
MATTHEW R. AMARAL

v.

MASSACHUSETTS DEPARTMENT OF CORRECTION

G1-18-144

January 16, 2020

Paul M. Stein, Commissioner

By *bypass Appeal-Original Appointment as a Correction Officer-Criminal Record-Driving History-Staleness-Sealing of Criminal Record-Employment History*—Commissioner Paul M. Stein reversed the bypass of a candidate for original appointment as a Correction Officer after finding that the DOC's reliance on a stale criminal record and driving infractions did not justify his rejection given a sterling employment history, five recent years of acceptable driving, and a clean criminal record over the past seven years. This candidate's background suggested merely youthful indiscretions that he had put behind him.

DECISION

The Appellant, Matthew Amaral, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b), to contest his bypass for appointment as a Correction Officer I (CO-I) with the Massachusetts Department of Correction (DOC).¹ A pre-hearing conference was held at the Commission's Boston office on September 4, 2018, and a full hearing was held at that location on November 9, 2018, which was digitally recorded.² Sixteen (16) exhibits (*Exhs. 1 through 3, 4A-4H, 5 through 16*) were received in evidence. Neither party chose to file a proposed Post-Hearing Decision. For the reasons stated below, Mr. Amaral's appeal is allowed.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Eugene T. Jalette, DOC Supervising Identification Agent
- Michael C. Abril, DOC Correction Officer I, Background Investigator

Called by the Appellant:

- Matthew R. Amaral, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Matthew R. Amaral, is a 2007 high school graduate who resides in Fall River MA. He took and passed the civil service examination for CO-I on March 19, 2016. (*Stipulated Facts*)

2. Mr. Amaral's name appeared in the 69th place on Certification #05164 issued by the Massachusetts Human Resources Division (HRD) to the DOC on or about January 19, 2018, from which DOC eventually hired 156 applicants, of which 7 were ranked below Mr. Ortiz on the Certification. (*Stipulated Facts*)

3. Mr. Amaral signed the Certification willing to accept employment and completed the DOC's standard form (rev. 0/2117) of Application for Employment. (*Exhs. 14 & 15*)

4. The DOC conducted its standard "law enforcement CJIS" check of Mr. Amaral's criminal record and driving history which disclosed the following initial information:

Criminal History

8/9/07 - Assault & Battery w/Dangerous Weapon - CWO/Dismissed 1/6/2009

2/9/11 - Assault & Battery - Dismissed 3/29/2011

7/18/11 - Negligent MV Operating/Racing - CWO/Dismissed 8/28/2013

1/5/12 - Negligent MV Operation - CWO/Dismissed 8/28/2013

8/29/12 - Uninsured/Unregistered MV/Plate Obscured - CWO/Dismissed 8/28/2013

Driving History

7/18/07 - Speeding - Responsible

4/4/08 - Municipal By Law Violation - Responsible

12/1/08 - No Inspection Sticker - Responsible

3/31/09 - Lane Violation (NP)/Seat Belt Violation - Responsible

8/3/09 - Speeding - Responsible

8/15/09 - No. Plate Display/Speeding - Responsible

7/13/10 - Speeding - Responsible

9/2/10 - Illegal Operation - Responsible

7/15/11 - Operating Recklessly/Driving to Endanger - CWO (see Criminal History 7/18/11)

10/6/11 - Operating Recklessly/Driving to Endanger - CWO (see Criminal History 1/5/12)

5/19/12 - No Inspection Sticker - Responsible

7/6/12 - Unregistered/Uninsured/Improper Equip - CWO (see Criminal History 8/29/12)

3/27/13 - Improper Equip/Display Plate - Responsible

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

5/30/13 - Failure to Stop - Responsible
 6/20/13 - Suspension 3 Surchargeable Events
 8/6/13 - NSC Class Completed
 8/7/13 - License Reinstated
 3/24/14 - No Transparent Window - NR
 5/15/15 - Speeding - Responsible
 2/23/17 - Surchargeable Accident³

(Exhs. 4, 4A through 4H)

5. CO-I Michael C. Abril was assigned to conduct Mr. Amaral's background investigation. He obtained court records and police incident reports regarding the criminal cases brought against Mr. Amaral, which he attached to his background investigation report. These documents include, among other details, the following information about those matters:

2007 Charge of Assault & Battery (Age 17)

After being verbally taunted by a neighbor while working in his yard, who then took a fighting stance and said to Mr. Amaral "let's go", Mr. Amaral approached the neighbor, yelling that he would "kick his ass" and, indeed, then struck the neighbor in the buttocks with his "shod foot". The neighbor punched back (another neighbor who witnessed the incident called it a "karate hold"), which caused Mr. Amaral to fall down. Mr. Amaral's mother appeared, gave Mr. Amaral a "metal tube" with which the neighbor said Mr. Amaral took a swing at him but missed. (Mr. Amaral admits holding the "metal tube" but denies swinging it.) After the men separated and returned home, Mr. Amaral's mother then committed an obscene gesture directed to the neighbor. The Fall River police responded, interviewed Mr. Amaral, the neighbor he tangled with and the neighbor who witnessed the incident. Mr. Amaral was charged with a count of Assault & Battery w/Dangerous Weapon (shod foot) and a second count of Assault w/Dangerous Weapon ("metal tube"). Mr. Amaral admitted to sufficient facts (no guilty plea) and apologized for his conduct. A CWOFF was entered and the charges were dismissed on January 6, 2009. (Exhs. 5 & 9)

February 2011 Charge of Charge Assault & Battery (Age 21)

Mr. Amaral in his bedroom studying for a motorcycle permit exam when his brother Michael (with whom he shared the room) came home in a "bad mood" and asked Mr. Amaral to study in the living room so Michael could go to bed. When Mr. Amaral declined to leave, the two brothers engaged in a verbal shouting match until their mother intervened. Another brother witnesses the incident. Fall River police responded, interviewed all the parties and took Matthew into custody, charging him with two counts of domestic assault and battery. A month later, on March 29, 2012, both charges were dismissed at the request of the Commonwealth. (Exhs. 6 & 10)

July 2011 Charge of Negligent MV Operation/Racing (Age 22)

Fall River police had received numerous complaints about "drag racing" and had set up surveillance in the area when they caught

Mr. Amaral and another operator engaged in the act. Both operators were arrested and charged with illegal drag racing and negligent MV operation. The DOC did not produce the court records for this matter, but the CJIS summary indicates that a CWOFF was entered and the charges dismissed on August 28, 2013. (Exhs. 4B & 11)⁴

2012 Charge of Negligent MV Operation (Age 22)

In October 2011, Mr. Amaral was stopped by Fall River police while operating his motorcycle in an erratic manner, swerving around vehicles and speeding. He had no inspection sticker and was operating without corrective lenses as required. He received written warnings for these latter infractions and was issued a summons on a charge of reckless operation. Mr. Amaral admitted to sufficient facts (no guilty plea), a CWOFF was entered and the charge eventually dismissed on August 28, 2013. (Exhs. 8 & 12)

2012 Charge of Uninsured/Unregistered MV Violations (Age 23)

No police report was produced for this incident. The criminal docket indicates three charges: (1) concealing number plate; (2) uninsured MV; and (3) unregistered MV. Mr. Amaral was found not responsible on the first charge, admitted to sufficient facts (no guilty plea) on the other two charges, a CWOFF was entered and those two charges dismissed on August 28, 2013. (Exh. 7)

(Exh. 3; Testimony of Abril)

6. As part of the background investigation, CO Abril conducted an on-site interview of the millwork company where Mr. Amaral has worked since 2007 and currently holds the position of an Assistant Supervisor. CO Abril learned that Mr. Amaral was considered an "overall mature person" who has never been disciplined and had a "meticulous attention to detail." The employer recommended him for hire as a CO. (Exh. 3; Testimony of Abril)

7. CO Abril also met with three professional references, all of whom praised Mr. Amaral highly, commenting that he was a person who was dependable, trustworthy and handled stress well and would be a good fit as a Correction Officer. CO Abril also verified that Mr. Amaral held an active Class C License to Carry Firearms. (Exh. 3; Testimony of Abril)

8. On March 29, 2018, CO Abril conducted a home visit with Mr. Amaral in the home he shared with his mother, who was also present. During this visit, CO Abril asked Mr. Amaral about two of the cases on his criminal record: (1) his involvement in the 2007 assault and battery incident and (2) the 2011 arrest for drag racing. As to the 2007 incident, Mr. Amaral stated: "I was just a dumb kid that got caught up in a dispute with my neighbor that got blown way out of proportion and ended up with me doing something extremely stupid." In response to the question about his 2011 drag racing, Mr. Amaral said: "I was a stupid 21-year-old who got caught up doing something extremely immature that I totally regret." CO Abril thanked Mr. Amaral "for his honesty in

3. At the Commission hearing, Mr. Amaral testified that he acknowledged, at the scene, his responsibility for causing this accident, which involved a minor "fender bender" that, to his surprise, turned out to exceed the threshold for being surcharged. (Testimony of Appellant)

4. The CWOFF was extended due to the subsequent two charges brought against Mr. Amaral during the year following his CWOFF and all three open cases were simultaneously dismissed in 2013, after Mr. Amaral remained "clean" for a full year after the final 2012 incident. (Exhs. 4B, 7 & 8; Testimony of Appellant & Jalette)

answering my questions regarding his prior arrest record.” (*Exh. 3; Testimony of Appellant & Abril*)⁵

9. CO Abril submitted his background investigation report on March 30, 2018, concluding that Mr. Amaral’s background included both positive and negative aspects:

Positive Employment Aspects

Steady employment history (has kept and succeeded in the same job for 11 years)

Well-liked and respected by employer as well as references

Considered to be a hard worker as well as skilled

Described as loyal and always willing to help others

Currently possess’[s] a valid Massachusetts License to Carry Firearms

Negative Employment Aspects

Multiple arrests on record

Multiple negative infractions on driving record

(*Exh. 3; Testimony of Abril*)

10. By letter dated April 13, 2018, Mr. Amaral received a “conditional offer of employment” subject to review of his background investigation and drug, medical and psychological testing. (*Exh. 13*)⁶

11. After Mr. Amaral’s application was presented to DOC Commissioner Turco and a committee of senior DOC management, Mr. Ortiz was informed, by letter dated July 9, 2018, that he was not selected for appointment due to a “Failed background investigation based on the following police reports: 2/08/11 Fall River Police Department; 8/08/07 Fall River Police Department. Additionally, the candidate has a poor driving history to include a misdemeanor arrest for racing in 2011 and a continued pattern of poor driver history up to 2/23/2017 as listed in his driver history report (KQ).” Mr. Jalette was present for the DOC management review, but had limited personal memory of what information about Mr. Amaral (both the positive and negative aspects) was discussed, other than a belief that there was a consensus that Mr. Amaral showed a pattern of being unable to follow rules. (*Exh. 2; Testimony of Jalette*)

12. At the Commission hearing, Mr. Amaral submitted a Petition to Seal Records under G.L. c.276, §100C that he filed on August 17, 2018, after his bypass, which contained a sworn statement that reads, in part:

“I desire to help others, and believe in rehabilitation and reform. I would like to apply for a position as a correction officer, but the obstacles created by having a record has put a halt to the process, in achieving a career path. In order to further my career, and buy

a home, It would be encouraging to have my record expunged, so when lender and employers do a thorough background check.”

“Having a career in the Correctional field, I aspire to help inmates rehabilitate themselves, encourage them to improve once released. Motivate them to attend programs. I have a firm faith that people like myself can change, and individuals, likewise, may exceed [sic] in all walks of life. Everyone, ought to keep in mind the everyone can make a difference.”

(*Exh. 16; Testimony of Appellant*)

13. After hearing on September 26, 2018, the Fall River District Court (Finnerty, J.) allowed the petition as to all five criminal matters in which Mr. Amaral had been charged. (*Exh. 16; Testimony of Appellant*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c.31, §1. *See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); *MacHenry v. Civil Serv. Comm’n*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den.*, 423 Mass.1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L. c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L. c. 31, §2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. *Boston Police Dep’t v. Civil Service Comm’n*, 483 Mass. 474-78 (2019); *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Service Comm’n*, 78 Mass.

5. CO Abril’s report does not show that any questions were asked about the three other criminal matters or his driving record. (*Exh. 3; Testimony of Appellant & Abril*)

6. The Commission has noted that DOC’s practice to extend a “conditional offer of employment” prior to completion of the background investigation makes problematic a subsequent disqualification for non-medical reasons. Here, however, nothing suggests that Mr. Amaral’s medical history could have played any role in the bypass decision.

App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’” *Brckett v. Civil Service Comm’n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere v. Civil Service Comm’n*, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”)

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The commission —

“ . . . cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority” but, when there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy,” then the occasion is appropriate for intervention by the commission.”

City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 426 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L. c. 31, §2(b), gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority’s action” and it is not necessary for the Commission to find that the appointing authority acted “arbitrarily and capriciously.” *Id.*

ANALYSIS

The DOC has not met the necessary standard that it proved that the decision to bypass Mr. Amaral was reasonably justified based upon a preponderance of the evidence of the relevant facts. Although DOC is entitled to considerable deference in deciding whom it finds suitable for appointment to the sensitive public safety position of a Correction Officer, that deference is not absolute.

First, DOC’s bypass decision relies incidents from Mr. Amaral’s criminal record seven or more years ago, and does not prove by a preponderance of the evidence since that time, how these isolated incidents reasonably infer a present unsuitable and disqualifying character trait. Specifically, DOC did not claim that it was the pattern of Mr. Amaral’s criminal history that was disqualifying but, rather, singled out two of the incidents that involved fighting: (1) a 2007 fight with a neighbor (which, according to the police report, he did not start and was egged on by his mother) when he was 17 years old; and (2) a 2011 verbal altercation with his brother who came home in a “bad mood” and demanded that Mr. Amaral leave their shared bedroom (charges that were never prosecuted). The DOC did not raise the most recent two subsequent (2012) criminal charges as problematic or claim they were part of the alleged pattern of criminal misconduct. In the intervening seven years since the two cited incidents, there is not the slightest indication that Mr. Amaral has engaged in any aggressive behavior, either physically or verbally. He was completely honest with the background investigator about these incidents and took full responsibility for

his mistake. To the contrary, he has held a steady job for the past thirteen years and received the highest praise from his employer and other references as to his good character. DOC was unable to explain whether the DOC management team actually weighed these positive and more recent attributes of his behavior against the evidence of one teenage brawl with a neighbor, for which Mr. Amaral apologized and takes full responsibility, and one fraternal argument, for which there was conflicting evidence of any actual physical violence. The preponderance of the evidence established that Mr. Amaral did not initiate either incident.

Second, the position of a Correction Officer requires, from time to time, that the officer transport inmates in a DOC motor vehicle and DOC is certainly entitled to be comfortable that a candidate is capable of doing so safely and in compliance with all of the rules of the road. DOC’s conclusion that Mr. Amaral’s driving record does not measure up to that required standard, however, is not supported by a preponderance of the evidence. Mr. Amaral’s record as a youthful driver does contain some dozen infractions, culminating in an arrest for drag racing. As a result, he was required to attend a remedial driver’s education course. After completing that course in 2013, however, his driving record during the ensuing five years to the present shows a markedly different pattern, involving one (2015) speeding ticket and one (2017) traffic accident (the first in his entire driving career). Even giving the DOC the deference it is due, without further explanation (which DOC was unable to present) there is no reasonable justification to disqualify Mr. Amaral for a “continuing” poor driving record on the history of those two infractions in the five years since completing his remedial driver’s education.

Third, after he was bypassed, Mr. Amaral procured a court order sealing all of his criminal records. DOC contends that, as a law enforcement agency, it is entitled to see and to rely upon all criminal records, whether or not they are sealed. Since Mr. Amaral’s records were not sealed until after he was bypassed, the legal consequences of doing so need not be addressed in this appeal. I note, however, that, Mr. Amaral’s initiative to procure a court order to seal the records does reflect favorably on his sincerity to become a Correction Officer, and, at a minimum, is worthy of notice.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Matthew Amaral, is allowed.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/or the Department of Correction in its delegated capacity take the following action:

- Place the name of Matthew R. Amaral at the top of any current or future Certification for the position of DOC Correction Officer I until he is appointed or bypassed after consideration consistent with this Decision.
- If Mr. Amaral is appointed as a DOC Correction Officer I, he shall receive a retroactive civil service seniority date which is the same date as the first candidate ranked below Mr. Amaral who was appointed from Certification No. 05164. This retroactive civil service seniority

date is not intended to provide Mr. Amaral with any additional pay or benefits including, without limitation, creditable service toward retirement.

* * *

By vote of the Civil Service Commission (Bowman, Chairman [absent]; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 16, 2020.

Notice to:

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[Address redacted]

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* * * * *

DARLING CARTER

v.

EXECUTIVE OFFICE OF HEALTH AND HUMAN
SERVICES

C-18-193

January 16, 2020
Paul M. Stein, Commissioner

Reclassification Appeal—Department of Health and Human Services—Personnel Officer II to Personnel Analyst III—Scope of Responsibilities—The reclassification petition of a Personnel Officer II to Personnel Analyst III with the Department of Health and Human Services was denied where the Appellant performed none of the duties of the sought-after classification and a reclassification would have elevated her to the same level as her supervisor. In this case, the Appellant was viewed as a “stellar” employee but the current personnel classifications were inapt and better suited to a more “generalist” human resources operation. Unfortunately, the mismatch of job titles and functions at the agency did not justify the Appellant’s reclassification to what was clearly another inappropriate classification.

DECISION

The Appellant, Darling Carter, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.30,§49,¹ from the denial of the Massachusetts Human Resources Division (HRD) of a request to reclassify her position at the Children, Youth & Families (CYF) Office of Human Resources (CYF-HR) within the Executive Office of Health and Human Services (EOHHS) from her current title of Personnel Officer II (PO-II) to Personnel Analyst III (PA-III). The Commission held a pre-hearing conference at the Commission’s Boston office on October 30, 2018 and a full hearing at that location on January 10, 2019, which was digitally recorded.² Twenty (20) exhibits (*Exhs. 1 through 14, 15A & 15B, 16A & 16B, 17 through 20*) Neither party chose to submit a Proposed Decision. For the reasons stated, the appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by EOHHS:

- Amy Lynch, EOHHS Director of Recruitment, Staffing & Policy
- Cindy Smey, CYF-HR, Planning & Staffing Analysis Unit

Called by the Appellant:

- Darling Carter, CYF-HR, Appellant

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with and conflicting provisions of G.L. c.30,§49, or Commission rules, taking precedence.

2. Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Darling Carter, holds the position of Payroll Assistant Supervisor in the CTF-HR's Personnel/Payroll Unit, with a civil service title of PO-II, a position that she has held since her promotion from PO-I in October 2012. (*Exhs. 5, .. 12 through 14, 17, 18 & 20: Testimony of Appellant*)

2. The Personnel/Payroll Unit handles payroll processing needs for CYF employees, including such activities as processing new hires, promotions, demotions, reclassifications, retroactive pay adjustments, changes in hours and alternative work schedules, employee tax forms, time and attendance records, payroll deductions and audit of employee bi-weekly payroll (pay advice). (*Exhs. 5, 7, 12 through 14, 15A, 17, 18 & 20: Testimony of Appellant & Lynch*)

3. The Personnel/Payroll Unit is managed by a Payroll Unit Manager (Administrator VI), who reports to an Employment Services Director aka Payroll Director (Administrator VII)³. The Payroll Unit Manager directly supervises two Payroll Supervisors (PA-IIIs), three Payroll Assistant Supervisors (PO-IIs) and one PO-I, who handles "120 Post-Retiree" matters. Ms. Carter (in conjunction with one of the Payroll Supervisors) directly supervises four PO-Is, one of the other PO-IIs supervises four other Personnel Officer Is (in conjunction with another Payroll Supervisor) and the third PO-II handles quality & compliance matters and appears to have no direct reports. (*Exhs. 5, 12, 18 & 20: Testimony of Appellant & Lynch*)

4. Ms. Carter devotes approximately 50% of her time in supervising, training and counseling others, including the four PO-Is for whom she is directly responsible for their performance evaluations as well as functional supervision of the other PO-Is and clerical staff. She devotes the rest of her time handling her own case load of payroll issues for CYF employees (she is responsible for handling all personnel/payroll processing matters for approximately 1,000 FTEs). (*Exhs. 5, 13, 14, 15A, 17 & 19ID; Testimony of Appellant*)

5. Ms. Carter is considered a "stellar" employee who consistently meets or exceeds her performance expectations. (*Exhs. 5 & 14; Testimony of Lynch*)

6. At one point, Ms. Carter was offered the opportunity for promotion to a newly created management position (M-IV), in effect, elevating her to a position of Assistant Payroll Unit Manager responsible to assume direct management over the other supervisors, including the PA-IIIs. She declined the promotion because it would have meant taking a pay cut from what she would be able

to earn as a PO-II after COLA adjustments that were about to take effect under her union CBA. That position was then "repurposed" and is no longer available. (*Testimony of Appellant Lynch*)⁴

7. On or about October 31, 2017, Ms. Carter filed a request with CYF-HR for reclassification of her position from a PO-II to a PA-III. By letter dated June 18, 2018, after review and audit of her request, CYF-HR Director Amy Lynch informed Ms. Carter that she did not warrant reclassification to the title of a PA-III and that her request was denied. (*Exhs. 1 through 8: Testimony of Smey & Lynch*)

8. Ms. Carter duly appealed the denial of her reclassification request to the Massachusetts Human Resources Division (HRD). By letter dated September 12, 2018, HRD informed Ms. Carter that she was appropriately classified as a PO-II, she did not warrant reclassification to a PA-III, and her appeal was denied. This appeal to the Commission ensued. (*Exhs. 9 through 11*)

9. The Personnel Officer Classification Specification was promulgated by HRD in 1987 and contains two job titles in the series: (1) PO-I is the "entry-level supervisory job" in the series, responsible for supervising at 1 to 5 clerical personnel and exercising functional supervision over 1 to 5 other professional, technical or administrative personnel; and (2) PO-II is the "second-level supervisory job" in the series, responsible to directly supervise 1 to 5 PO-Is or other professional personnel, and indirectly supervise (through an intermediate supervisor) another 1 to 5 clerical personnel. (*Exh. 16A*)

10. Incumbents of positions in the Personnel Officer series perform a broad variety of "personnel functions for an assigned agency", including support for staffing decisions, hiring, performance evaluations, discipline and personnel records. The "basic purpose" of the work is "to ensure that the agency personnel functions are in compliance with established law, rules, policies, regulations and contractual agreements". (*Exh. 16A*)

11. The Personnel Analyst Classification Specification, also promulgated by HRD in 1987, contains three job titles: (1) PA-I is the "entry-level professional job" in the series; (2) PA-II is the "first level supervisory job" in the series, responsible to directly supervise 1-5 professional personnel; and (3) PA-III is the "second-level supervisory job" in the series, responsible to directly supervise 1 to 5 professional personnel and indirectly supervise 6 to 15 professional personnel. (*Exh. 16B*)

12. Incumbents of positions in the Personnel Analyst series "make recommendations on position classification and related personnel actions", such as personnel studies, wage and salary surveys and classification studies. The "basic purpose" of the work of a

3. The Administrator VII reports to the CYF-HR Director. (*Exhs. 12, 18 & 20*)

4. At the Commission hearing, Ms. Lynch testified that, as a result of Ms. Carter's reclassification request, among other things, a review of the PA-III positions in CYF, led to the conclusion that Payroll Supervisors (as well as perhaps several dozen other PA-IIIs in the agency, were not doing the work of a PA-III and were

"misclassified", either because they were moved into those positions from other assignments or for other reasons. These positions have been "flagged" and, when the incumbents leave the position, they will be restructured to an appropriate management or other position. (*Testimony of Lynch*)

Personnel Analyst “is to ensure the proper maintenance of the statewide personnel classification system.” (*Exh. 16A*)

13. Both POs and PAs are represented by the same bargaining union, NAGE Unit 6. PO-II carries a Grade 13 ranking; PA-III carries a Grade 15 ranking. (*Testimony of Appellant & Lynch*)

APPLICABLE CIVIL SERVICE LAW

G.L.c.30, §49 provides:

Any manager or employee of the commonwealth objecting to any provision of the classification affecting his office or position may appeal in writing to the personnel administrator. . . Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it. If said commission finds that the office or position of the person appealing warrants a different position reallocation . . . it shall be effective as of the date of appeal . . .

“The determining factor of a reclassification is the distribution of time that an individual spends performing the function of a job classification.” *Roscoe v. Department of Environmental Protection*, 15 MCSR 47 (2002). In order to justify a reclassification, an employee must establish that she is performing distinguishing duties encompassed within the higher level position the majority (i.e., at least 50% or more) of the time. *See, e.g., Pellegrino v. Department of State Police*, 18 MCSR 261 (2005) (at least 51%); *Morawski v. Department of Revenue*, 14 MCSR 188 (2001) (more than 50%); *Madison v. Department of Public Health*, 12 MCSR 49 (1999) (at least 50%); *Kennedy v. Holyoke Community College*, 11 MCSR 302 (1998) (at least 50%). What must be shown is that Ms. Zeller performs the “distinguishing duties” of the RN-III position at least 50% of the time and, in making this calculation, duties which fall within both the higher and lower title do not count as “distinguishing duties.” *See Lannigan v. Department of Developmental Services*, 30 MCSR 494 (2017)

ANALYSIS

Ms. Carter is well-regarded by her colleagues as a “stellar” public servant who works hard at her job. However, reclassification of a position by the Commission requires proof that specified distinguishing duties of the title to which reclassification is requested are, in fact, actually being performed as the major part of her current work (i.e. more than 50 percent of her time is spent on these distinguishing duties). Accordingly, the issue before the Commission is limited to that narrow question.

The evidence establishes that Ms. Carter does not perform any of the duties of a PA-III and, therefore, the Commission has no basis upon which to overturn the decision of the EOHHS and HRD that she should not be reclassified to that position.

First, there is no dispute that Ms. Carter does not perform the duties of a PA-III (or a PA-I or PA-II for that matter) as defined by the Personnel Analyst Classification Specification. The jobs in this series involve work in the specialized personnel field of position classification. The work of the CYS-HR Personnel/Payroll unit does not involve any essential duties set forth in the Personnel Analyst job series. Ms. Carter acknowledged that she does not perform any duties relating to position classification because she is not currently assigned those duties but would be happy to perform them if requested. Ms. Lynch acknowledges that the supervisors in the CYS-HR Personnel/Payroll Unit who now occupy a job title of PA-III are “misclassified.”

