

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MICHAEL OWENS,
Appellant

v.

G1-17-008 &
G1-17-222¹

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Joseph G. Donnellan, Esq.
Rogal and Donnellan, P.C.
100 River Ridge Drive, Suite 203
Norwood, MA 02062

Appearance for Respondent:

Peter Geraghty, Esq.
Boston Police Department
Office of the Legal Advisor
1 Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman

DECISION

On January 13, 2017, Michael Owens (Mr. Owens), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Police Department (BPD) to bypass him for original appointment to the position of police officer for reasons related to: a) an incident that occurred while Mr. Owens was in middle school; b) an incident that occurred while Mr. Owens was in high school; and c) providing the BPD with

¹ The BPD bypassed Mr. Owens a second time as part of a subsequent hiring cycle for essentially the same reasons that were the subject CSC Case No. G1-17-222. The parties submitted a motion to consolidate these two (2) appeals and agreed to be bound on both bypass appeals by the decision in the first bypass. The motion was allowed.

information to a BPD investigator that allegedly differed significantly from the police reports regarding these incidents. On January 24, 2017, I held a pre-hearing conference at the offices of the Commission, which was followed by a full hearing at the same location on March 23, 2017.² The full hearing was digitally recorded and both parties received a CD of the proceeding.³ On May 1, 2017, the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Nine (9) Exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

For the BPD:

- Karyn VanDyke, BPD Detective;
- Nancy A. Driscoll, Director of the BPD's Human Resources Department;

For Mr. Owens:

- Michael Owens, 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 evidence establishes the following findings of fact:

1. Mr. Owens is twenty-nine (29) years old and currently resides in South Boston. He is a high school graduate and received a bachelors degree in criminal justice. (Testimony of Mr. Owens)

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ 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. If such an appeal is filed, this CD should be used to transcribe the hearing.

Stipulated Facts

2. On April 25, 2015, Mr. Owens took the civil service examination for police officer and received a score of 98.
3. On October 2, 2015, the state's Human Resources Division (HRD) established an eligible list of candidates for Boston police officer.
4. On May 4, 2016, HRD, at the request of the BPD, sent Certification No. 03766 to the BPD, from which the BPD ultimately appointed eighty (80) police officers.
5. Mr. Owens was ranked 65th among those candidates willing to accept appointment as police officer on Certification No. 03766.
6. Of the eighty (80) candidates appointed by the BPD as police officers, thirty-six (36) were ranked below Mr. Owens.
7. On November 15, 2016, the BPD notified Mr. Owens that it was bypassing him for appointment.

Reasons for Bypass

8. The BPD bypassed Mr. Owens for reasons related to: a) an incident that occurred while Mr. Owens was in middle school; b) an incident that occurred while Mr. Owens was in high school; and c) providing the BPD with information to a BPD investigator that allegedly differed significantly from the police reports regarding these incidents. (Exhibit 8)

Findings Regarding Mr. Owens Since Graduating from High School

9. Mr. Owens graduated from Archbishop High School in Braintree, MA. He spent a post-graduate year at Cushing Academy and then attended and graduated with honors from UMASS Dartmouth with a major in criminal justice. (Testimony of Mr. Owens)

10. While attending UMASS Dartmouth, Mr. Owens played four years on the men's varsity hockey team; was placed on the League's Academic All-Conference team every year; and served as Team Captain during his senior year. (Exhibit 1)
11. Mr. Owens interned with the Massachusetts Department of Probation during his final semester in college. (Testimony of Mr. Owens)
12. Mr. Owens is an electrical apprentice and a member of IBEW Local 103. He is employed by a local electrician in Boston, MA. (Testimony of Mr. Owens)
13. His previous employment included three (3) years with the Department of Youth Services (DYS) first as an Institutional Security Officer and later as a Transportation Officer working out of the Metro Youth Service Center in Dorchester. He had the care and custody of juvenile offenders remanded to DYS in those positions. (Testimony of Mr. Owens)
14. Mr. Owens's current supervisor describes Mr. Owens as "a hard worker, gets along with co-workers and is the best apprentice he ever had." (Exhibit 5)
15. Mr. Owens's previous supervisor at DYS describes Mr. Owens as "a great worker, go-getter, team player and an asset to have on his team. He stated the applicant is punctual and has perfect attendance. He stated the applicant works well with a diverse population, the kids love and respect him, and will be an asset to the Boston Police Department team." (Exhibit 6)
16. Mr. Owens currently resides with his girlfriend who he began dating approximately ten (10) years ago. His girlfriend describes him as: "very respectful of other people's beliefs ... level headed ... and calm..." (Exhibit 6)
17. Mr. Owens's current neighbors describe him as "... a good person who is always respectful and polite ..."; "... tolerable of all people ... even tempered ..."; "... very friendly ... a quiet neighbor ..." (Exhibit 6)

