

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

RICHARD A. ESCOBAR,
Appellant

v.

G1-05-214 & G1-06-93

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, Richard A. Escobar (hereafter "Escobar" 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 pre-hearing was held on September 1, 2005 and a status conference was held on September 13, 2006.

A full hearing was held on March 5, 2008 at the offices of the Civil Service Commission. One tape was made of the hearing.

FINDINGS OF FACT:

Eighteen (18) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Robin Hunt, Human Resources Director, Boston Police Department;
- Sergeant Detective Norman Hill; Boston Police Department;

For the Appellant:

- Richard Escobar, Appellant;

I make the following findings of fact:

1. The Appellant is a twenty-six (26) year old male from East Boston. He graduated from Madison Park Technical / Vocational High School in 1999. He is currently, and was at the time of his bypass, a bank protection officer for a company in Burlington.
(Testimony of Appellant and Exhibit 3)
2. The Appellant took and passed an open examination for the position of police officer.
(Stipulated Fact)
3. On February 2, 2005, the Appellant's name appeared on Certification 250087 for the position of permanent full-time police officer for the Boston Police Department.
(Stipulated Fact)
4. On June 8, 2005, the Appellant's name appeared on Certification 250526, also for the position of permanent full-time police officer for the Boston Police Department.
(Stipulated Fact)

5. The Boston Police Department filled eleven (11) police officer positions from Certification 250087. Seven (7) of the candidates selected for appointment from Certification 250087 were ranked below the Appellant (“BYPASS 1”). (Stipulated Facts)
6. The Boston Police Department subsequently filled six (6) police officer positions from Certification 250526. All six of the candidates selected for appointment from Certification 250526 were ranked below the Appellant (“BYPASS 2”). (Stipulated Facts)
7. In regard to “BYPASS 1”, the Boston Police Department notified the state’s Human Resources Division (HRD) that it was bypassing the Appellant for appointment for the following two (2) reasons: a) being rejected for employment by the Winthrop Police Department for “fail[ing] to provide truthful responses in his application...” related to his place of residence; and b) failing to acknowledge that his driver’s license had once been suspended. (Exhibit 1)
8. The state’s Human Resource Division (hereafter HRD) approved the reasons proffered by the City regarding “BYPASS 1” and the Appellant subsequently filed a timely appeal with the Civil Service Commission (CSC Docket No. G1-05-214). (Stipulated Fact)
9. In regard to “BYPASS 2”, the Boston Police Department notified HRD that it was bypassing the Appellant for appointment solely because he was rejected for employment by the Winthrop Police Department for failing to provide truthful responses in his application related to his place of residence. (Exhibit 2)

10. The second reason for bypass, related to the Appellant's purported license suspension, which was used by BPD in the "BYPASS 1" case, was proven to be erroneous after the Appellant provided the BPD with an official copy of his driving history from the Registry of Motor Vehicles. (Testimony of Ms. Hunt and Mr. Hill)
11. HRD approved the remaining reason proffered by the City regarding "BYPASS 2" and the Appellant subsequently filed a second timely appeal with the Civil Service Commission (CSC Docket No. G1-06-93). (Stipulated Fact)
12. The only issue now before the Commission is whether the events related to the Appellant being rejected for employment in the Town of Winthrop, standing alone, is a sound and sufficient reason for bypassing the Appellant.

Events Related to Appellant's Employment Application with the Town of Winthrop

13. In December of 2002, the Appellant was rejected from employment as a reserve police officer in the Town of Winthrop for "...failure to provide truthful responses in his application...". (Exhibits 4A and 4B)
14. The Winthrop police lieutenant responsible for conducting the Appellant's background investigation concluded that the Appellant had provided an incorrect residential address on his application for employment (32 Shelby Street, East Boston). (Exhibit 4A)
15. In a letter to the Winthrop Police Chief, the above-referenced Winthrop police lieutenant wrote, "Upon responding to 32 Shelby Street, East Boston, the address given in the application, it was revealed by neighbors that Richard Escobar had not resided there for at least three months. The was confirmed by the landlord. A call was placed to Richard Escobar who, when questioned, stated and confirmed his

address to be 32 Shelby Street, East Boston, MA. Upon my revelation of our site visit to 32 Shelby Street, East Boston, MA, Mr. Escobar informed me that he had in fact vacated the residence approximately three months before the police application was filed. Without being requested, Richard Escobar responded to the Winthrop Police Station and reported that he was staying somewhere in East Boston, but could not give the address as he was living with his sister and that, if this were discovered, his sister would lose her apartment and subsidy.” (Exhibit 4A)

