

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**NICHOLAS A. WOSNY,**  
*Appellant*

v.

**G1-15-83**

**BOSTON POLICE DEPARTMENT,**  
*Respondent*

Appearance for Appellant:

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Appearance for Respondent:

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Staff Attorney  
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Commissioner:

Paul M. Stein<sup>1</sup>

**DECISION ON MOTIONS FOR SUMMARY DECISION**

The Appellant, Nicholas A. Wosny (Mr. Wosny or Appellant), acting pursuant to G.L.c.31, §2(b), appealed to the Civil Service Commission (Commission) on May 5, 2015 the decision of the Respondent, the Boston Police Department (BPD), 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 May 26, 2015. On July 30, 2015, BPD filed a Motion for Summary Decision which the Appellant opposed. A motion

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Barbara Grzonka in the drafting of this decision.

hearing was held on August 20, 2015 at the office of the Commission. The hearing was digitally recorded, with copies provided to the parties.<sup>2</sup>

#### **FINDINGS OF FACT**

Giving appropriate weight to the documents submitted by the parties, the arguments of counsel and the inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. Mr. Wosny is 27 years old and resides in Allston. (Stipulated Fact)
2. Mr. Wosny served in the U.S. Marine Corps from 2005 to 2012. (Stipulated Fact)
3. Mr. Wosny had previously appealed a bypass decision by the BPD to the Commission. The Commission upheld the bypass decision. Wosny v. Boston Police Department, 26 MCSR 369 (2013) (Wosny I).
4. Mr. Wosny had previously applied to the BPD in 2010 and 2012. (Respondent's Motion)
5. In 2010, Mr. Wosny also applied to the Brookline Police Department and the MBTA Police. (Respondent's Motion)
6. On his 2010 BPD application and his 2010 Brookline Police Department application, Mr. Wosny failed to disclose a motor vehicle accident he was involved in. The accident occurred in 2008. Mr. Wosny struck a telephone pole while driving home from work at T's Pub. He was transported to Beth Israel Deaconess Medical Center (Beth Israel) for treatment of minor injuries. The hospital's medical records indicate

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<sup>2</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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

Mr. Wosny “appeared intoxicated” and his blood alcohol level was .242. The legal limit for driving at that time was .08. (Wosny I)

7. In December 2010, the Brookline Police Department notified Mr. Wosny that his application was no longer under consideration purportedly because his position on the Certification had not been reached.
8. In January 2011, Sergeant Michael Rutledge (Sgt. Rutledge) of the MBTA Police contacted Mr. Wosny by telephone as part of Mr. Wosny’s pre-employment background investigation. Sgt. Rutledge wanted information about Mr. Wosny’s 2008 car accident. Mr. Wosny initially said he was not drinking. Further into the conversation, Mr. Wosny said he had taken Nyquil and may have had one or two drinks the night of the accident. (Wosny I)
9. In January 2011 after speaking to Sgt. Rutledge, Mr. Wosny withdrew his application to the MBTA Police. (Wosny I)
10. On his 2012 BPD application, Mr. Wosny disclosed his 2008 motor vehicle accident and the fact that he was drinking that night. Mr. Wosny also disclosed that he was arrested while tailgating at Gillette Stadium for allegedly procuring alcohol for a minor. This incident occurred in 2009 and the case was dismissed before arraignment. (Wosny I)
11. In January 2013, BPD sent Mr. Wosny a bypass letter listing three reasons for his bypass: discipline he received in the military; his arrest at Gillette Stadium; and his contradictory responses on his 2010 and 2012 applications regarding his operating a motor vehicle while under the influence of alcohol. (Wosny I)

