

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

PETER FAY,
Appellant

v.

G1-07-378

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Peter Fay (hereinafter "Fay" or "Appellant") seeks review of the Personnel Administrator's (HRD) decision to accept the reasons of the Boston Police Department (hereinafter "Appointing Authority" or "BPD"), bypassing him for original appointment to the position of police officer. A pre-hearing was held

on January 7, 2008 and a full hearing was held on March 5, 2008 at the offices of the Civil Service Commission (hereinafter “Commission”). One tape was made of the hearing.

FINDINGS OF FACT:

Four (4) exhibits were entered into evidence at the hearing. Based on the exhibits submitted at the hearing and the testimony of the following witnesses:

For the Appointing Authority:

- Robin Hunt, Human Resources Director, Boston Police Department;
- Detective Bernadette Stinson, Recruit Investigations Unit, Boston Police Department;

For the Appellant:

- Peter Fay, Appellant;
- Maryann, Appellant’s girlfriend¹;

I make the following findings of fact:

1. The Appellant is a twenty-six (26) year old male who currently resides in Quincy with his girlfriend, Maryann. He graduated from Catholic Memorial High School in West Roxbury and took some classes at Merrimack College, Massasoit College and Salem State College.
(Testimony of Appellant)
2. The Appellant currently works for a glass company in Weymouth, MA. (Testimony of Appellant)
3. The Appellant took an open examination for the position of police officer in 2005.
(Stipulated Fact)

¹ In order to safeguard her identity, the Appellant’s girlfriend shall only be referred to as “Maryann” throughout this decision.

4. On January 17, 2007, the Appellant's name appeared on Certification 270048 for the position of police officer for the BPD. (Stipulated Facts)
5. The BPD filled 82 police officer positions from Certification 270048. Seven (7) of the candidates selected for appointment were ranked below the Appellant on the above-referenced Certification. (Stipulated Facts)
6. The BPD notified the Human Resources Division ("HRD") that it was bypassing the Appellant for appointment for the following reason:

"Mr. Fay was involved in an incident in July 2006 where police responded to a call from a friend to respond to a domestic situation between he and his girlfriend around 1:00 A.M. [Maryann], Mr. Fay's girlfriend at the time, explained that they were at a bar, both intoxicated, and began to argue. [Maryann's] friend who observed the fighting encouraged [Maryann] that she did not have to 'take this from him'. They left the bar in his car but shortly thereafter [Maryann] became more upset and asked to be let out with her friend so they could take a cab. They did and Mr. Fay followed the cab first to her friend's house and then to [Maryann's] house, prior to the cab even arriving at [Maryann's] house, where he was waiting inside. [Maryann] still had no interest in speaking to him, in her own words 'freaked out' and as a result, her friend called the police so that he would leave. He continued to fight with her even after the police were called.

Although Mr. Fay was not physically violent during the altercation, the Department is concerned over the lack of sound judgment when Mr. Fay chose to follow his girlfriend, first to her friend's house, and then on to her own house, to continue matters. According to [Maryann], they always had problems when alcohol was involved. This pattern of behavior was also troublesome

For the reasons cited above, the Boston Police Department finds Mr. Fay ineligible for appointment as a Boston Police Officer."
(emphasis added) (Exhibit 1)

7. All BPD recruit applications, including the background investigations, are reviewed by a "roundtable" consisting of several members, including Robin Hunt, Director of Human

Resources for the BPD in addition to the Commander of Recruit Investigations, a Deputy Superintendent from Internal Affairs and an attorney from the Legal Advisor's Office.

