

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

THOMAS CONNELLY,
Appellant

v.

G1-07-110

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

Leah Barrault, Esq.
Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan
18 Tremont Street
Boston, MA 02139

Respondent's Attorney:

Sheila B. Gallagher, Esq.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant, Thomas Connelly, (hereafter "Appellant"), seeks review of the Human Resources Division's (hereafter "HRD") decision to accept reasons proffered by the Respondent-Appointing Authority, Boston Police Department (hereafter "Department" or "Appointing Authority"), for the bypass of the Appellant for original appointment to the position of Boston police officer. The reason proffered for the bypass – more specifically, the removal of the Appellant's

name from the eligibility list in accordance with Personnel Administration Rule (PAR) .09 (2) - and accepted by the HRD was that the Appellant failed to disclose that he was terminated from a previous job on his Department employment application. The appeal was timely filed. A full hearing was held on October 3, 2007, at the offices of the Civil Service Commission (hereafter "Commission"). Witnesses offering sworn testimony were not ordered to be sequestered. Two audiotapes were made of the hearing. The parties submitted proposed decisions thereafter, as instructed.

FINDINGS OF FACT:

Based on the documents entered into evidence (Joint Exhibits 1-5) and the testimony of the Appellant, Edward Callahan and Detective Lanita Cullinane from the Boston Police Department and Melissa Henrikson from Gold's Gym of South Boston, I make the following findings of fact:

1. The Appellant is a twenty-six year old male who was born and raised in Massachusetts. His life-long dream has been to become a police officer with the Boston Police Department. The Appellant received his Bachelors degree in political science from UMass-Boston. (Testimony of Appellant)
2. The Appellant enlisted in the U.S. Army Reserve sometime in December of 2002 and he remains an army reservist to present. He was inspired to join the armed forces in response to the September 11, 2001 terrorist attacks on the United States. As a condition of his enlistment with the Army, the Appellant is required to attend monthly weekend trainings as well as two longer, more intense training sessions each year. The Appellant volunteered to go on an army law and order

- mission to Italy in 2005 and an army housing assistance mission to Panama in 2006. The Appellant has never received discipline from the Army and he holds a perfect attendance record. Additionally, the Appellant is in receipt of several commendations for his service over the years. (Id.)
3. The Appellant's employment history shows that he was hired by the Middlesex Sheriff's Office ("MSO") as an intern sometime in 2004. He was shortly thereafter promoted to the full-time position of Court House Security. Sometime in the spring of 2005, the Appellant was subsequently promoted again to the position of full-time Deputy Sheriff/Corrections Officer and he has remained in that position to present. (Id.)
 4. The Appellant has a spotless disciplinary record with the MSO. Additionally, the Appellant has had no issues with attendance or use of sick leave. (Id.)
 5. Prior to his joining the MSO, the Appellant held employment positions with the U.S. Army and Securitas USA. Additionally, while still employed with the MSO, the Appellant testified that held a side job with Gold's Gym for approximately one month. (Id.)
 6. Sometime in 2006, the Appellant's name appeared on Certification 260616 for the position of police officer with the Department. On July 15, 2006, the Appellant signed his Student Officer Application and submitted it to the Department. (Exhibits 1 and 3)
 7. Edward Callahan, (hereafter "Mr. Callahan"), the former Director of Human Resources at the Department for over nineteen (19) years, testified about the hiring process for becoming a Boston Police Officer. Mr. Callahan explained that

every candidate submits an application to the Department. Once the application is submitted, Detectives from the Department's Recruit Investigation Unit (hereafter "RIU"), conduct background investigations on each applicant. The information is later presented at a "roundtable" discussion. Typically, the "roundtable" discussion involves the Commander of the RIU, the Director of Human Resources, a Deputy Superintendent from Internal Affairs, and an attorney from the Legal Advisor's Office. If a recruit's application is unclear or the results of the background investigation need further clarification, a candidate may be asked to participate in a discretionary interview. (Testimony of Edward Callahan)

