

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

SEAN FINN,
Appellant

v.

Docket No. G1-05-441

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Representative:

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Respondent's Representative:

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Commissioner:

Donald R. Marquis

DECISION ON RESPONDENT'S MOTION TO DISMISS

Procedural Background

On December 28, 2005, the Appellant, Sean Finn (hereafter "Appellant"), appealed the Boston Police Department's (hereafter "the Department" or "BPD") decision to bypass him for employment as a Boston Police Officer due to his failure of the pre-employment psychological examination, pursuant to G.L. c. 31, § 2(b). The

appeal was timely filed. On March 20, 2006, a pre-hearing conference was held at the offices of the Civil Service Commission. On May 18, 2006, the Respondent submitted a Motion to Dismiss contending that the Appellant does not have Civil Service standing. On June 29, 2006, the Appellant filed an Opposition, as well as a Motion to Expedite Ruling on Respondent's Motion to Dismiss and Expedite Scheduling of the Final Hearing Date.

Factual Background

In 1979, the Department, with the approval of the Human Resources Division ("HRD"), established the Boston police cadet program. This program was established following the enactment of Chapter 174 of the Acts of 1978. Persons participating in the Boston Police cadet program must serve as cadets for at least two years, during which time they are to perform various administrative, police-related duties. Upon completion of the program, cadets are then eligible for consideration for hiring as permanent police officers. On June 15, 2001, the Appellant was appointed as a Boston police cadet. Sometime in June 2005, the Department requested a certification list from the HRD to make 23 original appointments to the October 31, 2005 Boston Police Academy. The HRD certified lists of eligible persons to be considered for appointment as new police officers on June 8, 2005, June 9, 2005 and June 27, 2005.

The Appellant, although he had passed the Civil Service examination, had not scored high enough to have his name placed among the eligible persons on these certified lists. However, since Finn had been a Boston police cadet from June 15, 2001 to

sometime in 2003, he was considered for these new positions under the Boston police cadet program. Under this program, the Department gave the Appellant a conditional offer of employment as a new Boston police officer. The condition for his hiring was that he successfully completes the same hiring process, which includes a medical and psychological examination as well as a physical agility test that all potential candidates must complete before they are allowed entrance into the Boston Police Academy.

As part of his psychological exam, the Appellant was required to take a battery of tests followed by interviews and an initial evaluation with Dr. Marcia Scott. He was subsequently sent for a second evaluation to Dr. Julia Reade. On November 30, 2005, Robin Hunt, Director of Department Human Resources, notified the Appellant that he had failed the psychological testing and that he would not be appointed as a Boston Police Officer. On December 28, 2005, the Appellant filed this appeal.

Respondent's Grounds for Dismissal

The Department argues that the Civil Service Commission lacks jurisdiction to hear the appeal because a police cadet is not entitled to the benefit of Civil Services laws. It argues that the Appellant was given a conditional offer of employment based solely on his status as a cadet and was not a tenured civil service employee at the time of his termination. Both parties cite Boston Police Department v Monroe and the Massachusetts Civil Service Commission, 2002 WL 445086 (Mass. Super.), a similar non-selection case, as well as G.L. c. 147, § 21A in their arguments.

The Department asserts that it may appoint police cadets to perform administrative duties and that these appointments are not subject to Civil Service laws or rules. G.L. c. 147, § 21A. In addition, the enabling legislation that established the cadet program (St. 1978, c. 174) was amended by Chapter 277 of the Acts of 1984 which states, in pertinent part:

“Notwithstanding the provisions of chapter thirty-one of the General Laws [which govern civil service], any person who has completed not less than two years of service as a police cadet in the police department of the city of Boston . . . may, subject to a program established by the police commissioner of said city and approved by the personnel administrator of the state division of personnel administration and the Massachusetts criminal justice training council, be appointed to fill a vacancy in the position in the lowest grade in the police force of said city without certification from an eligible list prepared under the provisions of chapter thirty-one of the General Laws; and provided further, that such person either is on a police entrance eligible list prepared under said chapter thirty-one or passes a qualifying examination to be given by said personnel administrator.”