(Testimony of Hunt)

8. According to Ms. Hunt, all members of the roundtable agreed that the totality of the circumstances surrounding how the Appellant handled a July 2006 incident with his girlfriend rendered him unsuitable to be a Boston police officer. (Testimony of Hunt)
9. Ms. Hunt explained that the BPD heavily weighs whether a candidate had any prior encounters with law enforcement when making hiring decisions. Furthermore, the BPD examines how recent an incident may have occurred and the nature of what happened. If the BPD believes that a recruit reacted with poor judgment in a given situation, this may become a concern for the BPD. Ms. Hunt testified that officers are often confronted with volatile situations and it is their job to use sound judgment in diffusing the situation. (Testimony of Hunt)
10. Ms. Hunt is the consummate professional. She has a strong background in the area of human resources and she takes her job seriously. She provided the Commission with a thorough overview of the Boston Police Department's hiring process and offered credible testimony regarding the BPD's desire to ensure that police recruits are able to exercise sound judgment in volatile situations. She displayed no personal bias and/or ulterior motive for her decision, shared by all members of the roundtable, to bypass the Appellant for a relatively recent incident in which they concluded he exercised poor judgment. (Testimony, demeanor of Hunt)
11. Both the Appellant and Maryann, who is now the Appellant's girlfriend and resides with him, testified before the Commission.

12. Maryann testified that she and the Appellant have dated in the past and that within the past year they have become a couple. When the Appellant wanted to exclusively date her in July 2006, she was not ready for that type of commitment. (Testimony of Maryann)
13. In regard July 2006 night in question, Maryann testified before the Commission that she, the Appellant, and a girlfriend went a nightclub named “Gypsy” in downtown Boston. This girlfriend, who lives approximately ½ mile from Maryann’s mother’s house, has been a friend since Maryann was eight years old. (Testimony of Maryann)
14. Maryann testified that she consumed three or four drinks while at the bar and that the Appellant consumed two beers “at the most”. (Testimony of Maryann) The Appellant later testified that he consumed “a beer and a half” while at the bar. (Testimony of Appellant)
15. Maryann testified that after approximately one and a half hours in the bar, she wasn’t feeling well and asked the Appellant to drive her and her friend home. (Testimony of Maryann and Appellant)
16. The Appellant retrieved his car from a nearby parking garage and returned to the bar to pick up Maryann and the girlfriend. (Testimony of Appellant)
17. Shortly after all three of them were in the car, the Appellant and Maryann engaged in a verbal argument. At some point, Maryann told the Appellant that she would go and spend the night with another male friend that she was dating. The Appellant testified, “she [knew] that would hurt me”. The Appellant asked Maryann, “why don’t you take a cab home?” (Testimony of Appellant)
18. Maryann and her female friend then got out of the Appellant’s car and got into a cab that was stopped ahead of the Appellant’s car. Maryann and her friend asked the cab driver to drive

them to the home of Maryann's friend in Milton via Route 93 South. (Testimony of Maryann)

19. The Appellant made multiple unsuccessful attempts to call Maryann via cell phone while Maryann was en route to Milton in the cab. The Appellant proceeded to the home of Maryann's friend, where he believed the two women were going via cab. (Testimony of Appellant)

20. When she arrived at her girlfriend's home, Maryann saw that the Appellant was already there. She did not talk to him, instead she walked directly into her friend's house. (Testimony of Maryann) According to the Appellant, he and Maryann's friend exchanged heated words outside of house and the friend said words to the effect of, "say one more word and I'm going to call the police." (Testimony of Appellant)

21. The Appellant and drove to Maryann's mother's home. (The Appellant testified that he previously had plans to stay overnight with Maryann at that home.) Asked at the Commission hearing why he decided to go there, despite the heated argument with Maryann, the Appellant stated, "she (Maryann) said something she shouldn't have said and I wanted to confront her." (Testimony of Appellant)

22. A short time later, Maryann asked her friend to drive her home to her mother's house. (Testimony of Maryann) When she arrived there, she "freaked out" when she saw the Appellant's car in the driveway. (Testimony of Maryann) With Maryann in the front passenger seat, her girlfriend drove around the corner and called the Milton Police Department. (Testimony of Maryann) They remained in the car around the corner until the Milton Police Department responded. (Testimony of Maryann)