8. Detective Lanita Cullinane (hereafter "Detective Cullinane") has worked for the Department for twelve (12) years. Her current assignment is in the RIU. Detective Cullinane described how she conducts background investigations on candidates. All applicants partake in a three (3) hour orientation. At this orientation, the RIU explains the Student Officer Application thoroughly. Applicants are advised to disclose everything, even if it includes negative employment history or a criminal record. According to Detective Cullinane, applicants can provide an explanation for anything that is unclear on their application. All applicants are told to provide employment records for their previous three (3) employers. (Testimony of Detective Cullinane)
9. Detective Cullinane testified that she asked the Appellant for his employment records regarding his last three (3) employers. The Appellant provided records from the last two (2) employers, omitted records from his third employer and he gave documents from his fourth, previous employer. According to Detective

Cullinane, when the Appellant failed to provide personnel records from his third employer, Gold's Gym, a "red flag" was raised. (Id.)

10. Detective Cullinane contacted Gold's Gym and was told that the Appellant had been terminated from that job. Detective Cullinane spoke with Melissa Henrikson (hereafter "Ms. Henrikson"), the Gold's Gym regional manager, and was informed that an on-duty manager "terminated" the Appellant for missing scheduled shifts. Ms. Henrikson faxed over a confirmation letter of the Appellant's termination to Detective Cullinane. Detective Cullinane was told by Ms. Henrikson that the Appellant received personal notice of the fact that he was terminated. (Testimony of Detective Cullinane and Exhibit 5)

11. After speaking with Ms. Henrikson, Detective Cullinane questioned the Appellant about his termination from Gold's Gym. She asked the Appellant why he checked "NO" on page 10, question 1, when asked if he was ever "terminated from a job?" The Appellant stated that he was not "terminated." He said he had resigned by providing notice to his girlfriend, Tanya Kawecki (hereafter "Ms. Kawecki"), who was also an employee at Gold's Gym. The Appellant stated that he never called a supervisor or put anything in writing to verify his resignation and he just stopped showing up for work. The Appellant told Detective Cullinane that he worked at Gold's Gym for a free membership and did not really care about this part-time job. (Testimony of Detective Cullinane)

12. When questioned at the hearing about his answer to question 1 on page 10 of his application, the Appellant stated that he did not think it was important to provide information regarding the part-time employment since he only worked at Gold's

Gym for a short period time. The Appellant also stated that he had resigned and was not aware that he was fired. (Testimony of the Appellant)

13. Ms. Henrikson testified about the circumstances surrounding the Appellant's separation from Gold's Gym. Ms. Henrikson has worked as a regional manager for Gold's Gym for three and one-half (3½) years and she testified that the Appellant worked for the South Boston Gold's Gym from March 2005 to April 2005. Ms. Henrikson testified that Rachel Pridgeon, (hereafter "Ms. Pridgeon") a manager in the South Boston Gold's Gym, personally informed her that she (Ms. Pridgeon) terminated the Appellant for not showing up for scheduled shifts. According to Ms. Henrikson, Ms. Pridgeon called her when she terminated the Appellant. Ms. Henrikson was informed by Ms. Pridgeon that the Appellant yelled at her in the lobby, threw staff shirts at her and threatened that he knew she walked to the Transit station at night, when Ms. Pridgeon fired him. (Testimony of Ms. Henrikson)

14. The Appellant denied having any confrontation with Ms. Pridgeon. The Appellant admitted that when he received a voicemail message from Ms. Pridgeon indicating that he was fired, he went to the gym to drop off his staff shirts. While returning the shirts, the Appellant admitted that he exchanged words with Ms. Pridgeon in the lobby of the South Boston Gold's Gym. The Appellant denied making threats or throwing shirts at Ms. Pridgeon. (Testimony of Appellant)

15. I credit the testimony of the Appellant relative to the events surrounding his last contact with Ms. Pridgeon and Gold's Gym. The Appellant presented to the

