

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

MICHAEL SHACKFORD,

Appellant

v.

G1-14-89

BOSTON POLICE DEPARTMENT,

Respondent

Appearance for Appellant:

Michael S. Rabieh, Esq.
Law Office of Michael S. Rabieh
90 Concord Avenue
Belmont, MA 02478

Appearance for Respondent:

Meryum Khan, Esq.
Boston Police Department
One Schroeder Plaza
Boston, MA, 02120

Commissioner:

Cynthia Ittleman¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Michael Shackford (hereinafter “Mr. Shackford” or “Appellant”), filed an appeal on April 9, 2014, regarding the decision of the Boston Police Department, the Appointing Authority (hereinafter “BPD” or “Respondent”), to bypass him for appointment to the position of police officer. The Appellant filed a timely appeal. A pre-hearing conference was held on April 29, 2014 and a full hearing was held on June 12, 2014 at the offices of the Civil Service Commission (hereinafter “Commission”). The hearing was digitally recorded and the parties were given a copy of the recording. Both parties submitted post-hearing briefs on July 23, 2014. For the reasons stated herein, the appeal is allowed.

¹ The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

FINDINGS OF FACT

Twenty-three (23)² exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Respondent:

- Erin Schroeder, BPD Detective
- Devin E. Taylor, BPD Director of Human Resources

For the Appellant:

- Robert O. Burns, Jr., Boston Police Sergeant
- Mr. W, BPD Dispatcher
- Michael Shackford, Appellant;

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

1. Mr. Shackford is twenty-nine (29) years old and is a resident of Charlestown, MA. Mr. Shackford graduated from St. Clement High School in Medford in 2002 and from Curry College, with a degree in Criminal Justice, in 2006. Mr. Shackford has been with BPD in the position of police dispatcher since September 2006. (*Exhibit 1*)
2. Mr. Shackford previously applied to be a BPD officer but was bypassed due to a psychological evaluation. The parties came to an agreement and settled the case by placing Mr. Shackford at the top of the next certification for the position of police officer until he was selected or bypassed. (*Administrative Notice: See Michael Shackford v. BPD, G1-12-106 (2012)*)

² Exhibits 22 and 23 were ordered post-hearing and contain an affidavit from the Police Clerk who conducted Mr. Shackford's hair drug test and an affidavit from the Tape Librarian, with a certified copy of the December 2, 2013 phone call on December 2, 2013 that is related to one of the reasons given by the BPD to bypass the Appellant. The Tape Librarian is the same person who created the recording of the same phone call that is Exhibit 15.

3. On May 10, 2013, BPD requested a certification from the state's Human Resource's Division (HRD). HRD sent Certification No. 00746 to BPD on June 2, 2013. Mr. Shackford was ranked tenth (10th) on the Certification among those willing to accept appointment. Eighty-three (83) candidates were appointed from the Certification, eighty (80) of whom were ranked below Mr. Shackford. (*Stipulated Facts*)
4. Mr. Shackford has two supervisors, Sgt. Burns, Jr. and Sgt. John Farrell. Both of Mr. Shackford's supervisors describe him as very dependable, an outstanding dispatcher, professional, respectful, and amicable. (*Exhibits 5 and 6*). Sgt. Farrell stated that he is confident that Mr. Shackford would make an excellent police officer. (*Exhibit 5*). Sgt. Burns often has to overrule or correct a dispatcher's call, at least a few times a week, but in the three years that he has supervised Mr. Shackford, Sgt. Burns has never had to correct one of Mr. Shackford's calls. (*Testimony of Burns*). When Sgt. Burns learned that Mr. Shackford was being considered for appointment as a police officer he wrote a recommendation letter on behalf of Mr. Shackford, dated May 27, 2013. (*Exhibit 7*)
5. On January 22, 2012, Mr. Shackford was a witness to an incident at his place of work. As Mr. Shackford, Ms. A, and an additional witness, Mr. W, were leaving work, Ms. A was having a conversation with Mr. Shackford. Ms. B then arrived in a cab. Ms. A and Ms. B are both co-workers of Mr. Shackford. Mr. Shackford was dating Ms. B at the time. Ms. B grabbed Mr. Shackford by the arm wishing to speak with him alone. Ms. A grabbed Mr. Shackford's opposite arm stating, "That's rude I'm in the middle of a conversation," which led to an argument between Ms. A and Ms. B. Ms. B then struck Ms. A in the face. Mr. Shackford and Mr. W then separated the two women. (*Exhibit 9*). Mr. Shackford was never in a relationship with Ms. A. (*Testimony of Shackford*). This incident led to the