Second, the job duties defined in the two-tier Personnel Officer Classification Specification are broadly defined and seem to be written to fit more of a “generalist” human resources operation. They are not a perfect fit for the specialized, multi-level supervisory positions occupied by Ms. Carter and her peers in the CYS-HR Personnel/Payroll unit. In particular, Ms. Carter is a first-line supervisor, not the second-line supervisor described in the PO-II job description (which would more aptly fit the supervisor to whom Ms. Carter reports.). Similarly, none of the PO-Is on her staff have any reports and do not directly supervise anyone as described in the PO-I job description. As there is no title above PO-II in the series, there is no opportunity for advancement in the unit within the job series above that level (i.e. Grade 15, NAGE Unit 6). This mismatch of job titles and job functions, however, does not justify Ms. Carter’s reclassification to what is another clearly inappropriate mismatch.⁵

Third, reclassification of Ms. Carter would be fraught with practical complications, including the elevation of an employee to the same level as her supervisor, which presents an organizational anomaly that, as a general rule, ought to be avoided. It would also perpetuate the “misclassification” issue that CYS has “flagged” and intends to rectify when incumbents who currently hold the PA-III job title leave the unit.

In sum, Ms. Carter did not meet her burden to establish that she performs the duties of a PA-III more than half of her time. Therefore, the Commission is not authorized to recommend that her position be reclassified.

Accordingly, for the reasons stated above, the appeal of the Appellant, Darling Carter, under Docket No. C-18-193 is **denied**.

* * *

By vote of the Civil Service Commission (Bowman, Chairman [absent]; Camuso, Ittleman, Tivnan & Stein, Commissioners) on January 16, 2020.

Notice to:

5. If there truly is need for a multi-level supervisory structure in a specialized HR unit such as found in the CYF-HR payroll operation, it should be addressed through a “group allocation” review and/or possible update to the 1987 Classification

Specifications in this area to better fit the reality on the ground, matters which are beyond the purview of the Commission’s authority in this appeal.

Darling Carter
[Address redacted]

Ricardo Couto, Labor Relations Specialist
EOHHS - 7th Floor
600 Washington Street
Boston, MA 02111

* * * * *

CARMINA DELL'ANNO

v.

MASSACHUSETTS DEPARTMENT OF REVENUE

C-18-083

January 16, 2020

Paul M. Stein, Commissioner

Reclassification Appeal-Department of Revenue-Child Support Enforcement Specialist I to II-Scope of Responsibilities—The Commission turned down the reclassification appeal from a DOR Child Support Enforcement Specialist I seeking a reclassification to Specialist II. Although the Appellant had been a dedicated public servant in the same entry-level position for 18 years, she continued to perform the level-distinguishing duties of her current classification most of the time. These included researching, tracking and recording information, processing cases for financial audit, legal proceedings and paternity testing, and flagging safety issues. The decision takes note of the work performed by the Appellant outside of grade but finds such work was either temporary or fell well short of the time needed to merit an upward reclassification.

DECISION

The Appellant, Carmina Dell'Anno, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.30,§49,¹ from the denial of the Massachusetts Human Resources Division (HRD) of a request to reclassify her position at the Department of Revenue (DOR) from her current title of Child Support Enforcement Specialist I (CSES-I) to the title of Child Support Enforcement Specialist II (CSES-II). The Commission held a pre-hearing conference at the Commission's offices in Boston on June 5, 2018 and a full hearing at that location on July 23, 2019, which was digitally recorded.² Sixteen (16) exhibits (*Exhs. 1 through 16*) were taken into evidence. The DOR filed a Proposed Decision on August 24, 2018.³

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by DOR:

- Diane Obear, Deputy Director, Metro Region, DOR Child Support Enforcement Division
- Sandra Antonucci, Classification Analyst, DOR Human Resources Bureau
- GERALYN Page, Classification and Hiring Manager, DOR Human Resources Bureau

Called by the Appellant:

- Carmina Dell'Anno, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Carmina Dell'Anno, has been employed since 1999 in the DOR's Metro Region, Child Support Enforcement Division (CSE). Originally classified as an entry-level Child Support Enforcement Worker A/B (CSEW A/B) assigned to the CSE Customer Service Bureau and later in the CSE Initiate Unit, her job title was reclassified from a CSEW A/B to the equivalent entry-level position of CSES-I when the prior Child Support Enforcement Worker Series was replaced by the current Child Support Enforcement Specialist Series in April 2015. She was transferred to her current assignment in the Establishment Unit in December 2015. (*Exhs. 1, 10 through 14; Testimony of Appellant & Obear*)

2. Ms. Dell'Anno received her Bachelor of Arts from Salem State College in 1996. She is multi-lingual (Spanish, Portuguese, Cape Verdean & Italian) and is assigned to Spanish intake and translation duties for which she receives separate compensation. In 2017, she became a Notary Public. She has completed dozens of DOR in-house training courses. (*Exhs. 3, 4, 7, 14 through 16; Testimony of Appellant, Page & Obear*)

3. The basic mission of the CSE is to "support the establishment and enforcement of child support agreements and court orders, including collection of money owed to the government and to families and to enhance the well-being of children." This work includes services to parents (customers) who pay child support and parents and caretakers who receive child support to establish paternity and to procure, enforce, or modify a child support order. (*Exh.10; Administrative Notice [https://www.mass.gov/orgs/child-support-enforcement-division]*)

4. The processing of a child support case begins with a referral from a state agency (e.g., Department of Transitional Assistance (DTA) or an application submitted by a custodial parent. The

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with and conflicting provisions of G.L. c.30,§49, or Commission rules, taking precedence.

2. Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the written transcript of the hearing to the

extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

3. After the close of the hearing, the Appellant submitted certain unsolicited additional documents to the Commission on August 3, 2018 which, for reasons described in the Commission's e-mail dated August 16, 2018, were not accepted for inclusion in the Commission's record.

“Initiate Unit” (aka “Create Unit”), performs the initial intake and enters the case into the CSE database, after which it is forwarded to the “Establishment Unit” which performs additional research to verify the information about the custodial and non-custodial parents needed to establish paternity, including flagging any “safety issues”, prior to further referral to an attorney or others who are responsible for obtaining the necessary paternity tests, seeking court orders and implementing any appropriate measures to secure and enforce the safety of the parents and children involved. (*Exhs. 3, 11 through 14; Testimony of Appellant & Obear*)

5. There are two CSE Case Establishment Units, each managed by a CSES-III, who report to Ms. Diane Obear, Regional Deputy Director, and supervise from three to four CSES-Is. Ms. Dell’Anno is assigned to the unit managed by Stephen La Verde. (*Exh. 1*)

6. Ms. Dell’Anno’s essential duties in the Case Establishment Unit include:

- Duty 1 - Conduct initial research on data bases and confer with parents, DTA, DCF, and Division of Medical Assistance and local courts to locate and verify identity of non-custodial parents responsible for the support of the children.
- Duty 2 - Verify and work toward establishing legal paternity by obtaining necessary documentation, updating paternity status codes, and referring cases to establish legal paternity via the courts.
- Duty 3 - Initiate and respond to telephone and written inquiries from parents, legal representatives, employers and others. She presents a monthly one-hour workshop at the New Market DTA office.
- Duty 4 - Monitor and maintain the regional “DTAN Report” which requires weekly review and updating the inventory of referrals from three DTA offices in the region.
- Duty 5 - Support agency efforts to promote safer child support enforcement, which entails sending out packets to parents to identify whether there would be any safety concerns with pursuing an enforcement case, following up to ensure the information is returned and referring the packet to another appropriate CSE unit to handle the safety issues that are flagged.
- Each of these duties are performed pursuant to “established policies and procedures”, with “critical issues” brought to the immediate attention of a supervisor.

(*Exhs. 3 & 11; Testimony of Appellant, Obear & Page*)

7. In addition to her core duties, Ms. Dell’Anno was one of approximately 20 employees involved as a volunteer in a four to six week test of a newly developed data base system called Comets HD. She helped to “debug” the system before it was formally rolled out. (*Exhs. 3 through 5; Testimony of Appellant & Obear*)

8. The CSES Series Classification Specification establishes three levels of work:

- CSES-I is the “entry-level professional classification” in the series. Incumbents “seek guidance and advice from more experienced colleagues.” Examples of the duties performed at the CSES-I level:

- Communicate with customers, attorneys, employers and others to explain proposed or completed child support enforcement activities and facilitate understanding of federal and state laws, rules, regulations and agency policies;
- Identify, define and diagnose child support enforcement issues, develop and prioritize steps for resolution and execute corrective action as necessary;
- Review, collect, verify, confirm, audit and make necessary adjustments to customer data information and documentation related to case records to ensure accuracy and confidentiality of financial, customer profile and other data;
- Assist in enforcement of court orders, makes determinations to exempt cases from enforcement and evaluate options such as lottery and tax intervention, insurance settlement interception and referral for litigation to collect arrearages owed to families or the Commonwealth;
- Review applications for services and referrals from other state agencies and collect information through on-line research, contacts with parents, referring agencies, court and other records to determine eligibility, initiate and close cases and prepare active cases for establishment of paternity and child support orders;
- Collaborate with other state or international child support enforcement agencies to initiate child support enforcement actions when one or more parties are located outside the Commonwealth or when any out-of-state agency seeks assistance to establish, enforce or modify child support orders of a party residing within the Commonwealth; and
- Elevate complex issues, customer conflicts and safety issues to higher level employees.
- CSES-II is the “full competent professional classification” in the series. Incumbents “perform work of greater complexity, exercise greater independence in making decisions and handle most cases independently.” While incumbents also may perform the duties of a CSES-I, they are expected to be “highly skilled in one or more areas of child support to handle more complex cases.” Examples of the duties performed at the CSES-II level:
 - Resolve complex or protracted customer issues and tasks to advance cases to establish paternity or modify or enforce court orders;
 - Provide experienced assistance and review the work of others and encourage appropriate case management;
 - Provide technical consultation on complex case processing issues, complex financial audits or complex customer inquiries requiring, among other things, data analytics and risk-based scoring methods to forecast payment behaviors;
- Conduct technical reviews through case sampling to measure compliance with state and federal standards;
- Coordinate parentage testing services by scheduling and follow-up with parties for genetic marker testing, working with test vendors and statistical recordkeeping of results;
- Assist in the preparation and presentation of court cases, including support of attorneys, court personnel, judges, preparation of court orders and testimony.
- CSES-III is the “first-level supervisory position” in the series. Incumbents “exercise direct supervision over, assign cases to and review the performance of CSES-Is and CSES-IIs.

(Exh. 10)

9. On or about February 1, 2017, Ms. Dell'Anno filed a request with the DOR Human Resources Bureau to be reclassified from a CSES-I to CSES-II. (Exh. 2)

10. At the time of her reclassification request, Ms. Dell'Anno's transition from her assignment in the Initiate Unit to the Establishment Unit was substantially complete. Accordingly, the Commission focuses exclusively on the assessment of her duties in the Establishment Unit to determine whether she is performing a majority of her time as a CSES-I or in the higher title of CSES-II. (Exhs. 3, 4, 11 & 13; Testimony of Appellant)⁴

11. As part of her reclassification request, Ms. Dell'Anno estimated in her "Interview Guide" that most of her day-to-day activity in the Establishment Unit was devoted to working on "reports" (70 to 80 percent) and "domestic violence cases", i.e., work as the "Safety Liaison" responsible to send out safety packets to parents, follow-up with them, and code the files for "safety watch". (20 to 30 percent) (Exhs. 3 & 4; Testimony of Appellant, Obear & Page)

12. Ms. Dell'Anno acknowledged that her duties did not include data analytics, early intervention, preparation and presentation of court cases, quality assurance review of the work of other employees (other than ensuring the accuracy of data entered in the computer system) or genetic testing (other than preparing cases for referral to a genetic marker test coordinator and/or scheduling paternity testing for clients who are in jail), or preparation and presentation of court cases. (Exhs. 3 & 4; Testimony of Appellant & Page)

13. After reviewing Ms. Dell'Anno's request and obtaining input from her supervisors, by letter dated December 14, 2017, DOR Human Resources Bureau Director Melissa Diorio denied her request for classification. The core reason for denying the request turned on the DOR's conclusion that the duties performed by Ms. Dell'Anno were substantially routine, repetitive and administrative activities that relied on standard operating procedures and "check lists", rather than the "complex" case-handling decisions and problem-solving work that distinguishes the higher position of a CSES-II. (Exhs. 6 through 8; Testimony of Obear & Page)

14. Ms. Dell'Anno duly appealed the DOR's decision to HRD which, by letter dated February 20, 2018 denied her appeal. (Exh. 9)

15. This appeal to the Commission duly ensued. (Claim of Appeal)

APPLICABLE CIVIL SERVICE LAW

G.L. c. 30, §49 provides:

Any manager or employee of the commonwealth objecting to any provision of the classification affecting his office or posi-

tion may appeal in writing to the personnel administrator. . . Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it. If said commission finds that the office or position of the person appealing warrants a different position reallocation . . . it shall be effective as of the date of appeal . . .

"The determining factor of a reclassification is the distribution of time that an individual spends performing the function of a job classification." *Roscoe v. Department of Environmental Protection*, 15 MCSR 47 (2002). In order to justify a reclassification, an employee must establish that she is performing distinguishing duties encompassed within the higher level position the majority (i.e., at least 50% or more) of the time. *See, e.g., Pellegrino v. Department of State Police*, 18 MCSR 261 (2005) (at least 51%); *Morawski v. Department of Revenue*, 14 MCSR 188 (2001) (more than 50%); *Madison v. Department of Public Health*, 12 MCSR 49 (1999) (at least 50%); *Kennedy v. Holyoke Community College*, 11 MCSR 302 (1998) (at least 50%). What must be shown is that Ms. Dell'Anno performs the "distinguishing duties" of the RN-III position at least 50% of the time and, in making this calculation, duties which fall within both the higher and lower title do not count as "distinguishing duties." *See Lannigan v. Department of Developmental Services*, 30 MCSR 494 (2017)

ANALYSIS

Ms. Dell'Anno is well-regarded by her colleagues and supervisors in the CSE as a dedicated public servant who is a reliable and experienced CSES-I. With eighteen years of service with the CSE, there is certainly something to her point that she should no longer be considered an "entry-level" employee. However, reclassification of her position to a CSES-II by the Commission requires proof that the specified distinguishing duties at the higher title are, in fact, actually being performed as the major part of her current work (i.e. more than 50 percent of her time is spent on these distinguishing duties). Accordingly, the issue before the Commission is limited to that narrow question.

The evidence establishes that substantially all of Ms. Dell'Anno's job duties appropriately fit squarely within her current level of CSES-I. Although she is clearly "fully competent" in her duties, that is not sufficient to establish that that she performs at the CSES-II level more than 50% of the time, which is the Commission's core requirement to allow a reclassification.

First, the preponderance of the evidence established that DOR and HRD correctly determined that substantially all of the duties regularly performed by Ms. Dell'Anno are not distinguishing duties of a CSES-II. Indeed, they largely fall well within the duties expected of a CSES-I, namely, researching, tracking and recording information, processing cases for financial audit, legal proceedings and/or paternity testing (other than those incarcerated),

4. Including consideration of Ms. Dell'Anno's transitional work for the Initiate Unit would not enhance, and would probably detract from, her reclassification claim, as those duties included the processing of initial applications for services,

creating the agency file and data entry, all of which fit the CSES-I job title as described below. (See Exh. 13 [EPRS, Duty 1])

and flagging safety issues, all for substantive, further handling by others. Moreover, even if some part of this work could be considered more complex than the work that a CSES-I typically does, the record simply does not show that such work comprises any quantifiable regular part of her job, let alone, show that it occupies more of her time than her core CSES-I level duties.

Second, as defined in the Classification Specification, while a CSES-II may, in part, also perform duties at the CSES-I level, the fact that there is some overlap in the two jobs does not bear on whether a reclassification is appropriate. Where duties are common to both the lower and higher titles, they are not considered “distinguishing” duties for purposes of applying the Commission’s 50% test. That test looks only at the duties prescribed in the Classification Specification for the higher title, i.e., the “complex” work of a CSES-II. Examples of this more “complex” work, none of which is a part of Ms. Dell’Anno’s regular duties, include: (1) technical consultation on complex case processing issues, complex financial audits or complex customer inquiries requiring, among other things, data analytics and risk-based scoring methods to forecast payment behaviors; (2) technical reviews through case sampling to measure compliance with state and federal standards; and (3) assist in the preparation and presentation of court cases, including support of attorneys, court personnel, judges, preparation of court orders and testimony.

Third, the work that Ms. Dell’Anno references as one of the staff assigned to assist with the analysis and “debugging” of the CSE’s new Comets HD data system falls short of meeting the preponderance of evidence test. That work was a temporary, voluntary special assignment that lasted for only four to six weeks and has long been completed. *See Hartnett v. Dep’t of Revenue*, 30 MCSR 498 (2017) (temporary, voluntary assignment cannot form the basis for reclassification); *Caragulian v. University of Mass. Amherst*, 18 MCSR 207 (2005) (same).

Fourth, Ms. Dell’Anno contends that other employees in the CSE that have been promoted to CSES-II over the past ten years are doing substantially the same level of work as she performs. As the Commission has repeatedly noted, when reviewing reclassification appeals, the Commission must look “only at the duties of the Appellant” and the classification of other employees who held those positions prior to being transferred to their current job, or promoted by the Appointing Authority to the position, have no bearing on the issue before the Commission as to whether the Appellant meets the preponderance of the evidence test that the Appellant is performing a majority of the time at the higher level. *See McBride v. Dep’t of Industrial Accidents*, 28 MCSR 242 (2015); *Palmieri v. Department of Revenue*, 26 MCSR 180 (2013).

Fifth, I can fully appreciate that Ms. Dell’Anno believes that she is just as “fully competent” a CSES professional as many of her peers, and has been overlooked for promotions that she deserved. The Commission, however, may not use the statutory authority granted to reclassify an employee as a substitute for an appointing

authority’s prerogative to make promotions in compliance with the civil service law and rules.

In sum, Ms. Dell’Anno did not meet her burden to establish that she performs the duties of a CSES-II more than half of her time. Therefore, the Commission is not authorized to recommend that her position be reclassified to a CSES-II.

Accordingly, for the reasons stated above, the appeal of the Appellant, Carmina Dell’Anno, under Docket No. C-18-083, is *denied*.

* * *

By vote of the Civil Service Commission (Bowman, Chairman [absent]; Camuso, Ittleman, Tivnan & Stein, Commissioners) on January 16, 2020.

Notice to:

Carmina Dell’Anno
[Address redacted]

Richard V. Gello, Esq.
Counsel, Office of Labor Relations
Department of Revenue - P.O. Box 9553
Boston, MA 02114-9553

* * * * *

IAN HUNT

v.

CITY OF WOBURN

G2-17-168

January 16, 2020

Cynthia A. Ittleman, Commissioner

Bypass Appeal-Promotion to Woburn Police Sergeant-Successful Candidate-Command Presence-Flawed Process-Bias—Commissioner Cynthia A. Ittleman voided the promotional bypass to sergeant of the #1 ranked Woburn police officer, finding him to be a stronger candidate than the appointed one with regard to community involvement, voluntary training, supervisory skills, and military experience. Woburn had promoted the successful candidate, a narcotics detective, based largely on his “command presence”—a characterization the Commission found inherently subjective. The Commission did decline to find that the hiring process had been biased but faulted the Police Chief and a captain for meeting with the Mayor before the candidate interviews and presumably presenting him with their recommendations.

DECISION

On August 31, 2017, Ian Hunt (the Appellant or Mr. Hunt) filed the instant appeal with the Civil Service Commission (the Commission) under G.L. c. 31, s. 2(b) challenging the decision of the City of Woburn (the Respondent, the City or Woburn) to bypass the Appellant for promotion to Sergeant in the Woburn Police Department (the WPD or the Department). The Commission held a prehearing conference in this regard in Boston on September 26, 2017 and a full hearing was held at the same location on November 21, 2017.¹ The hearing was digitally recorded and copies of the recording were sent to the parties.² The witnesses, with the exception of the Appellant, were sequestered. Both parties submitted post-hearing briefs. For the reasons stated herein, the appeal is allowed.

FINDINGS OF FACT

Eleven (12) Exhibits (Ex.) were entered into evidence.³ Based on the Exhibits and the testimony of the following witnesses:

Called by the Appointing Authority:

- Scott D. Galvin, Mayor of Woburn
- Robert J. Ferullo, Jr. Chief, Woburn Police Department (WPD)
- Robert Rufo, Captain, WPD

Called by the Appellant:

- Ian Hunt (Appellant)

and taking administrative notice of all matters filed in the case; stipulations⁴; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

1. The Appellant has been a Woburn Police Officer since 2008. He is married, with three (3) children, a homeowner and has served in the U.S. Coast Guard Reserves. (A.Ex. 1; Testimony of Appellant) He began work at the Department on the 3pm to 11pm shift but in 2014, he began working on the overnight shift instead of the 3pm to 11pm shift. (Testimony of Appellant)

2. The WPD has seventy-six (76) fulltime police officers, twenty (20) part-time officers and twenty (20) civilian employees. The employees include approximately fifty-six (56) Patrol Officers, nine (9) Sergeants and seven (7) Lieutenants in the Department. (Testimony of Ferullo) Mayor Galvin is the city’s appointing authority. (Testimony of Galvin⁵)

3. The Appellant took and passed the 2015 promotional exam for Police Sergeant. The state’s Human Resources Division (HRD) issued an eligible list on March 1, 2016 indicating that five (5) members of the WPD had passed the promotional exam, with the Appellant ranked second and Officer A ranked third. (Administrative Notice - HRD Information⁶) However, the Sergeant’s promotional Certification, prepared by Woburn as a delegated civil service community, indicates (and the parties stipulate) that there were four (4) candidates, that the Appellant was ranked first and that Officer A was ranked second. (Jt.Ex. 1; Stipulation (signed by the parties at the Commission prehearing conference); “Agreed Upon Facts and Exhibits”)

4. Since 2014, the Appellant has been working on the WPD night shift, where he is one of the most senior officers, if not the most senior officer, on the shift and he is the field training officer on the

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

3. Five (5) exhibits were filed jointly (Jt.Ex.); the Appellant filed five (5) separate exhibits (A.Ex.). In addition, on November 27, 2017, the Respondent submitted the affidavit of Police Chief Ferullo (R.Post-Hrg.Ex. 1) regarding the 2015 assignment of Officer A to the position of detective in the WPD Vice/Narcotics unit, attaching thereto Officer A’s letter to Captain Murphy expressing his interest in the assignment and Officer A’s resume. Also on November 27, 2017, the Appellant submitted a letter (A.Post-Hrg.Ex. 1) in response to my order at hearing, indicating

that when the detective assignment was available in 2015 he could not be considered for the assignment because of family commitments; Officer A informed the Department of his interest in the detective assignment in 2015 and he was subsequently assigned to the detective position.

4. At the prehearing conference in this case, the parties stipulated to certain facts. (Administrative Notice)

5. Mayor Galvin and Chief Ferullo are licensed attorneys but they do not practice law. (Testimony of Galvin and Ferullo)

6. The information provided by HRD includes eligible list 03156 but lists another candidate ranked first, the Appellant ranked second, and Officer A ranked third. However, the parties here have stipulated that at the pertinent time, the Appellant was ranked first and Officer A was ranked second. (“Agreed Upon Facts and Exhibits” and Stipulation (signed by the parties at the prehearing conference in this case) In addition, the Certification prepared by Woburn that candidates signed indicates that there were four (4) candidates, that the Appellant was ranked first on the list and that Officer A was ranked second. (Jt.Ex. 1)

shift. There are usually a minimum of four (4) police cruisers on the night shift, with no outside resources, such as a traffic unit. When the night shift does not have a supervisor, the Appellant takes on supervisory roles, such as assisting in booking, fingerprinting and running any crime scenes on his shift. (Testimony of Appellant) The Appellant has also participated in the North Eastern Massachusetts Law Enforcement Council (NEMLEC), which is a mutual aid association, providing aid to member communities in need of additional law enforcement resources. (Post-Hearing Affidavit of Chief Ferullo⁷ - Attachments from Officer A) Police Departments in the NEMLEC region are required to provide ten (10) percent of their officers to NEMLEC. WPD officers interested in working with NEMLEC can sign a WPD posting, although selection may reflect the WPD officer's seniority. Participating officers are trained once or twice per month. (Testimony of Ferullo)

5. In addition to required training, the Appellant has taken every training course he has been permitted by his superiors to take. As a result, for example, he is an EMT, he is certified to conduct CPR training, he is a suicide prevention instructor, a Nasal Narcan Instructor, a designated infection control officer; a first responder instructor; and, as a field training officer, the Appellant has trained approximately twelve (12) officers. He is the only field training officer on the night shift. In addition, the Appellant is trained in police mountain biking and in domestic drug interdiction. (A.Ex. 1; Testimony of Appellant) Certain other trainings were not available to the Appellant. (Testimony of Appellant; Testimony of Chief Ferullo)

6. The Appellant has been involved in more than 380 arrests and has been the lead arresting officer in more than 284 cases. He has been involved in more than 625 incident investigations and has been the lead officer in 554 of those cases. A 2013 performance evaluation of the Appellant rated his performance as "outstanding".

