

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MICHAEL LEWIS,
Appellant

v.

G1-17-175

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

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

Appearance for Respondent:

Katherine Sarmini Hoffman, Esq.
Boston Police Department
Office of the Legal Advisor
Boston, MA 02120

Commissioner:

Christopher C. Bowman

DECISION

On September 6, 2017, the Appellant, Michael Lewis (Mr. Lewis) 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 3, 2017, a pre-hearing conference was held at the offices of the Commission, which was followed by a full hearing at the same location on November 16, 2017.¹ The full hearing was digitally recorded and both parties received a CD of the proceeding.² On

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.

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

January 19, 2018 (Respondent) and January 21, 2018 (Appellant), the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Eight (8) exhibits were entered into evidence at the hearing: Respondent Exhibit 1-7 and Appellant Exhibit 1. Based on the documents submitted and the testimony of the following witnesses:

For the Boston Police Department:

- Gloria Kinkead, Detective, BPD;
- Nancy Driscoll, Director of Human Resources, BPD

For Mr. Lewis:

- Michael Lewis, Appellant;

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

1. Mr. Lewis is a thirty-eight (38) year old male. He was born in Trinidad and Tobago and has resided in Massachusetts for most of his life. He briefly attended Merrimack College but did not receive a degree. (Respondent Exhibit 1)

Prior Employment at a Local Hospital that is Relevant to this Appeal

2. Mr. Lewis was employed by a hospital in Boston for approximately four (4) years from June 2010 to June 2014. Mr. Lewis was provided with a copy of the hospital's Human Resource Policies when he began his employment in June 2010. For the majority of his employment, Mr. Lewis worked as a "surgical coordinator" and administrative assistant. Mr. Lewis's

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.

duties included: checking in patients, prepping patients' charts, and booking surgeries. Mr. Lewis worked directly for two (2) physicians. (*Testimony of Mr. Lewis*).

3. Mr. Lewis does not hold any medical degrees. The hospital was Mr. Lewis's first medical-related employment. (*Testimony of Mr. Lewis*).
4. Medical order forms must be completed by a doctor. A pre-printed form is used for most medical procedures and contains the following information: (1) procedure name, (2) check box for which eye(s) needs to be dilated, and (3) signature box for the physician to initial. (*Testimony of Mr. Lewis*).
5. Mr. Lewis believed that he had an implied agreement with a doctor to prepare and sign medical order forms for minor procedures.³ Mr. Lewis claims that a manager was aware of this implied agreement. (*Testimony of Mr. Lewis*).
6. In addition to medical order forms, Mr. Lewis signed other documents for the doctor. Specifically, Mr. Lewis signed the doctor's correspondence "with her authorization, yes, after she reviewed the letters." (*Testimony of Mr. Lewis*).
7. On June 19, 2014, a patient was seen by the doctor at the hospital for a minor laser procedure. The minor laser procedure was being performed to prepare the patient for Descemet Membrane Endothelial Keratoplasty (hereinafter "DMEK") which was scheduled to take place a few days later.⁴ DMEK is a major procedure which involves stripping the diseased part of a cornea from the eye. Mr. Lewis had no experience assisting in any

³ During the hearing on November 16, 2017, Mr. Lewis stated: "So what she did say to me on instances like the (ineligible)—the minor procedures, you basically can take care of it. She didn't direct—she didn't directly say, hey, you can do that, but it was more non-verbal, hey, Michael will take good care of you when she would bring the patient up and say, Michael will take good care of you, we'll get this done today." (*Testimony of Mr. Lewis*).

⁴ In testifying at the Commission hearing on November 16, 2017, Mr. Lewis first testified that the patient presented on June 19, 2014 for a YAG procedure to improve blurry vision after undergoing cataract surgery one (1) week prior. Mr. Lewis then informed the Commission that he was mistaken and that the patient presented for a preliminary procedure in anticipation of a DSEK. Thereafter, Mr. Lewis stated that he was mistaken again and that the patient was seen for a minor laser procedure in anticipation of a DMEK procedure as detailed above. (*Testimony of Mr. Lewis*).

capacity with DMEK. The doctor informed Mr. Lewis that the patient presented a “complicated” case. (*Testimony of Mr. Lewis*).

