

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

JOHN ALVES,  
Appellant,

v.

G1-07-411

BOSTON POLICE DEPARTMENT,  
Respondent.

Appellant's Attorney:

Stephen C. Pfaff  
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LLP  
67 Batterymarch Street  
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Respondent's Attorney:

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HRD's Attorney:

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Boston MA, 02108

Commissioner:

Paul M. Stein<sup>1</sup>

**DECISION**

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, John Alves, (hereinafter, "Mr. Alves") seeks review of Human Resource Department's (hereinafter "HRD") decision to accept the reasons proffered by the Boston Police Department

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<sup>1</sup> The Commission acknowledges the assistance of Legal Intern Kelly Deegan in the preparation of this Decision.

(hereinafter “BPD” or “Appointing Authority”) for bypassing him for original appointment to the position of Boston Police Officer. A full hearing was held on March 31, 2009 at the offices of the Civil Service Commission. One (1) tape was made of the hearing.

**FINDINGS OF FACT:**

Eleven (11) 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;
- Lieutenant Michael Chapman, Police Academy Lieutenant, Boston Police Department;

*For the Appellant:*

- John Alves, Appellant;

I make the following findings of fact:

- 1) In the winter of 2005, Mr. Alves’ name first appeared on Certification #25124, which the BPD requested from HRD for the position of police officer. (Testimony Hunt)
- 2) On April 6, 2006, Mr. Alves completed the background check, was admitted to the Police Academy and was offered employment conditional upon completing the Academy. (Testimony Hunt)
- 3) Once in the Academy, recruit officers must complete 800 hours of training over 30 weeks, including physical training in the morning and academic training in the afternoon. (Testimony Chapman)

- 4) Recruit officers must also pass weekly exams with 70%, a Level I exam, and a Level II exam to be eligible to graduate from the Academy. (Testimony Chapman)
- 5) A Level I exam is similar to a midterm and in order to pass, a recruit must receive a passing grade of 70% on each section of the exam as well as overall. (Testimony Chapman)
- 6) If a recruit does not pass a section of this exam but does pass overall, he is eligible to take a make-up in any subject areas he failed. (Testimony Chapman)
- 7) If the recruit does not pass the make-up, he is terminated from the Academy according to Boston Police Academy Rules and Procedures. (Ex. 5, Testimony Chapman)
- 8) While at the Academy, Mr. Alves struggled with his criminal law course, failing to achieve the 70% necessary to pass in both the Level I exam and the Level I exam make-up. Because he passed the Level I exam with at least 70% overall, he was allowed to take the make-up for the Criminal Law portion, but was unable to achieve the 70% required to pass the make-up. (Ex. 3, Testimony Chapman)
- 9) In a letter dated June 2, 2006, Mr. Alves was notified of his separation from the BPD without prejudice due to his failure to pass the Criminal Law portion of his Level I exam with a 70%. (Ex. 3, 4)
- 10) Shortly thereafter, Mr. Alves petitioned HRD to put his name back on the 2005 certification lists for Spanish, Cape Verdean Creole, and Portuguese speaking officers. (Ex. 7, Testimony Hunt)

- 11) HRD complied with this request and Mr. Alves' name reappeared on the list that the BPD requested in winter 2006 for the position of police officer. (Ex. 11, Testimony Hunt)
- 12) The BPD has a policy to not consider recruit officers who have previously failed out of the Academy unless they had taken and passed the next available Civil Service Exam and their names are reached on a certification issued from a new list. (Ex. 9, Testimony Hunt, Chapman)
- 13) The reason for this was to be reasonably sure that recruits had enough time to adequately prepare for reinstatement to the Academy and to preserve resources that the BPD would need to spend on retraining these recruits before they may be ready to reenter the Academy. (Testimony Hunt, Chapman)
- 14) The BPD expends a great amount of resources on hiring and training Academy classes and tries to expend them only on recruits who are likely to graduate from the Academy. (Testimony Chapman)
- 15) Some of the costs include the salary that they pay the student officers, the cost of the approximately twenty staff and instructors, which are officers being paid the overtime rate, the cost of the materials issued to recruits, and going through the entire process of screening additional applicants again to replace the recruits who failed and then supplying those new recruits with all of the items needed for the Academy. (Testimony Hunt)
- 16) Recruits who have very recently failed out of the Academy are unlikely to pass the second time around without additional time to prepare. (Testimony Chapman)

- 17) The goal of the Academy is to produce recruit officers who have been successfully trained to become Boston police officers to fill however many vacancies the BPD has at that time. (Testimony Chapman)
- 18) The BPD was informed by HRD that if they did not want to make another offer of employment to Mr. Alves, the BPD had to bypass him, which they did.  
(Testimony Hunt)
- 19) On September 17, 2007, HRD informed Mr. Alves of his bypass and the reasons for it. (Ex. 10, Testimony Hunt)
- 20) Mr. Alves filed a timely appeal of the bypass in December 2007. (Complaint of Mr. Alves)

## 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.” Cambridge v. Civil Serv. Com’n., 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. Commissioners of Civil Serv. v. Mun. Ct. of the City of Boston, 359 Mass. 214 (1971). Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). 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. Civ. Serv. Com’n., 31 Mass. App. Ct. 315 (1991). See G.L. c. 31, § 43.

