

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

PAUL DABENE, JR.,
Appellant

v.

G1-17-202

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Timothy M. Burke, Esq.
Jared S. Burke, Esq.
Law Offices of Timothy M. Burke
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Appearance for Respondent:

Devin Guimont, Esq.
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One Schroeder Plaza, 3rd Floor
Boston, MA 02120

Commissioner:

Christopher C. Bowman

DECISION

On October 4, 2017, the Appellant, Paul Dabene Jr., (Mr. Dabene) 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. On October 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 February 7, 2018.¹

¹ 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.

The full hearing was digitally recorded and both parties received a CD of the proceeding.² On March 16, 2018, the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Twenty-seven (27) Exhibits (Respondent Exhibits 1-12 and Appellant Exhibits 1-15) were entered into evidence at the hearing³ and two (2) documents (Post-Hearing Exhibits 1 & 2) were submitted by the BPD after the hearing at my request. Based on the documents submitted and the testimony of the following witnesses:

For the Boston Police Department:

- Rafael Antunez, Detective, BPD;
- Nancy Driscoll, Director of Human Resources, BPD

For Mr. Dabene:

- Paul Dabene Jr., 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. Dabene is twenty-five (25) year old and has lived in the North End of Boston for eight (8) years. (Testimony of Appellant)
2. In 2010, Mr. Dabene graduated from Weymouth High School. While in junior high school, he completed a Spanish Honors Class. In his freshman year of high school, Mr. Dabene completed a Spanish II Honors Class and received a “B”. In his sophomore year, Mr. Dabene completed a Spanish III Honors class and received a “B”. In his junior year, Mr.

² 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.

³ Approximately twelve of the exhibits submitted are duplicates, with both parties submitting the same document.

Dabene completed a Spanish IV Honors class and received a “B”. In his senior year, Mr. Dabene completed a Spanish V Honors class and received a “C+”. (Testimony of Appellant and Appellant Exhibit 9)

3. In 2014, Mr. Dabene received a bachelor’s degree from Suffolk University. In his freshman year, he completed an Elementary Italian I class and received a “B+” and then completed an Elementary Italian II class and received an “A-“. (Appellant Exhibit 10)
4. While enrolled in college, Mr. Dabene worked as a lot attendant for an auto dealership. His supervisor described him a “great and dependable employee” who “would be a great addition to the Boston Police.” (Respondent Exhibit 6)
5. All of Mr. Dabene’s neighbors that were interviewed by the BPD provided positive reviews of him, as did his personal references. (Respondent Exhibit 9)
6. Mr. Dabene has no entries on his driving history. (Respondent Exhibit 9)
7. Since 2015, Mr. Dabene has been employed as a Budget Examiner for the Massachusetts State Police (MSP). His supervisor describes him as a “great and dependable employee” who “would be a great addition to the Boston Police Department.” (Respondent Exhibit 9)

2015 Application with Massachusetts State Police

8. As a part of his 2015 application with the MSP, Mr. Dabene was asked to “List any language(s) other than English in which you are proficient, including Sign Language and Braille.” (Emphasis added) (Appellant Exhibit 2)
9. Mr. Dabene did not believe his language abilities were “proficient” and did not indicate on the application that he was “proficient” in other languages besides English. (Testimony of Appellant and Appellant Exhibit 2)

2016 Application and Review for Boston Police Department Cadet Program

10. In early 2016, Mr. Dabene submitted an application to the Boston Police Department for the position of “Cadet.” (Testimony of Appellant and Appellant Exhibit 3)

11. The application for the position with the Boston Police Department cadet program requested that all applicants provide information regarding their level of “basic knowledge” for other languages. (Appellant Exhibit 3)

12. Specifically, the Boston Police Department’s application for the Cadet position read:

“Languages Other Than English: List any language other than English of which you have basic knowledge. Choose from the following terms to describe your level of proficiency: “FAIR”, “GOOD”, or “FLUENT”. (Emphasis added) (Appellant Exhibit 3)

13. As referenced above, Mr. Dabene had taken honors Spanish classes for approximately five years from 8th grade throughout High School, as well as two semesters of Italian in college. The High School classes were honors courses and the highest level of Spanish available and required students to pass a pretest to qualify for enrollment. Accordingly, Mr. Dabene listed Spanish and Italian as languages he had a “basic knowledge” of. (Testimony of Appellant and Appellant Exhibits 3, 9 & 10)