7. The Appellant has advanced his academic and professional credentials. He has a Bachelor's degree in criminal justice and a Master's degree in criminal justice magna cum laude, both degrees from the University of Massachusetts at Lowell. In the Coast Guard Reserves, the Appellant rose to the rank of E6⁸, supervising eleven (11) others when he has been deployed (not overseas), and he leads search and rescue operations, albeit under supervision. His Coast Guard assignments have included deployment to the Deepwater Horizon oil leak off the coast of Texas as the lead agency to clean up the oil spill, preserve water safety, and address commercial ocean traffic. (A.Exs. 1 - 5; Testimony of Appellant)

8. The Appellant repeatedly applied for the WPD detective assignment when there was an opening, except in 2015 because of a family commitment, but his requests were denied. (Testimony of Appellant) The detective assignment is a highly sought-after position at the WPD. (Testimony of Capt. Rufo) A detective can

receive a stipend of between \$600 and \$2,000, in addition to overtime opportunities. (Testimony of Chief Ferullo)

9. An officer's community involvement plays a big role in promotions. (Testimony of Chief Ferullo) The Appellant steps up when officers are needed for many city events; the Appellant is always there for the Department and/or the City. (*Id.*) In addition, the Appellant represented the Department in the Boston Run to Remember (a half-marathon to remember fallen law enforcement officers and first responders), he led the Los Angeles Run to Remember (which his union sponsored), and he has worked with the Cops for Kids with Cancer program and the Special Olympics. (Testimony of Appellant)

10. The WPD has received letters from local residents, another police department and the Rear Admiral of the Coast Guard (First Coast Guard District) commending the Appellant for his actions on various occasions. His direct supervisor, Sgt. T, highly recommended the Appellant for a previous detective assignment. Sgt. D commended the Appellant and others for their roles in apprehending someone charged with assault and attempt to murder. The Appellant also received the Middlesex District Attorney's Office Team Investigation Award. (A.Exs. 2 and 4)

11. The Appellant has no disciplinary history. (Testimony of Galvin)

Officer A

12. Officer A was hired by the WPD in 2009. (Jt.Ex. 4) He took and passed the 2015 promotional exam for Police Sergeant and was ranked second thereon, after the Appellant, who was ranked first. (Jt.Ex. 1; Stipulation; Administrative Notice: HRD Information) Prior to working at the WPD, Officer A worked at the Suffolk County Sheriff's Department as a caseworker, where he was a detainees' liaison to the courts, parole, attorneys and various programs, as well as formulated institutional service plans for detainees and conducted board of probation reports. (Chief Ferullo's Post-Hearing Affidavit and Attachments)

13. In 2015, Officer A was selected for the WPD detective assignment in the narcotics unit. As a detective working in the WPD narcotics unit, Officer A was a "lone wolf" who worked mostly independently (while informing the narcotics unit Sergeant as needed) and worked on matters outside of Woburn. Chief Ferullo received good feedback from federal law enforcement authorities with whom Officer A interacted. (Testimony of Chief Ferullo) As a detective, the Appellant was involved in federal cases that yielded significant searches and seizures. He also took on "aggressive" street cases but also worked well with crime victims and family members to obtain additional information. As a detective, Officer A was involved in a case that began as a heroin drug investigation but, with Officer A's efforts, in conjunction with other authorities,

7. The only documentation attached to Chief Ferullo's affidavit about Officer A's detective assignment are Officer A's June 3, 2015 letter of interest in the assignment and his resume. There is no copy of the detective assignment posting or any indication how long the assignment was posted.

8. I take administrative notice that the Coast Guard rank of E6 is a Petty Officer First Class.

became a human smuggling case for which Officer A obtained warrants that led to prosecution in Boston. (Testimony of Ferullo)

14. Officer A's training includes suicide prevention, police mountain biking, field training officer, and cell phone investigation techniques. As a detective, Officer A took required detective training courses, including CrimeNtel criminal intelligence software certification, 80 hour Street Level Narcotics Investigations, and Interviews and Interrogation and Forensic Statement Analysis. (Jt. Ex. 4)

15. Officer A has been involved in more than 150 narcotics cases and was lead investigator in more than 70 cases; he has cultivated, managed, and supervised police informants; been an undercover officer in dozens of investigations; authored 40 search warrants and executed more than 75 search warrants; participated in numerous search and rescue operations with NEMLEC; and participated in multiple crowd control operations with NEMLEC. (Jt. Ex. 4)

16. Officer A has a Bachelor's degree in criminal justice from Westfield State University, a Master's degree in criminal justice from the UMass/Lowell, and certificates in Leadership and Police Development and Forensic Criminology (both from UMass/Lowell). (Jt.Ex. 4)

17. With respect to community involvement, Officer A apparently indicated during his interview for the Sergeant promotion that he has participated in events at the Boys Club, the Lions Club and unspecified charity events. (Jt.Ex. 4) As a detective, Officer A worked Monday through Friday but sometimes irregular hours, given the nature of the assignment. He likes to take the weekends off like some other members of the Department. (Testimony of Chief Ferullo)

18. Among the "achievements" listed on Officer A's resume are two (2) letters of commendation from the WPD Police Chief in 2011 and 2012, a letter of commendation from WPD Sgt. D in 2012, and Squad Leader at the MBTA Transit Police Academy. (Post-Hearing Affidavit of Ferullo and Attachments)

19. Like the Appellant, Officer A has no disciplinary history. (Testimony of Galvin)

Sergeant Promotion Process

20. Following receipt of the rank of each candidate who passed the 2015 Sergeant exam, Mayor Galvin asked Chief Ferullo for information about the candidates and he received a file for each candidate, including each candidate's certifications, resume and aspects of their personnel files. (Testimony of Galvin and Ferullo)

21. After receiving the Sergeant candidates' records, Mayor Galvin met with Chief Ferullo and/or Capt. Rufo to discuss the candidates. Thereafter, Mayor Galvin, by himself, interviewed all four (4) candidates, including the Appellant and Officer A, using the same questions each time, taking notes of the candidates' responses to the questions. (Testimony of Galvin and Ferullo; Exs. 3 and 4)

22. The questions and the Mayor's notes about the responses of the Appellant and Officer A indicate,

Question 1 - "Please describe your understanding of the duties and responsibilities of a Police Sergeant."

Answer of Appellant: "Big jump up more responsibility".

Answer of Officer A: Supervising men + woman on shift[.] - **Lead by example**. Expectations (illegible word) know"[.]

Question 2 - "Describe your leadership style and abilities, especially in difficult situations."

Answer of Appellant: - "**up front ... accountability, make decisions, employees need to know**".

Answer of Officer A: "- **Pro-active leader**[.] Difficult - situations - As to (illegible word)/**more Democratic** (word illegible) with time Permit".

Question 3 - "What basic values do you bring to your job ... and how would they be changed by your becoming a superior officer?"

Answer of Appellant: "**Hard work, reliability, integrity, friendly, - reputation - will do job, approachable, lead by example**".

Answer of Officer A: "**Integrity, ambitious, success driven**, motivated (illegible word) **dedicated**".

Question 4 - "If selected for the position of Sergeant, you would be supervising other police officers who have been your peers. What would be the biggest challenge for you in doing this?"

Answer of Appellant: "Challenges - **treat fairly**".

Answer of Officer A: "Consistent w/ everyone. **No favoritism respect for consistency**."

Question 5 - "How do you view discipline ..., the role of discipline in a police department, and it should be imposed?"

Answer of Appellant: "There is discipline - now **there are ways around it. Favoritism. Discipline immediate when necessary** other times more measured. Should be **fair + consistent**..

Answer of Officer A: "Could be better - lack of discipline in previous years, can hurt. If someone violates rule, it **should be consistent**."

Question 6 - "Please tell me how you would handle one of your police patrol officers who was being insubordinate and not following your directions."

Answer of Appellant: "On the street in public - **correct immediately. Supervisor can't be undermined**."

Answer of Officer A: "**Right (sic) them up. Consistency**".

Question 7 - "As a Police Superior Officer you will be working as part of a team with other Superior officers and as a team leader with your subordinates. Tell me about any related experiences you have had."

Answer of Appellant: "Throughout life - **served as captain in various sports**. In work always steps up - in various circumstances. **Military rose up quickly**."

Answer of Officer A: Detective - **lead Detective** - works with Sgt. McManus - **Directing officers w/more longevity**".

Question 8 - "Why are you interested in becoming a Sergeant in the [WPD] and what sets you apart from the other candidates for

Sergeant? Please include any community involvement you have had or currently have.”

Answer of Appellant: “Push to reach new goals. Applied for promotions ... (illegible) move forward. Senior officer involved in different cases - reliable - special events, Cops for Kids, running, fear.”

Answer of Officer A: “Concerned about Dept Reputation - strong leadership - Education (Masters C.J) Certificate Forensics - 2 year, cert. in Leadership + Policy - Experience on job sets him apart from other officer. NEMLEC. Crowd control. (Chief Ferrero

Question 9 - “Would you like to add anything further regarding your candidacy for this position?”

Answer of Appellant: “military, Masters degree, [illegible word], EMT, community service, well rounded”

Answer of Officer A: “Mt. Bike Unit - NEMLEC - not now [-] 150”

Ethics Issues:

Scenario 1: What do you do when, as a new Sgt., you see an officer who is a close friend “in a remote location” in a cruiser with another friend (not an officer) in the cruiser talking. The officer says he and his friend are just “catching up”.

Answer of Appellant: “Send friend home - (male or female?) - this is work time”.

Answer of Officer A: “order him to have friend leave - verbally address - discipline”.

Scenario 2: What do you do, as Sgt. and supervisor on a shift, when you are called to an altercation between a number of people and it's unclear who is at fault. One of the three (3) officers there does not follow your orders.

Answer of Appellant: “If not following orders and detracting from operation - send him home. If not detracting from operation - discuss. After - discipline, (illegible word) immediate - necessary to keep people in check.”

Answer of Officer A: - Remove him from scene, discuss privately - delegate different task.

The last part of the interview questions, entitled “Observations”, requires the interviewer to assign a numerical score to the candidate’s appearance, poise, communication and experience. The Mayor did not score the Appellant or Officer A in this section of the questionnaire. The Mayor made no additional notations in the “Observations” section of the questionnaire regarding the Appellant but he made the following notations there for Officer A,

- Boys Cub, Lions, charity events
- Maguire golf tournament
- Human Trafficking
- 150 drug cases
- **Handled drug informants**

- Many ethical issues w/ informants
- **Works w/ other officers 20/30 years older.**
- Directs Forfeiture assets

(Jt.Exs. 3 and 4)(emphasis added)

23. Mayor Galvin had interviewed the Appellant and Officer A when they applied for the Sergeant position previously. (Testimony of Galvin)

24. From his interviews⁹ of the Appellant and Officer A pertaining to this appeal, Mayor Galvin determined, in part, that,

- neither the Appellant nor Officer A had a disciplinary record;
- both of the candidates are well educated;
- the Appellant had military experience but Officer A did not;
- choosing between the Appellant and Officer A was a difficult decision;
- Officer A did not have the same level of involvement in the community as the Appellant;
- the Appellant is trustworthy, very visible in the community, a very good officer, and a strong family man;
- the Appellant did a very good job at the interview but his command presence was not as strong as that of Officer A; Mayor Galvin was most impressed with Officer A and found that Officer A was decisive;
- Officer A showed leadership as a successful detective in the WPD Narcotics Unit, sometimes working alone (but keeping his WPD supervisor informed of his actions), working effectively with informants, crime victims and federal law enforcement officials; and
- Officer A showed leadership by his participation in NEMLEC activities;
- Mayor Galvin is aware that the Appellant sometimes leads his over-night shift when a more senior officer is not available.

(Testimony of Galvin)

25. Mayor Galvin defines “command presence” to mean that someone has an air of confidence and is sure of himself. (Testimony of Galvin)

26. The Mayor understood that officers are granted detective assignments following the determination of a panel selected by the WPD and based on the training and based, in part, on the candidates’ detective training/s. (Testimony of Galvin) However, no such panel convened to determine which officer should receive the detective assignment in 2015 because Officer A was the only person who expressed an interest in it at that time. (R.Post-Hrg. Ex. 1) In addition, the Appellant informed the Department that he was not interested in the detective assignment in 2015. (A.Post-Hrg. Ex. 1)

9. There is no indication in the record that the interviews for the Sergeant promotion at issue were recorded.

27. The Mayor also believed that officers (like Officer A) are assigned to the detective position, at least in part, because of detective training they have taken. (Testimony of Galvin) However, Officer A did not receive detective training until he was granted the detective assignment. (Testimony of Ferullo)

28. Chief Ferullo would like the Department to offer training as much as possible but there is usually a fee that the Department would need to pay for each course. Chief Ferullo has assigned the WPD Captains and Lieutenants the task of processing training requests. (Testimony of Ferullo) The Appellant has been authorized to attend certain courses but not others. (Testimony of Appellant)

29. After Mayor Galvin interviewed the Sergeant candidates, he met again with Chief Ferullo and Capt. Rufo to discuss the candidates. The Chief and Captain orally recommended that the Mayor promote Officer A, even though Officer A was ranked second on the certification and the Appellant was ranked first. (Testimony of Galvin and Ferullo)

30. By letter dated July 20, 2017, Mayor Scott Galvin informed the Appellant that he had been bypassed by Officer A, a WPD detective, attaching the reasons for Officer A's selection and informing the Appellant of his right to file an appeal at the Commission. Neither the July 20 letter, nor the letter attached thereto, listed any negative reasons for the Appellant's bypass but listed seven (7) positive reasons for appointing Officer A over the Appellant:

"1. [Officer A] has a history of superior leadership qualities and diversity of public safety service while serving as a Woburn Police Officer.

2. [Officer A] has a Master's Degree in Criminal Justice with Graduate Certificates in Forensic Criminology and Leadership & Police Development.

3. [Officer A] has numerous accomplishments, training experience, and letters of commendation from superior officers in the Woburn Police department.

4. [Officer A] was highly recommended for the position by Woburn Police Chief Robert Ferullo Jr. and Captain Robert Rufo.

5. [Officer A] has served on NEMLEC and the Southern Middlesex Drug Task Force.

6. [Officer A] has served as a Detective with the [WPD], and has demonstrated strong leadership and self-started skills in that position.

7. [Officer A]'s experience on the job clearly sets him apart from the other candidates for the position of Sergeant."

(Jt.Ex. 2)

31. The Appellant timely filed the instant appeal. (Administrative Notice)

APPLICABLE LAW

G.L. c. 31, the civil service statute, is based on basic merit principles. That phrase is defined in section 1 of the G.L. c. 31, in part as,

(a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... ; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens

Id.

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).

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).

ANALYSIS

The Respondent has failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant, who was ranked first on the certification for promotion to Sergeant. The Appellant and Officer A have certain things in common. Specifically, their tenure is similar, they both have a Master's degree in pertinent subjects (although the Appellant graduated with honors), neither has a disciplinary record, both have participated in NEMLEC, and the WPD has received letters of support from a number of individuals (including a letter from the Appellant's supervisor and a letter from the Chief in support of Officer A).

However, the Appellant and Officer are also dissimilar. For example, the Appellant steps up when officers are needed for many city events and he is always there for the Department and/or the City. In addition, the Appellant listed detailed activities in which he has participated and organized. The Police Chief specifically testified that an officer's community involvement plays a big role in promotions. By comparison, Officer A provided little information about his community involvement, with the Police Chief testifying that Officer A, who works Monday through Friday with some irregular hours because of the nature of the detective work he has performed, likes to take the weekends off like some other members of the Department.

The Appellant and Officer A also differ with regard to training. The Appellant has taken every training course he has been permitted by his superiors to take, not just the courses that are required. In addition, the Appellant has trained to be an instructor in a number of courses and he is an EMT. The courses Officer A has taken as a detective are required courses. Further, the Appellant is the only trained field officer on his night shift and he has trained approximately twelve (12) officers whereas Officer A has trained approximately two (2) officers.

The evidence in the record establishes that the Appellant has experience as a supervisor. On his shift, the Appellant supervises other officers when there is no supervisor, he takes on related supervisory roles such as assisting in the booking and fingerprinting of detainees, and running any crime scenes. By comparison, the Police Chief testified that Officer A worked mostly independently as a "lone wolf" and, although he was involved in cases involving significant searches and seizures in which he worked with federal and other authorities and informants, there is no indication in the record that he supervised other officers.¹⁰ The Appellant has served in the military, where he supervised a number of others when deployed but there is no indication in the record that Officer A has served in the military. Thus, in addition to having the higher exam score, the Appellant has superior leadership on his shift performing as a supervisor as needed, he has supervised others in the military, he has been deeply and reliably involved in city activities, he has participated in and organized specific charitable and commemorative activities in support of his own Department as well as other law enforcement departments, obtained training in every course available to him, and become a training instructor in a variety of training courses.

This evidence notwithstanding, the Respondent also asserts that it promoted Officer A, rather than the Appellant, because Officer A has "command presence", an inherently subjective characterization that has been applied by some appointing authorities to justify a promotion decision. I have carefully reviewed the Appellant's testimony at the Commission hearing. The Appellant testified, responding to questions carefully and, on occasion, he paused to clarify his responses to questions. My perception of the Appellant's testimony was that, as a serious candidate, he carefully considered

his responses and he did not want to appear to be bragging. I have also carefully reviewed the candidates' responses at the interviews and I find that the responses of both the Appellant and Officer A to interview questions had their strengths and their weaknesses, with there being no clear indication that Officer A was better qualified than the Appellant, if that is the intended application of the phrase "command presence". However, the Commission has found that even when all factors for selection are equal between a selected candidate and an appellant bypassed with a higher civil service examination score, deference should be given to the candidate with the higher score. *Belanger v. Ludlow*, G2-03-518 [20 MCSR 285] (2007). In view of the Appellant's higher score on the civil service exam, his repeated displays of leadership and commitment to the Department, the city of Woburn, and the law enforcement community at large, the Respondent erred when it bypassed him.

The Appellant asserts that the promotional process is flawed. Specifically, the Appellant complains that Mayor Galvin met with Chief Ferullo and Capt. Rufo prior to the candidate interviews. While the purpose of the Mayor's meeting with the Chief and Captain prior to the interviews, purportedly, was to provide the candidates' files to the Mayor, it also presented an opportunity for the Chief and Captain to convey their recommendations, directly or indirectly, to the Mayor prior to the interviews. While it is understandable that the Mayor would be interested in the working knowledge that the Chief and Captain may have that is not reflected in the candidates' files, in the interest of civil service basic merit principles and transparency, the Chief and Captain should not meet with or otherwise discuss the candidates with the Mayor prior to the candidate interviews to avoid even the appearance of unacceptable bias. Further, and for the same reasons, the Chief's and the Captain's recommendations should not be submitted to the Mayor prior to the interviews and the recommendations should be in writing, indicating the reasons for the recommendation. If the Respondent does not begin recording promotional interviews, at least one (1) additional person of the Mayor's choosing should participate in the interview.

Police departments and other public safety agencies are properly entitled, and often do, conduct interviews of potential candidates as part of the hiring process. In an appropriate case, a properly documented poor interview may justify bypassing a candidate for a more qualified one. *See, e.g., Dorney v. Wakefield Police Dep't*, 29 MCSR 405 (2016); *Cardona v. City of Holyoke*, 28 MCSR 365 (2015). Some degree of subjectivity is inherent (and permissible) in any interview procedure, but care must be taken to preserve a "level playing field" and "protect candidates from arbitrary action and undue subjectivity on the part of the interviewers", which is the lynch-pin to the basic merit principle of civil service law. *E.g., Flynn v. Civil Service Comm'n*, 15 Mass. App. Ct. 206, 208, *rev. den.*, 388 Mass. 1105 (1983). The Commission's decisions have commented on a wide range of interview plans, some of which are commendable and some more problematic. Example of the former: *Anthony v. Springfield*, 23 MCSR 201 (2010), *Gagnon*

10. Officer A became a detective in 2015 when no one else (including the appellant, because of family needs, requested the assignment. I find it odd that Officer

A was the only person who requested the detective assignment that year when testimony indicated that it is a highly sought-after assignment)

v. Springfield, 23 MCSR 128 (2010); *Boardman v. Beverly Fire Dep't*, 11 MCSR 179 (1998). Examples of the latter: *Conley v. New Bedford Police Dep't*, 29 MCSR 477 (2016); *Phillips v. City of Methuen*, 28 MCSR 345 (2015); *Morris v. Braintree Police Dep't*, 27 MCSR 656 (2014); *Monagle v. City of Medford*, 23 MCSR 267 (2010); *Mainini v. Town of Whitman*, 20 MCSR 647, 651 (2007); *Belanger v. Town of Ludlow*, 20 MCSR 285 (2007); *Horvath v. Town of Pembroke*, 18 MCSR 212 (2005); *Fairbanks v. Town of Oxford*, 18 MCSR 167 (2005); *Sabourin v. Town of Natick*, 18 MCSR 79 (2005); *Sihpol v. Beverly Fire Dep't*, 12 MCSR 72 (1999); *Bannish v. Westfield Fire Dep't*, 11 MCSR 157 (1998); *Roberts v. Lynn Fire Dep't*, 10 MCSR 133 (1997).

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* * * * *

The Appellant also argues that he has been treated unfairly leading up to the promotional process. For example, the Appellant asserts that the Chief and/or Captain oppose the Appellant's candidacy for Sergeant because the Appellant is friends with a problematic officer and that Officer A was granted the Narcotics Unit detective assignment because he is close friends with a Sergeant in the Narcotics Unit.¹¹ There is insufficient evidence in the record to support these assertions.

CONCLUSION

For reasons stated herein, the Appellant's appeal under Docket No. G2-17-168, filed pursuant to G.L. c. 31, s. 2(b), is **allowed**.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders that:

HRD, or the City in its delegated capacity, is ordered to place the name of Ian Hunt at the top of any future Certification for the position of Police Sergeant in the Woburn Police Department until such time as he is appointed or bypassed.

* * *

By vote of the Civil Service Commission (Bowman, Chairman [absent]; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 16, 2020.

Notice to:

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Attorney at Law
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11. To consider the Appellant's allegation that Officer A was inappropriately granted the detective assignment and the Respondent relied on Officer A's experience as a detective, *inter alia*, to bypass the Appellant, at the hearing I ordered the parties to provide related information. Post-hearing, the parties submitted the information ordered and it was entered into the record as indicated in fn 3, *supra*. Although the Respondent's witnesses had testified at the hearing that six (6) officers (including Officer A) applied for the detective assignment in 2015 and they were each interviewed by a panel of interviewers, the Respondent's post-hearing information

indicates that there were no interviews when Officer A was granted the detective assignment because Officer A was the only one who had applied for the assignment. The Appellant's post-hearing information indicates that although he requested the detective assignment on other occasions, he did not apply for the detective assignment in 2015. At the hearing, Chief Ferullo and Capt. Rufo testified that there are no policies or procedures for considering detective assignment requests. In the interest of transparency and objectivity, the Respondent should make every effort to standardize the process for considering such assignment requests.

ARMANDO ORTIZ, JR.

v.

MASSACHUSETTS DEPARTMENT OF CORRECTION

G1-18-157

January 16, 2020

Paul M. Stein, Commissioner

By *bypass Appeal-Original Appointment as a Correction Officer-Employment History-Excessive Discipline-Troubled Youth*—The Commission affirmed the bypass of a candidate for original appointment to Correction Officer who had been ranked 50 out of the 156 applicants who were eventually hired. The Appellant had a lengthy record of disciplinary issues at his employer, a printing company, and Commissioner Paul M. Stein rejected his defense of “youthful indiscretions” since many of the incidents occurred when the Appellant was in his thirties. Most of these incidents involved insubordination and suggested a lack of self-control.

DECISION

The Appellant, Armando Ortiz, Jr., appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b), to contest his bypass for appointment by the Massachusetts Department of Correction (DOC) as a Correction Officer I (CO-I).¹ A pre-hearing conference was held at the Commission’s Boston office on September 25, 2018 and a full hearing was held at that location on November 27, 2018, which was digitally recorded.² Eight exhibits (*Exhs. 1 through 4, 5A-5K, 6 through 8*) were received in evidence and one exhibit marked for identification (*Exh. 9ID*). Neither party chose to file a proposed Post-Hearing Decision. For the reasons stated below, Mr. Ortiz’s appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Eugene T. Jalette, DOC Supervising Identification Agent
- Nathan Souza, DOC CO- I, Background Investigator

Called by the Appellant:

- Armando Ortiz, Jr., Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

1. The Appellant, Armando Ortiz, Jr., is a 1999 high school graduate who resides in Fitchburg MA. He took and passed the civil service examination for CO-I on March 19, 2016 with a score of 95. (*Exh.6; Stipulated Facts*)

2. Mr. Ortiz’s name appeared in the 50th place on Certification #05164 issued by the Massachusetts Human Resources Division (HRD) to the DOC on or about January 19, 2018, from which DOC eventually hired 156 applicants, of which 129 were ranked below Mr. Ortiz on the Certification. (*Stipulated Facts; Exh. 2*)

3. Mr. Ortiz signed the Certification willing to accept employment and completed the DOC’s standard form (rev. 0/2117) of Application for Employment. (*Exhs. 6 & 7*)

4. As required by the application, Mr. Ortiz listed the following employment:

3/14 to present - Press Operator, Gardner MA

1/13 to 3/14 - Press Operator, Greensboro NC

5/03 to 9/12 - Press Operator, Gardner MA (involuntary termination)

11/00 to 5/03 - Machine Operator, Shirley MA (Left for better job)

Mr. Ortiz provided copies of his disciplinary records with the Gardner printing company regarding eight incidents (1/20/04, 3-day suspension, threw brush; 10/24/05, 5 day suspension, attitude, refused task and bad language; 4/1/06, 3-day suspension, attitude/behavior, refused task; 5/1/07, 1-day suspension, attitude/behavior, disrespect; 1/24/10, 1-day suspension, unsatisfactory work; 3/29/2010, 2-day suspension, unsatisfactory work; 1/31/11, 1-day suspension, did not follow procedure; 8/3/11, 1-day suspension, unsatisfactory work. He stated that he was “unsure” of the reason he was terminated from his job in 2012. (*Exhs. 5D through 5K & 6*)

5. The DOC assigned CO-I Nathan Souza to perform a background investigation on Mr. Ortiz. CO Souza reported that Mr. Ortiz had a prior juvenile and criminal record as well as an “excessive” history of traffic violations. His personal and family references were all positive, (*Exh. 4; Testimony of Souza*)

6. On March 29, 2018, CO Souza conducted a home visit with Mr. Ortiz and his family present. CO Souza described Mr. Ortiz as “well-mannered and answered all questions asked of him. Mr. Ortiz told CO Souza that he took full responsibility for his past criminal record and knew what he did was wrong and learned from his mistakes. CO Souza discounted Mr. Ortiz’s driver history, crediting his explanation that he had been a victim of identity theft and it was not possible for the investigator to determine which, if any, of the offenses listed on the driving record were, in

2. Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

fact, attributable to Mr. Ortiz. Mr. Ortiz attributed his disciplinary history at with the Gardner printing company to a particular supervisor who was “hard on him” and attributed his 2012 termination to his conflict with this supervisor, but he also agreed that, sometimes, his “tone” can get him in trouble. (*Exhs. 4 & 8; Testimony of Appellant & Souza*)

7. On April 2, 2018, CO Souza met with Mr. Ortiz’s current shift supervisor at the Gardner printing company who stated that Mr. Ortiz had been disciplined for “performance related” issues as well as “behavior and interpersonal skills”, that “he could do the job of a Correction Officer but may need guidance on self-control”, although he had a good attendance record and now “had a stable relationship with coworkers” and has “grown a lot since his original employment and has improved his behavior.” (*Exh. 4; Testimony of Souza*)

8. Also on April 2, 2018, CO Souza met with an employee in the HR office of the company, who confirmed that Mr. Ortiz “had an issue with one specific supervisor that resulted in a difficult working relationship”. She could not confirm Mr. Ortiz’s disciplinary history prior to his 2012 termination as the company did not keep records that far back. She did state that Mr. Ortiz had three more recent additional disciplinary incidents on his record since his re-hire, but would provide them only to Mr. Ortiz. (*Exh.4: Testimony of Souza*)

9. Later that day, CO Souza received an email from Mr. Ortiz, enclosing the three additional disciplinary records which included:

1/13/2016 - Written Warning - Work performance - Failure to report issue

5/3/2017 - Written Warning - Insubordination - Refusing to follow direction

11/28/2017 - 1-day Suspension - Insubordination - Aggressive & Disrespectful

Mr. Ortiz called CO Souza to say that he had “forgotten about the last three issues” and apologized for the error. (*Exhs. 4 & 5A thorough 5C; Testimony of Souza*)

10. CO Souza completed his background investigation report on April 3, 2018, concluding that Mr. Ortiz presented with some positives (all positive professional references³, eligible for rehire by all his employers, good attendance record) and some negatives (12 disciplinary actions taken on current employer, several police contacts to include arrest). (*Exh.4; Testimony of Souza*)

11. By letter dated April 13, 2018, DOC extended Mr. Ortiz a “conditional offer of employment” subject to a review of his background investigation, a drug test and medical and psychological examination. (*Exh.3*)⁴

3. At the Commission hearing, Mr. Ortiz provided a packet of additional character references which he procured prior to the hearing but were not available at the time of his bypass or previously presented to DOC. Accordingly, these documents were marked for identification (*Exh. 9ID*), but have not been considered in the decision of this appeal.

