

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

JOAO PAULO LEITE PEREIRA DE ARAUJO,
Appellant

v.

G1-16-065

ABINGTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Pro Se

Appearance for Respondent:

Timothy D. Zessin, Esq.
Kopelman and Paige, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

DECISION ON RESPONDENT’S MOTION FOR RECONSIDERATION

The Appellant, Joao Paulo Pereira DeAraujo, brought this appeal to the Civil Service Commission (Commission) from the decision of the Town of Abington Police Department (APD) to bypass him for appointment as a full-time permanent police officer. By a 4-1 Decision dated March 1, 2018, the Commission Majority voted to allow the appeal, finding that the two dozen reasons that purportedly disqualified Mr. Araujo as unsuitable were factually unsupported by the evidence, were marshalled as a pretext to disguise his disparate treatment from other applicants, and that the primary reason for his rejection by the APD was related to the Appellant’s immigration status prior to becoming a United States citizen. The Commission Majority concluded that the APD’s reliance on Mr. Araujo’s past immigration status, and the fact that he had not filed tax returns for that period, was too stale. The preponderance of evidence

failed to show how this decade-old history remained relevant to a present fitness to serve as a police officer. The Dissenting Commissioner agreed that all but one of the reasons used to bypass Mr. Araujo were unjustified, but she would have upheld the bypass on the grounds that Mr. Araujo's failure to file proper tax returns from 2001 to 2004, alone, disqualified him.

On March 12, 2018, the APD filed the "Respondent's Motion for Reconsideration", which asserted 27 errors (one factual error in the Decision's Finding of Facts, 18 errors in the Dissenting Commissioner's Analysis and Conclusion, and eight errors in the Commission Majority Analysis and Conclusion). Mr. Araujo filed the "Appellant's Response to Respondent's Motion for Reconsideration", which responded to each of the 27 alleged errors raised by the Respondent.

On March 22, 2018, the APD filed a complaint in Plymouth Superior Court (Civil Action No. 1883CV00336) seeking judicial review of the Commission's Decision and moved to stay the Decision, which motion is pending.

After carefully considering the APD'S Motion For Reconsideration and the Appellant's comprehensive response, the Commission allows, in part, the Motion for Reconsideration, insofar as it called attention to certain clerical and mechanical errors, but concludes that the Commission Majority has not overlooked any significant factors that would require reconsideration and, therefore, otherwise denies the motion and affirms the Decision. Also, while not specifically germane to the Motion to Reconsider, the Commission clarifies its intent as to the effect of the Decision. Specifically, nothing in the Commission's Decision of March 1, 2018 or this Decision is intended to be construed to mean that the Commission's March 1, 2018 remedial order undermine the rights of individuals who accepted a conditional offer of employment as part of a recent hiring cycle under Certification No. 05184. The remedial order

does not require that Mr. Araujo be hired over any other qualified candidate, but simply requires that the APD provide him with at least one future opportunity for fair consideration consistent with the requirements of the civil service law.

The Applicable Law

Pursuant to 801 C.M.R. 1.01(7)(1):

After a decision has been rendered and before the expiration of the time for filing a request for review or appeal, a Party may move for reconsideration. *The motion must identify a clerical error or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked* in deciding the case. . . .”
(*emphasis added*)

Clerical and Mechanical Errors

The APD’s Motion for Reconsideration aptly identifies one mechanical error in the Presiding Officer’s Findings of Fact (Finding No. 31, pp. 19-22), with which the Appellant agrees, namely, the Presiding Officer (Commissioner Ittleman) mistakenly attributed the APD officer’s voice on the February 10, 2016 interview of the Appellant as that of APD Chief Majenski, when, in fact, it was Deputy Chief Cutter that did most of the talking and Finding No. 31 will be corrected accordingly. This error, however, does not alter the substance of the colloquy or change the findings, conclusion or inferences drawn by the Commission Majority or the Dissenting Commissioner from the substance of this interview.