The Department maintains that the Appellant was not bypassed for appointment, pursuant to G.L. c. 31, § 27, because his name did not appear on a Civil Service Certification List of eligible candidates. His conditional offer of employment was extended to him solely because of his having completed the police cadet program. St. 1984, c. 277.

In citing Monroe, the Department notes that the Civil Service Commission found that the Department had failed to prove that Monroe was psychologically unfit to perform the duties of a police officer. Subsequently, the Department sought review by the Superior Court pursuant to c. 30A, § 14. The Monroe court vacated the decision of the Civil Service Commission and held that, because Monroe was given a conditional offer

of employment based on his cadet status, the Commission did not have jurisdiction to hear his appeal.

Appellant's Arguments in Opposition

The Appellant argues that the Commission does have jurisdiction to hear his appeal. He contends that under the Respondent's cadet program, he has the right to appeal the recession of the conditional offer of employment as a police officer where his disqualification was based on his failing to meet the Civil Service requirement that a police officer be psychologically fit.

The Appellant maintains that, since the psychological screening requirement is a fitness standard under the provisions of G.L. c. 31, § 61, as promulgated by the Personnel Administrator, the requirement is a Civil Service standard for a police officer that must be met prior to employment. Where psychological fitness is a Civil Service requirement for a police officer and where the Department's own cadet appointment program, established pursuant to St. 1984, c. 277, provides that a cadet reached for permanent appointment pursuant to this statute has a right to appeal to the Personnel Administrator a disqualification based on his or her failure to meet the Civil Service requirements for a police officer, the Appellant's appeal can be properly heard by this Commission.

In his Memorandum in Opposition to the Motion to Dismiss, the Appellant states, in part:

“. . . psychological fitness *is* a Civil service requirement for a police officer. The Monroe court therefore got it wrong. The Monroe court

wholly disregarded M.G.L. c. 31, § 61 and the Civil Service requirement that police officer candidates pass a medical examination as a condition of their employment. The court also *wholly disregarded* the regulations implementing c. 31, § 61 which expressly make psychological fitness part of this medical examination and thereby a Civil Service criteria of employment. On this basis, this Commission *should* disregard both the lower court's decision in Monroe as well as the BPD's reliance upon this decision. Moreover, where Monroe is only a superior court decision which was not appealed to courts of higher jurisdiction and is not binding in law in Massachusetts, this Commission is *not* required nor bound by this decision despite the BPD's assertions to the contrary.

For these reasons, this Commission should deny the City's motion and allow Finn's appeal to go forward to hearing without further delay."

The Appellant alleges that there is nothing in any of the Massachusetts statutes and acts expressly prohibiting cadets from filing appeals with the Commission when they have been aggrieved during the permanent police officer hiring process.

Conclusion

By establishing the Boston police cadet program, the Legislature clearly created two separate pathways by which a person could become a permanent Boston Police Officer, a Civil Service position. A candidate may apply to and serve in the cadet program for a minimum of two years or that candidate can choose to take the Civil Service competitive examination and score high enough to be considered for an employment offer. In either instance, the candidate must pass the Civil Service written examination and satisfy medical, psychological and physical fitness requirements for the title of permanent police officer. St. 1984, c. 277. Both pathways are merit based in this sense. An argument can be made that the cadet program is even more merit based than

the traditional examination in that it provides a candidate with two year's worth of practical, on-the-job training prior to consideration for full employment.

Additionally, the cadet program offers an advantage to a candidate through preference in the order of hiring given to cadets over candidates on certified lists. St. 1984, c. 277 leaves the decision of which cadets to appoint to the permanent vacancies in the hands of the Boston Police Commissioner. The Police Commissioner may appoint as many as 1/3 of police officer vacancies from the ranks of the police cadets. St. 1979, c. 560, § 2. The balance of the new police officer appointments must then come from the certified list provided by the HRD.