termination of Ms. B's employment with BPD. Mr. Shackford and Mr. W appeared in court as witnesses to the altercation and both testified. Both Mr. Shackford and Mr. W also appeared in court at the request of Ms. B in regard to a restraining order hearing involving Ms. A and Ms. B. Ultimately, Mr. Shackford did not testify in relation to the restraining order hearing. (*Testimony of Shackford and Mr. W*)

6. In one period on the night of December 2, 2012, during his midnight to 8:00 a.m. shift, Mr. Shackford was handling calls involving a double shooting, a motor vehicle pursuit, and the deployment of City Wide Emergency Deployment Teams and coordinating police efforts responding to these calls. (*Exhibit 12*). Mr. Shackford was the only dispatcher handling these situations. (*Testimony of Shackford*). At or about that time or shortly thereafter, at approximately 3 a.m., Mr. Shackford received a 911 call but since it was a lower priority, Mr. Shackford did not respond to the call. The same 911 caller then called another number at the BPD, in response to which three police officers were sent to the caller's location. The responding officers indicated that the incident involved a drunk causing a disturbance (referred to as a "15P") and nothing more. The same 911 caller called yet again and Mr. Shackford responded. Mr. Shackford was aware that three officers had already been sent to the scene involving this caller and that they determined that it involved a drunk causing a disturbance. Mr. Shackford was having difficulty understanding the caller, whose speech was somewhat slurred, and stated, "Are we speaking the same fucking language," hanging up on the caller and sending the same three police officers to address the situation again. (*Testimony of Shackford*). Someone filed a complaint against Mr. Shackford regarding his response to the caller and Sgt. Burns investigated. Sgt. Burns and Mr. Shackford listened to the pertinent call together,

coming to the conclusion that the caller was intoxicated.³ (*Testimony of Shackford and Burns*). Mr. Shackford was truly sorry for his use of inappropriate language and wanted to write the caller to apologize. (*Testimony of Shackford; Exhibit 12*). Sgt. Burns recommended issuing Mr. Shackford a written warning as Mr. Shackford had no disciplinary record prior to this incident. (*Exhibit 12*). However, a superior officer disagreed with Sgt. Burns' recommendation and, on December 31, 2012, Mr. Shackford received a one-day suspension for his conduct in this regard. (*Exhibit 14*)

7. Following the Boston Marathon bombing on April 15, 2013, Sgt. Frank W. Flynn was assigned to assist with operation control of the Tactical Operations Center (TOC). The TOC was tasked with synchronizing a unified response between federal, state and local agencies. Sgt. Flynn wrote a recommendation letter for a commendation for Mr. Shackford, using a Department form, and forwarded it to the Department Awards Board for further consideration on May 2, 2013. The recommendation letter states that Mr. Shackford's "dedication and professionalism was remarkable. Despite the confusion, high volume of calls and the seriousness of the situation, he performed brilliantly in a calm and skilled manner. I watched as he managed several radio channels at the same time, while coordinating with me to provide the immediate responses needed, without delay." Sgt. Flynn described Mr. Shackford as "amazing to say the least," and that Mr. Shackford's "diligence and overall positive attitude was impressive," and that Mr. Shackford's "professional work ethic was second to none." (*Exhibit 19*)

³ A recording of the 911 call was played during the hearing (listed as Exhibit 15). Mr. Shackford and Sgt. Burns testified that the recording seemed to be edited. Post-hearing, the BPD was ordered to produce an affidavit of the staff person familiar with the recording. Thereafter, the BPD filed the affidavit of the staff person involved in recording calls, which affidavit states that the call was not edited when produced for this hearing.