The APD’s Motion for Reconsideration also identifies as clerical errors in the Dissenting Commissioner’s Analysis and Conclusion the inclusive dates during which Mr. Araujo worked in construction jobs and the years for which he was asked to produce his tax returns. With one exception, the dates were not incorrect but were findings for the pertinent time period coinciding with the period in which the Appellant did not report his income. The exception to be corrected is that the Respondent had asked the Appellant for tax returns for 2001 to 2005, not 2002 to

2005. That said, it is not inaccurate to add the other dates that the Appellant was working. This one scrivener's and other date alterations, which have no material impact on the Commission Majority or Dissenting Commissioner's finding, inference or conclusions, will be changed.

- p. 40, ¶2, ln.2 – change from “2004” to “2006”
- p. 40, fn. 25 – change from “2004” to “2006”
- p. 40, ¶2, ln.4 – correct “2002” to “2001”

Other “Significant Factors” That Were Allegedly “Overlooked”

The alleged errors asserted by the APD include three references to the Dissenting Commissioner's Analysis and Conclusions on the subject of Mr. Araujo's record and testimony on the subject of his of non-payment of taxes. (p. 40, lns.5-6; p. 40, ln.5; p. 41, lns. 15-16) None of these statements by the Dissenting Commissioner were factually erroneous and none of them are “significant” to her findings, inferences and conclusions or those of the Commission Majority, all of whom concluded that Mr. Araujo did not file certain required tax returns, but that this stale misconduct was not shown to be reasonably relevant in weighing his present suitability to perform the duties of a police officer and constituted disparate treatment by the APD. It is also noted that Mr. Araujo's tax issues did not call into question his character when he applied for, and won, permanent immigrant status and eventually become a naturalized U.S. citizen under federal law. (Decision, p. 52)

The APD also alleges that the Dissenting Commissioner (and, by implication) the Commission Majority) did not address all of the APD's reasons for bypass in the Commission Decision (p.41, fn.26). This is clearly not a requirement and does not serve as grounds for reconsideration. See Weinberg v. Board of Registration in Medicine, 433 Mass. 679, 687 (2005) (“The board is not required to address each and every legal issue, theory and case citation relied on by the respondent. . .” citing Hamilton v. Department of Public Utilities, 245 Mass. 130, 137

(1963); see also Catlin v. Board of Registration of Architects, 414 Mass. 1, 6 (1992)(also relying on Hamilton, “Although an agency's adjudicative body must review all the evidence in the record, it need only record findings which were necessary for it to decide the issue and provide the courts with a basis for judicial review. ... Thus, the choice by the board or, indeed, by a court not to refer in a decision to a particular piece of evidence does not imply the failure to consider that evidence when ruling on the issue.”) In Asselin v. Civil Service Commissioners, Hampden Superior Court, C.A. No. 98-1299, the court (Page, J.) affirmed a Commission decision relying, in part, on the Supreme Judicial Court decision in Catlin in this regard.

The APD also points to three alleged errors in the Dissenting Commissioner’s analysis concerning the number of “verbal altercations” during Mr. Araujo’s employment at the Norfolk Sheriff’s Office (pp. 42 and 44), one reference to the APD’s erroneous representation that Mr. Araujo “was going to be terminated” by that employer (p. 45) and two references in the Commission Majority’s analysis that the Norfolk County Sheriff’s Department considered him an “exemplary employee” who, contrary to the APD’s assertion, was never truly in jeopardy of termination (p. 56, bullet 5; p. 60, Chart). Each of these statements in the Decision is supported by the evidence, inferences and findings of fact and fully addressed in the Appellant’s Response to the Motion to Reconsider. Further, as noted in the Decision facts, early in his career at the Norfolk Sheriff’s Department which began in 2012, a supervisor commented that the Appellant was a by-the-book officer but it was not discipline or even counselling in regard to a specific event. Therefore, there is no “significant” factor that was overlooked about current employment history with the Norfolk County Sheriff’s Department.