16. The Appellant testified before the Commission regarding the above-referenced discrepancies on his application for employment with the Town of Winthrop. The Appellant’s testimony fell far short of the honest, forthright answers warranted by a witness under oath. (Testimony, demeanor of Appellant)
17. On July 15, 2002, the Appellant received a certification card from the state’s Human Resources Division (HRD) informing him of seven (7) permanent reserve police officer position in the Town of Winthrop. The certification card was mailed to the Appellant at: 32 Shelby Street, Apt. 1, East Boston, MA 02128. (Exhibit 15)
18. Asked during direct testimony how long he had lived at 32 Shelby Street prior to receiving the above-referenced certification card from HRD, the Appellant stated he was living at that address at the time and had been living at that address since 1993. (Testimony of Appellant)
19. Shortly after receiving the above-referenced certification card, the Appellant went to the Winthrop Police Department and signed a list indicating his willingness to accept employment as a reserve police officer in Winthrop if selected. (Testimony of Appellant)

20. Shortly after signing the above-referenced certification list, the Appellant attended an orientation at the Winthrop Police Department and received an application for employment. (Testimony of Appellant)
21. At the time of the orientation, the Appellant testified that he was living at 32 Shelby Street in East Boston. Within one week of the orientation, the Appellant returned his application for employment to the Winthrop Police Department. According to the Appellant, he was living at 32 Shelby Street in East Boston at the time he submitted the application. (Testimony of Appellant)
22. On or about August 26, 2002, the Appellant received a telephone call on his cell phone from the Winthrop police lieutenant conducting the background investigation regarding the Appellant's employment application. (Testimony of Appellant)
23. The Appellant testified that the lieutenant asked him what his address was and the Appellant indicated to the lieutenant that his address was 32 Shelby Street in East Boston. (Testimony of Appellant)
24. The Appellant then testified that the lieutenant, upon hearing the Appellant's answer, told the Appellant that he had just come from 32 Shelby Street and spoken with the landlord, who had told the lieutenant that he had not seen the Appellant in months. According to the Appellant, he then told the lieutenant that he had recently had an argument with his mother and that his mother had left the country on vacation. (Testimony of Appellant)
25. According to the Appellant, at some point during the conversation with the Winthrop police lieutenant, he told the lieutenant that, as a result of the argument with his

mother, he was staying at another address on Border Street with this sister, but that he did not know the exact address. (Testimony of Appellant)

26. According to the Appellant, the lieutenant then told the Appellant to provide a written explanation regarding the discrepancy. (Testimony of Appellant)

27. On August 27, 2002, one day after the conversation with the Winthrop police lieutenant, the Appellant wrote a letter to the lieutenant which stated in part, “I’m temporarily living at [Border Street address]¹...I’ve been here for about three months...the reason I moved out [of 32 Shelby Street] was because the landlord wanted to raise the rent because there was a lot of people living there...”. (emphasis added) (Exhibit 16) If the Appellant had been living at the [Border Street address] for three months at the time he wrote the letter on August 27, 2002, he would have begun living there on or about May 17, 2002.

28. The above-referenced written statement, completed on August 27, 2002, in which the Appellant states that he had been living at the [Border Street address] for three months, directly contradicts the Appellant’s testimony before the Commission in which he testified that he was living at 32 Shelby Street when he received the certification card from HRD on July 15, 2002. Either the Appellant’s written statement to the Winthrop police lieutenant is untrue or his testimony before the Commission is untrue. (Testimony of Appellant; Exhibit 16; Exhibit 15) The August 27, 2002 letter also contradicts the Appellant’s testimony that he was living at 32 Shelby Street when he attended the orientation session after he received the above-referenced certification card. (Testimony of Appellant)

29. Further, the Appellant's August 27, 2002 letter to the Winthrop police lieutenant makes no mention of an argument with his mother as the reason for vacating the apartment on Shelby Street. Rather, the letter lists the landlord's concerns about overcrowding as the reason he vacated the apartment, directly contradicting the Appellant's testimony before the Commission. Again, either the Appellant's written statement to the Winthrop police lieutenant was untrue or his testimony before the Commission was untrue. (Testimony of Appellant; Exhibit 16) Asked to explain this discrepancy during his testimony, the Appellant testified that he didn't mention the argument with his mother on his application for employment in Winthrop because it would have made him look "childish". (Testimony of Appellant) Yet, he apparently didn't have this concern when he purportedly told this to the lieutenant during the phone conversation the previous day.
30. On November 6, 2004, as part of his application for employment with the Boston Police Department, the Appellant indicated that he lived at the [Border Street address] from September to December 2002, contrary to his written statement to the police lieutenant in Winthrop which indicated that the Appellant had lived at the [Border Street address] since May 2002. (Exhibit 3; Exhibit 16; Testimony of Appellant) The Appellant testified that he did not become aware of this discrepancy until he attended a pre-hearing conference at the Civil Service Commission and that he intends to amend his application with the Boston Police Department. (Testimony of Appellant)

¹ The Appellant listed the exact address on Border Street where he was living in his letter to the Winthrop Police Lieutenant. To protect the privacy of individuals not a party to this appeal, the full address is not included in this decision.

