

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

GREGG M. GERBUTAVICH,
Appellant

v.

G1-06-3

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, Gregg Gerbutavich (hereafter "Gerbutavich" or Appellant") seeks review of the Personnel Administrator's decision to accept the reasons of the Boston Police Department (hereafter "Appointing Authority", "City" or "BPD"), bypassing him for original appointment to the position of

police officer. A full hearing was held on February 7, 2007 at the offices of the Civil Service Commission. One tape was made of the hearing.

FINDINGS OF FACT:

Sixteen (16) exhibits were entered into evidence at the hearing (Joint Exhibits 1-8; Appellant Exhibits 9 & 16; Appointing Authority Exhibits 10-15). Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Robin Hunt, Director of Human Resources; Boston Police Department;
- Deputy Superintendent Marie Donahue; Boston Police Department;

For the Appellant:

- Gregg Gerbutavich, Appellant;

I make the following findings of fact:

1. The Appellant is a thirty-four (34) year old male from South Boston. He graduated from Don Bosco Technical High School in 1990 and received a bachelors degree from North Adams State College in 1995. He is employed (and was at the time of his bypass) as an Account Executive for USA Mobility in Dedham. (Exhibit 3)
2. The Appellant took an open examination for the position of police officer in 2003. (Exhibit 7)
3. On June 8, 2005, the Appellant's name appeared on Certification 250537 for the position of police officer for the Boston Police Department. (Exhibit 7)
4. The Boston Police Department filled 61 police officer positions from Certification 250537. Eleven (11) of the candidates selected for appointment were ranked below the Appellant on the above-referenced Certification. (Exhibit 7; Stipulated)

5. On November 10, 2005, the Boston Police Department notified the state's Human Resources Division (HRD) that it was bypassing the Appellant for appointment for the following reasons: a) On March 14, 2004; the Appellant was arrested by the New Hampshire State Police for the offense of Driving While Intoxicated. On April 27, 2004, Mr. Gerbutavich entered a plea of guilty and was fined \$350.00 in Plymouth District Court in the State of New Hampshire; b) the Appellant was terminated from his employment with FedEx for failing to notify his supervisor of the New Hampshire DWI incident in a timely manner; and c) the Appellant's driving history was deemed to be "highly problematic and of significant concern." (Exhibit 1)

DWI Incident

6. Approximately one year after taking the civil service examination for the position of police officer, the Appellant was arrested for Driving While Intoxicated in New Hampshire on March 14, 2004. (Testimony of Appellant; Exhibit 11)
7. The New Hampshire State Police Trooper who stopped the Appellant on March 14, 2004 completed an Incident Report which was entered as Exhibit 11 at the Commission hearing. (Exhibit 11)
8. According to the above-referenced incident report, the Trooper stopped the Appellant at approximately 1:25 A.M. after the Appellant pulled into the oncoming path of another car while taking a left turn. (Exhibit 11)
9. After observing "the odor of alcohol in addition to the fact that the Appellant had a flushed face, thick speech, slow and hesitant speech; slow and awkward movements; poor dexterity while looking for his wallet"; and the fact that the Appellant would not

make eye contact with him; the State Trooper administered a series of sobriety tests.
(Exhibit 11)

10. The Trooper's observations from the "Balance" test were as follows: "Obvious sway; wide and circular; almost fell against car 2 times; obvious difficulty with balance; never complained about back; never saw him show signs of pain / discomfort; count estimate: 25". (Exhibit 11)

11. The Trooper's observations from the "Finger to Nose" test were as follows: "Asked to stand normally; missed finger to nose on all 4 attempts; swaying noticeably; difficulty with balance; slow / steady arm movements; never complained of back; showed no signs of pain." (Exhibit 11)

12. The Trooper's observations from the "Walking" test were as follows: "Walked off and on heel to toe; couldn't touch heel to toe; walked normal gait on other steps; very unsteady on his feet; cross stepped several times. Arms extended at times to keep balance; almost fell against car when he turned; hesitant with gait on many steps; never complained of back pain; showed no signs of discomfort." (Exhibit 11)

13. The Trooper's observations from an "HGN" test were as follows: "All points distinct; eyes blood shot; eyes glazed; 6/6 points." (Exhibit 11)

14. Based on the above-referenced tests administered by the Trooper, the Appellant was arrested for DWI. He later refused a breathalyzer test. (Exhibit 11)

15. On his way to the police station, the Appellant asked the State Trooper if he could simply place him in protective custody as opposed to arresting him. (Exhibit 11)

16. On April 27, 2004, the Appellant pled guilty to "Operating Under the Influence; agreed to pay a \$350.00 fine; had his privilege to operate revoked for 9 months with 6

months suspended upon entrance into IDIP within 45 days and successful completion thereof.” (Exhibit 14)

17. During his testimony at the Commission hearing, the Appellant testified that he had three beers on the night in question at a local bar in New Hampshire between 12:00 midnight and 1:30 A.M. When asked during cross-examination if he failed the “Finger to Nose” test administered by the Trooper on the night in question, the Appellant answered “no” only to recant his testimony after being shown a copy of the Trooper’s incident report. (Testimony of Appellant)