18. Mr. Owens volunteers in the South Boston community with local youth groups including South Boston Youth Hockey and the South Boston Leadership Initiative. (Exhibit 1)

Findings Regarding Middle School Incident

19. Mr. Owens attended what was then St. Brigid's School in South Boston. During 7th and 8th grade, he was in a class of thirteen (13) students. (Testimony of Mr. Owens)

20. As part of his Student Officer Application, Mr. Owens disclosed that "in the winter of 2001, when I was 13 years old, I received notice that I would need to attend a probable cause hearing for an assault. The incident was a fight between a classmate and me. At the hearing, the clerk magistrate found that there was no probable cause to extend the case and it was dismissed. I contacted the Suffolk County Juvenile Court Clerk Magistrate's office to gather more information on this incident and was informed there were no records on file."

(Exhibit 1)

21. Det. Karyn VanDyke, who conducted the background investigation for Mr. Owens, obtained a Boston Police Department Incident report dated January 22, 2001. The victim reported that Mr. Owens attacked the victim from behind, tackled him to the ground, and began punching him in the face, causing damage to the victim's teeth. (Exhibit 2)

22. Det. VanDyke then contacted the victim on the phone to obtain further information regarding the incident. The victim informed Det. VanDyke that on January 21, 2001, Mr. Owens and the victim were sledding with other classmates, and classmates had been picking on the victim. Mr. Owens then hit the victim from behind, jumped on top of him and began punching him in the face. Some of the other classmates had to pull Mr. Owens off of the victim to stop the attack. Mr. Owens's attack caused the victim to lose his top two teeth. The victim described the damage

to his teeth as a traumatic injury. He further described Mr. Owens as a violent person.

(Testimony of VanDyke, Exhibit 2, Exhibit 6)

23. The victim informed Det. VanDyke that Mr. Owens bullied him while they were classmates at St. Brigid's. The bullying occurred in fifth (5th), sixth (6th) and seventh (7th) grade. Mr. Owens yelled at the victim, swore at him, and called him names, including a homophobic slur. The victim told Det. VanDyke that Mr. Owens called him a homophobic slur so many times that he questioned his sexuality. (Testimony of VanDyke, Testimony of Driscoll, Exhibit 6).

Findings Regarding High School Incident

24. Mr. Owens further disclosed in his application that in 2005 when he was 17, he was summonsed to Hingham District Court for a charge of assault and battery as a result of an incident in which he urinated on a high school hockey teammate in the shower area of the locker room. (Exhibit 1)
25. In the course of her investigation of the 2005 incident, Det. VanDyke obtained a Hingham Police Department incident report. The police report indicates the victim had just finished taking a shower and was drying off. Mr. Owens approached him, cornered him, and urinated on him, while laughing at the victim. The victim attempted to cover himself with a t-shirt, but did not fight back because Mr. Owens was larger and stronger. The victim stated that approximately two months earlier, Mr. Owens and another teammate had urinated on him. The victim also reported that Mr. Owens pushed and hit him during practice. After coming forward to report Mr. Owens's assault, the victim was harassed at school and called a "rat" and a "snitch". (Testimony of VanDyke, Testimony of Driscoll, Exhibit 3, Exhibit 6).
26. Det. VanDyke spoke to the victim from the 2005 incident. He confirmed the contents of the Hingham police report, specifically that Mr. Owens cornered him in the shower and urinated

on him while laughing at the victim, while the victim attempted to cover himself with a shirt. The victim also informed Det. VanDyke that this was the second time Mr. Owens had urinated on him, and that Mr. Owens used to punch and hit the victim, as well as other players on the team, during practice. The victim confirmed that the fallout from his reporting of the assault caused the victim to leave the school. (Testimony of VanDyke, Exhibit 6)

27. Det. VanDyke further spoke to the Dean of Archbishop Williams High School, where Mr. Owens attended high school. He referred to the assault as a single, unfortunate incident. Det. VanDyke then searched for the incident on the internet and located a newspaper article from the Patriot Ledger. The Patriot Ledger article details Mr. Owens's admission in court to urinating on the victim, as well the victim's family's dissatisfaction with Archbishop Williams High School's response to the assault. (Testimony of Det. VanDyke, Exhibit 7)
28. Det. VanDyke also reviewed the Hingham District Court docket in connection with the 2005 incident. Mr. Owens admitted to sufficient facts on a charge of assault and battery, and the case was Continued Without a Finding. Mr. Owens was ordered to complete community service and draft a letter to Archbishop Williams High School regarding what it means to be a leader. One year later, the charge was dismissed. (Testimony of Det. VanDyke, Testimony of Appellant, Exhibit 4, Exhibit 6).