31. The Appellant testified that he never received mail or telephone calls at the [Border Street address] and kept the majority of his clothes and belongings at 32 Shelby Street. (Testimony of Appellant)
32. During cross-examination, the Appellant painfully parsed the meaning of “lived”; and, when asked if he lived at Shelby Street during specific time periods, offered a non-responsive, “that has always been my address”. (Testimony of Appellant)
33. On June 13, 2006, the Town of Winthrop and the Appellant entered into a settlement agreement in which the Appellant’s appeal to the Commission regarding the bypass in the Town of Winthrop was dismissed. As part of that settlement agreement between the parties, the agreement states, that Winthrop “retracts its stated reasons for bypass of Richard Escobar in exchange for M r. Escobar withdrawing his application for employment and agreeing “not to apply again”. (Exhibit 6)

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 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.

Mr. Escobar is a long-time resident of Boston and attended Madison Park Technical / Vocational High School. Notwithstanding his lack of candor during key parts of his testimony before the Commission, Mr. Escobar is a compelling witness. He struck this Commissioner as a strong-willed individual who has maintained a positive outlook despite having to overcome a series of obstacles that have come his way. I don't doubt his commitment or his sincere desire to serve the City of Boston as a police officer.

Unfortunately for the Appellant, however, his untruthfulness during his previous application for employment with the Town of Winthrop provides the City of Boston with reasonable justification for bypassing him for appointment as a police officer.

Based on the testimony of the Appellant and the documentary evidence entered as part of the record in this case, it is painfully clear that the Appellant misrepresented his place of residence to the Winthrop Police Department when he applied for employment as a reserve police officer there in 2002. It wasn't until after a Winthrop police lieutenant conducted an on-site visit of the Appellant's purported residence (32 Shelby Street) in August 2002, that the Appellant acknowledged, in a written statement, that he had moved from that address three months earlier, in May 2002. During his testimony before the Commission in 2008, however, the Appellant stated unequivocally that, when he received the certification card for the Winthrop position in July 2002, he was still living at 32 Shelby Street. Further, the Appellant testified before the Commission that when he received the application for employment in Winthrop during an orientation session sometime after July 2002, he was still living at 32 Shelby Street, directly contradicting his prior written statement to the Winthrop Police Department. Finally, the Appellant provided inaccurate information regarding his dates of residence to the Boston Police Department when he completed an application for employment in 2004. The Appellant's testimony that he intends, apparently at some future date, to amend his application for employment with the Boston Police Department, rings hollow. The Appellant's testimony fell far short of the honest, forthright answers warranted by a witness under oath and I conclude that he knowingly provided misinformation to the Winthrop Police Department regarding his residential address.

An Appointing Authority is well within its rights to take disciplinary action when a police officer has “a demonstrated willingness to fudge the truth in exigent circumstances” because “[p]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer.” See Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2004); citing City of Cambridge, supra at 303. Likewise, an Appointing Authority is well within its rights to bypass an individual for fudging the truth as part of an application process for the position of police officer.

The Appellant argues that, even if true, this reason can not be used by the City of Boston in bypassing him from employment as a result of a settlement agreement between the Appellant and the Town of Winthrop. That settlement agreement states that the Town of Winthrop “retracts its stated reasons for bypass” in exchange for the Appellant withdrawing his application for employment and agreeing “not to apply again”. This agreement is not viewed by the Commission as an admission that the underlying reasons for bypass by the Town of Winthrop were not valid. Rather, the reasons simply became moot to the Town of Winthrop given the Appellant’s agreement to withdraw his application and never apply again. Moreover, the documentary evidence in this case, and the Appellant’s own testimony, show that the Appellant was indeed untruthful to the Winthrop Police Department.

The City of Boston bypassed the Appellant for just cause, providing sound, rationale reasons for its decision and there is no evidence of inappropriate motivations or objectives on the part of the Appointing Authority that would warrant the Commission’s intervention.

For all of the above reasons, the appeals under Docket Nos. G1-05-214 and G1-06-93 are hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis and Taylor, Commissioners) on April 10, 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. 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:

Galen Glibert, Esq. (for Appellant)

Tara Chisholm, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)