14. On this Cadet application, Mr. Dabene stated that his “proficiency” level for speaking and writing in Spanish was “Fair” and that his proficiency in understanding and reading Spanish was “Good.” Mr. Dabene marked the same levels for his proficiency in Italian. (Testimony of Appellant and Appellant Exhibits 3, 9 & 10)

15. On July 16, 2016, Mr. Dabene participated in an interview with the Boston Police Department for the cadet program. The interview was conducted by Detective Rafael Antunez of the Boston Police Recruit Investigations Unit. During the interview, Detective Antunez noted on the application that Mr. Dabene had stated he had a “basic knowledge” of

Spanish and Italian. (Testimony of Appellant and Testimony of Detective Rafael Antunez and Appellant Exhibit 3)

16. Detective Antunez then proceeded to ask Appellant “Que hicistes hoy [What did you do today?] in Spanish. Detective Antunez describes himself as “fluent” in Spanish and uses the Spanish language every day. Prior to Appellant’s interview, Detective Antunez had never questioned any previous applicant about languages that were disclosed on an application.

(Testimony of Appellant and Testimony of Detective Rafael Antunez)

17. Mr. Dabene understood the question and responded, “Does that mean, what did I do today?”

Mr. Dabene testified that he was unable to respond to the question and properly conjugate the verb due to the fact he has not spoken Spanish recently. (Testimony of Appellant and

Testimony of Detective Rafael Antunez)

18. After the interview for the cadet program was concluded, Detective Antunez asked Mr.

Dabene to draft a letter outlining why he marked Spanish and Italian as “Languages Other Than English” on his application. (Testimony of Appellant and Testimony of Detective

Rafael Antunez)

19. On July 18, 2016, Mr. Dabene wrote Detective Antunez a letter stating the following;

“I am writing this letter as a follow-up to the home visit on Saturday, July 16. During the visit, you noted that on the application I had put Spanish and Italian as languages that I speak. I then had trouble speaking Spanish with you. This was not an attempt by me to be deceptive, or make a false claim. Rather this was a lack of practice... I did take Spanish classes for five years, from eighth grade throughout high school, as well as two semesters of Italian in college. While in both high school and college, I was rather proficient in the languages. However, having not used Spanish in over six years, or Italian in over four, it is clear that I have lost a lot of this proficiency simply from lack of use or practice.” (Appellant Exhibit 4)

20. A round table discussion was held by the BPD on or about July 27, 2016, to discuss the positive and negative attributes of prospective candidates for the cadet program. Both

Detective Antunez and the BPD's Director of Human Resources were present for the round table discussion of Mr. Dabene. (Testimony of Detective Antunez)

21. Everyone who "passed the round table" received a conditional offer of employment.

(Testimony of Ms. Driscoll)

22. Subsequent to the full hearing before the Commission, the BPD, at my request, produced documentation demonstrating that, in fact, Mr. Dabene "passed" the round table for the cadet program. (Post Hearing Exhibit 1)

23. Subsequently, on July 28, 2016, Mr. Dabene was provided with a conditional offer of employment letter. (Appellant Exhibit 14)

24. As a result, Mr. Dabene underwent and passed a psychological evaluation administered by the Occupational Health Services Unit for the BPD. (Testimony of Appellant)

25. On November 17, 2016, Mr. Dabene was notified by the BPD that they were unable to offer a position of "Cadet" with the Boston Police Department. (Appellant Exhibit 14)

26. The November 17, 2016 letter stated:

"Good Morning. Thank you for submitting an application to the Boston Police Department for the position of Police Cadet. Unfortunately, we are unable to offer you a position in the Cadet program at this time. Please be advised that your name will remain in the candidate pool for possible consideration in the future should you meet the eligibility requirements for the position until a new Cadet Examination takes place."
(Appellant Exhibit 14)

27. Mr. Dabene responded to inquire about the reasons for not being selected;

"Thank you for getting back to me regarding the Cadet position. I was hoping you could give me an idea as to why I was not selected. I am going to continue pursuing a law enforcement career, and I would like to fix or improve whatever these reasons were in order to make myself a more attractive candidate for future positions." Ms. Driscoll did not respond. (Testimony of Appellant and Appellant Exhibit 14)