8. After assisting with the last minute scheduling of the patient’s minor laser procedure, Mr. Lewis prepared a medical order form requesting that a technician dilate one (1) of the patient’s eyes in preparation for the minor laser procedure. Specifically, Mr. Lewis wrote down the procedure name, indicated which eye needed to be dilated, and initialed for the doctor on the pre-printed medical order form. The doctor did not inform Mr. Lewis that dilation was necessary for the minor laser procedure. Mr. Lewis did not ask any questions or request assistance before completing the medical order form. Mr. Lewis did not make any attempt to locate the doctor or another physician before preparing the medical order form and signing the doctor’s initials. Mr. Lewis engaged in this course of action pursuant to his perceived implied agreement with the doctor.⁵ (*Testimony of Mr. Lewis*).
9. After meeting with the patient to perform the minor laser procedure, the doctor realized that the patient’s eye had been erroneously dilated. The patient had to have the dilation reversed before she could proceed with the minor laser procedure. As a result, the patient submitted a complaint to the hospital alleging undue discomfort. (*Exhibit 5 and Testimony of Mr. Lewis*).
10. Thereafter, Mr. Lewis was approached by a manager about the incident. Mr. Lewis explained his actions, cited his implied agreement with the doctor and admitted to preparing

⁵ At the hearing on November 16, 2017, Mr. Lewis testified:

“Q: Did [the doctor] say anything to you prior to you completing the signed order in this case?

A: She just said like—she brought the patient up like she usually would after—they’re coming out of a room. She’ll bring them up and say, here you go, Michael’s going to schedule that for you right now, he will take care of it, and goes back to her room.”

.....

Q: Okay, and did she on that date say, Michael, complete this form for me?

A: She didn’t directly say it, but part of—it was implied.

Q: Has she ever directly told you to complete a form for her or is it all just implied?

A: All implied.” (*Testimony of Mr. Lewis*).

and signing the medical order form. The following day, June 20, 2014, Mr. Lewis was terminated from employment. (*Exhibit 5 and Testimony of Mr. Lewis*).

2017 Application and Review for Boston Police Officer

11. On April 25, 2015, Mr. Lewis took the civil service examination for police officer and received a score of 89. (*Stipulated Fact*)
12. On November 1, 2015, the state's Human Resources Division (HRD) established an eligible list for police officer, which included the name of Mr. Lewis. (*Stipulated Fact*)
13. On February 22, 2017 and March 2, 2017, Mr. Lewis's name appeared on Certification #04401 for consideration as a Boston police officer, from which the BPD eventually appointed one hundred thirty (130) police officers, six (6) of whom were ranked below Mr. Lewis, who was tied for 76th on the Certification. (*Stipulated Facts*)
14. On or around March 21, 2017, Mr. Lewis signed his application and submitted it to the BPD. Thereafter, Detective Kinkead was assigned to review Mr. Lewis's application and conduct a background investigation. (*Exhibit 1 and Testimony of Detective Kinkead*).
15. During the background investigation, Detective Kinkead reviewed all aspects of Mr. Lewis's background, including his criminal history, driving record, previous employment, references, and application. (*Testimony of Detective Kinkead*).
16. In the application, Mr. Lewis admitted to being terminated from the local hospital. Mr. Lewis submitted a written explanation which read, "I was terminated for filling out [doctor]'s Orders in order to expedite a patient's procedure prior to surgery. My doctor wanted a patient to have a procedure done ASAP and time was limited and it seems like pulling teeth to get the signature. This patient would have to get procedure done prior to surgery. When the patient arrived for minor procedure there was a delay and patient was upset. [Local

hospital] of course had to make the patient whole and then noticed that the orders were filled out by me. They decided this was a termination event and I was called into the office June 20, 2014 and terminated on the spot.” (*Exhibit 1*).