12. After a review of Mr. Ortiz’s application by a committee of senior DOC management that included then Deputy DOC Commissioner Paul Dietl, Mr. Ortiz was informed, by letter dated July 9, 2018, that he was not selected for appointment due to a “Failed Background Based on poor work history at present employer: Specifically, the applicant was subjected to 8 disciplinary suspensions prior to being terminated in [2012]. In 2014 he was re-hired by the same company due to his knowledge in the business. Since that time he has been subjected to three more disciplinary proceedings (2 in 2016 and 1 in 2017).” (*Exh.2; Testimony of Jalette*)

13. This appeal duly ensued. (*Exh.1*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, §1. *See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); *MacHenry v. Civil Serv. Comm’n*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den.*, 423 Mass.1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L.c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L. c. 31, §2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. *Boston Police Dep’t v. Civil Service Comm’n*, 483 Mass. 474-78 (2019); *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Service Comm’n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

4. The Commission has noted its concern with the DOC practice to extend a “conditional offer of employment” prior to completion of the background investigation, as that procedure makes problematic a subsequent disqualification for any non-medical reasons. There is no evidence presented in this appeal to suggest that Mr. Ortiz had a medical condition that could have entered into the DOC’s decision-making process here.

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’” *Brckett v. Civil Service Comm’n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere v. Civil Service Comm’n*, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”)

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The commission —

“ . . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*,” then the occasion is appropriate for intervention by the commission.”

City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 426 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L. c. 31, §2(b), gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority’s action” and it is not necessary for the Commission to find that the appointing authority acted “arbitrarily and capriciously.” *Id.*

ANALYSIS

The DOC has established, by a preponderance of the evidence, that it had reasonable justification for the decision to bypass Mr. Ortiz for appointment as a Correction Officer. Although Mr. Ortiz presented many positive qualities, and appears to have a strong and sincere desire to serve the Commonwealth, his employment record provides reasonable justification for his non-selection. That record, which is largely undisputed, includes a dozen disciplinary actions spanning more than a dozen years, most of which involve insubordinate behavior against multiple supervisors, most recently within a year of the bypass.

The DOC is a para-military organization where order and discipline is a critical component of the work that is required of the high-stress work of a Correction Officer responsible for the care and custody of incarcerated criminals and other persons who present risks to the safety of themselves and others. While Mr. Ortiz sincerely believes that he possesses the qualities that would enable him to work under the pressures of such a position, the undisputed record, including the detailed descriptions of the specific misconduct that Mr. Ortiz acknowledges he committed and the opinions expressed to the DOC background investigator, presently before the Commission shows a history of behavior that supports the DOC’s conclusion that Mr. Ortiz does not presently have the temperament and self-control needed to perform the job of a DOC Correction Officer.

I give Mr. Ortiz credit for acknowledging his flaws and recognizing that his “tone” sometimes gets him in trouble, and that he is well-regarded as a dependable worker (“Employee of the Year” in 2016 in a 500 employee company) and good neighbor and family man (as noted by CO Souza in his background investigation report). The DOC is entitled, however, to balance his positive traits against the negative ones, especially, when the facts are not disputed and the DOC’s decision has been vetted at the senior management level as it was in this case. The Commission may not substitute its own judgment on these thoroughly reviewed, undisputed facts, but, rightfully, must defer to the DOC’s reasonable and unbiased assessment in such circumstances as are presented in this appeal.

I have considered Mr. Ortiz’s argument that he has overcome the obstacles of a troubled youth and his past disciplinary record does not fairly represent his present good working relationship with peers and supervisors. I have carefully reviewed the detailed disciplinary reports (which are written by various supervisors and reviewed by the Department manager). They span more than a decade, into Mr. Ortiz’s thirties, well beyond what might be discounted as “youthful indiscretion”, and do fairly show a well-documented, recent pattern of continuing misconduct that DOC is reasonably justified to view as problematic to the current fitness for a candidate for Correction Officer.⁵ I also give weight to the DOC’s concern that Mr. Ortiz was not entirely forthcoming about his three incidents of recent discipline, claiming that he omitted them from his application because he “forgot” about them.

Fourth, Mr. Ortiz offered to present evidence through his current supervisor and other character witnesses to vouch for him. I excluded this evidence as the supervisor was not available to testify at the date of the Commission hearing and the other evidence was presented in the form of unsworn, statements that were not part of the application record and not available to the DOC at the time of the bypass. While such evidence may be relevant to a consideration of Mr. Ortiz’s future applications, I cannot consider this untested, hearsay evidence as worthy of such weight as would compel a different conclusion from that reached by DOC on the evidence that was before it at the time of the bypass decision.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Armando Ortiz, Jr., is *denied*.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 30, 2020.

Notice to:

Armando Ortiz, Jr.
[Address redacted]

5. By way of contrast, I note that DOC accepted Mr. Ortiz’s responses to questions about his criminal and driving history, and those factors were not included in the reasons for bypass.

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* * * * *

G.L. c. 31, § 72 Inquiry Re: BOSTON FIRE DEPARTMENT

I-19-181

January 30, 2020
Christopher C. Bowman, Chairman

Section 72 Inquiry-Boston Fire Department-Discipline for Racist Social Media Postings-Commission Recommendations—In connection with a Section 72 Inquiry into the mild punishment of a white Boston firefighter for racist social media postings, the Commission recommended that the Department impose discipline on this firefighter beyond a two-tour suspension and follow through with a mandatory “Respectful Workplace” training program.

RECOMMENDATION REGARDING SECTION 72 INQUIRY

BACKGROUND

On August 29, 2019, the Civil Service Commission (Commission) issued a decision affirming the Boston Fire Department (BFD)’s decision to terminate Firefighter Octavius Rowe. (*See Rowe v. Boston Fire Department*, CSC Case No. D1-18-074 [32 MCSR 314] (2019)).

A summary of the Commission’s decision in *Rowe* stated in part that:

“Firefighter Rowe maintained a presence on social media and participated in various podcasts in which he regularly identified himself as a Boston firefighter. As part of those same public forums, he repeatedly spoke, wrote and/or posted bigoted comments that violate the norms of decency and various rules and regulations of the Boston Fire Department, including conduct unbecoming a firefighter, justifying his termination.”

As part of its decision in *Rowe*, the Commission also addressed allegations of disparate treatment, including allegations by the Appellant that another incumbent Boston firefighter may have engaged in similar behavior by allegedly posting racist comments on social media.

Specifically, the Commission’s decision stated:

As referenced in the findings, Rowe’s counsel presented the BFD with a posting from a Facebook account which had the name of MG as the person who posted it.

The posting stated:

“all lives matter means shut up [n-word]????? Hahahahahaha funny i don’t see a mark on this man, his t-shirt isn’t ripped or slightly askew what channel can I follow this on?? cnn... nope msnbc...nope, bet...nope, fox news nope, local channels nope”

The Commission was not satisfied that the BFD pursued the same due diligence regarding the allegations against Firefighter MG that it did against Rowe.

G.L. c. 31, § 72 states that:

‘The commission or administrator [HRD], upon the request of an appointing authority, shall inquire into the efficiency and conduct of any employee in a civil service position who was appointed by such appointing authority. The commission or the administrator may also conduct such an inquiry at any time without such request by an appointing authority. After conducting an inquiry pursuant to this paragraph, the commission or administrator may recommend to the appointing authority that such employee be removed or may make other appropriate recommendations.’ (emphasis added)

Based on the facts presented here, the Commission determined that a Section 72 inquiry was warranted and opened such an inquiry, ordering the BFD to complete a further investigation regarding Firefighter MG and to provide the Commission with the results of that investigation, including findings and recommendations.

BFD’s Further Investigation

The BFD has now completed the further investigation and provided the Commission with its findings and recommendations.

As part of its investigation, the BFD determined that:

1. Firefighter MG did author the above-referenced post on his Facebook account approximately three years ago.
2. Firefighter MG denies authoring this post.
3. Firefighter MG’s denials are untruthful.

Further, the BFD found that, absent additional information about MG’s post (i.e. - the posts that may have come before and after), they were “reluctant to find that the use of the n-word [in MG’s post] was meant to be pejorative.”

The BFD has found that a two-tour suspension of MG is warranted based on his untruthfulness.

Commission’s Response

The Commission has consistently found that use of racist comments by a civil service employee constitutes substantial misconduct that adversely affects the public interest.

In *Duquette v. Department of Correction*, 19 MCSR 337 (2006), the Appellant authored a racist cartoon that was meant to disparage a black supervisor. The Commission, upholding DOC’s decision to terminate the Appellant, stated: “One would have hoped that this century’s workplace had been purged of such offenses ...

There is no place for such behavior in the workplace and there is no place for the Appellant—or others that would engage in such behavior—at the Department of Correction.” When the Appellant in that appeal argued that employees who engaged in similar behavior were not terminated in the past, the Commission stated that it would not “... use those cases as a guide (or moral compass) to lower the bar on what is considered appropriate discipline against individuals who use racist statements ...” *Id.* at 340.

In *Davis v. Newton Fire Department*, 27 MCSR 16 (2014), the Commission upheld the termination of a fire fighter based primarily on his engagement in racist harassment. Specifically, the Appellant in that case, who is African American, referred to another firefighter, who is biracial, as a “house n-word”; a “corn bread” and “home grown,” all derogatory references to the firefighter’s race, during a conversation about shift swaps.

In *Lavallee v. Boston Fire Department*, D1-19-059 [32 MCSR 396] (2019), the Appellant, while intoxicated, referred to a fellow black firefighter as a “fucking [n-word].” The Commission, in upholding the BFD’s decision to terminate the Appellant, stated in part that the Appellant had: “engaged in substantial (and abhorrent) misconduct which adversely affects the public interest and constitutes a violation of various rules and regulations of the BFD, including conducting unbecoming a firefighter.”

Here, the BFD stated that, based on the limited information available three years after the posting in question was made, they were unable to determine whether the use of the n-word in MG’s post was “meant to be pejorative”.

Even if the Commission were to accept the BFD’s questionable conclusion regarding the intent of MG’s post, there is the troubling finding regarding untruthfulness. Specifically, after a thorough further investigation, the BFD reached the well-supported conclusion that : a) Firefighter MG did indeed author the post in question; and b) his (ongoing) statements to the contrary are untruthful.

The Commission has consistently held that untruthfulness is among the most serious offenses warranting discipline, particularly when it involves untruthfulness as part of an internal investigation.

In *Garrett v. Haverhill*, 18 MCSR 381 (2005) the Commission found that there was reasonable justification for the discharge of a police officer who repeatedly presented false testimony during the departmental investigation of the officer’s misconduct.

In *Meaney v. Woburn*, 18 MCSR 129 (2005), the discharge of a police officer was upheld based, in part, on the officer’s consistent dishonesty and “selective memory” during the departmental investigation of that officer’s misconduct.

In *Royston v. Billerica*, 19 MCSR 124 (2006) the Commission upheld the discharge of a police officer who “knowingly lied to the Chief during a departmental investigation to cover up” his own misconduct.

In *Desharnias v. City of Westfield*, 23 MCSR 418 (2009), a police officer’s discharge was upheld based primarily on the officer’s dishonesty about a relatively minor infraction that occurred on his shift.

Here, the BFD has found that an incumbent firefighter has been continuously untruthful during a departmental investigation regarding whether he authored a post with the n-word in it.

As referenced above, the Commission’s authority here, after conducting an inquiry under G.L. c. 31, s. 72, is limited to “recommend[ing] ..that such employee be removed or [to] make other appropriate recommendations” to the Appointing Authority.

Based on a careful review of the record, including the BFD’s own findings, I recommend that the BFD consider implementing discipline beyond the relatively short-term (two-tour) suspension currently proposed.

Finally, the BFD has indicated to the Commission that it is initiating a mandatory “Respectful Workplace” training program that will make clear that the use of racist comments is unacceptable in any context. That training program should, among other things, emphasize that failing to comply with that directive, on a going forward basis, will warrant serious discipline, up to and including termination.

The Commission’s inquiry under Tracking No. I-19-181 is hereby ***closed***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 30, 2020 .

Notice to:

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* * * * *

RYAN T. DAVIS

v.

SALEM POLICE DEPARTMENT

D1-18-110

January 30, 2020

Paul M. Stein, Commissioner

Disciplinary Action-Discharge of Salem Police Officer-Failure to Observe Conditions of Last Chance Agreement-Failure to Make Monthly Reports of Counseling Sessions-Failure to Maintain Trainings-Incompetence—In a decision authored by Hearing Commissioner Paul M. Stein, the Commission affirmed the discharge of an 18-year Salem Police career officer who failed to observe the conditions set forth in a Last Chance Agreement whereby he had agreed to accept an 18-month suspension rather than be discharged. The Appellant failed to observe the conditions requiring him to submit monthly reports proving his attendance at counseling sessions. He also failed to maintain his professional trainings as required by the agreement.

DECISION

The Appellant, Ryan T. Davis, acting pursuant to G.L.c.31, §43, appealed to the Civil Service Commission (Commission), challenging his discharge by the Respondent, the Salem Police Department (SPD), as a tenured SPD Police Officer.¹

The Commission held a pre-hearing in Boston on August 7, 2018. A full hearing was held at that location on November 14, 2018 and December 19, 2018, which was declared private, with witnesses sequestered, and digitally recorded.²

Seventeen (17) exhibits were received in evidence (*CityExh.1 - CityExh.3; CityExh.4w/enclosures (1)-(14); CityExh.5 - CityExh.14; Exhs.15 - Exh.17*). The Commission received Proposed Decisions on March 22, 2019. For the reasons stated below, the Appellant's appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the SPD

- SPD Police Chief Mary E. Butler
- SPD Police Captain Kate Stephens
- SPD Administrative Aide Robert Mulligan

Called by the Appellant:

- Ryan T. Davis, Appellant

- Hayden Duggan, Ed.D.

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Ryan T. Davis, was appointed as a full-time permanent police officer with the SPD effective July 1, 2000 and served in that position until he was terminated, effective June 12, 2018. (*Stipulated Facts; Exh. 1; Testimony of Appellant & Chief Butler*)

2. Before his appointment as a permanent, full-time SPD police officer, Officer Davis had served several years as an SPD Reserve Police Officer. (*Testimony of Appellant*)

3. During his service as a tenured SPD police officer, prior to the incidents that led to his termination, Officer Davis was the subject of the following prior disciplinary action:

- March 8, 2006 - Two day suspension for failing to follow proper police procedure during a detail on February 2, 2006.
- December 19, 2011 - Written warning for attending non-police event in uniform and allowing civilian to operate police vehicle.
- December 19, 2011 - One day suspension for unauthorized deployment of Pepperball gun on October 31, 2011.
- May 18, 2016 - Written reprimand and eight-day suspension for neglect of duty during details on April 22, 2016.
- April 3, 2017 - One-day suspension for violating expected and standard protocols in responding to a motor vehicle accident.
- April 5, 2017 - Verbal warning (documented) for failure to follow protocol in responding to a report of a 209A violation.
- April 5, 2017 - Written reprimand for failure to report complaint of indecent assault with alleged perpetrator remained at large.
- May 10, 2017 - Two day suspension for reporting late for duty.
- June 2, 2017 - Agreement between Appellant and SPD (the 2017 Agreement) for eighteen (18) month suspension (6/1/2017 through 11/30/2018) to settle a pending disciplinary charge concerning his "misconduct on May 1-2, 2017 which violated the Department's Rules and Regulations."

(*CityExhs.4(2) & 4(5) through 4(12)*)

4. The 2017 Agreement included, in part, the following provisions:

"2. **Apology.** Davis agrees to acknowledge his misconduct in writing and provide a written apology to his superior officers - Chief Butler, Captain Ryan, Lieutenant Engelhard, and Sergeant Verrette.

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

2. CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

3. **Counseling.** For the duration of the unpaid suspension, Davis agrees to continue to attend stress counseling session and provide monthly proof of the same to Chief Butler. No further information as to the counseling received will be required unless Davis has been found to be at risk of injury to himself or others, in which case this information shall be provided to the Chief.

4. **Training.** Davis agrees to maintain his training while on unpaid suspension as follows and he acknowledges that he is to (i) report to work upon the end of his suspension with current and valid first responder and CPR certifications; (ii) attend the MPTC in the fall of 2018 to recertify for firearms prior to his return; and (iii) participate in the Department's online training as directed by the Chief. All time spent pursuing this training will be uncompensated and any out-of-pocket costs associated will not be reimbursed by the Department.

5. **Fitness for Duty upon Return.** Davis agrees to submit to a fitness for duty examination in November 2018 prior to returning on December 1, 2018.

...

7. **Insurance.** The parties acknowledge that while on unpaid suspension, Davis may maintain his health, life, dental, and accidental death and disability insurance through the City's sponsored plans. Davis shall be responsible for the full amount of each premium. The Human Resources Department will provide Davis with all information regarding his rights to continue his coverage under any existing plans as well as the payment requirements. Davis acknowledges that non-payment of any premium(s) shall result in cancellation(s) of the same."

(CityExh.4(2))

5. At the outset of his suspension, consistent with SPD's standard practice, Officer Davis surrendered his SPD firearm, badge and secure access card. He was not authorized to enter the building unaccompanied and needed to use the front (public entrance), which he did on a few occasions. The SPD did not change or block his department email account or his ability to access that account. (*Testimony of Appellant, Chief Butler & Capt. Stephens*)

6. As required by the 2017 Agreement, Officer Davis acknowledged his misconduct in writing and provided a written letter of apology for his actions to the four superior officers named in the 2017 Agreement. (*Testimony of Appellant*)³

7. Also as required by the 2017 Agreement, Officer Davis arranged to begin monthly stress counseling sessions with Dr. Hayden Duggan, a licensed psychologist and founder of the On Site Academy, a non-profit organization that specializes in counseling police and other public safety officers. Dr. Duggan serves as the Chief Psychologist for the Boston Police Peer Support Unit, with whom On Site Academy has contracted to provide such psychological counseling services to Boston Police Department personnel and, on occasion, to other municipal officers, when approved by the BPD to use the services of On Site Academy as was

the case with Officer Davis here. (*Testimony of Appellant & Dr. Duggan*)

8. On Site Academy provides its services without charge to the participants and does not get reimbursed through any insurance plans or policies. The organization has a limited staff to handle administrative paperwork and is not accustomed to providing treatment documentation or information to a participant or his or her department. (*Testimony of Dr. Duggan*)

9. By letter to Officer Davis dated September 14, 2017, SPD Police Chief Mary Butler inquired why she had not received any of the monthly reports proving that he had attended attend stress counseling. Chief Butler reminded Officer Davis of the requirement of "monthly reporting of your attendance" and directed him to "provide documentation of your attendance at all stress counseling sessions that you have attended since execution of the [2017] Agreement." Chief Butler also stated: "Failure to comply with the terms of the [2017] Agreement will result in further disciplinary proceedings." (*CityExh.4(3); Testimony of Chief Butler*)

10. Officer Davis understood that the directive to him in the September 14, 2017 letter constituted a lawful order from Chief Butler. (*Testimony of Appellant*)

11. On October 4, 2017, Chief Butler's Administrative Aide, Robert Mulligan, received an e-mail letter on the letterhead of On Site Academy, electronically signed by Dr. Duggan. The letter verified that "in the performance of my duties I have been seeing Patrolman Ryan Davis of the Salem Police Department on a regular basis at our unit. Patrolman Ryan will continue in treatment until further notice . . . [he] has been fully cooperative with treatment and has never missed an appointment. He is motivated and is making good progress. He is always punctual." (*CityExh.4(4); Testimony of Chief Butler, Mulligan & Dr. Duggan*)

12. On November 13, 2017, Chief Butler again wrote to Officer Davis. The letter confirmed that the October 4, 2017 letter from Dr. Duggan proved attendance at stress counseling through September 14, 2017, but stated:

"It is now November 13, 2017; over a month has passed without me having received the agreed upon monthly proof that you have been attending the required stress counseling sessions. The requirement that you provide me with monthly proof of your attendance at stress counseling sessions is your responsibility and was clearly articulated in the [2017 Agreement] and my September 14, 2017 letter to you. To be clear, . . . monthly documentation must be received . . . no later than the 4th day of the month. . . No further reminders of the monthly reporting requirements of your attendance at stress counseling sessions will be forthcoming from this office. Henceforth, any further failure to comply with the reporting requirements of the [2017] Agreement will result in disciplinary proceedings, up to and including your discharge." (*emphasis in original*)

3. The apology was not introduced into evidence, but it is not disputed that it was provided. According to the SPD's Notice of Discipline, dated May 12, 2017, the misconduct involved Officer Davis's false report that he had cut his foot on some glass in the police station locker room, when the incident had actually oc-

curred at a private apartment off-duty and his related "misleading and untruthful" statements to the SPD and to the 911 responders to the scene of the incident. (*CityExh.4(2); Testimony of Appellant*).

(*CityExh.4(5); Testimony of Chief Butler*)

13. Officer Davis understood that the directive to him in the November 13, 2017 letter constituted a lawful order from Chief Butler. (*Testimony of Appellant*)

14. On December 1, 2017, Mr. Mulligan received an email letter electronically signed by Dr. Duggan stating that Officer Davis “attended a session with me on Tuesday October 17, 2017 and also on Tuesday November 21, 2017. We will confirm his December session and all additional sessions as well.” (*CityExh.4(6); Testimony of Chief Butler, Mulligan & Dr. Duggan*)

15. Chief Butler received no further confirmation, either on or before January 4, 2018 or any time thereafter, that Officer Duggan had attended counseling during the month of December 2017. (*Testimony of Chief Butler & Mulligan*)

16. Meanwhile, on or about October 5, 2017, the SPD in-house training system (known as PMAMHMC sent an automated message to Officer Davis’s SPD email account, assigning him a training module on Use of Force with a target completion date of 10/16/2017. (*CityExh.4(7) & 13; Testimony of Chief Butler & Capt. Stephens*)⁴

17. On October 16, 2017, and on October 25, 2017, the PMAMHMC system sent an automated email reminder to Officer Davis’s SPD account stating that the Use of Force training module was overdue. (*CityExh.4(7) & 13; Testimony of Chief Butler & Capt. Stephens*)

18. On October 23, 2017, Officer Davis reached out to Capt. Stephens, then the commander of the SPD Professional Standards Unit responsible to oversee officer training. In a text message to Capt. Stephens, Officer Davis stated:

“I keep getting an alert on my phone that says my department email is unable to “refresh/update... I will stop by Verizon and see what if anything I can do to fix it. I just wanted to touch base with you so you didn’t think I forgot. I will contact you tomorrow and hopefully have it resolved. I do not know how to access my depth [sic] email on my desktop.”

(*Exh. 17: Testimony of Appellant & Capt. Stephens*)

19. After receiving the text from Officer Stephens, she spoke with Officer Davis over the telephone and referred him to the IT manager to get his email issues resolved. She also informed Chief Butler of her communications with Officer Davis. (*CityExh.4(7), 16 & 17; Testimony Capt. Stephens*)

20. On November 21, 2017, the PMAMHMC system sent Officer Davis a second training assignment (OUI and Marijuana) with a target completion date of 12/22/2017 and, on December 19, 2017 sent a reminder of the due date. On December 22, 2017,

January 21, 2018, January 28, 2018 and February 4, 2017, the PHAMHMC system sent Officer Davis reminders that the assignment was overdue. (*CityExh.4(7)&13*)

21. On January 30, 2018, the PMAMHMC system sent Officer Davis a third training assignment (Harassment) with a target completion date of 2/2/2018. On February 7, 2018, the PHAMHMC system sent Officer Davis a reminder that the assignment was overdue. (*CityExh.4(7)&13*)

22. The SPD also requires officers to complete another on-line training program through MPI, consisting of seven courses. All officers were informed by Capt. Stephens through their departmental email of the MPI training requirement on or about December 4, 2017 with a completion date of May 1, 2018. (*CityExh.4(7), 4(8) & 14*)

23. On or about December 26, 2018, Capt. Stephens noted that Officer Davis had not yet logged into the MPI training website. She sent an email to Officer Davis’s departmental email account, noting: “This is something you should be able to do from any computer. If you need assistance please let me know. Were you able to contact [the IT manager] and access PMAM?” Officer Davis did not reply. (*CityExh.4(7) & 14; Testimony of Capt. Stephens*)⁵

24. By letter hand-delivered to Officer Davis on February 8, 2018, Chief Butler informed Officer Davis that a hearing would be held on February 14, 2018 to consider his discharge from employment with the SPD based on four charges set forth in the letter.

I. Noncompliance with the 2017 Agreement “as it pertains to the monthly reporting of your attendance at stress counseling sessions.”

II. Noncompliance with the 2017 Agreement “as it pertains to your participation in the Department’s online training programs and subsequent failure to follow an order” from Capt. Stephens.

III. Failure to comply with the SPD’s Rules and Regulations, Section 1, Subsection E (Orders); Subsection F.31 (Required Conduct-Submitting Reports; Subsection G.9(a) & (b) (Prohibited Conduct-Incompetence; and Subsection G.11 (Prohibited Conduct-Insubordination)

IV. Failure to comply with “the job criteria established for patrol officers as delineated in the ‘Duties by Assignment for Salem Police Department Personnel’ and Policy Document Number 42 (Training)” of the SPD’s Manual of Policies and Procedures.