12. In March 2013, Mr. Wosny appealed his bypass to the Civil Service Commission.  
(Wosny I)
13. In August 2013, the Commission upheld his bypass on the basis of Mr. Wosny's untruthfulness in his 2010 application. The Commission also noted that "truthfulness is crucial for police office candidates." The two other reasons given for Mr. Wosny's bypass were not upheld. The Commission decided that BPD erroneously interpreted the military discipline Mr. Wosny received and since the charges at Gillette Stadium were later dismissed, Mr. Wosny did not have to disclose the incident according to the BPD's application instructions. (Wosny I)
14. In accordance with the Commission's policy, the Commission's Decision in Wosny I is posted on the Commission's website, [www.mass.gov/csc](http://www.mass.gov/csc). (Administrative Notice)
15. In 2014, Mr. Wosny reapplied to the BPD. (Respondent's Motion)
16. On or about February 26, 2015, BPD notified Mr. Wosny by letter that he was being bypassed. The listed reasons for bypass were identical to those in the 2012 bypass.  
(Respondent's Motion)
17. BPD has a policy regarding truthfulness which articulates concerns about officers being untruthful. Specifically, untruthfulness damages an officer's ability to testify in court proceedings which the BPD considers a fundamental job requirement.  
(Respondent's Exhibit 1)

*Legal Standard for Motion for Summary Decision*

A motion for summary decision of an appeal before the Commission may be filed pursuant to 801 C.M.R. 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the

light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n. 6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

*Applicable Civil Service Law*

The authority to bypass a candidate for permanent appointment or promotion to a civil service position derives from G.L. c. 31, § 27, which provides:

If an appointing authority makes an original or promotion 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.

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 Selectman of Wakefield v Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

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 appointing authority's reasons for "bypassing" a candidate higher on the list in favor of hiring a lower ranked candidate must be "reasonably justified", based on a "thorough review" and supported by a preponderance of the evidence, when weighed by an unprejudiced mind, guided by common sense, and correct rules of law. See, e.g., Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006) and cases cited; Beverly v. Civil Service Comm'n 78 Mass.App.Ct. 182 (2010); 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). See also Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991) ("discretionary acts of public officials . . . must yield to the statutory command that [they] produce 'sound and sufficient' reasons" consistent with basic merit principles and protected from arbitrary and capricious actions).

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". Beverly at 190-91. See also, Reading v. Civil Service Comm'n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914 (2004) (rescript opinion). Further, "An officer of the law carries the burden of being expected to comport himself or

herself in an exemplary fashion.” McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 474 (1995). “Police 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).

#### *Parties’ Positions*

The Appellant argues that the latest bypass was not reasonably justified because the Respondent automatically relied on the 2012 hiring cycle bypass reasons. Further, BPD did not review Mr. Wosny with a fresh set of eyes, in compliance with certain Commission decisions that instruct Appointing Authorities to “consider redeeming and ameliorating factors such as recent work history, civic contributions and overall deportment of the Appellant.”<sup>3</sup>

The Respondent argues that BPD cannot have untruthful officers on the police force out of a concern for possible impeachment of officer testimony. Also, BPD has a zero tolerance policy for untruthfulness. Moreover, the Commission already upheld BPD’s reason for bypass and there is no new issue of material fact in this matter and summary decision should therefore be allowed.

#### *Analysis*

The Commission previously decided that Mr. Wosny’s untruthfulness in describing his 2008 DUI on multiple occasions during his applications for police officer positions at BPD and in Brookline applications from 2010 through 2012 justified the BPD’s bypass of him for appointment to the position of a BPD police officer in 2010 and 2012. The

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<sup>3</sup> The Appellant cites three Commission decisions which he calls the “Redemption Trilogy” as providing guidance on the standard for review of candidates who had been previously bypassed. The decisions are Ramirez v. Springfield Police Department, 10 MCSR 256 (1997); Radley v. Brookline Police Department, 10 MCSR 289 (1997) and Joseph v. Brookline Police Department, 10 MCSR 243 (1997).