8. Lieutenant Phillip Terenzi also wrote a recommendation letter for commendation for Mr. Shackford, using a Department form, as well as for another dispatcher. There is no date on this recommendation letter but Mr. Shackford learned that Lt. Terenzi wrote a recommendation for commendation letter in early May 2013. (*Testimony of Shackford*). Lt. Terenzi stated in the recommendation letter that Mr. Shackford “performed [his] duties exemplary and with the finest traditions of professionalism that is demanded by the Boston Police Department at times like this.” Lt. Terenzi went on to state that Mr. Shackford was “forced into the position of having to exert command and control with the utmost precision, and as a result [was] able to manage the multiple resources assigned to [his] channel and coordinate multiple responders and multiple disciplines with exemplary [sic] professionalism, and their actions of professionalism should not go unnoticed.” (*Exhibit 18*)
9. These recommendation letters were not in Mr. Shackford’s file when BPD reviewed his candidacy to be appointed as Boston police officer although both letters were filled out on BPD recommendation for commendation forms. (*Testimony of Schroeder and Taylor*)
10. As part of the recruit application process to be a BPD officer, candidates must submit to hair sample drug testing. On June 11, 2013, it was determined that Mr. Shackford had insufficient head hair to collect for an accurate sample as he keeps his hair very closely cropped. BPD did collect a hair sample from his arm to begin preliminary drug testing. The notice that Mr. Shackford signed in this regard stated, “... you must grow head hair long enough for us to collect a sample. *You must report to the Occupational Health Services Unit on or before 6-21-13 9-3 p.m...*” (*Exhibit 16*). Mr. Shackford was told by the police clerk collecting the hair sample to return when he felt his hair was long enough

for a hair sample to be taken. Mr. Shackford did not receive a copy of the notice that he signed that informed him to return by or on June 21, 2013. (*Testimony of Shackford*). Mr. Shackford returned to have a hair sample taken on June 28, 2013 because he felt at that time that he had enough hair. (*Exhibit 16*)

11. On June 26, 2013, a BPD round table gathered to discuss various candidates' potential to be appointed or bypassed. Mr. Shackford was one of the individuals discussed in this session. (*Testimony of Taylor*)

12. On March 22, 2014, Mr. Shackford received the Marie Conley Civilian of the Year Award due to the two letters recommending that he be commended for his work during the Boston Marathon bombing events. (*Exhibit 21*). This award is presented to the civilian member of the BPD who made exceptional contributions on and off the job. Mr. Shackford received the award due to his efforts during the aftermath of the Boston Marathon bombing. Mr. Shackford's nomination for the award stated, "Despite the confusion, high volume of calls and the seriousness of the situation, he performed brilliant in a calm and skilled manner. He deftly managed several radio channels at the same time, coordinating with command staff to provide the immediate responses, without delay. He is a dedicated young man, whose professional work ethic was second to none. His commitment and perseverance to the mission was a credit to the Operations Division and the Boston Police Department." Mr. Shackford had already been bypassed when he received this award. (*Exhibit 20*)

13. By letter dated February 12, 2014, Mr. Shackford was notified of the reasons for his bypass. The notification stated that after the incident involving the two female co-workers, Mr. Shackford appeared in court with one of the two as their "support system,"

and so BPD questioned his judgment. Another reason given for bypassing Mr. Shackford was the one-day suspension Mr. Shackford had received for using profanity in the December 2, 2012 911 call. The last reason given for bypassing Mr. Shackford was his conduct relating to the hair drug test. The letter stated that after being drug tested on June 11, 2013, he was told to return by June 21, 2013. It went on to state, “Despite working in the same building you reported one week later, on June 28, 2013, with no prior communication.” (*Exhibit 8*)

14. Mr. Shackford filed an appeal on April 9, 2014.

DISCUSSION

Applicable Law

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 v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304 (1997). 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). G.L. c. 31, § 2(b) requires that bypass cases be determined by 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). G.L. c. 31, § 43.

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 ... 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)).

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. “Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to perform their official responsibilities.” Police Commissioner of Boston v. Civil Service Commission, 22 Mass.App.Ct. 364, 371 (1986).