17. Detective Kinkead attempted to obtain additional information from the hospital regarding Mr. Lewis’s employment and termination. Detective Kinkead spoke with the hospital Human Resources Coordinator who confirmed Mr. Lewis’s prior employment with the hospital but refused to provide any additional information pursuant to company policy. (*Exhibit 4 and Testimony of Detective Kinkead*).

18. Detective Kinkead spoke with Mr. Lewis about his termination, and Mr. Lewis indicated that it was common practice for assistants to complete medical orders at the hospital. (*Testimony of Detective Kinkead*).

19. Mr. Lewis informed Detective Kinkead that he was attempting to get in touch with the doctor and that she contact Detective Kinkead and supply additional information regarding Mr. Lewis’s termination. Detective Kinkead was not contacted by any physicians on Mr. Lewis’s behalf. (*Testimony of Detective Kinkead*).

20. On or around June 17, 2017, Detective Kinkead prepared a Privileged and Confidential Memorandum which contained a summary of her investigation of Mr. Lewis’s background. (*Exhibit 2*).

21. On or around June 29, 2017, a BPD roundtable reviewed Mr. Lewis’s background and requested that Detective Kinkead obtain additional information regarding Mr. Lewis’s termination from the hospital. (*Testimonies of Detective Kinkead and Driscoll*).

22. Following the June 29, 2017 roundtable, Detective Kinkead requested and obtained the termination notice from Mr. Lewis. The termination notice indicated that, “On Thursday,

June 19, 2014 a patient was prepped for a procedure by an Ophthalmic Technician based on the signed orders in their chart. When the attending physician came to perform the procedure she discovered that the orders were incorrect and additional measure had to be taken to reverse the effects of the earlier preparation causing undue discomfort to the patient. When questioned by your manager you confirmed that you completed the orders and signed the physician name to the chart.” (*Exhibit 5*).

23. The termination notice indicated that “It is clear after investigating this incident and also by your own admission that you falsified the signature of the attending physician” and that Mr. Lewis’s actions were in violation of the hospital’s Human Resource Policy 5.0(q) which prohibits employees from falsifying or omitting information on an employment application, chart, record, form, or other data used by the hospital. In addition, the termination notice indicated that Mr. Lewis’s actions failed to “follow the standards and expectations of professional conduct.” (*Exhibit 5*).

24. After obtaining the termination notice, Detective Kinkead updated the Privileged and Confidential Memorandum to incorporate the newly obtained information. On or around July 6, 2017, the roundtable reconvened to discuss Mr. Lewis’s application and decided to bypass Mr. Lewis. (*Exhibit 3 and Testimonies of Detective Kinkead and Driscoll*).

25. The roundtable’s decision to bypass Mr. Lewis was based on what they concluded was the unreasonable judgment he exercised in what they considered to be the falsifying of a physician’s signature. The roundtable believed that Mr. Lewis’s act of signing another individual’s name reflected poorly on Mr. Lewis’s credibility and capacity for truthfulness, both of which are essential requirements to become a Boston police officer. Moreover, the roundtable considered the fact that Mr. Lewis’s actions were in violation of the hospital’s

written policy and established medical standards. The roundtable believed that Mr. Lewis's conduct was especially problematic because his actions caused undue discomfort to a patient.

(Exhibit 6 and Testimony of Driscoll).

26. On August 31, 2017, the BPD sent a letter to Mr. Lewis informing him of their decision to bypass him for original appointment to the position of Boston police officer. *(Exhibit 6 and Testimony of Driscoll).*

27. At the full hearing before the Commission, Mr. Lewis submitted a letter from the doctor, on hospital stationery, dated September 19, 2017 stating:

"To whom it may concern:

I would like to write this most enthusiastic letter of support for Michael Lewis' application to the Boston Police. Michael worked with me as an Administrative Assistant/Surgical Coordinator from 9/2010 till 6/2014. He has done the most superb job for taking care of my patients and a very busy clinical practice. He is by far the best administrative assistant I have ever had. In my opinion, the reason Michael was terminated was because he was trying to go above-and-beyond to help my practice run in the most efficient manner. He took upon himself to sign a pre-printed order sheet for a minor procedure to expedite the matters. There was no ill will or any intent to forge a signature. I personally was not in agreement with the decision to terminate Michael and, if it were up to me, I would rehire him in a heartbeat. I hope this helps with your decision in considering Michael's candidacy. I recommend him without any reservation and I hope that you will consider him highly for this important position.