Appointing Authorities are expected to use sound discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The Appointing Authority may not be required to appoint any person to a vacant post. “He may select, in the exercise of a sound discretion, among persons eligible for promotion or may decline to make any appointment. See Commissioner of the Metropolitan Dist. Com’n. v. Director of Civil Serv. 348 Mass. 184, 187-93 (1964). See also Starr v. Bd. of Health of Clinton, 356 Mass. 426, 430-431 (1969); Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Corliss v. Civil Serv. Com’r. 242 Mass. 61, 65 (1922). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-72 (1940). A judicial judgment should “not be substituted for that of . . . [a] public officer” who acts in good faith in the performance of a duty. See Goldblatt v. Corporation Counsel of Boston, 360 Mass. 660, 666, (1971); M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-72 (1952). 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 Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003); Commissioners of Civil Serv. v. Mun. Ct. of Boston, 369 Mass. 84, 86 (1975). 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. Cambridge, 43 Mass. App. Ct. at 304.

Although the Commission does not doubt Mr. Alves' sincere desire to serve as a Police Officer for the City of Boston, the BPD has provided reasonable justification for bypassing him for appointment. The BPD has shown a legitimate concern about Mr. Alves' ability to complete the Academy and become a fully trained police officer. The BPD provided explanations for why these concerns would affect his ability to be a competent police officer if he were appointed to the position. Specifically, Mr. Alves had been dismissed from the Academy's Spring 2006 class and would have been entered into the Winter 2006 class if he had not been bypassed. Less than a year had passed at that point and the BPD has provided a reasonable justification for its belief that the same difficulties Mr. Alves struggled with the first time could prevent his success again.

Mr. Alves argues that he had been studying since his dismissal and that it was possible that he could pass all of his examinations even after such a short period of time had passed. Although it is possible and Mr. Alves' efforts at self-improvement are admirable, the fact remains that the BPD had little concrete evidence to confirm that it was worth making an exception from an otherwise rational policy and accept Mr. Alves.

The process of putting recruit officers through the Academy is expensive and for that reason, the BPD tries to select the candidates that they believe will have the best chance of completing the Academy requirements and becoming fully trained police officers. The BPD reasonably believes that recruit officers who have recently been dismissed from the Academy for academic reasons need more than a few months' time to prepare for the challenges of the Academy before trying it again. They have determined

that to increase the chances of a recruit completing the Academy, they should wait until the next civil service exam is administered and his name is selected from the new list before readmitting him. The Commission finds this policy logical and rational. The BPD should not be required to ignore the fact that a candidate had been dismissed from the Academy.

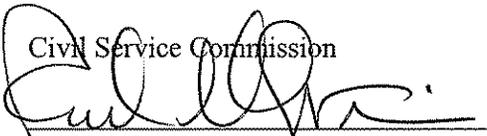
Mr. Alves next argues that this policy may not have been applied to all candidates and that there may have been some who were readmitted to the Academy without retaking a civil service exam. Ms. Hunt testified that while she was working as the director and as the deputy director for Human Resources, she had not seen any applicant who was considered twice off of one eligibility list. Mr. Alves indicated that this had happened in the period from 1983-1987. He did not present any substantial evidence to support this contention, however, and the Commission is not inclined to give significant weight to this argument based on inconclusive evidence dating back over two decades.

There is also an issue of fairness here. Mr. Alves was given a chance to go to the Academy in spring 2006 and was not successful in completing the requirements. If he had to be reconsidered again and given a second chance, another candidate is prevented from getting a first chance to complete the Academy. The Commission believes it would be unwise to preclude the BPD from a policy that gives as many qualified candidates a chance before giving out second chances to the same candidates. In deciding to not make another offer of employment to Mr. Alves, the BPD was in accordance with basic merit principles because all candidates were fairly considered; the BPD was trying to ensure that all candidates would receive an opportunity to be considered and that no candidate would be unfairly denied such an opportunity.

It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Com'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Here, there is no evidence of any inappropriate motivations on the part of the BPD. All of the witnesses for the BPD, including Ms. Hunt and Lieutenant Chapman, were credible witnesses whose only interest was in selecting the best candidate for the position of Police Officer. Mr. Alves was also a credible witness and the Commission encourages him to continue his efforts to become a police officer.

For all of the above reasons, the appeal under Docket No. G1-07-441 is hereby *denied*.

Civil Service Commission  
  
Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein, and Taylor, Commissioners on July 23, 2009)

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:

Stephen C. Pfaff (Appellant)

Amanda C. Wall, Esq. (Boston Police Department)

Tsuyoshi Fukudi, Esq. (Human Resources Division)