Roundtable Concerns

29. Det. VanDyke documented her findings in a report and shared the findings with the Roundtable consisting of Sergeant Detective Bryan Riley, Deputy Superintendent Jeffery Walcott, Driscoll, Kate Hoffman and Jaclyn Zawada from the Office of the Legal Advisor. (Testimony of Driscoll)

30. The Roundtable decided to bypass Mr. Owens for appointment as a Boston police officer.

The Roundtable decided that Mr. Owens should be bypassed based upon what they concluded were his violent tendencies, his history of bullying, and his allegedly incomplete and untruthful reporting of the 2001 and 2005 incidents. (Testimony of Driscoll, Exhibit 8).

31. The Roundtable was troubled by the nature and severity of the 2001 attack in which they conclude that Mr. Owens attacked the victim from behind and repeatedly punched him, until he was pulled off the victim by others. Based on the police reports and interview with the victim, they concluded that the attack caused the victim to lose teeth and required significant dental work and that the victim was traumatized by the attack and resulting disfigurement. (Testimony of Driscoll).

32. The Roundtable also had serious concerns regarding what they conclude was Mr. Owens's history of bullying. Specifically, with regard to the 2001 incident, they conclude that Mr. Owens bullied the victim for several years; including the repeated use of a homophobic slur. They concluded that Mr. Owens continued to bully classmates in high school, which resulted in his admission to sufficient facts on a charge of assault and battery after he urinated on a hockey teammate in 2005. They conclude that this was not an isolated incident; based on the victim's report that Mr. Owens urinated on the teammate twice, and hit and pushed teammates during practice. (Testimony of Driscoll).

33. The Roundtable believed Mr. Owens was untruthful in his application when he allegedly failed to accurately and completely disclose what happened in 2001 and 2005. Specifically, with regard to the 2001 incident, the Roundtable was concerned that Mr. Owens referred to the incident as a "fight between a classmate and me." The Roundtable believed Mr. Owens's explanation attempted to minimize the incident as a school fight, when the investigation

revealed it was a violent attack from behind that resulted in traumatic injury to the victim.

With respect to the 2005 assault, the Roundtable was concerned that Mr. Owens failed to disclose that he had urinated on his teammate more than once and that he referred to the assault as an incident, as opposed to a pattern of bullying as reported by his teammate.

(Testimony of Driscoll, Exhibit 6, Exhibit 2)

34. The Roundtable decided to bypass Mr. Owens and sent him a notice of bypass with stated reasons on November 28, 2016.

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 256 (2001) citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

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 Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. Beverly citing Cambridge at 305, and cases cited. "It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." Town of Burlington, 60 Mass.App.Ct. 914, 915 (2004).

Analysis

Honesty is a required trait of any person holding the position of police officer -- or seeking to become a police officer. The criminal justice system relies on police officers to be truthful at all times and an appointing authority is justified in bypassing a candidate who does not meet this standard. See, e.g., LaChance v. Erickson, 522 U.S. 262 (1998) (lying in a disciplinary investigation alone is grounds for termination); Meaney v. Woburn, 18 MCSR 129, 133-35 (discharge upheld for police officer based, in part, on officer's consistent dishonesty and "selective memory" during departmental investigation of officer's misconduct); Pearson v. Whitman, 16 MCSR 46 (appointing authority's discharge of police officer who had a problem telling the truth upheld); Rizzo v. Town of Lexington, 21 MCSR 634 (2008) (discharge upheld based partially on officer's dishonesty regarding a use of force incident); and Desharnias v. City

of Westfield, 23 MCSR 418 (2009) (discharge upheld based primarily on officer’s dishonesty about a relatively minor infraction that occurred on his shift).

The corollary to the serious consequences that flow from a finding that a police officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. (See Morley v. Boston Police Department, 29 MCSR 456 (2016) (Based on unreliable hearsay and false assumptions, the Boston Police Department erroneously concluded that the Appellant, a federal police officer and a disabled veteran who had been deployed on active duty overseas on four occasions, was untruthful.)

In that context, it is troubling that certain reasons cited by the BPD to show that Mr. Owens was allegedly untruthful were actually erroneous statements *by the BPD*. The BPD alleged in the bypass letter that: a) Mr. Owens was arrested on two (2) occasions; and b) he failed to disclose these two (2) arrests. Both of these assertions by the BPD are false. Mr. Owens was arrested once (for being a minor in possession of alcohol at a St. Patrick’s Day Parade)⁴ and he fully disclosed this on his application. Even more troubling is that, even after this was brought to the BPD’s attention in the first bypass appeal, they repeated these false statements in the bypass letter sent to Mr. Owens as part of the subsequent hiring cycle.