Commission as a sincere, even-tempered individual. He was neat of appearance and answered all questions posed of him confidently and without hesitation lending credence that his statements were sincere. His military and law enforcement training were evident in his speech and comportment. I do not credit the testimony of anything that Ms. Pridgeon may have informed Ms. Henrikson, as Ms. Pridgeon did not appear to testify on her own behalf. Therefore, I dismiss any testimony attributed to Ms. Pridgeon's words or actions as hearsay. The issue as to whether the Appellant resigned or was terminated is a "he-said, she-said" scenario. I find that the Appellant resigned – although that word seems lofty for a 3-hour per week activity – as the Appellant's version is heavily weighted by both his credibility and the absence of testimony from the disputing party, Ms. Pridgeon. (Testimony and Demeanor of Appellant)

16. When reviewing the Appellant's application at the "roundtable," Mr. Callahan indicated that the Appellant's failure to disclose that he was terminated by Gold's Gym on page 11 Section J of his application and that he had argued with a Gold's Gym Supervisor on page 11 Section I of his application demonstrated a lack of truthfulness on the Appellant's part. Mr. Callahan stated that since applicants receive a three (3) hour orientation on how to complete the Student Officer Application, the Department weighs heavily when an individual fails to answer truthfully on an application. All members of the roundtable discussion pertaining to the Appellant agreed that the Appellant's failure to reveal information surrounding his employment with Gold's Gym raised a truthfulness issue and

made the Appellant an unsuitable candidate as a Boston Police Officer.
(Testimony of Mr. Callahan.)

17. Mr. Callahan is a long-time employee of the Department. He served over 18 years as Director of Human Resources (HR) and he testified that he was filling in for current HR Director Robin Hunt (hereafter “Ms. Hunt”). Mr. Callahan is well respected for his institutional knowledge and professionalism by the Commission. He credibly testified that he only recommended the Appellant be bypassed and not PAR .09 (2) removed from the certification list. That request was made of HRD by Ms. Hunt by letter dated January 10, 2007. (Testimony of Mr. Callahan and Exhibit 3)

18. The Appellant testified that he was a “floor boy” at Gold’s Gym. He was hired as an employee at will by Ms. Kawecky who was Gold’s Gym floor manager and his girlfriend at that time. He related that there was no formal hiring process or training involved. The Appellant worked a three (3) hour shift on Fridays (6 pm – 9 pm) but sometimes on Sundays, instead, for \$8.00 per hour and the use of gym equipment to stay fit. He stated that his primary duties were to clean and sanitize the exercise equipment and keep the floor area neat and tidy. While working he reported directly to Ms. Kawecky and had little to no interaction with other supervisors, managers or staff. However, the Appellant did recall Ms. Pridgeon giving him a “hard time” about his needing Sundays off from work to attend army reserve training. (Testimony of Appellant.)

19. The Appellant testified that he resigned from Gold’s Gym sometime in late April or early May of 2005. He notified Ms. Kawecky that he was resigning. She did

not instruct him to put his resignation in writing nor was the Appellant aware of any gym rule or policy requiring him to put his resignation into writing. The Appellant resigned because he had been promoted to the position of Deputy Sheriff/Corrections Officers with the MSO and was therefore required to attend an intense 19-week training program beginning in June of 2005. Additionally, the Appellant wanted to travel to Germany before his training to see his brother who was being deployed to Iraq. (Id.)

20. Subsequent to his resignation, the Appellant stated that he did receive a telephone message from Ms. Pridgeon informing him that he was terminated for failing to show up for shifts and instructing him to return his uniform. The Appellant brought his uniform to the gym. He attempted to explain to Ms. Pridgeon that he had already tendered his resignation. However, she refused to speak with him. The Appellant credibly testified that he then left and never gave the telephone message from Ms. Pridgeon a second thought, considering it to be just another instance of her giving him a hard time. The Appellant never received a letter or notice from Gold's Gym notifying him of termination. Ms. Henrikson testified that she had no interactions with the Appellant while he was employed at Gold's Gym. She never disciplined the Appellant nor does she have personal knowledge that the Appellant failed to show up for shifts. Ms. Henrikson has no personal knowledge regarding the circumstances surrounding the Appellant's separation from the gym. (Testimony of Ms. Henrikson and Appellant)