(*CityExh.4; Testimony of Chief Butler*)

25. There were fourteen enclosures to the February 8, 2018 letter, including, among other things, copies of the 2017 Agreement, Chief Butler’s two prior letters to Officer Davis, the email letters received from Dr. Duggan, the email notices issued by the PMAMHMC system, Capt. Stephens’s message to Chief Butler concerning her October 2017 contacts with Officer Stephens

4. The responsibility to “maintain” training on a timely basis is considered a critical part of the duties of the position of an SPD officer as it is essential to demonstrate that the officer force is up-to-date on all new policies and laws (e.g., legalization of marijuana and handling issues of operating while impaired) as well as necessary to document compliance with the standards that the SPD must meet to maintain its

accreditation from the Commonwealth. (*CityExh.4(14)[SPD Department Manual Ch.42-Training]; Testimony of Chief Butler & Capt. Stephens*)

5. The MPI training was subsequently put on hold. (*CityExh.4; Testimony of Appellant*)

about his problem accessing his SPD email account and the applicable sections of the SPD Rules and Regulations and Manual of Policies and Procedures. (*CityExh.4 w/enclosures (1) through (14); Testimony of Chief Butler*)

26. The same day that Chief Butler’s February 8, 2018 letter was delivered to Officer Davis, he sent an email (@8:45 pm) to the IT director in which he stated:

“Jake, could you please, at your convenience, call me? I need your assistance in setting up my new phone so I can receive emails from the police department. Please call anytime. Thank you. Ryan Davis [phone #] Sent from XFINITY Connect Application”

(*CityExh.14*)

27. The IT director had not previously communicated with Officer Davis and the Salem email server did not recognize the sender and put the message in the IT director’s spam folder. The IT director first discovered the message on or about March 7, 2018, after being queried by Mr. Mulligan and performing a search of his email account. The next day, March 8, 2018, the IT director reported this information to Mr. Mulligan and Chief Butler. (*CityExh.14*)

28. After several postponements of the date of the appointing authority hearing, made to accommodate Officer Davis, an evidentiary hearing was held on May 14, 2018 before the Salem Director of Human Resources, designated by Chief Butler to preside at the hearing. (*CityExhs. 1 through 3; Testimony of Appellant, Chief Butler & Capt. Stephens*)

29. Officer Davis did not testify at the appointing authority hearing, but the hearing officer expressly stated that she drew no adverse inference from his failure to do so. (*CityExh.2; Testimony of Appellant*)

30. The On Site Academy letters from Dr. Duggan dated October 4, 2017 and December 1, 2017 were proffered on the Appellant’s behalf, as well as a third letter from On Site Academy, dated January 25, 2018, and electronically signed by Dr. Duggan. The January 25, 2018 letter stated, in part, that “Patrolman Ryan [sic] will continue in treatment until further notice. He was seen on Tuesday December 12, 2107 [sic] and again on January 23, 2018.” (*CityExhs.2 & 15*)

31. The January 25, 2018 letter from Dr. Duggan was meant to be sent to Chief Butler, but through a scrivener’s error, it was directed to an erroneous email address and never received at the SPD. Neither Chief Butler, nor anyone else at the SPD had seen the January 25, 2018 letter from Dr. Duggan until it was presented at the May 14, 2018 appointing authority hearing. (*CityExhs; 2 & 15; Testimony of Chief Butler & Mulligan*)

32. At the Commission hearing, the Appellant claimed to be unaware of how this letter was generated or sent, but Dr. Duggan authenticated the document during his testimony before the Commission. (*Testimony of Appellant & Dr. Duggan*)

33. On June 8, 2018, the Hearing Officer submitted her recommendation. She credited the documentary evidence presented by the SPD and the testimony of Chief Butler that Officer Davis had failed to make monthly reports of his counseling as required by the 2017 Agreement, the express orders of Chief Butler and the SPD Rules and Regulations; that Officer Davis had failed to comply with his duty to maintain his training as required by the 2017 Agreement as well as the SPD’s Rules and Regulations and Manual of Policies and Procedures; and had demonstrated his incompetence to perform the duties of an SPD police officer. (*CityExh.2*)

34. Among other facts, the Hearing Officer relied on the fact that Officer Davis was an eighteen year veteran officer who was well aware of the duties and responsibilities of his position which included the duty to “maintain” training, submit timely reports and follow orders, that he had a significant history of prior discipline, and that he knew, in particular, that compliance with the 2017 Agreement was meant to give him the benefit of a “second chance” and avoid termination. The Hearing Officer noted that, even after being notified in February 2018 that further discipline was pending, Officer Davis provided no additional counseling reports or completed any training assignments. The Hearing Officer concluded that, “despite such disciplinary actions, [Officer] Davis has yet to possess or demonstrate any understanding for the personal and professional responsibility required of a sworn police officer” and his conduct “demonstrates incompetence, insubordination, and an utter lack of respect for the authority of his superior officers.” The Hearing Officer recommended that Officer Davis be terminated from his position with the SPD. (*CityExh.2*)

35. By letter dated June 11, 2018 to Officer Davis, Chief Butler concurred with the Hearing Officer’s report and informed him that she concluded “there is just cause for your termination based on the aforementioned [i.e., failure to comply with the 2107 Agreement, to provide reports as required, to follow orders and to “maintain” training], your disciplinary record, and the lack of responsibility of an officer with twenty years of service. You failed to take responsibility to adhere to the Agreement. I cannot reason that another decision, aside from termination, would be suitable, as it would undeniably undermine the importance of adherence to the Rules and Regulations and Policies and Procedures and the integrity of the Department.” Chief Butler ordered Officer Davis terminated effective June 12, 2018. (*CityExh.1; Testimony of Chief Butler*)

36. This appeal duly ensued. (*Claim of Appeal*)

APPLICABLE LEGAL STANDARD

G.L.c.31,§41-§43 requires that discipline of a tenured civil servant may be imposed only for “just cause” after due notice, hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of decision that states “fully and specifically the reasons therefore.” G.L.c.31,§41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L.c.31,§42 and/or §43, for de novo review by the Commission “for the pur-

pose of finding the facts anew.” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited.

The Commission’s role 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 Comm’n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997). *See also Police Dep’t of Boston v. Collins*, 48 Mass. App. Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000); *McIsaac v. Civil Service Comm’n*, 38 Mass. App. Ct. 473, 477 (1995); *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331, *rev.den.*, 390 Mass. 1102 (1983).

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence⁶, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971); *City of Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928) *See also Mass. Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-65 (2001).

The Commission determines justification for discipline by inquiring “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” *School Comm. v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488, *rev.den.*, 426 Mass. 1104 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983) The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of “merit principles” which govern civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c.31, §1.

G.L.c.31, Section 43 vests the Commission with “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. *See, e.g., Police Comm’r v. Civil Service Comm’n*, 39 Mass. App. Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”) *Id.*, (*emphasis added*). *See also Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006), quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

The Commission also must take into account the special obligations the law imposes upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to adhere to the law, both on and off duty. “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct . . . Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. . . . they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” *Attorney General v. McHatton*, 428 Mass. 790, 793-74 (1999) and cases cited. *See also Falmouth v. Civil Service Comm’n*, 61 Mass. App. Ct. 796, 801-802 (2004); *Police Commissioner v. Civil Service Comm’n*, 39 Mass. App. Ct. 594, 601-602 (1996); *McIsaac v. Civil Service Comm’n*, 38 Mass. App. Ct. 473, 475-76 (1995); *Police Commissioner v. Civil Service Comm’n*, 22 Mass. App. Ct. 364, 371, *rev.den.* 398 Mass. 1103 (1986) *See also Spargo v. Civil Service Comm’n*, 50 Mass. App. Ct. 1106 (2000), *rev.den.*, 433 Mass. 1102 (2001).

ANALYSIS

The SPD had just cause to terminate the employment of Officer Davis from his position as a police officer based on his demonstrated failure to conform to the requirements imposed upon him by the Rules and Regulations of the SPD as well as his non-compliance with the 2017 Agreement in which he agreed to accept an 18-month suspension with conditions in lieu of termination. Officer Davis’s contentions that his non-compliance was the result of snafus for which he does not accept responsibility and that he has not been afforded a fair chance to cure his deficiencies and that his termination was premature are not supported by a preponderance of the evidence.

First, the preponderance of the evidence established a mind-boggling level of non-compliance with Officer Davis’s duty to provide timely reports of his attendance at counseling. Despite the clear duty imposed on him to provide monthly reports of his attendance under the 2017 Agreement as well as Section 1, Subsection F.31 of the SPD’s Rules and Regulations, he provided no such reports until Chief Butler issued the September 14, 2017 letter that noted his prior noncompliance and ordered him to furnish such required reports in the future. Despite this direct order, however, it required a second letter on November 13, 2017 which, again, ordered him to provide such monthly reports, and set a reporting deadline of the 4th of each month, before Officer Davis produced another required report. Although a third report was generated on or about January 25, 2018, it did not meet the January 4th reporting deadline and, from that time until the Appointing Authority hearing in May, 2018, no further reports were submitted. This malfeasance by a twenty-year career police officer who knew that his job was

6. It is within the hearing officer’s purview to determine the credibility of live testimony. *E.g., Leominster v. Stratton*, 58 Mass. App. Ct. 726, 729 (2003). *See Embers of Salisbury, Inc. v. 37 Alcoholic Beverages Control Comm’n*, 401 Mass. 526, 529 (1988); *Doherty v. Ret. Bd. of Medford*, 425 Mass. 130, 141 (1997). *See*

also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where witnesses gave conflicting testimony, assessment of their relative credibility cannot be made by someone not present at the hearing).

on the line can only be explained as a willful indifference for authority, incompetence, or both, in violation of the 2017 Agreement and the SPD's Rules and Regulations, Section 1, Subsection E (Orders) and Subsection G.11 (Insubordination), and Subsection G.9 (Incompetence).

I have not overlooked the fact that, to some extent, there may have been some initial confusion on the part of Dr. Duggan, who is not accustomed to treating patients that require the type of reporting mandated of Officer Davis. The duty to report, however, was always Officer Davis's obligation (both under the 2017 Agreement, specifically, and the SPD's Rules and Regulations, generally). The logistical problems Officer Davis may have faced, notwithstanding, the obligation to comply rested with him. By the middle of December, he knew what Chief Butler had ordered him to do and that, if he did not comply, his job could be in jeopardy.

While it is not disputed that Officer Davis did attend monthly counseling with Dr. Duggan through the date of the Commission hearing, he also failed to comply with the monthly reporting requirement. Chief Butler made clear that the two obligations were independent and both were important benchmarks needed to regain her confidence that he was competent to continue his employment with the SPD. Given his past disciplinary history of failing to make reports and other failures that exhibited a "pattern of behavior whereby you lack the diligence necessary to follow through with a completion of a task" as recently as April 2017 (CityExh.6), Chief Butler was fully entitled to expect that Officer Davis demonstrate due diligence and compliance to follow through with both obligations, and, when he failed to do so, she reasonably concluded that his misconduct could not be remediated and that he must be terminated.

Second, the undisputed facts establish that Officer Davis did not maintain the training required of him during his suspension. In particular, he was expected to complete training on Use of Force, OUI & Marijuana and Harassment prior to the date that he was informed that Chief Butler had initiated a new disciplinary action against him for reasons that included, among other things, his failure to complete that specific training. Nevertheless, even after receiving that notice, he took no action other than sending an email to the IT director the night he got the February 8, 2018 notice of discipline from Chief Butler. As a twenty-year veteran of the SPD, Officer Davis knew that he had a duty to maintain his training and, by October 23, 2017, he had been in contact with Capt. Stephens to be sure she knew he hadn't "forgotten" about his need to complete training. Nevertheless, neither before February 8, 2018 nor anytime thereafter, did he reach out to anyone for assistance, although he had been counseled by Capt. Stephens to do so in October 2017, yet another example of a lack of due diligence on his part and explicit violation of his duty under the 2017 Agreement and the SPD Department Manual (Chapter 42-Training).

I do not credit the Appellant's claim that he was stymied by his inability to access his departmental email once he was put on suspension. His text message to Capt. Stephens mentions that he was getting some sort of messages from the SPD email server and his

February 8, 2018 email to the IT director that asks for help setting up his "new" cell phone. This evidence contradicts the Appellant's testimony that he faced any obstacles to accessing his SPD email other than problems of his own making. Similarly, I do not credit the Appellant's testimony that the only way he knew how to access his department email was through one of the SPD's computers in the "Muster Room" of the police station and that he could not do so because "for all practical purposes he wasn't an employee while on suspension" and no longer had an access card to the building. Officer Davis was never barred from the police station and, on occasion, did come into the building, albeit accompanied and through the front (public access) door. He knew that, if he wanted access to his department email through a "Muster Room" computer, all he needed to do was make arrangements with Chief Butler or Capt. Stephens to do so.

Third, I have considered whether, on all of the evidence, the Commission should exercise its discretion to modify the Appellant's termination and impose some lesser form of discipline. My findings do not differ in any material respect from those relied upon by the appointing authority. I find no evidence that the discipline imposed upon Officer Davis resulted from any disparate treatment, favoritism, bias or other arbitrary or unlawful motivation. To the contrary, Chief Butler gave Officer Davis more than ample opportunity to demonstrate that he had remediated his behavior. Chief Butler had concluded that he had not done so and that, no matter what "babysitting" (her words) she undertook, he was not going to change. This conclusion is supported by a preponderance of the evidence and a modification of the termination is not warranted.

CONCLUSION

For these reasons, the Appellant's appeal, Case No. D1-18-110 is hereby *denied*.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 30, 2020.

Notice to:

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* * * * *

ALGIMANTAS HARRELL

v.

MASSACHUSETTS ENVIRONMENTAL POLICE

G1-19-065

January 30, 2020

Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment as an Environmental Police Officer-Inadequate Experience in Natural Resource and Environmental Protection—The bypass of a candidate for original appointment as an environmental police officer for the Massachusetts Environmental Police was affirmed by the Commission where the Appellant was found to lack the necessary background in environmental and natural resource protection. The candidate, a New Bedford police officer, was an agricultural technical high school graduate focused on arboriculture and also had a Bachelor's degree in Criminal Justice. The Environmental Police has had mixed results when hiring municipal police officers with most of them returning to traditional policing.

DECISION

The Appellant, Algimantas Harrell, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), to contest his bypass for appointment as an Environmental Police Officer A/B (EPO A/B) with the Massachusetts Environmental Police (MEP).¹

A pre-hearing conference was held at the Commission's Boston office on April 16, 2019, and a full hearing was held at that location on July 12, 2019, which was digitally recorded.² Three (3) exhibits (*Exhs. 1 through 3*) were received in evidence. Neither party chose to file a proposed Post-Hearing Decision. For the reasons stated below, Mr. Harrell's appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- MEP Lieutenant James Cullen

Called by the Appellant:

- Algimantas Harrell, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Algimantas Harrell, resides in Acushnet, MA. He is an agricultural technical high school graduate where he fo-

cused on arboriculture. He holds a Bachelor's Degree in Criminal Justice from Curry College. He has been employed as a permanent, full-time Police Officer with the New Bedford Police Department (NBPD) since February 2013, where his duties include assignment to the NBPD Marine Unit. He also works as a landscaper. He has served with the US Army Reserve since 2008, currently assigned as a Special Agent with a Military Police unit. He is a certified firearms instructor. (*Exhs. 3 & 4; Testimony of Appellant & Lt. Cullen*)

2. Officer Algimantas took and passed the civil service examination for EPO A/B and his name appeared ranked #6 on Certification #05821 dated September 20, 2018 issued to the MEP by the Massachusetts Human Resources Division (HRD), from which MEP eventually hired nine (9) candidates, of which one or more were ranked below Mr. Algimantas. (*Stipulated Facts*)

3. The MEP is a law enforcement agency of approximately 70 officers whose primary mission includes protection of the environment and natural resources through enforcement, education and outreach, with jurisdiction over the entire Commonwealth coexistent with the Massachusetts State Police, as well as in the state's territorial waters (3 mile limit) and "customs waters" (up to twelve miles offshore). (*Testimony of Lt. Cullen; Administrative Notice [https://www.mass.gov/service-details/the-massachusetts-environmental-police-our-mission]*)

4. Because the unique focus of the MEP on protection of the Commonwealth's environment and natural resources covers a range of specialized and technical subjects (e.g., fish and wildlife, protection of endangered species and laws regulating boating and recreational vehicles), the minimum entrance requirements for the position of EPO A/B are tailored to fit this mission. In particular, in addition to the requirement of a high school diploma, applicants must have

"...at least two years of full-time, or equivalent part-time, professional or para-professional experience in wildlife or fisheries conservation or management, natural resources conservation or management, biological or environmental science, forestry, ecology, marine science, conservation law enforcement or related field, or any equivalent combination of such experience and the substitutions below.

Substitutions:

An Associate's degree in environmental science, biology, oceanography, ecology, natural resources management, wildlife management, fisheries management, forestry, conservation law enforcement or related field, may be substituted for one year of the required experience on the basis of two years of education* for one year of experience.

A Bachelor's or higher degree in environmental science, biology, oceanography, ecology, natural resources management, wildlife management, fisheries management, forestry, conservation law

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

enforcement or related field, may be substituted for the required experience on the basis of two years of education* for one year of experience.

*One year of education equals 30 semester hours or its equivalent. Education completed toward a degree will be prorated on the basis of the proportion of the requirements actually completed.”

(*Exh. 2; Testimony of Lt. Cullen*)³

5. The experience that meets these entrance requirements includes such full-time jobs as a Harbormaster, Park Ranger, Fish & Game Warden, Coast Guard duty and Marine Fisheries scientists and technicians. It also may include part-time, seasonal or volunteer work as an assistant Harbormaster or Shellfish Constable, as well as employment or volunteer work for the Division of Fisheries & Wildlife, the Audubon Society or similar conservation organizations. (*Testimony of Lt. Cullen*)

6. Presently, and historically, a Criminal Justice college degree and/or the work of a typical municipal police officer have not been considered acceptable education and/or experience by the MEP to meet the entrance requirements for EPO A/B. The few exceptions are some coastal municipalities that operate their own Marine Units, which do handle some of the same type of boating safety issues as the MEP. For a brief period, a prior MEP Colonel did decide to hire some officers with traditional law enforcement experience only, with mixed results. According to Lt. Cullen, of the approximately twenty officers hired on that basis, only about one in five (20%) became successful EPOs, with most of the others tending to gravitate back to traditional police work (traffic enforcement, personal and property crimes, etc.) rather than devote their full time and attention to conservation and environmental protection. (*Testimony of Lt. Cullen*)

7. The MEP processes all EPO A/B candidates through an initial screening interview before a panel of MEP senior officers and HR management to provide each candidate with an opportunity to establish they met the necessary minimum entrance requirements. Following his appearance before the screening interview panel, the MEP determined that Officer Harrell did not possess the necessary two years of full-time experience or educational substitute necessary to meet the minimum entrance requirements. (*Exhs. 3 & 4; Testimony of Appellant & Lt. Cullen*)⁴

8. By letter dated November 8, 2018, MEP Lt. Colonel Anthony Abdal-Khabir informed Officer Harrell that he was bypassed for appointment due to his failure to meet the minimum entrance requirements for the position of EPO A/B. (*Exh. 1*)

9. This appeal duly ensued. (*Claim of Appeal*)

3. The entrance requirements are established by approval from HRD, with input from the various stakeholders (e.g., Department of Fish & Game, Department of Conservation & Recreation, Department of Environment Experience) See G.L.c.31, §5 & §18.

4. At the Commission hearing, Officer Harrell explained that his military duty included deployment overseas as a Military Police Inspector who was responsible for customs screening of personnel who were completing their tours of duty to

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L.c.31, §1. See, e.g., *Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); *MacHenry v. Civil Serv. Comm’n*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den.*, 423 Mass. 1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L.c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L.c.31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L.c.31, §2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. *Boston Police Dep’t v. Civil Service Comm’n*, 483 Mass. 474-78 (2019); *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Service Comm’n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’” *Brackett v. Civil Service Comm’n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. See also *Mayor of Revere v. Civil Service Comm’n*, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”)

search for any plants or other materials that would be harmful to the natural environment of the United States. This information was not brought to the MEP’s attention prior to the bypass and, as the duty lasted for less than three months, it would not have changed the MEP’s decision. Similarly, Lt. Cullen was familiar with Officer Harrell’s agricultural high school experience, as he sits on the school’s advisory board, and is familiar with the curriculum, which includes many subjects that relate to natural resources conservation and environmental science. (*Testimony of Appellant & Lt. Cullen*)

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The commission—

“... cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority” but, when there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy,” then the occasion is appropriate for intervention by the commission.”

City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 426 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L.c.31,§2(b), gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority’s action” and it is not necessary for the Commission to find that the appointing authority acted “arbitrarily and capriciously.” *Id.*

ANALYSIS

The MEP has shown by a preponderance of the evidence that it was reasonably justified to bypass the Appellant for appointment as an EPO A/B on the grounds that he did not possess the minimum entrance requirements specified for the position as approved by HRD. These requirements call for education and experience that is directly related to the subject of natural resource and environmental protection that are reasonably related to the requirements of the job and have been uniformly applied to all candidates (save for a brief, less than successful experiment that enabled a few candidates to be hired whose qualifications were limited to general police work). The Commission has made clear that, absent proof that job requirements are arbitrary or unequivocally irrelevant to the performance of the duties required of the position, it will defer to the interpretation given to those requirements by the appointing authority, who is best situated and informed on those matters. *See, e.g., Graham v. Department of Conservation & Recreation*, 31 MCSR 337 (2018) (DCR’s definition of “major park” and other terms); *Trubiano v. Department of Conservation & Recreation*, 31 MCSR 298 (2018) (definition of “major recreational area” and “heritage park”).

In the case of Officer Harrell, neither his degree in Criminal Justice nor his general law enforcement experience as a New Bedford Police Officer fit the type of education and experience that MEP deems necessary to meet the minimum entrance requirements. The few months that he spent as a customs inspector in the Marines may qualify, but it falls far short of the two years necessary. His high school diploma from an agricultural technical high school, where he was exposed to a curriculum that included courses in environmental science and conservation that are not available to students in a traditional high school, is one of the “educational” substitutions on the MEP’s interview screening sheet, but is not referenced in the HRD approved educational substitutes incorporated as part of the minimum entrance requirements. The MEP was unable to provide an explanation for the origin of this discrepancy. If as the MEP contends, it does not, and has never accepted high school level experience as qualifying education, it

would behoove the MEP to make the appropriate changes to its forms.

In sum, Officer Harrell has many attributes that would serve him well in the job of an EPO, including a life-long interest in environmental issues and some military experience as a customs inspector and private sector experience as a landscaper that does seem fairly related to the job, as well as six years of service as a sworn New Bedford police officer. There would be nothing unreasonable for MEP to consider his unique blend of “General Police Work Plus” a “good fit” (putting him on a par with the one in five EPOs previously appointed by MEP without strict compliance with the literal definition of the entrance requirements), but, the MEP has provided reasonable justification not to do so, strictly and uniformly interpreting the requirements needed to qualify him for appointment.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Algimantas Harrell is denied.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 30, 2020.

Notice to:

Algimantas Harrell
[Address redacted]

Julia O’Leary, Esq.
Counsel, Massachusetts Secretary of
Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114

* * * * *

JESSZIRIS LOPEZ

v.

MASSACHUSETTS DEPARTMENT OF CORRECTION

G1-19-071

January 30, 2020

Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment as a Correction Officer-Recent Violence and Criminal Conduct-Disregard of the Law-Driving with Suspended License—The Commission affirmed the bypass of a candidate for original appointment as a Correction Officer in light of her recent record of personal misconduct that included physical violence and disregard of the law. The Appellant had a record of arrests for assault, keeping a weapon in a motor vehicle, and had been named as a defendant in a civil restraining order. The defense of “troubled youth” was ineffective as some of these incidents were barely two years in the past.