23. Three Milton police officers responded to the call, including a friend of Maryann's brother.
(Testimony of Maryann)
24. Upon seeing the blue flashing lights of the cruisers, the Appellant walked outside of the house and spoke to one of the responding officers. (Testimony of Appellant)
25. The Appellant told one of the police officers that he wanted to be a police officer and didn't want anything to put that in jeopardy. The Appellant was told by one of the Milton police officers to get in his car, leave the property and not contact Maryann any further that night.
(Testimony of Appellant)
26. Boston Police Detective Bernadette Stinson testified before the Commission that she conducted a background investigation on the Appellant as part of his application for employment with the Boston Police Department. As part of her investigation into the Appellant's background, Detective Stinson contacted the Wellesley Police Department to verify why the recruit was not hired by that department. As part of her contact with the Wellesley Police Department, Detective Stinson learned about the July 2006 incident referenced above. (Testimony of Detective Stinson)
27. Detective Stinson testified before the Commission that after receiving that information from the Wellesley Police Department, she asked the Appellant to provide a written explanation of the incident. (Testimony of Detective Stinson and Exhibit 4)
28. Detective Stinson testified that she asked both the Appellant and Maryann for the address of Maryann's girlfriend, but neither provided her with this information. (Testimony of Stinson)
29. When asked during this Commission hearing why he had not provided Detective Stinson with the address of Maryann's girlfriend, the Appellant testified that he had only met that person twice and did not know her exact address. (Testimony of Appellant)

30. Maryann testified that she supports the Appellant's desire to become a Boston police officer.

(Testimony of Maryann)

31. Even though her answers were geared toward portraying her now-boyfriend in a favorable light, Maryann was a good witness and she offered credible testimony before the Commission. Maryann, who was somewhat nervous testifying before the Commission, understandably seeks to downplay the events that occurred on the night in question. I find after listening to her testimony, however, that she did not want to see or speak with the Appellant after the verbal argument on the night in question. She did not expect to see him when the cab arrived at the girlfriend's house, she went directly into the home without speaking to him. Later that night, when she arrived at her mother's house, she was not comfortable going in with the knowledge that the Appellant was already inside. She testified that she told a responding police officer to "just get him off the street." (Testimony, demeanor of Maryann)

32. During his testimony before the Commission, the Appellant exhibited a personable and calm demeanor and testified credibly about his desire to become a Boston police officer. His recollection of events regarding the night in question was largely consistent with that of Maryann and the written statement he had provided at the request of Detective Stinson. I find, however, that he was less than candid in regard to why he could not provide Detective Stinson with the address of Maryann's girlfriend, an address less than ½ mile from Maryann's residence, an address that he drove to on the night in question, even arriving before the cab occupied by Maryann and her girlfriend. (Testimony, demeanor of Appellant)

33. When asked if he had he exercised good judgment on the night in question, the Appellant answered yes. (Testimony of Appellant)

CONCLUSION

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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). However, 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. City of Cambridge, 43 Mass. App. Ct. at 304.

I do not doubt the Appellant's sincere desire to serve the City of Boston as a police officer. However, in this case, the Boston Police Department has shown, by a preponderance of the evidence, that it had reasonable justification to bypass the Appellant. Specifically, the Boston Police Department bypassed the Appellant for exercising poor judgment in regard to an incident involving the woman who is now his girlfriend on an evening in July 2006, approximately seven months prior to his application for employment with the Boston Police Department. After reviewing all of the testimony and exhibits during the de novo hearing before the Commission, I reached the same conclusion, that the Appellant exercised poor judgment on the night in question.

Having concluded that the Appellant did not use good judgment regarding the events of July 2006, the Boston Police Department made a valid exercise in discretion based on sound policy considerations to bypass the Appellant. There is no evidence that the decision was based on political or personal bias or objectives unrelated to basic merit principles. Since the Boston Police Commissioner, not the Commission, bears the responsibility for how BPD officers conduct themselves on the job, the Commission should not overrule the Police Commissioner's hiring decisions if they are supported by reasonable justification. Boston Police Department v. Monroe and the Massachusetts Civil Service Commission, 2002 WL 445086 (Mass. Super.).

For all of the above reasons, the Appellant's appeal filed under Docket No. G1-07-378 is

hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman -Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; Stein, Commissioner – Yes; and Taylor, Commissioner - No) on July 17, 2008.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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.

Notice:

Joseph G. Donnellan, Esq. (for Appellant)
Sheila Gallagher, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)