Analysis

The January 2012 Incident

BPD bypassed Mr. Shackford because of concern over his level of judgment in his involvement to the incident that took place in January 2012 between two of his female co-workers. The incident started out as a verbal argument that turned into a physical altercation as one of his co-workers struck the other. BPD was concerned because Mr. Shackford was having a relationship with the employee who initiated the physical altercation and was ultimately terminated. As Mr. Shackford was witness to the incident, it would only stand to reason that he would be called to testify in the related court proceeding and Mr. Shackford did testify, as did the other witness to the incident, Mr. W. Although Mr. Shackford appeared in a subsequent, related restraining order hearing involving Ms. A and Ms. B, and did not testify as a witness, both he and Mr. W were present just in case their testimony would be needed. At this time, Mr. Shackford was dating Ms. B and BPD took this to mean that Mr. Shackford used poor judgment in appearing in court in these matters. I find nothing untoward or unprofessional in supporting

someone you are dating. Therefore, the BPD did not establish by a preponderance of the evidence that Mr. Shackford displayed poor judgment in these regards.

The One-Day Suspension

BPD also indicated that it bypassed Mr. Shackford because he received a one-day suspension for using profanity towards a caller while on duty as a BPD dispatcher. Mr. Shackford makes no excuses for his use of profanity; he apologized to supervisor Sgt. Burns, and offered to write a letter of apology to the caller. At the time of the call at issue, Mr. Shackford was addressing a number of grave calls and the available officers who could respond to the calls. Mr. Shackford testified that he lost his temper with the caller because when the caller called previously three (3) officers were sent to the scene only to have the responding officers advise that the call was “a drunk causing a disturbance.” BPD did not produce a copy of the caller’s earlier calls; nor did BPD dispute that officers had been sent to the caller earlier and what the officers found when they responded to the scene. While the Commission certainly does not condone the use of profanity, this is just one call in Mr. Shackford’s eight years on the job as a dispatcher in what Sgt. Burns testified has been a strong and successful career, as evinced by the recommendations for commendations that he received prior to his bypass. Moreover, the BPD failed to consider the two absolutely outstanding commendations Mr. Shackford for his performance under extremely difficult circumstances because they were not, for an unexplained reason, included in his file. Therefore, BPD failed to establish by a preponderance of the evidence that it had reasonable justification to bypass Mr. Shackford in this regard.

The Hair-Drug Test

BPD’s last bypass reason states that Mr. Shackford did not provide a head hair sample for the hair drug test by the date he was told, after being given notice that he initially had insufficient

head hair for the test. Instead, Mr. Shackford appeared a week after the date on the notice because it was not until that date that Mr. Shackford felt as though he had enough head hair for a proper sample to be taken. Mr. Shackford testified that the police clerk who took an arm hair sample and then had him sign the notice told him simply to return when he had sufficient head hair so that she could collect a sample. The police clerk's affidavit states that she does "... not recall a specific conversation with Mr. Michael Shackford during the 2013 hiring cycle. However, [her] signature and initials appear on the document signed by Michael Shackford on June 11, 2013." (Ex. 22) She also states that such a statement would be improper. (*Id.*) Since the notice says he "... must grow head hair long enough for us to collect a sample..." in addition to "on or before" June 21, 2013, and Mr. Shackford recalls the conversation with the police clerk and that his hair was not long enough until June 28, 2013, I find his statements credible. Therefore, BPD did not establish this reason for bypass by a preponderance of the evidence.

Conclusion

For all of the above reasons, BPD has not provided reasonable justification for its decision to bypass Mr. Shackford for appointment as a police officer. The decision to bypass Mr. Shackford is overturned and his appeal under Docket No. G1-14-89 is hereby *allowed*.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the state's Human Resources Division (HRD) or the City in its delegated capacity shall:

- Place the name of Michael Shackford at the top of any current or future Certification for the position of Police Officer until he is appointed or bypassed.
- If Mr. Shackford is appointed as a Police Officer, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 00746.

This retroactive civil service seniority date is not intended to provide Mr. Shackford with any

additional pay or benefits including creditable service toward retirement.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, Commissioners) on July 24, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(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 S. Rabieh, Esq. (for Appellant)
Meryum Khan, Esq. (for Respondent)
John Marra, Esq. (HRD)