In regard to alleged untruthfulness, that leaves BPD’s conclusion that Mr. Owens provided “incomplete information regarding bullying ... and any interaction with the Police.” The evidence paints a very different picture. First, the BPD asks the following question on the student officer application: “*Is there anything not previously addressed that may cause a problem concerning your possible appointment as a police officer?*” This question is highly subjective and provides no guidance as to what may be considered a problem concerning

⁴ This arrest was not used as a reason for bypass.

possible appointment. Yet, Mr. Owens answered “yes” to this question and provided a two (2)-page (typed, single-spaced) response recounting the incidents in middle school, high school and the St. Patrick’s Day Parade arrest. Further, I credit Mr. Owens’s testimony that he tried unsuccessfully to obtain court documents regarding the middle school and high school incidents. Det. VanDyke made the same inquiries to the Court and was also unsuccessful. The BPD’s charge of untruthfulness here appears to hinge largely on their conclusion that: 1) he failed to self-identify as a “bully” and 2) his written disclosure to a vague question on the application did not match up exactly with the recollection of the victims regarding events that occurred up to sixteen (16) years ago, even though the BPD never gave Mr. Owens the opportunity to respond to the statements taken by the background investigator. This does not (and cannot) form the basis of a career-ending conclusion that an individual has been untruthful to the Boston Police Department. The evidence does not support his conclusion and, hence, it is not a valid reason for bypassing Mr. Owens.⁵

⁵ This question also raises questions regarding whether it conforms with G.L. c. 151B, §4(9) which provides that it is unlawful: “For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.”

That turns to the underlying issue of the incidents themselves -- and whether Mr. Owens's behavior while in middle school and high school constitutes a valid reason for bypass. Mr. Owens argues that the BPD is limiting their review of his character to "two snapshots of him covering his actions as a 12-year-old boy and again as a 17-year-old high school student rather than taking in the full, developing, and all-encompassing panorama of his life as he has lived it over 29 years."

The BPD argues that they properly exercised the broad discretion afforded to them and concluded that Mr. Owens's "violent, criminal misconduct and history of bullying others" calls into question his "ability to de-escalate tense and violent situations" and "renders him unfit to be a police officer".

Years of precedent-setting judicial decisions have established that the Commission cannot substitute its own judgment for that of the appointing authority. However, the Commission is charged with reviewing the "legitimacy and reasonableness" of the reasons for bypass and whether the decision to bypass the candidate was reached after an impartial and reasonably thorough review.

In Teixeira v. Department of Correction, 27 MCSR 471 (2014), DOC bypassed a thirty-eight (38)-year-old candidate primarily because he was charged with soliciting a prostitute as a seventeen (17)-year-old high school student. DOC, when making its hiring decision, did not know that Mr. Teixeira was a junior in high school when the crime was committed or the circumstances surrounding the underlying event. Further, they did not know that, during the two decades that had transpired since then, Mr. Teixeira had become a father who is actively involved in his son's school and extracurricular activities, serving as a youth sports coach and chaperone for class trips. They did not know that, for the past eight (8) years, Mr. Teixeira had

worked as the food and beverage coordinator at a restaurant, supervising many employees. In short, they knew almost nothing about Mr. Teixeira, his accomplishments, his character or his ability to perform the duties of a Correction Officer, other than the information they gleaned from a CORI report. The Commission, citing the lack of thorough review and the need to look behind, if not beyond, an applicant's prior criminal conduct and ensure that the misconduct is put in the proper context, allowed the Appellant's bypass appeal and ordered his reconsideration.

Here, in contrast, the BPD did conduct a reasonably thorough review of the two (2) incidents, including speaking to the victims involved and, in one case, interviewing the parents of one of the victims. Through those interviews, they found that, although the incidents occurred many years ago, Mr. Owens's misconduct had a lasting (negative) impact on their lives. The victim involved in the high school locker room incident was ostracized by other students and forced to transfer to another school. The victim in the middle school incident lost his two front teeth and he and his family are still in fear of Mr. Owens.

Further, the BPD did review and consider the positive aspects of Mr. Owens's life since these incidents occurred, including his positive references, educational attainment, employment history and community involvement. Although it may have been helpful to conduct, as they have in other cases, a discretionary interview to hear directly from Mr. Owens, the Roundtable did review and consider Mr. Owens's written submission regarding these incidents.

Ultimately, after weighing all of Mr. Owens's (many) positive attributes, as well as the negative, they reached what appears to be a legitimate and reasonable conclusion that Mr. Owens should be bypassed for appointment in favor of other candidates. Given the broad discretion afforded to appointing authorities, the facts in this case do not warrant intervention by the Commission.

Conclusion

For all of the above reasons, Mr. Owens's bypass appeals under Docket Nos. G1-17-008 and G1-17-222 are hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso – Absent]) on January 3, 2018.

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. 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:
Joseph Donnellan, Esq. (for Appellant)
Peter Geraghty, Esq. (for Respondent)