Please do not hesitate to contact me if you have any questions." (Appellant Exhibit 1)

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

In Beverly, a candidate for police officer was bypassed for appointment because he was terminated from his previous employer for serious misconduct – the unauthorized access of the voicemail accounts of other employees. A majority of the Commission concluded that the City “failed to prove that [the candidate] illegally accessed voicemails of employees . . . the reason given for his bypass, and accordingly did not support the reason by the necessary preponderance of the evidence.”

That decision was subsequently vacated by the Superior Court. Agreeing with the Superior Court, the Appeals Court stated, “Instead of focusing on whether the city had carried its burden of demonstrating a ‘reasonable justification’ the commission focused on whether the city had proven that [the candidate] in fact engaged in the misconduct. We believe the commission erred as a matter of law in placing such an added evidentiary burden on the city. In simple terms, neither [the candidate] nor the commission has presented a convincing argument that the Legislature intended to force an appointing authority to hire a job applicant for such a sensitive position unless it is able to prove to the commission’s satisfaction that the applicant in fact engaged in the serious alleged misconduct for which he was fired.”

Applied here, the Boston Police Department is not required to prove that Mr. Lewis actually violated the hospital’s policies and that he completed orders and signed a physician’s name to a patient’s chart without authorization. Rather, they are required to show that they conducted a reasonably thorough review of that matter and, after such review, decided to bypass Mr. Lewis for a valid reason. They have done so.

Instead of simply relying on the relatively recent termination to bypass Mr. Lewis, the BPD sought to obtain additional information from the hospital regarding Mr. Lewis’s termination but was effectively rebuffed by their human resource department “due to legal reasons”. The BPD then obtained from Mr. Lewis the termination letter from the hospital stating that, based on an investigation and Mr. Lewis’s own statements, that he had falsified a doctor’s signature. The BPD then provided Mr. Lewis with an opportunity to respond (in writing and during a meeting with the background investigator) to the charges. The BPD then convened a roundtable, which included the background investigator, to discuss the findings of the background investigation. Based on all of the information obtained, the BPD concluded that Mr. Lewis, while employed at

the hospital, exercised unreasonable judgment by completing a doctor's order without the training or qualifications that a doctor possesses, and, as a result, caused undue discomfort was caused to the patient.

Even if the BPD was required to prove that Mr. Lewis engaged in the alleged misconduct at the hospital (which they are not), the preponderance of the evidence would support such a finding. After listening to Mr. Lewis's testimony at the hearing before the Commission, two things were clear: 1) Mr. Lewis did not have a doctor's authorization to order that a patient's eye be dilated; and 2) Mr. Lewis, to this day, fails to understand the gravity of effectively making medical decisions for a patient without authorization – *or any medical training*.

Frankly, I was stunned to review the highly-accredited doctor's letter (presumably unauthorized by the hospital that refused to even confirm that Mr. Lewis was terminated) that sought to minimize, if not excuse, what occurred here. However, even if I were to consider this hearsay evidence, the letter from the doctor states that Mr. Lewis, whose job was clearly administrative in nature, "took upon himself" the act of ordering the dilation for the patient.

Conclusion

For all of the above reasons, the BPD had reasonable justification to bypass Mr. Lewis for appointment as a police officer. His appeal under Docket No. G1-17-175 is hereby *denied*.

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:

James Gilden, Esq. (for Appellant)

Kaherine Sarmini Hoffman, Esq. (for Respondent)