation from Mr. DaVeiga that his criminal case had been closed before or after November 1, 2011. (Testimony of Doherty)

15. In a letter dated January 23, 2012, the City notified Mr. DaVeiga of the reasons for bypass, which were that Mr. DaVeiga had two open criminal cases. (Exhibit 3) This appeal followed.

LEGAL STANDARD

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).

ANALYSIS

The Department argues that its decision to bypass Mr. DaVeiga was reasonably justified. Mr. DaVeiga had two open criminal cases at the time he was on Certification No. 202233 to be considered for appointment as a full-time police officer at the Department. All background investigations and all conditional offers needed to be sent out by October 31, 2011. Mr. DaVeiga had until November 1, 2011 to close his criminal cases and provide the Department with documentation that the cases had been closed in order for the Department to complete its background investigation on Mr. DaVeiga and consideration of him for appointment. There is no evidence that the Department was provided with such documentation. The Department, consequently, was unable to continue a background investigation on Mr. DaVeiga. Therefore, the Department avers, based on the Department’s policy against hiring someone who has open criminal cases, it was justified in bypassing Mr. DaVeiga.

Mr. DaVeiga argues that he should not have been bypassed. He contends that his criminal cases were closed prior to November 1, 2011 and that he provided the Department with documentation that his cases had closed. He further argues that he was never notified that his pretrial probation would have to end prior to November 1, 2011 for his cases to be considered

closed. Mr. DaVeiga notes that due to his strong desire to become a police officer, as evidenced by his degree in criminal justice and his employment in various criminal justice positions, and to the fact that it would have been simple to close out his open cases, he would have petitioned to have his probation end prior to November 1, 2011 had he been made aware that the probation would be an obstacle to his becoming a police officer.

Although Mr. DaVeiga argues that his criminal cases had closed by November 1, 2011 and that he provided the Department with such documentation, there is no evidence that either argument is supported by the evidence. The documentation Mr. DaVeiga provided the Commission stating that his cases are closed is dated February 15, 2012. Mr. DaVeiga has failed to provide any other documentation with an earlier date, which could have plausibly been sent to the Department prior to November 1, 2011. Therefore, the Department made appropriate inquiry regarding Mr. DaVeiga's criminal history and appropriately relied on the information it found. Moreover, the Department's decision is consistent with its policy to bypass a candidate if he or she has an open criminal case at the time of his or her consideration, unless the candidate provides the Department with proof that the case has been closed. The Department is a law enforcement agency with a substantial public safety responsibility and its employees must be above suspicion with regard to upholding the law. Additionally, the Department had to not only complete its background checks on potential candidates, but also had to send out conditional offers by the end of the day on October 31, 2011. This means that the Department would have had to receive Mr. DaVeiga's documentation that his criminal cases were closed prior to October 31, 2011 in order for the Department to give adequate consideration to Mr. DaVeiga as a potential candidate and to have time to decide whether to extend him a conditional offer.

The Commission gives deference to an appointing authority's judgment in choosing whether to select a candidate for appointment when it conforms to the requirements of civil service law and is consistently applied. The appointing authority here has shown reasonable justification for its choice to not appoint Mr. DaVeiga to the position of police officer. Specifically, Mr. DaVeiga had open criminal cases at the time of his application for employment at the Department and failed to provide documentation that the cases had closed, which is sufficient to disqualify Mr. DaVeiga from being selected and appointed to the position of police officer pursuant to the Department's consistent practice. In order to be offered conditional candidacy, the Department must have completed background checks. Background checks cannot be completed if a candidate has open criminal cases. The Department informed Mr. DaVeiga about the need for his criminal cases to be closed. Having done so, the Department was allowed to rely on the open criminal cases as a reason for its bypass. Therefore, the Department was reasonably justified in bypassing Mr. DaVeiga for appointment. Mr. DaVeiga's argument about the date the criminal cases were closed misses the mark. Having found the open criminal cases against Mr. DaVeiga, the Department ceased its consideration of Mr. DaVeiga. Thus, by the time the Mr. DaVeiga's criminal record was closed, it was too late to consider Mr. DaVeiga for appointment in any event.

CONCLUSION

For the reasons stated herein, the Department had reasonable justification to bypass Mr. DaVeiga. Therefore, Mr. DaVeiga's appeal filed under Docket No. G1-12-69 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 June 13, 2013.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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:

James W. Gilden, Esq. (for Appellant)

Amanda E. Wall, Esq. (for Respondent)

John Marra, Esq. (HRD)