21. The Appellant did not produce a personnel file for Gold's Gym South Boston and this employer was among his previous three (3) employers. The Appellant did,

however, list Gold's Gym in his application and he provided the Department a waiver allowing the Department to contact Gold's Gym regarding his employment. The Appellant omitted his file from Gold's Gym because he said he believed it was a casual job for which he actually performed duties for a total of one (1) month and he believed that the Department would be more interested in receiving personnel files from previous jobs that he held on a full-time basis and for longer periods of time. (Testimony of Appellant and Detective Cullinane)

22. The Appellant was officially bypassed for appointment as a Boston police officer and, moreover, was PAR .09 (2) removed from certification number 260616 on January 10, 2007. (Exhibit 3)

23. PAR .09 (2) states:

“If an appointing authority concludes the appointment of a person whose name has been certified to it would be detrimental to the public interest, it may submit to the administrator a written statement giving in detail the specific reasons substantiating such a conclusion. The administrator shall review each such statement, and if he agrees, he shall remove the name of such person from the certification and shall not again certify the name of such person to such appointing authority for appointment to such position. For the purposes of this section, ‘appointments’ shall include promotions.”

A PAR .09 (2) removal from a certification list is a more egregious personnel action to take against a candidate for selection than a simple bypass. If a candidate is bypassed, he or she remains on the certified list to be eligible for any subsequent rounds of selection from that list. In contrast, a PAR .09 (2) removal precludes the candidate from any such further consideration. This is a tool that can be used by the various Appointing Authorities to ensure that candidates who pose a threat to the public interest are excluded from any consideration for a given

position. Common examples of such candidates include, but are not limited to, those persons with extensive criminal histories, significantly adverse driving histories, extremely poor employment histories, etc. I find that it defies any standard of reasonable justification that the Appellant, even remotely, fits into the category of being “detrimental to the public interest” and it remains something of a mystery as to how this particular determination was made by the Department. This is especially disturbing in light of Mr. Callahan’s testimony that he did not recommend a PAR .09 (2) removal of the Appellant. (Administrative Notice and Testimony of Mr. Callahan)

24. The Appellant was notified on February 1, 2007 by the HRD of his removal from the list and subsequently filed this bypass appeal with the Commission. (Administrative Notice)

CONCLUSION:

The Civil Service Commission grants wide latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion. Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987). In a bypass appeal, the CSC must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was “reasonable justification” for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority’s actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided

by common sense and 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).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, the Commission must consider the fundamental purpose of the Civil Service System which is “to protect against overtones of political control, objectives unrelated to merit standards and assure neutrally applied public policy.” If the Commission finds that there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy”, then it should intervene. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. City of Cambridge at 304.

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). All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.” Borelli v. MBTA, 1 MCSR 6 (1988).

The Department's written explanation to the HRD in support of the Appellant's removal was that the explanation he provided regarding the reason for his separation from Gold's Gym, "opportunities with MSO," was false. The Department, however, failed to produce any credible evidence that the Appellant's explanation was in fact untruthful. To the contrary, the Appellant testified credibly at hearing that he worked at Gold's Gym for a total of approximately one (1) month from approximately March to late April/early May of 2005. He was hired by his then girlfriend, Tanya Kawecki, and when he worked he reported directly to Ms. Kawecki. He received no discipline from Gold's Gym. Sometime in late April/early May of 2005, the Appellant was promoted to the position of Deputy Sheriff/Corrections Officer for the MSO and because he had to participate in an intense 19-week training period in June of 2005, and he wanted to travel to Germany to see his brother who was being deployed to Iraq, he gave a verbal two-week resignation to Ms. Kawecki.