DECISION

The Appellant, Jessziris Lopez, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b), to contest her bypass for appointment as a Correction Officer I (CO-I) with the Massachusetts Department of Correction (DOC).¹ A pre-hearing conference was held at the Commission’s Boston office on April 23, 2019, and a full hearing was held at that location on June 10, 2019, which was digitally recorded.² Fifteen (15) exhibits (*Exhs. 1 through 15*) were received in evidence. Two additional exhibits were received from the DOC after the close of the hearing and marked in evidence (*PHExh.13A & PHExh.14A*). Neither party chose to file a proposed Post-Hearing Decision. For the reasons stated below, Ms. Lopez’s appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Eugene T. Jalette, DOC Supervising Identification Agent
- Jason Romans, DOC Sergeant (CO-II), Background Investigator

Called by the Appellant:

- Jessziris Lopez, Appellant
- MR, Appellant’s significant other

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Jessziris Lopez, currently resides where she was born and raised. She is a graduate of Westfield State University, where she received a Bachelor of Science Degree (Major: Criminal Justice; Minor: Psychology) and is continuing to study toward a Master’s Degree in Criminal Justice. (*Exhs 1 & 12; Testimony of Appellant*)

2. Ms. Lopez took and passed the civil service examination for CO-I on April 14, 2018, achieving a score of 93. Her name was placed on the eligible list for CO-I dated October 27, 2018 and appeared in the 39th place on Certification #05868 issued by the Massachusetts Human Resources Division (HRD) to DOC on or about January 19, 2018, from which DOC eventually hired 160 applicants, of which 113 were ranked below Ms. Jessziris on the Certification. (*Stipulated Facts*)

3. Ms. Lopez signed the Certification willing to accept employment and completed the standard DOC Application for Employment. (*Testimony of Appellant, Jalette & Romans*)

4. The DOC conducted its standard “law enforcement CJIS” check of Ms. Lopez’s criminal record and driving history which disclosed the following initial information:

April 10, 2014 - Operating after Suspended License -Dismissed 5/30/14

February 24, 2016 - Civil Restraining Order - Expired 06/09/16

April 20, 2016 - A&B Dangerous Weapon/A&B Aggravated Pregnant Woman/Malicious Destruction of Property over \$250 - Dismissed After one year Pre-trial Probation

July 29, 2017 - Weapon in Motor Vehicle (Connecticut) - Verdict Date: 02/13/2018

(*Exh.4; Testimony of Jalette & Romans*)

5. DOC Sergeant Jason Romans was assigned to conduct Ms. Lopez’s background investigation. He obtained a Springfield Police Department “Order Report” regarding the 2016 civil restraining order and a Holyoke Police Department Report regarding the 2016 A&B incident. Sergeant Romans was unsuccessful in obtaining further documentation about the 2014 license suspension or the 2017 Connecticut weapons offense also identified in the CJIS record.³

6. The Springfield Police Department “Order Report” documented service of a domestic abuse restraining order “Effective 3/10/2016” and “Expires: 3/20/2017”, also noting that the “Order Status” [as

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

3. Sergeant Romans also routinely checks police records in each city or town where the applicant resided. Sergeant Romans also procured additional police reports involving Ms. Lopez in 2011, but none of these incidents were cited or relied upon by the DOC in the assessment of her suitability and did not form any basis for the bypass decision. (*Exhs. 2, 7 through 10; Testimony of Appellant, Romans & Jalette*)

of the 12/17/2018] was “Vacated/Terminated”. The report indicates that initial service of the restraining order was attempted on 2/24/2016 and eventually “served in Court” in hand on 3/10/2016.” The report contains no details about the underlying circumstances and Sergeant Romans did not obtain the 209A complaint, affidavit or restraining order itself. (*Exh. 6; Testimony of Romans*)

7. The Holyoke Police Department Report contains detailed narratives prepared by two of the police officers who responded to the scene. These narratives, which are based, in part, on percipient observations by the responding officers, reported that Ms. Lopez, her younger sisters and friends, were stopped by the police about 11:30 pm on April 20, 2016 as they were leaving the scene in Ms. Lopez’s car, after an attack upon the reporting female victim (4½ month’s pregnant), her boyfriend and his car, which had multiple dents, all its windows smashed and all four tires slashed. The female had been cut and scratched and had a bump on her head, and was treated at the scene by paramedics. A search of Ms. Lopez’s car found 2 knives, bb’s a bb gun, a paintball gun and a steering wheel lock, items that were consistent with the description of what had been used to attack the victims and their car. Ms. Lopez’s car had its rear window smashed, also consistent with what the boyfriend reported to police he had done as Ms. Lopez was driving away. The female victim’s car keys were found in Ms. Lopez’s car.⁴ When asked at the scene how the female victim’s keys got into the car, Ms. Lopez said: “I don’t know, maybe she threw them there.” Ms. Lopez and the other passengers in her car were arrested and booked on two counts of A&B w/deadly weapon, Aggravated A&B and Malicious damage over \$250. While the boyfriend was giving his statement, Ms. Lopez was texting him, and the police took copies of the messages and placed them in the case file.⁵ (*Exh. 5; Testimony of Romans*)

8. As part of the background investigation, Sergeant Romans interviewed Ms. Lopez’s professional references, all of whom recommended her for hire, commenting that she was dependable and friendly. Save for work as a personal caretaker since 2012, Ms. Lopez provided no employment history that Sergeant Romans could verify. (*Exh. 3; Testimony of Romans*)

9. On December 17, 2018, Sergeant Romans conducted a home interview with Ms. Lopez. She was provided with a copy of her CJIS records (*Exh. 4*) and asked about her past negative interaction with law enforcement. She replied by providing two letters which Sgt. Romans asked her to sign and he placed them in her application folder. (*Exh.3; PHExh.3A & PHExh.14A; Testimony of Appellant & Romans*)

10. The first letter addressed the 2016 Holyoke A&B incident. Ms. Lopez stated that she had taken her younger sisters and friends to the mall and had stopped at her mother’s ex-boyfriend’s apartment, where one of her sisters went to get some milk formula

for her newborn baby brother. Ms. Lopez claims that she was not involved in the altercation and only entered the fray after the ex-boyfriend was wielding a baseball bat at one of her sisters and smashed out the rear and front windows of her (Ms. Lopez’s) car. She claims that her sister was the one who fired paint balls and does not know how the boyfriend’s car windows got smashed. She wrote that all of the passengers in her car were arrested but “some of us did not participate in the same way”, “it was very surprising to many people throughout the court process as to why the other party didn’t get arrested” and they “were going back and forth to court for about a year before all of the charges were finally dismissed.” (*Exh. 13A*)

11. The second letter addressed the 2017 Connecticut incident. According to Ms. Lopez, she went to Connecticut with friends to celebrate the 21st birthday of her significant other (MR) and was the “designated driver” for the night. Everyone else had become “belligerently drunk” and MR was in the back seat, angry and appeared passed out. Ms. Lopez stopped the car, MR got out and a scuffle ensued trying to get MR back into the car when the police arrived. Ms. Lopez was arrested and, after completing a Domestic Abuse program, the charges were dismissed. The statement does not address the “weapons” charge. (*Exh. 14A*)

12. Sergeant Romans submitted his background investigation report on December 31, 2018, concluding that Ms. Lopez’s background included both positive and negative aspects:

Positive Employment Aspects

Positive Professional References

Spanish, French and English capabilities

Negative Employment Aspects

Negative interaction with law enforcement. Reports supplied in applicant’s folder.

(*Exh. 3; Testimony of Romans*)

10. After Ms. Lopez’s application was presented to DOC Commissioner Mici and a committee of senior DOC management, Ms. Lopez was informed, by letter dated July 9, 2018 from Deputy Commissioner Preston, that she was not selected for appointment due to “Background Investigation. On 7/28/2017 you were arrested in Connecticut for a weapon in a motor vehicle, on 4/21/2016 you were arraigned in Massachusetts for 1 count of A&B, 1 count of malicious destruction of property and 3 counts of assault with a deadly weapon. On 4/10/14 you were arraigned for operating on a suspended license, from 2/24/16 to 6/9/16 you were listed as a defendant on a civil restraining order.” Mr. Jalette was present for the DOC management review, and recalled that the DOC’s concern was with the applicant’s history of multiple, recent incidents involving physical conflicts and failure to adhere to the requirements of the law. (*Exh.2; Testimony of Jalette*)

4. The officers’ reports differ as to where in Ms. Lopez’s car the victim’s keys were found, one stating they were between the seats and the other stating they were in the trunk, but I do not find this discrepancy sufficient reason to question the overall reliability of the officer’s percipient observations of the scene or the accuracy of their reports.

5. The Holyoke police report also makes reference to another incident a week earlier. (*Exh.5*) The record does not contain any other reference to such an incident.

11. At the Commission hearing, Ms. Lopez submitted substantially the same documentation regarding the 2017 Connecticut arrest and the 2016 Holyoke incident as she had provided to Sergeant Romans. She also explained that the “weapon” involved in the Connecticut incident was a hooking tool that she used for retrieving boxes in a temporary warehouse job in which she was then employed.⁶ The license suspension was due to her getting a speeding ticket which, being under age 18, resulted in an automatic suspension and, once she took care of the ticket her license was restored. (*Exhs. 13 & 14; Testimony of Appellant*)

12. As to the 2016 restraining order, Ms. Lopez does did not have a clear recollection of the legal proceedings, except that she does remember that MR and a school security officer appeared and testified under oath, after which the restraining order was extended for one year. MR testified at the Commission hearing, affirming her written statement that her decision to obtain a restraining order was an over-reaction to a break-up early in their relationship, she was “playing victim to get revenge” and was untruthful in her testimony in court. In June 2016, she returned to court, stated that she was not in fear and wanted to terminate the restraining order, which was then vacated at her request. (*Exh. 15; Testimony of Appellant & MR*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L.c.31, §1. *See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); *MacHenry v. Civil Serv. Comm’n*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den.*, 423 Mass.1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L.c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L. c. 31, §2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough

review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. *Boston Police Dep’t v. Civil Service Comm’n*, 483 Mass. 474-78 (2019); *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Service Comm’n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’” *Brckett v. Civil Service Comm’n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211,214 (1971) and cases cited. *See also Mayor of Revere v. Civil Service Comm’n*, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”)

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The commission—

“ . . . cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority” but, when there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy,” then the occasion is appropriate for intervention by the commission.”

City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 426 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L. c. 31, §2(b) , gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority’s action” and it is not necessary for the Commission to find that the appointing authority acted “arbitrarily and capriciously.” *Id.*

ANALYSIS

The DOC has established, by a preponderance of the evidence, that it had reasonable justification for the decision to bypass Ms. Lopez for appointment as a Correction Officer. Ms. Lopez has successfully achieved a Bachelor’s Degree in Criminal Justice and is pursuing a Master’s Degree in that field. She appears to have a strong and sincere desire to become a Massachusetts Correction Officer. However, her recent record of personal misconduct, including physical violence and disregard for the law, that has occurred within two years before she applied to the DOC, provides reasonable justification for her non-selection at this time.

The DOC is a para-military organization where order and discipline is a critical component of the work that is required of the high-stress work of a Correction Officer responsible for the care and custody of incarcerated criminals and other persons who present risks to the safety of themselves and others. While Ms. Lopez sincerely believes that she possesses the qualities that would enable her to work under the pressures of such a position, the record provides reasonable justification for DOC to believe that Ms.

6. I do not see any reference to this employment in the background investigation report. (*Exh. 3*)

Lopez is not ready to assume the responsibility of such a position. This record includes a credible description by percipient law enforcement officers that details her involvement in a very disturbing act of violence committed in April 2016, as well as undisputed evidence that she had been driving while her license had been suspended due to non-payment of a speeding ticket in 2014, for which a warrant had been issued for her arrest. The underlying facts surrounding the 2017 Connecticut arrest are not documented by any official record (other than the CJIS report), and I credit Ms. Lopez's testimony that the "weapons" charge did not involve a firearm, but some sort of blunt instrument that she legitimately possessed. Nevertheless, Ms. Lopez admits that there was some form of "physical contact" between MR and herself, witnessed by Connecticut police, and that she was ordered to complete a Domestic Violence course. Similarly, as to the 2016 restraining order, I credit the testimony of Ms. Lopez and MR that they are now reconciled and have maintained a stable relationship for the past few years. The fact remains, however, that a court of law, after hearing the testimony from both Ms. Lopez, MR and a disinterested school officer, concluded that the 209A restraining order against Ms. Lopez should be extended for a year. Although MR recanted her story, at the time DOC decided to bypass Ms. Lopez, DOC did not have the benefit of this information.

I have considered Ms. Lopez's argument that she has overcome the obstacles of a troubled youth and has learned from her past mistakes. That argument might carry more weight if the incidents were less recent and her testimony had indicated more clearly than she did, that she fully accepts responsibility for her actions. Should she maintain her desire to become a Correction Officer, at some point in time, DOC may be able to conclude that, absent any future problematic incidents, Ms. Lopez, indeed, has overcome her history of negative behavior. On the facts presented in this case, however, DOC is fully justified to conclude that far too little time has passed for DOC to assume that Ms. Lopez has, indeed, matured sufficiently, truly put her past behind her, and is ready to join a para-military organization tasked with the stressful duties of the care and protection of inmates required of a Correction Officer.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Jessziris Lopez, is denied.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 30, 2020.

Notice to:

Jessziris Lopez
[Address redacted]

Norman Chalupka, Jr., Esq.
Joseph S. Santoro.
Labor Relations Advisor Department of Correction
P.O. Box 946 - Industries Drive
Norfolk, MA 02056

* * * * *

RICHARD J. MELANSON

v.

CITY OF GLOUCESTER

G1-18-198

January 30, 2020

Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment as a Gloucester Police Officer-Criminal Conduct-Domestic Violence-State Information-Lack of Thorough and Independent Review—By a 3-1 majority, the Commission voted to grant the bypass appeal of a candidate for original appointment to the Gloucester Police Department, finding that the City failed to conduct a thorough and impartial review of his background and cited incidents of misconduct and violence that were very much in the past or misconstrued. Chairman Christopher C. Bowman dissented, finding that this candidate had been shown to have serious issues of personal self-control that had been adequately documented by Gloucester PD, even if the review process was far from perfect.

DECISION

The Appellant, Richard J. Melanson, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b), to contest his bypass by the City of Gloucester (Gloucester) for appointment as police officer with the Gloucester Police Department (GPD).¹

The Commission held a pre-hearing conference on January 14, 2019 and a full hearing on March 6, 2019 and April 24, 2019, which was digitally recorded and subsequently transcribed by the parties.² Witnesses were sequestered. Twenty-five Exhibits (Exhs. 1 - 4, 6 - 8, 10 - 26) were received in evidence, and two documents marked for identification (Exhs. 5ID & 9ID). One additional exhibit was marked after the hearing (PHExh.27) Proposed decisions were filed on July 8, 2019. For the reasons stated below, Mr. Melanson's appeal is allowed.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

- GPD Lieutenant Michael A. Williams, Jr.
- GPD Lieutenant David Quinn
- GPD Detective Steven Mizzoni

Called by the Appellant:

- Richard J. Melanson, Appellant
- Richard A. Melanson (Appellant's father)

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Richard J. Melanson, is a life-long Gloucester resident. He graduated from Gloucester High School (2004), received a Bachelor of Science Degree in Sport & Movement Science (Fitness/Wellness) from Salem State College (2010) and received an Associate's Degree in Criminal Justice from Endicott College (2016). (*Exhs.1, 6, 10, & 14 through 16; Tr.157 [Appellant]*)

2. In June 2007, Mr. Melanson was returning home when he noticed that a neighbor's house was on fire. He called 911, roused his sleeping neighbor, and kept the flames under control with a garden hose until the Gloucester Fire Department arrived on scene. His valor was reported in the local paper; he was called a "hero" (by his neighbor) who "saved the home" (according to the Fire Chief). As a result of his actions, Mr. Melanson, then 21, was awarded a Certificate of Bravery and a \$1,000 award for his "brave rescue" by the Massachusetts Humane Society. This incident prompted him to consider a career in fire service but, eventually, decided that working on the "front lines" as a police officer was his preferred choice. (*Exh.23; Tr.197-198 [Appellant]*). See also, "*Gloucester Man praised for saving family, house from fire*", *Gloucester Times*, June 4, 2007.

3. Since 2013, Mr. Melanson has been employed with the Endicott College Public Safety Department as a full-time sworn police officer for Endicott College. He is fully armed on duty and serves as the first responder to any calls that come into the police station. (*Exhs.1,6 & 10; PHExh.27; Tr.157-158 [Appellant]*)

4. Mr. Melanson is licensed by the Commonwealth of Massachusetts as a Special State Police Officer and as a Deputy Sheriff by the Essex County Sheriff's Office. He holds a Class A (Large Capacity) License To Carry issued by the Gloucester Chief of Police. (*Exhs.1,6 10 & 24*)

5. Mr. Melanson completed the MLETA Reserve Police Academy in 2015. He also holds certificates as a Field Training Officer and serves as a Field Training Officer for the Endicott College Public Safety Department. He also holds certificates for completion of MPTC Firearms Training, Massachusetts State Police Firearm Safety, and Basic Police Mountain Bike Patrol. (*Exhs. 17 thorough 22; PHExh.27*)

6. In 2015, Mr. Melanson applied for a position as a police officer with the Gloucester Police Department. After submitting his Application Packet, he was called in to the GPD and advised to withdraw his application, which he did in early 2016. (*Exhs. 1 & PHExh27; Tr.25-29 [Williams]; Tr.174-176 [Appellant]*)

7. At the Commission hearing, the GPD officers who handled Mr. Melanson's 2015 background investigation testified that they performed a "complete" investigation at that time, which, typically, included a criminal history and driving record check and interviews with professional and personal references. None of those records, however, were produced at the Commission hearing. The officers made no "findings" and prepared no written background investigation report. Save for phone interviews with one of Mr. Melanson's former girlfriends (Ms. A) and another male acquaintance of hers, and speaking with one of the two GPD officers about a traffic stop of Mr. Melanson approximately thirteen years ago,³ the background investigators had no specific recollection of conducting any other interviews as part of their 2015-2016 investigation. (*Tr.25-28,50-60 [Williams]; Tr.115-129 [Mizzoni]*)

8. Mr. Melanson took and passed the next civil service examination and his name appeared on Certification #05683 requisitioned by the GPD for appointment of up to 6 full-time permanent police officers, issued by the Massachusetts Human Resources Division (HRD) on or about July 18, 2018. Mr. Melanson was ranked in fifth place on the certification. Eventually, the GPD appointed four candidates, effective 10/18/2018, all ranked below Mr. Melanson. (*Exhs.2 & 3*)

9. Mr. Melanson signed Certification #05683 willing to accept appointment and, on or about July 30, 2018, submitted a new application form to the GPD. (*Exhs. 1 & 2 tr.37-38 [Williams]*)

10. Upon receiving Mr. Melanson's 2018 application, Lt. Michael Williams, the GPD superior officer who handled new recruit background investigations, spoke with GPD Police Chief John McCarthy. Chief McCarthy informed Lt. Williams that further investigation of Mr. Melanson's application was not required as he again would be disqualified based on the results of the 2015 application process. As a result, Lt. Williams took no action to investigate Mr. Melanson's application in 2018. (*Tr. 30-31,43-47 [Williams]*)

11. By letter dated September 4, 2018, Gloucester HR Director Donna Leete informed Mr. Melanson that "you will be by-passed on certification #05683 and not offered employment with the City of Gloucester Police Department" for the following reasons:

"The background investigation revealed that you have had two restraining orders from former girlfriends, two assault charges, stalking allegations with threats, verbal confrontation with property damage, and a report as an unwanted guest. In addition, in December after being pulled over in Gloucester, MA for a speeding violation, you called the police officer a "dickhead" and continued to yell at the officer. In February 2011 you were

3. The other responding officer was Sgt. John Bichao, now retired from the GPD, who later provided a recommendation for Mr. Melanson's appointment as a Special Police Officer. (*Exh. 13; Tr.50 [Mazzoni]; Tr.192 [Appellant]*)

pulled over in Wenham, MA for a stop sign violation and told the police officer that you “did stop” and continued with aggressive conversation.”

“Your conduct demonstrates a past history of control issues and is inappropriate behavior for a candidate for the Gloucester Police Department.”

(*Exh. 4*)

12. This appeal duly ensued. (*Claim of Appeal*)

13. The evidence presented by the GPD at the Commission hearing in support of the bypass reasons stated in the September 4, 2018 letter to Mr. Melanson consisted of oral testimony from the two GPD officers who had conducted Mr. Melanson’s 2015-2016 background investigation and “Affidavits” tied to the two restraining orders referenced in Mr. Melanson’s application (one in 2001 and the second in 2006). Neither the restraining orders, nor any other civil or criminal court records, nor any police incident reports were specifically identified, let alone proffered in evidence. Neither GPD officer who testified at the Commission hearing possessed percipient knowledge of any of the incidents involved and provided only general recollections of the contents of documents which they could not be certain when they last reviewed. (*Exhs. 25 & 26; Tr.25-100 [Williams]; Tr.101-132 [Mizzoni]*)⁴

14. The GPD’s bypass letter appears to catalogue numerous incidents of civil or criminal misconduct, but several of the references overlap. The disclosures by Mr. Melanson, the only percipient witness to testify, in the 2015 and 2018 application packets, and his testimony at the Commission hearing, establish seven actual incidents, only one of which was criminal in nature.

- November 2001. Mr. Melanson, then a sophomore in high school (age 15), had a girlfriend (Ms. G.) who spoke with a guidance counselor and stated she was having “issues” with Mr. Melanson and “was beginning to see another boy.” Mr. Melanson and Ms. G. were called to the principal’s office, where he was asked to empty his pockets, producing his “wallet, breathe mints, keys and a fishing pocket knife”. Ms. G.’s mother procured a 10-day 209A restraining order against Mr. Melanson, which was dismissed when Ms. G. failed to appear in court. Mr. Melanson was suspended from school for possession of a knife in school. A charge of A&B w/deadly weapon was continued without a finding and duly dismissed.⁵

Ms. Melanson and Ms. G. parted ways and have not been in contact since high school. (*Exh.1 & PHExh.27; Tr.176-180 [Appellant]*)

- June 2006. Mr. Melanson (then age 19) was at a local church festival when he spotted Ms C whom he previously dated in an altercation

with a male companion. He mistakenly (his word) tried to intervene. No criminal charges emanated from this incident but Ms. C.’s grandmother obtained a 209A restraining order which Mr. Melanson did not contest and remained in effect for one year and was not renewed. Ms. C lives in Gloucester and works as Head Teller at a Gloucester savings bank and has remained “close friends” with Mr. Melanson to this day. (*Exhs. 1 & PHExh.27; Tr. 180-182, 207 [Appellant]*)⁶

- February 2005/December 2006. Mr. Melanson was stopped in Gloucester for speeding on two occasions. During one of the stops (the evidence did not indicate which one), Mr. Melanson said, referring to one of the responding officers: “I don’t understand why he’s being such a dick head.” Mr. Melanson was issued a civil citation and appeared in court, not to contest it, but to apologize. The other responding officer, Sgt. Bricheo, was present at the court hearing and, after Mr. Melanson apologized for his remark about the other officer, the clerk waived the citation. (*Exh. 1; Tr. 191-193 [Appellant]*)
- February 2011. Mr. Melanson was stopped in Wenham by an officer doing a traffic detail at a construction site who said he observed Mr. Melanson fail to come to a complete stop at a nearby intersection. Mr. Melanson, who worked as an instructor for a local driving school for three years after college, honestly believed he had fully stopped and said so to the officer. Mr. Melanson subsequently received a citation in the mail and paid the \$100 fee. (*Exh. 1; Tr.194-196 [Appellant]*)
- June 2013 (approximate). Mr. Melanson’s mother had received an email from her sister (Mr. Melanson’s aunt) that had upset his mother and “she starting crying about it.” Mr. Melanson drove to his aunt’s home to find her “intoxicated”. When she told him to leave and said she was calling the police, he walked outside and waited until the police arrived. No citations, restraining orders or summons issued as a result of this incident. (*Tr.187-189 [Appellant]*)
- Summer 2015 (approximate). Mr. Melanson received a call while on duty at Endicott College from his then girlfriend (Ms. A). Their relationship had become strained, although they continued living together. Ms. A told him that she was “upset about some things but wanted to work them out. . . . she was currently out having drinks with her sister and asked me if I would come see her after work.” When Mr. Melanson arrived after his shift at approximately 11:30 pm, he found Ms. A in bed with another “gentleman” (his words) whom Mr. Melanson knew from the gym where they both worked out. The man apologized, explaining that Ms. A had led him to believe that she had ended her relationship with Mr. Melanson. Mr. Melanson was surprised to hear this, as he still had a key to the house, kept his belongings there, and Ms. A had just told him to come home and that she wanted to patch things up. No physical violence was involved, the police were not called and no restraining orders or criminal complaints were sought.⁷ (*Exhs. 1 & PHExh.27; 151-152 [RA Melanson]; Tr.159-172, 20-202 [Appellant]*)
- Time Uncertain. At some unspecified time, Mr. Melanson happened to cross paths in Gloucester with another man who admitted to stealing money from Mr. Melanson’s younger brother. They engaged in

4. Most of the GPD’s assertions were not corroborated and many were contradicted by other credible evidence., i.e., Tr.32, 50, 54-55, 74-75 [Williams] (no evidence of “multiple license suspensions”; wrong “back-up officer in Gloucester traffic stop; no evidence that Mr. Melanson ever “pulled” a knife or gun or threatened to do so; Mr. Melanson’s aunt, not Mr. Melanson, was the intoxicated person in the “unwanted guest” incident) and Tr.104-106, 109-111 [Mizzoni] (timing of incident with “Ms. A (11:30 pm not 4:00 am as she claimed and, false claim that Mr. Melanson had frequent “blackouts”, implying he was habitually intoxicated)

5. The only evidence of the 2001 case came from Mr. Melanson & his father. Neither the court record nor the CORI report of this juvenile offense was produced in evidence. Mr. Melanson acknowledged a CWOFF in response to a question on the GPD application which asked: “Have you ever had a court case continued

without a finding?. If Yes, complete the following [Arrest Date & Final Disposition -Dismissed, for which he listed the same date, 11/14/2001] (*Exhs. 1 & PHExh.27; Tr. 151-156 [RA.Melanson]*)

6. Ms. C. prepared a written statement to corroborate Mr. Melanson’s version of the 2006 incident. I did not accept Ms. C.’s statement in evidence but I take note that it was marked for identification. (*Exh.91D*)

7. It appears that the only reason that the GPD was made aware of Ms. A is because Mr. Melanson disclosed his relationship with her (as well as his current girlfriend Ms. S.), as required by the GPD application, the names and contact information for “all boyfriends/girlfriends or any person you have dated for one month or more during the past five years.” (*Exh.1 & PHExh.27; Tr.104-106,126-127 [Mazzoni]*)

a heated argument about it and, as he went to leave, Mr. Melanson kicked the man's car, causing a dent. The Gloucester Police responded, but no citations were issued. Mr. Melanson admitted responsibility for the damage and voluntarily paid the man \$700 to have the car repaired. (*Tr.189-191 [Appellant]*)

15. The GPD took little, if any, notice, of Mr. Melanson's employment history and personal references which he supplied as part of his applications, both in 2015 and, again, in 2018. These included two letters written in 2014 by career GPD Sergeants in support of Mr. Melanson's candidacy for the position of Special State Police Officer. Each officer attested to his percipient knowledge of Mr. Melanson's professional and personal life. In view of their positions with the GPD and the business purpose for which the letters were prepared, I find their statements reliable and credible. Sgt. Bichao, now retired (who was the "back-up officer" involved in the traffic stop that involved the "dickhead" remark), stated that "integrity" was Mr. Melanson's "strongest quality" and his "concern for others, his respect for family, friends and community are unmatched by any young man I have come into contact within the past 40 years." Det. Sgt. Conners stated that he had been "privileged to watch him mold into a well-rounded, highly motivated, charismatic young man" who "excels in all he does . . . [w]hether he is instructing at Nicastro's Driving School or simply education someone on fitness and wellness, it shows [Mr. Melanson's] desire to make a difference in his community and is a testament to his 'do for other attitude.' . . . Particularly noteworthy is the care and respect [Mr. Melanson] has for the law enforcement profession. . . ." (*Exhs. 12 & 13*)

16. At the Commission hearing, Mr. Melanson proffered five additional letters in the nature of character references. This included a letter from the Mr. Melanson's current employer, the Chief of Police at Endicott College, letters from a patrol officer and a lieutenant who worked with him at Endicott College and letters from the proprietor of the driving school and the President of the gym, his two prior employers. The authors were listed as part of Mr. Melanson's GPD applications, but they were not called to testify and their letters were prepared after Mr. Melanson had been bypassed. As there was no other record of what contact, if any, the GPD investigators had with these employers, I admitted these documents into evidence solely for the limited purpose of showing what those witnesses were likely to have said, all of which was highly positive, had they been contacted by the GPD investigators as part of the background investigation, as the investigators claimed is typically done. (*Exhs. 6 through 8, 10 & 11; Tr. 26 [Williams]*)⁸

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against co-

ercion for political purposes, and are protected from arbitrary and capricious actions." G.L.c.31, §1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); *MacHenry v. Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den.*, 423 Mass.1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a "certification" of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L.c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L. c. 31, §2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't v. Civil Service Comm'n*, 483 Mass. 474-78 (2019); *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

"Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brckett v. Civil Service Comm'n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere v. Civil Service Comm'n*, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient")

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The commission—

" . . . cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority" but, when there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy," then the occasion is appropriate for intervention by the commission."