We find that the provisions of St. 1984, c. 277 are unambiguously prefaced by the words, "*Notwithstanding the provisions of chapter thirty-one of the General Laws [which govern civil service]. . .*" The Legislature made provisions, by requiring approval of the program by the Personnel Administrator, for Civil Service standards and requirements for employment to be adopted by the Police Commissioner in order to construct the cadet program. Although cadets must meet these requirements and standards for job placement, they enjoy hiring preference and other advantages outside of the purview of the Civil Service laws and rules which non-cadets do not enjoy. Because their pathway to becoming permanent police officers is not within the provisions of chapter 31, they cannot be considered aggrieved parties under the statute and, therefore, their right to appeal to this Commission is necessarily diminished by their choice to seek employment through the cadet program.

The Appellant's contention that the Monroe court "got it wrong" and "wholly disregarded" the adopted requirements of c. 31, § 61 is refuted by the plain language of the Monroe decision. The decision states, in pertinent part:

"1. The Commission Was Without Jurisdiction to Review BPD's Decision

First, the Commission did not have jurisdiction to review the BPD's decision to rescind Munroe's conditional offer of employment as a police officer. . . . Munroe did not score high enough on the Civil Service Examination to be included on the certified list of those eligible for appointment under G.L. c. 31. He was given a conditional offer of employment only because, under St. 1984, c. 277, the Police Commissioner was permitted to select a certain number of police cadets as new police officers, provided they had received a passing score on the Civil Service Examination.

There is no dispute that the appointment of persons as police cadets is not subject to the civil service law or rules, and that a police cadet is not entitled to the benefit of civil service law or rules. G.L. c. 147, § 21A. Nor can there be any dispute that, under St. 1984, c. 277, the BPD has the discretion to determine which cadets it would appoint as new police officers. St. 1984, c. 277 left such decisions in the hands of the Boston Police Commissioner, provided the cadet program he established was approved by the Personnel Administrator of what was then called the Division of Personnel Administration. The cadet program submitted to the Personnel Administrator on June 27, 1978 and approved by him on January 16, 1979 provided for four steps in that appointment process:

1. the qualified cadet submits a detailed history background form;
2. the cadet undergoes the same background screening, interviewing, and psychological and medical testing as candidates on the certified list;
3. the candidate applicant is rated and ranked by a panel of three members of the Command Staff; and
4. the Police Commissioner considers the cadet applicants "in order of their standing in the Command Staff ranking."

. . . Apart from approving the cadet program, the Personnel Administrator has no role in the decision of which cadets to appoint as new police officers; that decision rests solely with the Boston Police Commissioner. The appointment of these cadets as police officers, plain and simple, is outside the scope of the civil service law and rules under G.L. c. 31, and therefore outside the scope of the Commission's review. See G.L. c. 31, §

2 (Commission review limited to those “aggrieved” because of decisions, acts, or failures to act that were in violation of G.L. c. 31, or in violation of “the rules of basic merit principles promulgated thereunder”).

2002 WL 445086 (Mass. Super.) at pp. 4 - 5.

This Commission is keenly aware that it is not bound by a Superior Court decision. Nonetheless, in this matter we agree with the basic tenets set forth in Monroe. We find that the Appellant is not an aggrieved party under the provisions of G.L. c. 31 and has failed to state a claim upon which a remedy can be granted. Therefore, the Commission lacks jurisdiction to hear this appeal.

For the above reasons, the Respondents’ Motion to Dismiss is allowed and the Appellant’s appeal filed under Docket No. G1-05-441 is hereby *dismissed*.

Civil Service Commission

Donald R. Marquis
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Taylor, Guerin and Marquis, Commissioners) on August 23, 2007.

A true copy. Attest:

Commissioner

A motion for reconsideration may be filed by either party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with GL c. 30A, s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to GL c. 31, s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under GL c. 30A, s. 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 to:

Leah Marie Barrault, Esq.

Boston Police Department, Office of the Legal Advisor