only additional facts that could be presented in the present appeal that were not before the BPD and the Commission in *Wosny I* is the passage of three more years since Mr. Wosny made these untruthful statements. Moreover, the fact that the Commission's finding that Mr. Wosny had engaged in a pattern of untruthfulness is now a matter of public record. In these narrow circumstances, BPD has established that there is no reasonable expectation that Mr. Wosny can persuade the Commission that BPD was not justified in, again, bypassing him in 2015 for his past pattern of untruthfulness.<sup>4</sup>

The duty imposed upon a police officer to be truthful is one of the most serious obligations he or she assumes, because, among other things, it may compromise the officer's ability to serve as a credible witness in the prosecution of a criminal case. See, e.g., City of Cambridge v. Civil Service Comm'n, 43 Mass. 300, 303 (1997); Gallo v. City of Lynn, 23 MCSR 348 (2010). Since there is some discretion as to what, and for how long, a prosecutor may be required to make disclosure of indicia about a police officer's truthfulness under the so-called "Brady Rule", claims of untruthfulness against a police officer carry serious consequences and must be carefully scrutinized, but the Commission generally must defer to the judgment of a law enforcement agency on this point, which is lawfully grounded in constitutional law. Compare Orr v. Town of Carver, CSC Case No. D1-08-242, 24 MCSR 222 (2011) with Gallo v. City of Lynn, 23 MCSR 348 (2010) and Robichau v. Town of Middleborough, 24 MCSR 352 (2011) See generally, United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976), citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). See also Kyles v. Whitley, 514

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<sup>4</sup> The Appellant's contention that *Wosny I* rejected two of the three reasons reasserted as grounds for the 2015 bypass does not change the conclusion that, as to the issue of untruthfulness, which the Commission did sustain, there remains no new material issue on that issue.

U.S. 419, 115 S.Ct. 1555 (1995); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); “*Police Officer Truthfulness and the Brady Decision*”, 70 POLICE CHIEF, No. 10 (Oct. 2003) reprinted at [policechiefmagazine.org](http://policechiefmagazine.org).

The Commission also must take into account the case law that imposes special obligations upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion:

“[P]olice officers voluntarily undertake to adhere to a higher standard of conduct . . . . Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. . . . they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.”

Attorney General v. McHatton, 428 Mass. 790, 793-74 (1999) and cases cited. See Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 801-802 (2004); Police Commissioner v. Civil Service Comm’n, 22 Mass.App.Ct. 364, 371 (1986)

The conclusion that there are no material issues for hearing in this case should not be equated with the rejection of the principle of “redemption” or treated as an endorsement by the Commission that an applicant who has once been found untruthful is forever barred from ever becoming a police officer. Untruthfulness, however, stands on a somewhat different footing from “youthful indiscretion” or other misconduct when it comes to considerations of rehabilitation and, in this area especially, law enforcement agencies are entitled to a reasonable degree of discretion in determining whether or not a candidate’s past untruthfulness no longer puts his credibility as a witness at risk when put to the test. See City of Cambridge v. Civil Service Comm’n, 43 Mass. 300, 303 (1997) (“The city was hardly espousing a position devoid of reason when it held that a

demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.”)

To be sure, in different circumstances and given enough time, a bypass, even for past untruthfulness, would warrant a further inquiry (i.e., a discretionary interview) in order to meet the “reasonably thorough review” standard for justification of a bypass under basic merit principles. In the present case, however, in view of the Commission’s findings of a pattern of untruthfulness, BPD is justified to rely on its recently formed judgment about Mr. Wosny, confirmed in Wosny I, without further investigation, to conclude that further inquiry into alleged claim to “redemption” would be a futile exercise and is not required to justify the current bypass.

For the reasons stated above, the Respondent’s Motion for Summary Decision is *allowed*, the Appellant’s Opposition to Respondent’s Motion for Summary Decision is *denied* and the appeal under Docket No. G1-15-83 is *dismissed*.

Civil Service Commission

/s/ Paul M. Stein  
Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on January 7, 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)(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 a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's 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 to:

James Lamond, Esq. (for Appellant)

Meryum Z. Khan, Esq. (for Respondent)