City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 426 Mass. 1102 (1997) (*emphasis add-*

8. At the Commission hearing, the GPD raised additional issues, including multiple alleged driver license suspensions, an alleged confrontation at the gym where Mr. Melanson was then employed, and untruthfulness in his application. While none of these were stated as reasons for the bypass, and, therefore are not properly

before the Commission and need not be addressed further in this appeal (See G.L. c. 31, §27, ¶2; PAR.08(4)), I note that (save for a one-time license suspension as a juvenile), I found nothing that corroborated any of these additional reasons by a preponderance of the evidence.

ed) However, the governing statute, G.L. c. 31, §2(b), gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary for the Commission to find that the appointing authority acted "arbitrarily and capriciously." *Id.*

ANALYSIS

The GPD has failed to establish by a preponderance of the evidence that it made a thorough and impartial review of the relevant facts bearing on Mr. Melanson's suitability for appointment as a GPD police officer and that the reasons asserted for his bypass were reasonably justified as required by basic merit principles of civil service law and rules. Accordingly, Mr. Melanson deserves another opportunity to be considered for appointment after appropriate consideration as required by law.

First, as to Mr. Melanson's 2018 application itself, it is not disputed that the GPD decided that any substantive review or investigation of that application was "not required", and none was conducted. HRD provides a procedure to enable, and the Commission has permitted, in certain circumstances, such rote rejection of a candidate who has been recently lawfully bypassed, especially, when the two bypass decisions emanate from a certification from the same eligible list. *See, e.g.,* Personnel Administration Rules, PAR.09(2); *Wosney v. Boston Police Dep't*, 29 MCSR 33 (2016).

However, the circumstances that would permit application of that principle do not apply here. Mr. Melanson withdrew from the 2015 hiring process and the GPD never completed its investigation of Mr. Melanson and made no prior "findings" of his suitability. Mr. Melanson had no right of appeal to the Commission to obtain a review of the lawfulness of the GPD's actions at that time.

Second, as to the GPD's reliance solely on information derived during the 2015 hiring process, the evidence presented to the Commission in this appeal falls woefully short of what is required under basic merit principles to establish that, even in 2015, the GPD conducted an "impartial and reasonably thorough review". The GPD presented little direct evidence that established, what, if any, investigation was actually conducted two years earlier or what information the documents, if any, obtained actually stated. Although the GDP offered conclusory testimony that it performed its typical "complete" background investigation at that time, little documentary evidence was offered to corroborate that conclusion—no CORI report, no driver's history, no police incident reports, no civil or criminal court records, and no investigator's notes or background investigation report. The GPD investigators could not recall who, if anyone, they actually interviewed, other than Ms. A, her boyfriend and one of the two GDP officers involved in a thirteen-year old traffic stop (but not the GPD officer who had written a reference for Mr. Melanson in 2014). In particular, no evidence pointed to any outreach to Mr. Melanson's current or past employers, to his current significant other or to Ms. C, who was the alleged victim in the 2006 incident at the church festival, all of whom were listed in both the 2015 and 2018 applications and fully available to be interviewed.

Third, the lack of a thorough review aside, after taking account of the very limited evidence that the GDP did proffer, virtually all of it multilayer hearsay, together with other relevant and percipient evidence to the contrary, the preponderance of the credible evidence comes up short of meeting the GDP's burden of proof to show that the reasons given to bypass Mr. Melanson are reasonably justified and support the decision to bypass him.

The Supreme Judicial Court has recently clarified the quantum of proof that is necessary for an appointing authority, including a law enforcement agency such as the GPD, to carry the burden of establishing facts that justify a bypass to the satisfaction of the Commission. In *Boston Police Dep't v. Civil Service Comm'n*, 483 Mass. 461 (2019), the Court considered, among other issues, the degree of deference that a law enforcement appointing authority deserves from the Commission, when it serves as a de novo fact-finder in a bypass appeal. By a 6-1 decision, the SJC's majority opinion dismissed the notion (arguably embraced previously by the Appeals Court and supported by the lone dissent) that, when a case comes before the Commission on disputed facts regarding a candidate's conduct, the appointing authority "need only provide a 'sufficient quantum of evidence to substantiate its legitimate concerns' regarding that candidate . . . rather than providing reasonable justification by a preponderance of the evidence as required by G.L. c. 31, §2(b)".

"[T]he dissent claims that an appointing authority can demonstrate reasonable justification by presenting a "sufficient quantum of evidence" to substantiate its "legitimate concerns" about the risk of an applicant's misconduct. [*citing Beverly*, 78 Mass. App. Ct. 182 (2010)]. We agree that a police department should have the discretion to determine whether it is willing to risk hiring an applicant who has engaged in prior misconduct (including one who has done so and subsequently lied about it). However, where, as here, the alleged misconduct is disputed, an appointing authority is entitled to such discretion only if it demonstrates that the misconduct occurred by a preponderance of the evidence. See *Cambridge*, 43 Mass. App. Ct. at 305, 682 N.E.2d 923; G.L. c. 31, §2(b)."

"[T]he misconduct in *Cambridge* was undisputed by the applicant. Here, in contrast, the question whether Gannon engaged in past misconduct was the single issue brought before the commission. . . . To the extent that the dissent suggests that there are occasions when an appointing authority need not demonstrate reasonable justification by a preponderance of the evidence as required by G.L. c. 31, §2(b), we disagree."

...

"Citing to *Cambridge* . . . the court in *Beverly* . . . suggested that to require an appointing authority to prove a candidate's alleged misconduct "would force the city to bear undue risks." However, the "risk" discussed in Cambridge pertained to risk that the candidate might engage in future misconduct, not risk that the candidate engaged in past misconduct."

"For these reasons, the department may not rely on demonstrating a "sufficient quantum of evidence" to substantiate its "legitimate concerns" about the risk of a candidate's misconduct. . . . Instead, it must, as required by G.L. c. 31, §2(b), demonstrate reasonable justification for the bypass by a preponderance of the evidence."

Id., 483 Mass. at 333-36 (*emphasis added*) (*emphasis in original*)

Applying this standard to the evidence presented in this appeal, the GPD fails to meet the required preponderance of the evidence test. Mr. Melanson’s only formal brush with the criminal law arose from a 2001 ex-parte (10-day) restraining order against him as sophomore in high school. The absence of any subsequent criminal history since then, alone, justifies discounting this incident as probative of his present unsuitability. *See, e.g., Wallace v. Town of Saugus*, 32 MCSR 29 (2019); *Stylien v. Boston Police Dep’t*, 31 MCSR 154 (2018). Moreover, although Mr. Melanson admitted that he agreed to a CWO of a serious criminal offense, he also provided the only percipient account of what actually did happen. I found his demeanor and candor as a witness honest and credible, and his testimony was far more persuasive than the multi-level hearsay account provided by the GPD about this decades-old incident.

Similarly, as to the 2006 restraining order, it too, carries diminished weight from the stale nature of the incident. In addition, Mr. Melanson has stayed on good terms with the alleged victim, Ms. C. and provided her contact information to the GPD. She was fully prepared to tell the GPD that she had foolishly embellished her story thirteen years ago. She now holds a position of trust with a local Gloucester savings bank, but the GPD never reached out to her (as it did to Ms. A). Again, I found Mr. Melanson’s recollection of the church festival to be credible.

In the same vein, GPD simply got the incident with Ms. A horribly wrong. Without a record of what she actually told Sgt. Mizzoni, I cannot actually credit anything he claimed she said, but, whether she put the incident at 4:00 am or Sgt. Mizzoni’s recollection is faulty, Mr. Melanson credibly explained that simply wasn’t true, and neither was most of the story Ms. A allegedly recounted to Sgt. Mizzoni.

The remaining incidents can be addressed summarily. Mr. Melanson’s accounts of the two traffic stops, the “unwanted guest” complaint, and his anger after a run-in with a thief (at a date unknown), all rang true. GPD never reached out to speak to the second GPD officer present at the traffic stop and at that court hearing and offered none of the police reports or other credible explanation to justify why his conduct in any of those other incidents was sufficient discount the considerable evidence to the contrary, from his current police department employer and others, and disqualify him from becoming a GPD police officer.

In sum, GPD failed to prove that its bypass of Mr. Melanson was based on a reasonably thorough and independent review that established, by a preponderance of the evidence, misconduct on the part of Mr. Melanson that reasonably justified its decision.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Richard J. Melanson, is allowed.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/or the City of Gloucester in its delegated capacity take the following action:

- Place the name of Richard J. Melanson at the top of any current or future Certification for the position of GPD Police Officer until he is appointed or bypassed after consideration consistent with this Decision.
- If Mr. Melanson is appointed as a GPD Police Officer, he shall receive a retroactive civil service seniority date which is the same date as the first candidate ranked below Mr. Melanson who was appointed from Certification No. 05683. This retroactive civil service seniority date is not intended to provide Mr. Melanson with any additional pay or benefits including, without limitation, creditable service toward retirement.

OPINION OF COMMISSIONER BOWMAN

While I defer to the findings of Commissioner Stein, I respectfully reach a different conclusion regarding whether the City had reasonable justification to bypass the Appellant for the position of permanent, full-time police officer.

The City bypassed the Appellant for appointment after concluding that he demonstrated a history of control issues.

A preponderance of the evidence supports the City’s conclusion.

In 2001, a female signed an affidavit under the pains and penalties of perjury stating in part that the Appellant “... grabbed my arm and pulled me down the hall, pushed me against the wall and said he had a knife and wasn’t afraid to take it out in front of everyone ...”.

In 2006, a different female also signed an affidavit under the pains and penalties of perjury stating in part that the Appellant “... approached me at St. Peter’s Fiesta and got in my face. I asked him several times to get away from me and to stay away from me. He continued to antagonize me and I pushed him away from me. Then he grabbed my boyfriend’s shirt and was pulling it, he then spit in his face. I again pushed him away and other people pulled him off of my boyfriend and I ...”. In his testimony before the Commission, the Appellant acknowledged that a restraining order was issued regarding this matter and was extended for one year.

In 2013, in response to an email that his mother received from his aunt, the Appellant went to the aunt’s house, uninvited, to confront her. Based on his own testimony, the Appellant refused to leave the premises when told to do so by his aunt.

In 2015, the Appellant engaged in a confrontation that involved a different female. Based on his own testimony before the Commission, the Appellant, during the confrontation, ominously informed her male partner that he (the Appellant) owned a firearm.

Finally, the Appellant acknowledged being involved in another incident, in which he kicked a citizen’s automobile, causing \$700 in damage, purportedly because the citizen had allegedly stolen money from the Appellant’s brother.

While I concur with Commissioner Stein that the review process here wasn't perfect, I believe that the preponderance of the evidence supports the City's conclusion that the Appellant has a history of control issues.

Having met that evidentiary burden, the City, as reaffirmed in *Gannon*, has wide latitude to conclude, in their judgment, that the Appellant is not an appropriate candidate for police officer at this time.

The City's decision to bypass the Appellant should be affirmed and the appeal should be denied.

* * *

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman [NO]; Camuso [AYE], Stein [AYE] and Tivnan [AYE], Commissioners) on January 30, 2020 [Ittleman - Not Participating].

Notice to:

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* * * * *

1. The Standard Adjudicatory Rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evi-

CHRISTOPHER AMENTA

v.

DEPARTMENT OF CORRECTION

D1-17-160

February 13, 2020

Cynthia A. Ittleman, Commissioner

Disciplinary Action-Discharge of Correction Officer at Souza-Baranowski Correctional Center-Conduct Unbecoming-Last Chance Agreement-Social Media Posts—The Commission upheld the discharge of a much disciplined Correction Officer at Souza-Baranowski Correctional Center for conduct unbecoming after he made an offensive Facebook post sarcastically thanking his superiors for providing him with a vacation to Disney. The Appellant made the post while under a Last Chance Agreement and serving a 60-day suspension for fighting on-duty with his sergeant.

DECISION

Christopher Amenta (Mr. Amenta or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on August 11, 2017, under G.L. c. 31, ss. 42 and 43, challenging the decision of the Department of Correction (Respondent) to terminate Mr. Amenta's employment. A prehearing conference was held in this regard on September 17, 2017 at the offices of the Commission. A full hearing¹ was held on October 31, 2017 at the Commission. The hearing was deemed to be private since I did not receive a request from either party for a public hearing. The witnesses were sequestered. The hearing was digitally recorded and the parties received a CD of the recording.² The parties submitted post-hearing briefs. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Respondent's Exhibits (R.Ex.) 1 through 9 and the Appellant's Exhibits (A.Ex.) 1 through 7 were entered into evidence at the hearing. At the hearing, the Respondent was ordered to produce additional documents, which it produced and which have been entered into the record as Respondent's Post Hearing Exhibits (R.PH.Exs.³). Based on all of the exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Steven Silva, Superintendent, Souza-Baranowski Correctional Center
- Keith Nano, Deputy Superintendent, North Central Correctional Center

dence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

3. The documents produced by the Respondent in response to the order at hearing are: details regarding discipline issued in 2000, 2001, 2002 and 2003, 2010 and 2015, a 2007 settlement agreement, and a 2017 sixty (60)-day suspension.

Called by the Appellant:

- Mrs. Amenta
- Mrs. C
- Ms. L, friend of the family⁴
- Christopher Amenta (Appellant)

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, rules, regulations, policies, and reasonable inferences from the evidence; a preponderance of credible evidence establishes the following facts:

1. The Appellant was hired by the Department on September 6, 1998 and was a tenured civil service employee as a Correction Officer I (CO I) assigned to the Souza Baranowski Correctional Center (SBCC) at the time of his termination. (Testimony of Appellant)

2. The incident that led to the Appellant's termination and the instant appeal occurred on or about May 1, 2017, while the Appellant was on a sixty (60)-day suspension for his conduct on October 19, 2016. On October 19, 2016, the Appellant was working at the SBCC, a maximum security facility, and he had an altercation with a Sergeant. In a letter dated January 6, 2017, following an investigation and DOC hearing concerning the altercation, then-Commissioner Turco found, in part, that the Appellant,

... made inappropriate and insubordinate comments to a Sergeant while on duty. For example, [the Appellant] made comments to him about being late, [the Appellant] referred to him as "Mr. Mcxxxxy", and [the Appellant] requested music to get the "xxxxiness" out of the air.

[The Appellant] engaged in a verbal and physical altercation with the Sergeant while on duty. Initially, the altercation between [the Appellant] and the Sergeant was mutual as [they] grabbed each other's uniform tops, pushed each other, and fell to the floor.

Once on the floor, however, [the Appellant] punched the Sergeant in the face twice. ...

[The Appellant] caused serious injury to the Sergeant ...

[The Appellant] lied to [his] Lieutenant about what transpired ... In particular, [the Appellant] told the Lieutenant that [the Appellant] and the Sergeant had just been horse playing and there were no issues....

[The Appellant] failed to properly report [his] October 19, 2016 altercation with the Sergeant.

[The Appellant] lied and [was] less than forthcoming when questioned by the Superintendent's Special Investigator about this incident. ...

The above-stated conduct is in violation of the following Rules and Regulations Governing All Employees of [the Department]:

General Policy I, ... "Nothing in any part of these rules and regulations shall be construed to relieve an employee of his/her pri-

mary charge concerning the safe-keeping and custodial care of inmates or, from his/her constant obligation to render good judgment and full and prompt obedience to all provisions of law and to all orders ... Improper conduct affecting or reflecting upon any correctional institution or the Department ... in any way will not be excused ...

Rule 1 ... You must remember that you are employed in a disciplined service which requires an oath of office. Each employee contributes to the success of the policies and procedures established for the administration of [the Department] ... Employees should give dignity to their position ...

Rule 6(a) ... "Correctional goals and objectives can be best achieved thorough (sic) the united and loyal efforts of all employees. In your working relationships with coworkers you should treat each other with mutual respect, kindness and civility ... You should control your temper, exercise the utmost patience and discretion, and avoid all collusions, jealousy and controversies in your relationships with co-workers ..."

Rules 6(b) ... "Do not foster discontent or otherwise tend to lower the morale of any employee, and be particularly discreet ... when discussing personal matters of yourself ..."

Rule 6(c) ... "The duties assigned to you should demand your entire attention. ..."

Rule 6(d) ... "Relations between supervising and subordinate employees should be friendly in aim yet impersonal and impartial You shall readily perform such duty as assigned, and must exhibit at all times, the kind of respect toward your superior which is expected and required in correctional service. ..."

Rule 7(c) ... "Any [Department] ... employee who is found ... flagrantly, wantonly, or willfully neglecting the duties and responsibilities of his/her office shall be subject to immediate discipline up to and including discharge."

Rule 19(c) ... "... You must respond fully and promptly to any questions or interrogatories relative to the conduct of ... another employee or yourself. ..."

Rule 19(d) ... "It is the duty and responsibilities of all institution and [Department] employees to obey these rules and official orders ..."

This behavior also violates the Department's Policy for the Prevention and Elimination of Workplace Violence, 103 DOC 237, which provides, in part:

Workplace Violence - includes but is not limited to ...: 1) Bullying, Intimidation, harassment, stalking, ... or physical assault and/or battery; and ... Any behavior that causes disruption of workplace productivity 103 DOC 237.02 ..."

"... All allegations, reports, incidents, or threats of workplace violence must be immediately reported to the Superintendent, Division Head or designees verbally and follow up with a confidential incident report before the end of the shift. ..."

Finally, [the Appellant's] conduct violates 103 DOC 215.13, the [Mass. DOC] Conflict of Interest and American Correctional Association Code of Ethics policy, which states, ... "members shall maintain relationships with colleagues to promote mutual respect within the profession and improve the quality of service," and "Members shall respect, promote, and contribute to a work-

4. Ms. L testified briefly, asserting that she was in the hotel room of Mrs. Amenta and Mrs. C while Mrs. Amenta and Mrs. C allegedly used the Appellant's cell

phone but that she was in the shower and, therefore, she did not observe them allegedly using the Appellant's cell phone. (Testimony of Ms. L)

place that is safe, health and free of harassment in any form.” ... (R.Ex. 7)(emphasis in original)

3. The Appellant’s Sergeant at the time of the Oct. 19, 2016 altercation was Brian Nano, brother of Deputy Superintendent Keith Nano at the SBCC. (R.Ex. 1) Sgt. Nano was also disciplined as a result of the altercation. (R.Ex. 2) Dep. Supt. Keith Nano worked at the SBCC briefly from 2016 to 2017. (Testimony of Keith Nano)

4. On March 28, 2017, the Appellant, the Department and the Appellant’s union signed a “Last Chance Settlement Agreement” regarding the Oct. 19, 2016 altercation, which provided, in part, as follows,

... [the Appellant] will receive a sixty (60) day suspension. ...

... any future incidents of unprofessional conduct and/or conduct unbecoming of a correctional professional, in violation of the General Policy and/or Rule 1 of the Rules and Regulations Governing All Employee (sic) of the [DOC], as determined by the Commissioner of the Department after a hearing pursuant to G.L. c. 31, s. 41, shall constitute just cause for Christopher Amenta’s termination. Christopher Amenta and MCOFU expressly waive their right to appeal ... This paragraph shall remain in effect for two (2) years ...

... Christopher Amenta will be reassigned to MCI-Concord ...

MCOFU and Christopher Amenta agree that they will not pursue any claims which may be pending relative to this specific matter ...

... It is understood that this Last Chance Settlement Agreement is without any admission of liability or wrongdoing by any party.

.... (R.Ex. 7)

5. As indicated by a cover letter dated April 6, 2017, attached to the Agreement, the Appellant was to serve the 60-day suspension from March 29 to June 20, 2017. (R.Ex. 7)

6. The Appellant signed the last chance agreement so that he would not be terminated. (Testimony of Appellant)

7. On May 1, 2017, the Appellant was serving his 60-day suspension and was in Florida to visit amusement parks with Mrs. Amenta, his wife⁵; Mrs. C, his mother-in-law; his minor daughter; and Ms. L, a family friend. (Testimony of Mrs. Amenta) Mrs. C contributed \$2,500 to the trip by check dated April 6, 2017. (A.Ex. 3) The Appellant’s mother reportedly contributed \$2,500 in cash. (Testimony of Mrs. Amenta and Mrs. C)

8. On May 1, 2017, at or about 3:26 p.m., a posting appeared on the Appellant’s Facebook page stating, “Just wanted to thank the Nano’s for making our Disney Vacation possible” and included a photograph of the Appellant’s minor daughter apparently at an amusement park-related event. (R.Ex. 6)

5. Mrs. Amenta works at the Department.

9. Dep. Supt. Keith Nano was told about the posting on the Appellant’s Facebook page and Dep. Supt. Nano told Supt. Silva about it. (Testimony of Dep. Supt. Nano) A couple of other Correction Officers told Supt. Silva about the posting and printed it out. (Testimony of Silva; R.Ex. 6) Supt. Silva looked at the posting and saw no other person’s name on it so he believed the Appellant posted it on his own Facebook page. Further, Supt. Silva found the Facebook posting to be a distraction to several staff members. At the DOC hearing, Supt. Silva stated that Dep. Supt. Nano found the Facebook posting to be highly offensive. (R.Ex. 2) Supt. Silva told Dep. Supt. Nano not to get involved in the matter other than writing a report. (Testimony of Silva) Asked at the DOC hearing why the Facebook posting was not investigated, the hearing officer wrote in her report that Supt. Silva answered that “investigations do not always occur when there is an ‘overt’ act as in this case.” (R.Ex. 2)

10. The Appellant deleted the posting not long after it was posted. He received a comment about it and contacted his union. (Testimony of Appellant)

11. On May 3, 2017, Dep. Supt. Keith Nano prepared a Confidential Incident Report stating, in part,

On May 2, 2017 during my tour of duty at SBCC, it was brought to my attention that a derogatory or inflammatory comment about me from an employee had reportedly been seen on a social media website. Specifically, ... that [the Appellant] had posted a family vacation photo and had attached the comment to the effect of “I would like to thank the Nano’s for making this vacation possible”. This appeared to be a reference to the suspension Officer Amenta was currently serving following an incident which occurred at SBCC some months ago involving him and Officer Brian Nano, my younger brother. His apparent reference to me was unclear, however, as I was not involved in the incident. Nor was I involved in investigating the matter, or in the imposition of any discipline. I reported this matter to my supervisor, Superintendent Silva, as it appeared to be related to a formal staff disciplinary matter (R.Ex. 5)

12. Supt. Silva found that the Appellant’s conduct in this regard was unprofessional and unbecoming a Correction Officer, that it disrupted the workplace and that the posting was a big insult to the whole Department. (Testimony of Silva)

13. DOC did not conduct an investigation of the May 1, 2017 posting on the Appellant’s Facebook page, although he reported it to his supervisor, Dep. Commissioner Paul Henderson. (Stipulation)

14. 103 DOC 522 is the Department’s Internal Affairs Unit Policy, which discusses investigations. Section 522.03 states, in part,

It is the Department’s philosophy that all complaints of staff misconduct are to (sic) systematically examined and investigated when warranted to discover truth. ... (PH.Exs.)⁶

6. The Appellant avers that the DOC did not follow 103 DOC Rules and Responsibilities policy 239.04. However, that policy pertains to the role of the Internal Affairs Unit regarding allegations of discrimination and retaliation and the role of Superintendents, Division Heads and Supervisory personnel regarding the

15. By letter dated May 19, 2017, DOC notified the Appellant that there would be a hearing on June 1 at 11:00 a.m. regarding the May 1, 2017 Facebook posting, stating the provisions of cited applicable DOC rules that it was alleged the Appellant's posting violated. (R.Ex. 1)

16. The June 1, 2017 DOC hearing was held. It was attended by Supt. Silva, Appellant's Attorney James Simpson, a union representative, Mrs. C, Mrs. Amenta, and the Appellant. Ms. C and Mrs. Amenta were sequestered witnesses. (R.Ex. 2)

17. On June 15, 2015, the DOC Hearing Officer, Annabelle Cisternelli, sent a lengthy memo about the June 7 hearing, which concluded that the Department established, by a preponderance of the evidence, that the Appellant's Facebook posting violated General Policy 1, rule 6(a), (b) and (d) of the Rules and Regulations Governing All Employees of the [Department]. (R.Ex. 2)(*supra*)

18. By letter dated August 1, 2017, Commissioner Turco informed the Appellant that his employment was terminated based on the findings in the hearing officer's detailed report and a Last Chance Agreement signed by the Appellant on March 28, 2017 following his fight with Sgt. Nano. (R.Ex. 3)

19. The Appellant filed the instant appeal with the Commission on August 11, 2017. (Administrative Notice)

20. At the Commission hearing, the Appellant alleges that, while his family was inside a hotel room where they stayed on May 1, 2017 and he was at the pool, his mother-in-law was learning how to use Facebook and his wife, who allegedly uses his phone and Facebook account, posted the photo on his cell phone and that his mother-in-law intended to insert text that thanked the "Nanas" (the name by which the Appellant's daughter refers to her grandmothers) for the vacation because his daughter's grandmothers had paid for a significant part of the vacation but the smart phone auto-correct function changed it so that it appeared to thank the "Nano's", which name appeared in the auto-correct function because the Appellant had communicated with Brian Nano online previously. I find that the attempted alternate explanations for the posting on the Appellant's Facebook account have little credibility for the following reasons:

a. The Appellant asserted that Sgt. Nano had attacked him first in their altercation, despite the notice of hearing that states that the altercation was mutual until they were on the floor where the Appellant punched Sgt. Nano twice. (R.Ex. 7)

b. At the time of their vacation, the Appellant was on a 60-day suspension for the altercation with Sgt. Nano and used obscene epithets to insult the superior officer. (R.Ex. 7)

c. Although there is concrete evidence (a copy of a check) in the record of the contribution of the Appellant's mother-in-law, there is no documentary evidence of the contribution by the Ap-

pellant's mother since the Appellant asserts that the contribution was in cash. (Testimony of Appellant and Mrs. Amenta; Administrative Notice)

d. Mrs. Amenta said that she and Mrs. C used the Appellant's phone to instruct Mrs. C how to use Facebook because Mrs. Amenta's phone was being charged. However, Mrs. Amenta used her own cell phone (while it was charging) to send a photo to the Appellant's cell phone in order to demonstrate how to post it on Facebook. (Testimony of Mrs. Amenta)

e. Mrs. Amenta stated that he had deleted Brian Nano's name from the contact list on the Appellant's phone after May 1. However, a screen shot of the Appellant's phone shows that Brian Nano's name is still on the phone. (Testimony of Mrs. Amenta; R.Ex. 6)

f. Mrs. Amenta and Mrs. C said that Mrs. C asked Mrs. Amenta how to post something on Facebook because she had recently bought a smart phone. However, at the Commission hearing, Mrs. C stated that she does not have a Facebook account or use one. (Testimony of Mrs. Amenta and Ms. C)

g. Mrs. Amenta stated that she never had a Facebook account but Mrs. C and the Appellant said that she had her own FB account some time ago. (Testimony of Appellant and Mrs. C)

h. Mrs. Amenta and the Appellant stated that Mrs. Amenta uses the Appellant's Facebook account and his phone. This information was not disclosed at the DOC hearing. When asked why, Mrs. Amenta said, hesitatingly, that she did not know. (Testimony of Appellant and Mrs. Amenta; A.Ex. 2)

i. Mrs. Amenta has a Facebook application on her own phone. (Testimony of Mrs. Amenta) This indicates that Mrs. Amenta did not need to use the Appellant's phone to access Facebook.

j. Mrs. Amenta stated that she used her own cell phone, while it was charging, allegedly to send a photo to the App's phone, indicating that one can use a cell phone when it's charging. (Testimony of Mrs. Amenta) This undermines Mrs. Amenta's need to use the Appellant's cell phone.

k. Mrs. C's testimony varied at times, giving the appearance of an attempt to avoid being pinned down to a specific response. For example, asked if she showed Mrs. Amenta the wording she had written to post on Facebook, she said that she showed it to Mrs. Amenta but then said that Mrs. Amenta did not read it. (Testimony of Mrs. C)

l. When Mrs. C was asked when Mrs. Amenta sent the photo of her daughter to the Appellant's phone purportedly so that Mrs. C could learn to post it on Facebook, Mrs. C said on one occasion that Mrs. Amenta sent it to the Appellant's phone at the time that Mrs. Amenta was teaching her how to use Facebook but then Mrs. C said that Mrs. Amenta had sent the photo to the Appellant's phone earlier. (Testimony of Mrs. C)

m. When Mrs. C was asked if she read what she had written to post on Facebook before posting it, Mrs. C waived again, once saying that she did and once saying that she did not. (Testimony of Mrs. C)

same. The Appellant states that Dep. Supt. Nano testified at the Commission that the Facebook posting was "harassing and disturbing". The Appellant further avers that 103 DOC 239 defines harassment as one type of discrimination, requiring an investigation, *inter alia*. However, Dep. Supt. Nano's confidential report made no such statement. Moreover, as noted above, Dept. Supt. Nano's report stated

that he believed the posting was directed at his brother, Sgt. Nano, with whom the Appellant had been involved in a fight that led to his (the Appellant's) sixty (60)-day suspension, not Dep. Supt. Nano, and, thus, related to the disciplinary matter, not harassment of Dep. Supt. Nano.

n. When Mrs. C was asked if she had typed “s” on the proposed Facebook posting after she thought she had typed “Nana”, so that the posting would refer to both grandmothers as allegedly intended, Mrs. C was uncertain but thought she read what she had typed and saw that she needed to add the “s”. (Testimony of Mrs. C)

o. It is unclear why Mrs. C, who had not used Facebook (and, at the time of the CSC hearing, still did not use the Facebook application on her smart phone)(Testimony of Mrs. C), decided on May 1, 2017 to inquire about Facebook, of all the applications that may be accessible on a smart phone.

p. When Mrs. C was asked why she would post something on Facebook thanking herself, as one of the two Nanans, for the vacation trip, she asserted that she thought it was like a “shout out” to people that they were able to make this trip. (Testimony of Mrs. C (at 2 hrs. 6 mins.))