The Appellant admits that subsequent to his separation from Gold's Gym he did receive a telephone voice message from Ms. Pridgeon indicating that he was terminated, however, the Appellant had already resigned from his position at Gold's Gym. The Appellant never received a termination notice or any documentation from Gold's Gym stating that he had been terminated or that his resignation had been rescinded. Ms. Pridgeon had harassed the Appellant in the past regarding his military service and his need to have Sundays off for training and the Appellant, therefore, reasonably believed that Ms. Pridgeon's telephone voice message to him was nothing more than a

continuation of that harassment and a unilateral act on her part. We find that the Appellant reasonably believed that he had voluntarily resigned his employment.

The only evidence proffered by the Department substantiating that the Appellant's explanation that he had resigned from Gold's Gym was false consisted of a August 4, 2006 letter from Ms. Henrikson to Detective Cullinane (not the Appellant) stating that the Appellant had been terminated for "not showing up for scheduled shifts" and Ms. Henrikson's hearsay testimony at the hearing before this Commission on October 3, 2007. Ms. Henrikson did not produce a termination letter or notice addressed to the Appellant nor did she offer any evidence whatsoever demonstrating that the Appellant had failed to show up for his scheduled shifts. Indeed, Ms. Henrikson admitted at hearing that she had no interactions with the Appellant while he was employed at Gold's Gym, she never disciplined the Appellant nor does she have any personal knowledge that the Appellant failed to show up for shifts and, most importantly, she has no personal knowledge regarding the circumstances surrounding the Appellant's separation from the gym.

Detective Cullinane learned from Gold's Gym that the Appellant had been purportedly terminated. When she confronted the Appellant regarding this information he insisted to her that he had resigned and that the information he provided in his application was truthful and accurate. The Appellant offered to come in and speak with the Detective about this discrepancy and offered to provide an affidavit from Ms. Kawecki regarding his resignation. Despite Ms. Henrikson's failure to provide any evidence to Detective

Cullinane that the Appellant had been terminated other than what Ms. Henrikson had alleged to have heard from one of her floor managers and despite the Appellant having an otherwise outstanding and unblemished record, Detective Cullinane simply decided to credit the gym's version of events and deem the Appellant dishonest. According to Detective Cullinane's own testimony, the Department was well within its rights and means to hold a discretionary hearing with the Appellant with respect to his employment with Gold's Gym, however, the Department failed to hold such a hearing. Where Gold's Gym had not produced an adequate termination notice and where the Appellant was an otherwise exemplary candidate with police and military experience, the Department owed it to the Appellant to give him a hearing and a fair opportunity to show that his representations were truthful. The Appellant was given no such opportunity.

Additionally, there is simply no evidence to suggest that the Appellant was attempting to be "deliberately untruthful" to the Department in his application regarding the circumstances surrounding his separation from Gold's Gym or that he was trying to keep critical information from the Boston Police Department about that job. The Appellant reasonably believed that his prior verbal resignation prevailed and that Ms. Pridgeon's voice message indicating that he had been terminated was not only well after the fact but was also never substantiated through an in-person verbal notice or subsequent written notice. Moreover, the Appellant maintained that his representations regarding his voluntary separation from Gold's Gym – a job that, frankly, could not have been more casual employment - were truthful and accurate when he was questioned by Detective Cullinane.

For all of the reasons discussed herein and based upon a preponderance of the credible evidence adduced at hearing, the Commission finds that the Department has not sustained its burden of proving reasonable justification for removing the Appellant from certification list number 260616 pursuant to PAR .09 (2) because its reasons for doing so are incapable of substantiation. Therefore the appeal on Docket No. G1-07-110 is hereby *allowed*.

Pursuant to its powers of equitable relief inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts and Resolves of 1993, the Commission hereby orders the Human Resources Division to take the following action:

The name of Thomas G. Connelly shall be placed at the top of the current certification list for original appointment to the position of Police Officer in the Boston Police Department and at the top of any subsequent list until such time as he has received an opportunity for consideration for selection.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Taylor, Henderson, Marquis and Guerin, Commissioners) on February 28, 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)(1), 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 to:

Leah M. Barrault, Esq.

Sheila B. Gallagher, Esq.