28. The BPD did not respond to Mr. Dabene's inquiry. (Testimony of Appellant)

2017 Application and Review for Boston Police Officer

29. On April 25, 2015, Mr. Dabene took the civil service examination for police officer and received a score of 91. (Stipulated Fact)
30. On November 1, 2015, the state's Human Resources Division (HRD) established an eligible list of candidates which included Mr. Dabene. (Stipulated Fact)
31. On February 22, 2017 and March 2, 2017, the BPD received Certification No. 04401 from HRD, from which it ultimately appointed one hundred thirty (130) candidates, thirty (33) of whom were ranked below Mr. Dabene, who was ranked 73rd. (Stipulated Facts)
32. Mr. Dabene completed another application requesting that he provide, once again, "Languages Other Than English: List any language other than English of which you have basic knowledge. Choose from the following terms to describe your level of proficiency: "FAIR", "GOOD", or "FLUENT". (Emphasis added) (Testimony of Appellant and Appellant Exhibit 6)
33. Based upon his previous interview with Detective Antunez for the Cadet position, Mr. Dabene wrote "N/A" (Not applicable) to this question. (Appellant Exhibit 6)
34. Mr. Dabene was subsequently interviewed by Detective Gloria Kinkade from the Boston Police Recruit Investigations Unit. During the background investigation, Detective Kinkade questioned Mr. Dabene why he had previously listed Spanish and Italian on his application to become a "Cadet", but did not list any languages on the current application. (Testimony of Appellant)
35. Again, Mr. Dabene was asked to write a letter explaining his reasons for not including Spanish and Italian. Mr. Dabene stated;

"I am writing in regards to the discrepancy between my two recent applications to the Boston Police Department... When it came time to fill out my application for the Police Officer

position, I did not list these languages. Although I had taken classes in the past, it is clear that I have lost much of my proficiency in these languages. As a result, I did not list these languages, as I am now aware that I am not as proficient as I once was.” (Appellant Exhibit 7)

36. On August 31, 2017, Mr. Dabene was notified that he had been “bypassed for employment for the position of police officer with the Boston Police Department.” (Appellant Exhibit 1)
37. The BPD stated that they had “significant concern regarding untruthful information previously provided to the Department.” (Appellant Exhibit 1)
38. “Specifically, while applying to the Boston Police Department Cadet program in 2016 you reported that you could speak, read and write Spanish and Italian; however, the background investigation revealed that you could not speak, read or write these languages as reported. When asked this question as part of the student officer application in 2017, you answered “no” when asked about ability to speak other languages.” (Appellant Exhibit 1)
39. At no point during either interview was Mr. Dabene asked to *read* or *write* in either language. (Testimony of Appellant and Detective Antunez)
40. According to Detective Antunez, Mr. Dabene’s responses on the BPD application did not, standing alone, constitute untruthfulness. In his (Antunez’s) opinion, it is only when the application is compared to the MSP application that Mr. Dabene is deemed to be untruthful. (Testimony of Detective Antunez)
41. Detective Antunez concluded that Mr. Dabene “should have answered Spanish and Italian and filled out those boxes” on the MSP application instead of leaving it blank. (Testimony of Detective Antunez)
42. The BPD’s Director of Human Resources concluded that Mr. Dabene’s alleged “untruthfulness” was a result of writing “fair” under the category of “speak” on his

application for Cadet when asked what languages he had a “basic knowledge.” (Testimony of Ms. Driscoll)

43. At the full hearing, I posed a hypothetical question in which I recited the numbers one through ten (1-10) in Spanish, asked a rudimentary question: “Tu tienes agua?” [Do you have water?] and then stated that I had taken four years of Spanish in high school. Based upon that criteria alone, I asked what the BPD’s expectation would be of me regarding the language question on the application. According to the BPD, I should write “Good” on the BPD application regarding being able to speak Spanish because I have a “basic understanding.” (Testimony of Ms. Driscoll)

44. Upon further reflection, the BPD stated that it was unclear what I should put on the application, acknowledging that the question is subjective and that there were no guidelines in place detailing levels of “basic knowledge.” (Testimony Ms. Driscoll)

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 Mass.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.

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 not employing individuals who do 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 (2005) (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 (2003) (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).

Labeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and uniform review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety. (See Morley v. Boston Police Department, 29 MCSR 456 (2016) (Based on unreliable hearsay and false assumptions, the Boston Police Department erroneously concluded that Mr. Morley, 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 the *only* example cited by the Boston Police Department to show that Mr. Dabene was allegedly untruthful was a subjective question about his “basic knowledge” of Spanish. What is more troubling is that the BPD, at the full hearing before the Commission, offered conflicting information regarding what Mr. Dabene “should” have stated on his application to the position of Police Officer to avoid being labeled as “untruthful.”

The BPD has not shown, by a preponderance of the evidence, that Mr. Dabene was untruthful during the hiring process. Rather, the BPD’s conclusions regarding alleged untruthfulness appear to be based on subjective interpretations of the phrase “basic knowledge” of a foreign language, a lack of standardized testing or questioning of applicants and a poorly worded and confusing application.⁴

It is clear that the allegation of untruthfulness regarding Mr. Dabene’s application stems from a question asking applicants to “List any language other than English of which you have basic knowledge.” (Emphasis added) First, this question is highly subjective and provides no guidance

⁴ I note that the Department has since this matter, changed their application and notified future applicants that they may be tested on their ability to speak a foreign language during the interview process.

as to what may be considered “basic knowledge.” The BPD acknowledges that the question is, in fact, subjective. The BPD could not provide instructions on how to evaluate the Applicant’s ability to speak, read or write a foreign language. Nor could they provide guidance on how to differentiate the levels of an applicant’s fluency. Moreover, the Applicant was never asked to “read” or “write” anything in Spanish during his interview. He testified, credibly, that in response to the one question he was asked in Spanish that he understood the question, but could not conjugate the proper verb in response.

Mr. Dabene’s testimony, as well as the High School and College class room performance and transcripts provided, make clear that Mr. Dabene received satisfactory grades during the four (4) years of High School Honors Spanish classes and two (2) semesters of college Italian courses.

In their testimony before the Commission, the BPD witnesses rely heavily on Mr. Dabene’s MSP application as a basis for their belief that Appellant was untruthful in completing his BPD application. However, the MSP application required applicants to list foreign languages that they were “proficient” in, as opposed to the BPD’s application that requested languages, which the applicant held a “basic knowledge.”

Based on the BPD’s conflicting testimony regarding how Mr. Dabene should have filled out his application, the lack of any standards for measuring fluency and the unreliable and contradictory evidence presented, the BPD has not proven that Mr. Dabene was untruthful regarding his application. 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 fact that this false assessment of Mr. Dabene’s honesty has tainted the review process; and the fact that a law enforcement agency’s conclusion that a job applicant has been untruthful can potentially put an end to that candidate’s desire to pursue a career in law enforcement,

standing alone, show that Mr. Dabene is an aggrieved person under G.L. c. 31, § 2(b) for whom relief should be granted.

Conclusion

For all of the above reasons, Mr. Dabene's appeal under Docket No. G1-17-202 is hereby ***allowed.***

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the state's Human Resources Division and/or the Boston Police Department in its delegated capacity to take the following actions:

1. To ensure that other potential employers making inquiries are provided with a complete and accurate portrayal of Mr. Dabene, the BPD shall, forthwith, add this Commission decision to any personnel records that it maintains regarding Mr. Dabene.
2. The state's Human Resources Division (HRD) shall place Mr. Dabene's name at the top of any future Certification for Boston Police Officer issued to the Boston Police Department and his name shall remain there until such time as he has been bypassed or appointed.
3. Subject only to the BPD updating the background investigation for the time period that has transpired since the most recent background investigation was completed, Mr. Dabene's conditional offer of employment shall be reinstated.
4. In any future consideration of Mr. Dabene for appointment as a BPD Police Officer, the BPD shall not bypass him as a result of any facts or circumstances in his background which it had knowledge of prior to notifying him that he had been bypassed for appointment in 2017.
5. If and when Mr. Dabene is appointed as a Boston Police Officer, he shall receive a retroactive civil service seniority date the same as those candidates appointed from Certification No. 04401. This retroactive date is for civil service purposes only and is not meant to provide the Appellant with any additional pay or benefits, including creditable time toward retirement.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein, and Tivnan, Commissioners) on April 12, 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:

Timothy M. Burke, Esq. (for Appellant)

Devin Guimont, Esq. (for Respondent)

Michael Downey, Esq. (HRD)

Regina Caggiano (HRD)