Similarly, the APD is simply wrongheaded to assert that the Dissenting Commissioner and the Commission Majority erroneously concluded that the APD had improperly relied on alleged

misconduct, purportedly shown in Mr. Araujo's driving record and criminal history, which did not occur. (p. 48, ln. 1-3; p. 59, bullet 8 & 10; p. 59, Chart; p. 60, Chart). The findings and conclusion of the Dissenting Commissioner and the Commission Majority "overlooked" nothing, but correctly accounted for Mr. Araujo's two driving infractions (in 2002 and 2007), a record that was far less serious than the record of another hired candidate, and correctly concluded that, in fact, Mr. Araujo had no material criminal record. As the Decision explained, it is the APD that "overlooked" the true facts in this regard due, in part, to its use of ambiguous, inconsistent and improper questioning on these subjects, well beyond the bounds generally permitted by law.

The APD also asserts that the Commission Majority and Dissenting Commissioner erroneously interpreted or overlooked the facts in finding that the APD repeatedly harped on inquiries dwelling on Mr. Araujo's stale immigration history and tax status and that these inquiries constituted disparate treatment that could not be used as a reason for bypass. (pp. 45-46, 59, and 62) The APD's contention merely constitutes rearguing that the Commission should have made different findings and inferences and weighed and resolved the disputed evidence differently, but that is not grounds to seek reconsideration of the Decision. The Commission Majority and the Dissenting Commissioner stand by their findings and conclusions as reasonably supported by the preponderance of the credible evidence in the record. In particular, the Commission Majority and the Dissenting Commissioner did not overlook the fact that Mr. Araujo's federal complaint of discrimination was dismissed. Neither did the Commission overlook the fact that the Appellant had also filed a discrimination claim against APD at the MCAD which was pending at the time of the Decision. Moreover, the conclusion of the Commission Majority did not turn on whether Mr. Araujo had proved a claim of discrimination. Rather it was the preponderance of the evidence that he had been the victim of disparate

treatment barred under civil service merit principles (G.L. c. 31, s. 1) in that he was treated differently than other hired applicants (e.g., the one who bypassed the Appellant had received pay from an employer for hours he did not work and there is no indication that that selected candidate was asked about his income tax history), as well as the reasonable inference from the evidence of repeated inquiry of Mr. Araujo about his immigrant history, together with the highly unusual “piling on” of nearly two dozen spurious reasons for bypass, that inferred it was not, in fact, any of those spurious reasons, but that it was indeed, Mr. Araujo’s immigrant status that was the significant contributing factor to his being bypassed.

Finally, the remaining alleged errors made by the Commission Majority and the Dissenting Commissioner – i.e., discounting the use of psychological examination information (from Mr. Araujo’s prior “employment” as an APD Special Police Officer) containing hearsay about Mr. Araujo’s alleged drug use (pp. 42-43 and 61)(i.e. use of marijuana a decade or so ago) and the disputed evidence as to whether Mr. Araujo was allowed to resign before he was terminated from his position as an APD Special Police Officer (p. 45) – can be addressed summarily, as neither issue is material to the Commission Majority’s Decision. As to the former, the weight given to hearsay is a matter within the sound discretion of the Commission and, as to the latter, the Commission Majority’s conclusion did not rely on that point.

In sum, the APD’s Motion for Reconsideration is, as was its original bypass decision, a scattershot approach meant to hide the forest for the trees. Save for the clerical and mechanical errors noted above, neither the Commission Majority nor the Dissenting Commissioner find that the APD’s Motion for Reconsideration has identified any significant factor that was overlooked or requires modification. The Commission Majority stands by their Decision that the APD’s

bypass of Mr. Araujo was not reasonably justified and he deserves at least one more opportunity for a fair and impartial consideration.

Accordingly, for the reasons set forth above, the APD's Motion for Reconsideration is ***allowed in part*** (as to the clerical and mechanical errors identified) and otherwise ***denied***.

For the Commission Majority:

/s/ Christopher C. Bowman
Chairman

Dissenting Commissioner (as to clerical errors):

/s/ Cynthia A. Ittleman
Commissioner

By a 5-0 vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 12, 2018.

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:

Joao Paulo Leite Pereira de Araujo (Appellant)
Timothy D. Zessin, Esq. (for Respondent)
Melissa Thomson, Esq. (HRD)