Termination from FedEx

18. Prior to his arrest for Driving While Intoxicated, the Appellant was employed part-time at FedEx. (Testimony of Appellant)
19. As referenced above, the Appellant pleaded guilty to Driving While Intoxicated on April 27, 2004. (Exhibit 14)
20. According to the Appellant, he notified FedEx of the incident on April 28, 2004, one day after entering his guilty plea. (Testimony of Appellant)
21. According to the Appellant, he was unaware that FedEx policy required employees to notify them upon being arrested for DWI (on March 14, 2004), as opposed to waiting to notify them until the case was disposed of (via a guilty plea on April 27, 2004).
22. For violating the above-referenced policy, the Appellant was terminated from FedEx. (Testimony of Appellant)

Driving Record

23. In addition to the above-referenced DWI, the Appellant’s driving includes the following violations:

01/30/90 ONE WAY STREET BOSTON R
05/16/91 SPEEDING LEOMINSTER
07/15/91 RT OF WAY INTERSECTION BOSTON
01/31/96 FAILURE TO STOP BOSTON NR
04/18/96 SURCHARGEABLE ACCIDENT MEDFORD
10/04/96 FAILURE TO STOP S BOSTON R
10/22/96 MASS PIKE SPEED MILLBURY R
03/08/99 SURCHARGEABLE ACCIDENT BOSTON
07/20/99 FAILURE TO STOP REVERE R
08/25/99 SUSPENSION PAYMENT DEFAULT INDEFINITE

Issue of Disparate Treatment

24. The Appellant argues that the Boston Police Department has hired individuals with more serious violations than those committed by the Appellant.
25. On April 13, 2006, the Appellant sought from the Boston Police Department, among other things, the criminal record of any individual appointed as police officer by the City of Boston for the past ten (10) years. (Exhibit 9)
26. Robin Hunt, Director of Human Resources for the Boston Police Department, could not explain why the City only provided the Appellant with information regarding officers appointed in calendar years 2005 and 2006. (Testimony of Hunt)
27. According to Ms. Hunt, two applicants selected for appointment as police officers by the Boston Police Department in the last two classes were arrested for Operating Under the Influence. According to Ms. Hunt, these two individuals were not bypassed for appointment as the charges were dismissed in both cases and the incidents occurred 8 – 10 years ago. When asked by this Commissioner if either of those applicants has a relative employed by the Boston Police Department, Ms. Hunt indicated that one of the two applicants is related to a sworn officer in the Department and has a sister that works for the Department as a clerk. (Testimony of Hunt; Exhibit 4 & 5)

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, s. 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 the 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, 334 (1983). See Commissioners of Civil Serv. 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.

Gregg Gerbutavich took and passed the civil service examination for the position of police officer in 2003. He scored high enough to rank among those individuals to be considered for appointment as a police officer to the Boston Police Department, no small feat for an applicant, such as the Appellant, who does not qualify for the absolute statutory preference afforded to veterans who take and pass the same exam. A long-time resident of South Boston and a graduate of Don Bosco Technical High School, the Appellant is a likeable, well-mannered man with a sincere desire to serve his community as a police officer.

Unfortunately for the Appellant, approximately one year after taking the above-referenced exam, he exercised horrible personal judgment that led to his arrest for Driving While Intoxicated. While visiting his sister at a college in New Hampshire, the Appellant and a friend went out for pizza and ended up at a local bar. The Appellant acknowledges that he consumed three beers between 12:00 midnight and 1:30 A.M. before getting behind the wheel of his car. While driving back from the bar, the Appellant turned into oncoming traffic while making a left turn, forcing another car to veer off to the parking lane. A New Hampshire State Trooper witnessed the incident and stopped the Appellant, who was driving the car. The Appellant failed a series of sobriety tests and later refused to take a breathalyzer test. The detailed incident report of the New Hampshire State Trooper was admitted as an exhibit and clearly shows the Appellant,

who on at least two occasions almost fell against the car while taking the tests, as an individual who should not have been operating an automobile on the night in question. Given the serious nature of the incident, and the central role it plays in this appeal, it was troubling to hear the Appellant initially deny that he failed the “Finger and Nose” portion of the tests administered by the New Hampshire State Trooper. Notwithstanding the Appellant’s memory lapse on this point, he did indeed plead guilty to Operating Under the Influence, paid a fine and had his license suspended. Further, he waited several weeks to notify his then-part-time employer, FedEx, of the arrest, violating their policy regarding the need to immediately notify them of such arrests. The Appellant’s testimony that he wasn’t aware of the FedEx policy, much like his failure to recall failing a key component of the test administered by the New Hampshire State Trooper, rings hollow with this Commissioner.

Finally, the Appellant has failed to show that the Appointing Authority has engaged in disparate treatment regarding the treatment of similarly situated applicants. While two applicants from the two most recent class of police officers were arrested for Operating Under the Influence, the charges were dismissed and the incidents occurred 8 – 10 years ago. Those facts, as summarized by the City’s Director of Human Resources, distinguish those Appellants from Mr. Gerbutavich, who pleaded guilty to the charge of Operating Under the Influence only one year after taking the police officer civil service examination. Further, there is no evidence showing that the fact that one of these applicants has relatives employed by the Boston Police Department influenced the City’s decision-making process.

After considering all the testimony and evidence in the record, I conclude that the Boston Police Department had sound and sufficient reasons for bypassing the Appellant for selection as a police officer in the City of Boston and there is no evidence of inappropriate motivations or objectives that would warrant the Commission's intervention in this matter.

For all of the above reasons, the appeal under Docket No. G1-06-3 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Bowman, Guerin and Marquis, Commissioners [Goldblatt, Chairperson, Taylor, Commissioner – Absent]) on March 1, 2007.

A true record. 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 M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:
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Tsuyoshi Fukuda, Esq.
John Marra, Esq.