21. The Appellant’s disciplinary record is as follows:

a. 3/28/17 - Last Chance Agreement for unprofessional and/or conduct unbecoming a correction officer, sixty (60)-day suspension, and transfer to MCI-Concord “Referred to a Sgt as ‘Mr. Mcxxxxy’ and similarly insulting language. Work place violence - struck sergeant in the face twice, causing injury.”

b. 10/15/15 - three (3)-day suspension with two (2) days held in abeyance affirmed at the Commission [27 MCSR 168]. “Verbal and physical altercation with another employee. Rude and disrespectful to co-worker, called him ‘lazy’ and ‘useless’. Failed to report workplace violence incident.”

c. 6/15/11 - “terminated (reinstated with time served as [suspension] (6/5/10 thru 5/13/11) per AAA dtd. 5/13/11)(sic)[.] Brought personal laptop into facility; looked at porn websites; failed to operate doors on interlock system[.]”

d. 10/4/05 - “ ... 3 day susp (combined & reduced to a 15 day sus. ... Parked truck in a fire lane after being told not to do so twice.”

e. 2/2/05 - “5 day susp (combined & reduced to a 15 day sus ... Refused direct order to blouse pants in boots[.]”

f. 3/29/04 - “ ... 15 day susp (combined & reduced to a 15 day sus ...) Disrespectful and insubordinate to a superior officer failed to comply with orders[.]”

g. 8/21/03 - 2 day susp (combined & reduced to a 15 day sus. ... Complaint filed with [police department]; became belligerent to police officer[.]”

h. 3/13/03 - “ ... 10 day susp Sleeping and; (sic) or negligent in performing duties[.]”

i. 2/8/02 - “letter of reprimand Removed state property [without] permission[.]”

j. 1/4/02 - “5 day susp[.] Insubordinate; disrespectful to supervisor[.]”

k. 11/15/01 - “1 day susp[.] Disrespectful behavior towards superior[.]”

l. 5/30/00 - “letter of reprimand[.] Failed to do pat searches; neglect of duties[.]”

(Exhibit 8)

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, s. 43 provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” *Commissioners of Civil Service v. Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971); *Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” *School Comm. v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

The Appointing Authority’s burden of proof by a preponderance of the evidence is satisfied “if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.” *Tucker v. Pearlstein*, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” *Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he commission’s task ... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘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’,” which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. *Id.*, quoting internally from *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

Also under section 43, the Commission has “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. *See, e.g. Police Comm’r v. Civil Service Comm’n*, 39 Mass. App. Ct. 594, 600 (1996)(“The power accorded to the commis-

sion to modify penalties must not be confused with the power to impose penalties ab initio ...accorded the appointing authority.”) *See also Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006), quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [Commission] upon which a court conducting judicial review treads with great reluctance.” *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 729 (2003); *see Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’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).

ANALYSIS

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant. On May 1, 2017, the Appellant posted on his Facebook account, “Just wanted to thank the Nano’s for making our Disney Vacation possible” and included a photograph of his daughter apparently at the park. (R.Ex. 6) At that time, the Appellant and his family (including his mother-in-law and a family friend) were on vacation at Disney.

Shortly after the Appellant’s Facebook posting, some of the DOC staff at the SBCC where the Appellant worked saw the posting online, causing a disruption. Dep. Supt. Nano was informed of it and he reported it to his superior, who instructed him to write a report about it but to otherwise have nothing to do with the matter. The Department did not conduct an investigation about the Appellant’s Facebook posting but conducted a hearing at which Supt. Silva, the Appellant, Mrs. Amenta and Mrs. C testified.⁷ The hearing officer’s detailed report concluded that the Appellant’s posting violated General Policy 1, Rule 6(a), (b) and (d) of the Rules and Regulations Governing All Employees of the [DOC].

Denying that he made the Facebook posting at issue, the Appellant puts forward an alternate scenario. Specifically, he asserts that Mrs. C posted the photograph and comments, with the assistance of Mrs. Amenta. However, I find that the credibility of the Appellant’s witnesses in this regard is compromised. For example, at the Commission hearing, the Appellant said that Sgt. Nano had attacked him first in their fight, despite the fact that the notice of hearing said that the fight was mutual until they were on the floor, when the Appellant punched the Sergeant twice. Although the Appellant said that he did not use his phone much while they were in Florida on vacation, it was clearly available to him and, at least on one day of the vacation, he did not participate in all of the family activities. Mrs. Amenta said that she never had a Facebook account but Mrs. C and the Appellant stated that Mrs. Amenta had had a Facebook account, albeit some time ago. Mrs. Amenta said that she and Mrs. C used the Appellant’s phone to show Mrs. C

how to use Facebook because Mrs. Amenta’s phone was charging. However, Mrs. Amenta had used her own cell phone, while it was charging, to send a photo to the Appellant’s cell phone. Although Mrs. C said that she wanted to learn how to use Facebook, as of the date of the Commission hearing, Mrs. C did not have a Facebook account. The Appellant and Mrs. Amenta testified at the Commission that Mrs. Amenta uses the Appellant’s Facebook account and his phone. However, the Appellant’s case before the DOC did not include such a statement, which suggests that the statements were belatedly contrived. Mrs. Amenta has her own cell phone and supposedly accesses the Appellant’s Facebook account from her phone. If that were the case, why would Mrs. Amenta need to use the Appellant’s phone? In addition, Mrs. C’s responses to questioning at the Commission hearing were, at times, evasive. Asked if she showed Mrs. Amenta the wording she had written on Facebook before posting it, she said that she showed it to Mrs. Amenta but then said that she did not. When Mrs. C was asked when Mrs. Amenta sent the photo of her daughter to the Appellant’s phone, Mrs. C said that Mrs. Amenta sent it to the Appellant’s phone when Mrs. Amenta was showing Mrs. C how to use Facebook but later said that Mrs. Amenta sent the photo to the Appellant’s phone earlier. When Mrs. C was asked if she read what she wrote on Facebook before posting it, Mrs. C said on one occasion that she did but then said that she did not. When she was asked if she typed “s”, to indicate that the posting supposedly related to both grandmothers, Mrs. C said on one occasion that she did not but then said that she had. When Mrs. C was asked why she would post something thanking herself for the trip, she said she thought it was like a “shout out” about the trip because the winter weather had been harsh, which I do not find credible. Given these doubts about testimony in support of the Appellant’s case, I find its credibility limited and that it undermines the alternate scenario offered by the Appellant.

The SBCC, where the Appellant was working at the pertinent time, is a maximum security facility. Staff distractions at such a DOC facility can be dangerous. A preponderance of the evidence shows that at least some SBCC staff were distracted by the posting and at least one staff person printed it out and showed it to Dept. Supt. Nano, who discussed it with his superior, and Dept. Supt. Nano was instructed to write a report about the posting. The Appellant’s posting reflected the Appellant’s continuing disrespect, at least, toward Sgt. Nano and reflected poorly on the SBCC and the DOC as a whole. As such, there is little doubt that the posting and its aftermath constitute substantial misconduct which adversely affects the public interest by impairing the efficiency of public service. In the context of a DOC facility, especially a maximum security facility, it is also a threat to the safety and security of the officers and inmates. Given the essential similarities between the Respondent’s findings and the findings herein and the lack of bias in the record, I find no reason to modify the discipline issued by the Respondent.

7. The lack of a DOC hearing appears to be the sole “procedural” claim by the Appellant under G.L. c. 31, s. 42. A strict reading of DOC policy 522 (*infra*) does not require an investigation, per se, in regard to every disciplinary issue that arises.

es. However, it would behoove the DOC to conduct them as a matter of course, whether the conduct was “overt”, as Supt. Silva is reported to have stated at the DOC hearing in this matter, or not.

Compounding matters for the Appellant, at the time of his Facebook posting he was serving a sixty (60)-day suspension for a fight he had with Sgt. Nano. The Appellant, his union representative and the DOC signed a Last Chance Agreement relating to the fight. The Agreement stated, in part, that the Appellant and his union acknowledge that “any future incidents of unprofessional conduct and/or conduct unbecoming a correctional professional”, in violation of cited rules, after a hearing per G.L. c. 31, s. 41, shall constitute just cause for termination and that the Agreement remained effective for two (2) years. (R.Ex. 7) The Appellant signed the Agreement to avoid being terminated. Unfortunately, on May 1, 2017, just a short while after the Appellant signed the Agreement, he entered the offending statement on his Facebook page, sealing his fate.

CONCLUSION

Accordingly, for the above stated reasons, the discipline appeal of Mr. Amenta, Docket No. D1-17-160, is hereby denied.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso [absent], Ittleman, Stein and Tivnan, Commissioners) on February 13, 2020.

Notice to:

James Simpson, Esq.
100 Concord Street, Suite 3B
Framingham, MA 01702

Amy Hughes, Esq.
Department of Correction
Division of Human Resources
Industries Drive, P.O. Box 946
Norfolk, MA 02056

* * * * *

JEFFREY GODERE

v.

CITY OF CHICOPEE

D1-18-217

February 13, 2020

Christopher C. Bowman, Chairman

Disciplinary Action-Termination of Chicopee Police Officer-Lying About Dissemination of Homicide Photos-Laches-Disparate Treatment-Political Bias-Brady Letter—The Commission reduced the discharge of a Chicopee police sergeant to a demotion where the City had let him off with a reprimand in 2012 for “incompetence” arising from his dissemination of photos of a female homicide victim. However, after a change of Mayor and Police Chief, the City fired him six years later for lying about the matter to investigators. The decision takes aim at the fact that the Appellant was subject to disparate treatment, since two other officers who engaged in the same misconduct were not discharged, and rejects Chicopee’s citation of the Appellant being the subject of a Brady letter as another reason for his termination.

DECISION

On November 8, 2018, the Appellant, Jeffrey Godere (Sgt. Godere), pursuant to the provisions of G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission) contesting the decision of the Respondent, the City of Chicopee (City) to terminate his employment as a police sergeant. I held a pre-hearing conference at the Springfield State Building in Springfield, MA on November 28, 2018. I held a full hearing at the same location on February 27, 2019 and March 13, 2019.¹ On March 14, 2019, a conference call was held to take additional testimony. At the request of Sgt. Godere, the proceedings were declared public. Three (3) CDs were made of the hearing, including the conference call.² Both parties submitted proposed decisions to the Commission.

FINDINGS OF FACT

Based upon the documents entered into evidence (Respondent Exhibits 1-21 and Appellant Exhibits 1-15), stipulated facts, the testimony of:

Called by the City:

- William Jebb, Chicopee Police Chief;
- Mark Wilkes, Chicopee Police Officer;
- The Honorable Mark G. Mastroianni, former Hampden County District Attorney;³

Called by Sgt. Godere:

1. The Standard Adjudicatory Rules of Practice and Procedure; 801 CMR §§ 1.00 et. seq.; apply to adjudications before the Commission, with G.L. c. 31, or any Commission rules, taking precedence.

2. Subsequent to the hearing, the parties had the recordings transcribed and a copy of the transcript was provided to the Commission. That transcript is deemed to be the official record of the proceedings.

3. Judge Mastroianni is now a federal district court judge. At the outset of his testimony, he emphasized that his Testimony was solely related to his tenure as a Hampden County District Attorney. To avoid confusion, the decision, at times, simply refers to him as “Mastroianni”.

- Mayor Richard Kos, City of Chicopee;
- Richard Nunes, retired Chicopee Police Lieutenant;
- Thomas Charette, retired Chicopee Police Chief;
- Jeffrey Godere, Appellant;

and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following:

1. Sgt. Godere is forty-seven years old and has lived in Chicopee for most of his life. He is married, with two biological children and two step-children. He received an associate's degree in criminal justice from Quincy College and a bachelor's degree in criminal justice from Curry College. (Testimony of Sgt. Godere)

2. Sgt. Godere served as a special police officer in Chicopee from 1994 to 2001 before being appointed as a permanent, full-time police officer in February 2001. He was promoted to the position of sergeant in June 2011. (Testimony of Sgt. Godere)

3. Chief William Jebb has been the Chief of Police for the past five years. (Testimony of Chief Jebb)⁴

4. At approximately 7:00 P.M. on August 26, 2011, over nine years ago, Chicopee officers, including Sgt. Godere, responded to an apartment for a call of an unresponsive person. (Testimony of Sgt. Godere; Exhibit R13)

5. Below is a list of relevant persons and their titles as of August 26, 2011:

Relevant Person	Title
Michael Bissonnette	Mayor
Mark G. Mastroianni	Hampden County District Attorney
John Ferraro	Police Chief
William Jebb	Deputy in charge of internal affairs
Thomas Charette	Police Captain
Jeffrey Godere	Police Sergeant
KL	Police Sergeant
TD	Police Officer
CL	Police Officer
MC	Police Officer

6. Upon arrival at the scene on August 26, 2011, a female was discovered on the floor; once the female was determined to be deceased, apparently as a result of a homicide, Sgt. Godere directed responding personnel to clear the apartment and posted Officer TD at the door to maintain a log of persons who entered the scene. (Testimony of Sgt. Godere)

7. Sgt. KL was also at the scene on August 26, 2011. (Exhibit R13)

8. While at the scene, Sgt. KL and Officer TD each used their cell phones to take a photograph of the female. (Exhibit R13)

9. When the Chicopee Police Department Detective Bureau arrived, Sgt. Godere left the scene and eventually returned to the police station sometime after 8:00 P.M. (Testimony of Sgt. Godere)

10. Sgt. KL, who was the officer in charge at the police station that night, also returned to the police station. (Testimony of Sgt. Godere)

11. While at the police station, Sgt. KL showed Sgt. Godere the picture that he (Sgt. KL) had taken of the female on his cell phone, stating words to the effect, "this is why you want to stay out of the scene, not contaminate it." (Testimony of Sgt. Godere)

12. Sgt. Godere, after looking at the photograph of the female on Sgt. KL's phone, asked Sgt. KL to send it to him (Sgt. Godere). (Testimony of Sgt. Godere)⁵

13. "Right after" Sgt. KL showed the photograph to Sgt. Godere, Sgt. KL sent the picture to Sgt. Godere's cell phone. (Testimony of Sgt. Godere)

14. Sgt. Godere subsequently forwarded the photograph of the female that he had received from Sgt. KL to Officer CL. (Exhibit R13)

15. The next day, on August 27, 2011, over a period of several hours, Officer TD sent the photograph that he had taken of the female to nine fellow Chicopee police officers (including Officer MC), via individual text messages. (Exhibit R13)

16. Officer CL was involved in youth sports in Agawam. On August 27, 2011, Officer CL showed the picture of the female that he had received from Sgt. Godere to multiple parents whose children were participating in a sporting event at Phelps Field in Agawam that day. (Exhibit R13)

17. Approximately one month later, on October 3, 2011, the Chicopee Police Department became aware of the allegation that Officer CL had shown the photograph of the female to parents at Phelps Field. Jebb, who was then Deputy Chief in charge of internal affairs, commenced an internal investigation. (Testimony of Jebb and Exhibit 13)

18. After the potential existence of crime scene photographs being disseminated became known in the Fall of 2011, the Hampden County District Attorney's Office, then headed by Judge Mastroianni, became apprised of the situation. He was deeply troubled by the allegations for many reasons, including the fact that pictures taken by first responders would be significant in any criminal prosecution related to the case as such images would

4. As Chief Jebb held different titles during the relevant time period, the decision refers to him as "Jebb" instead of Chief Jebb to avoid any confusion.

5. Sgt. Godere's exact testimony was "I might have asked him to send it to me. I don't remember ... I might have asked him for it as he was showing it to me. I just don't have a certainty of asking him." I have found that it is more likely than not that Sgt. Godere did indeed ask Sgt. KL to send him the photograph.

need to part of the prosecution's discovery production. In both written and verbal exchanges, Mastroianni stressed the serious and consequential nature of this matter to the City's Mayor at the time, Mayor Bissonnette. (Testimony of Judge Mastroianni)

19. Jebb's internal investigation took place over approximately four months, from October 2011 to February 2012. As part of his investigation, he conducted multiple interviews (with citizens and police officers) and reviewed the phone records of various police officers. (Exhibit R13 and Testimony of Jebb)

20. Most relevant to this appeal, as it relates to untruthfulness, are the written statements and interview responses of four individuals: Officer CL; Officer TD; Officer MC; and Sgt. Godere. (Exhibit R13)

Written and Oral Statements of Officer CL

21. As referenced above, Officer CL received a photograph of the female from Sgt. Godere and showed the photograph to parents at a youth sports event.

22. On October 4, 2011, Jebb met with Officer CL. In his interview with Jebb, Officer CL denied receiving a photograph of the female, discussing such a photograph or showing such a photograph to anyone. (Exhibit R13)

23. In a written report dated October 5, 2011, Officer CL again denied ever receiving, possessing, showing or sending a picture of the female. (Exhibit R13)

24. On November 30, 2011, Jebb met with Officer CL again and informed him that he had uncovered information which contradicted Officer CL's denials. Officer CL stood by his previous denials. (Exhibit R13)

25. On January 24, 2012, Officer CL told Jebb that he had not been honest during the investigation and admitted to possessing the photograph and showing it to parents. (Exhibit R13)

26. When asked by Jebb who sent him the photograph, Officer CL stated that he didn't want to get anyone in trouble. When pressed by Jebb, Officer CL told Jebb that it was a supervisor and then showed Jebb his cell phone records in which the name of Sgt. Godere, a supervisor, appeared. (Exhibit R13)

Written and Oral Statements of Officer TD

27. As referenced above, Officer TD, who was at the crime scene, took a photograph of the female and sent it to multiple other police officers, including Officer MC.

28. On October 4, 2011, Jebb interviewed Officer TD.

29. In his interview with Jebb, Officer TD admitted that he took one photograph of the female and sent it to others, but stated that he could not remember who he sent the photograph to. Even after stepping outside the room and discussing the matter with his union representative, Officer TD returned to the interview and told Jebb that he could not remember who he sent the photograph to. (Exhibit R13)

30. In a letter to Jebb dated the same day (October 4, 2011), Officer TD acknowledged taking and sending the photograph, but wrote, "To the best of my knowledge I regretfully do not recall to who or whom I sent the picture to." (Exhibit R13)

31. Officer TD also denied that the photograph was sent out multiple times, indicating instead that it was sent as a group message, a statement that the investigation later revealed to be false, as multiple messages were sent by Officer TD over a period of hours. (Exhibit R13)

Written and Oral Statements of Officer MC

32. As referenced above, Officer MC was one of the many police officers who received a photograph of the female from Officer TD.

33. On October 5, 2011, Jebb interviewed Officer MC. (Exhibit R13)

34. Officer MC acknowledged that he received the photograph. When asked if he received the photograph from Officer TD, he stated that he was "99% certain" that he did. (Exhibit R13)

35. One day later, on October 6, 2011, however, Officer MC submitted the following written statement to Jebb:

"On Wednesday, October 5, 2011 I was called into your office in regards to a picture being sent to my phone. On an unknown date, I do recall receiving a picture of the female victim of the homicide ... I do not remember who the message was sent from, or when exactly I received the message ...". (Exhibit R11)

Written and Oral Statements of Sgt. Godere

36. As referenced above, Sgt. Godere, on the night of the murder, viewed a picture of the female taken by Sgt. KL. Sgt. Godere asked Sgt. KL to send it to him. Sgt. KL immediately sent the photograph of the female to Sgt. Godere. Sgt. Godere subsequently forwarded the picture of the female to Police Officer CL.

37. On January 26, 2012, two days after learning from Officer CL that he (Officer CL) had received the photograph of the female from Sgt. Godere, Jebb sent the following email to Sgt. Godere:

"Sgt. Godere,

I thought I had already accomplished this, but I researched my records and discovered that I had not received a report from you or it was misplaced. If I misplaced your response, please resubmit it. If not, I need a report from you answering the following questions:

1. Did you take or receive a photograph of homicide victim [redacted]?
2. If you did not take the photograph, who sent it to you?
3. Did you forward this photograph to anyone?

Please submit your report to me ASAP in a To/From format with signature." (Exhibit R12)⁶

38. On January 28, 2012, Sgt. Godere submitted a written report to Jebb stating:

6. [See next page.]

“Sir,

On January 27, 2012, I received an email from you asking me to answer three questions. The following are the questions you asked me to answer with my response.

1. Did I take or receive a picture of [redacted]?

I did not take any picture of [redacted]. I do remember receiving a picture through text message.

2. If you did not take a picture, who did you get it from?

This picture would have been sent to me over five months ago, I receive different pictures, jokes and videos that people send me and I do not recall who sent me the picture.

3. If I sent a picture to anyone, who did I send it to?

Again, I receive different pictures, jokes and videos on my phone. Some of those pictures, jokes and videos I forward to others. I do not recall if I sent this particular picture to anyone.

Respectfully,

Sgt. Jeffrey Godere”

(Exhibit R12)

39. On January 30, 2012, Jebb sent another email to Sgt. Godere that read as follows:

“Sgt. Godere,

It’s unfortunate that you are having problems with your memory. Fortunately for you, I am willing to help with this issue. Therefore, I am requesting that you contact your wireless provider and obtain a copy of your picture/data transactions for 8/26/11 to 9/15/11. Pay particular attention to 8/27/11 at 12:40 hours, if this helps with your memory, submit a report to me with this information, along with a copy of these transactions.

Deputy Chief.” (Exhibit R12)⁷

40. On January 31, 2012, Jebb sent a third email to Sgt. Godere that read as follows:

“Sgt. Godere,

You will have eight hours to refresh your memory at work. Therefore, I am requesting your report to my office at 08:00 hours with a union representative on your first day back to work.

Deputy Chief.” (Exhibit R12)

6. A relevant issue here is whether this January 26, 2012 email (from Jebb to Godere) was the first time that Jebb communicated with Godere about this issue. Jebb testified that, weeks prior to this email, in a one-on-one conversation, Godere denied receiving or sending a photograph of the female. Godere denies that this conversation ever took place. For reasons discussed in the analysis, I believe that Godere has a better recollection of what occurred.

7. There was a considerable back-and-forth at the hearing regarding how and when Sgt. Godere retrieved his cell phone records. For reasons discussed in the analysis, I ultimately determined that this information was irrelevant as I have concluded that, even without consulting his cell phone records, Sgt. Godere, when first questioned by Jebb on January 26, 2012, knew who sent him the photograph and who he sent it to, without the need to refresh his memory by reviewing his cell phone records.

8. There were nuanced differences between the testimony of Chief Jebb and Sgt. Godere, including, but not limited to, when, during the interview, Sgt. Godere stated his concern about being a “rat” and whether he expressed that concern once

41. On February 2, 2012, Sgt. Godere reported to Jebb’s office, along with his union representative. Jebb advised Sgt. Godere that he wanted Sgt. Godere to be truthful and wanted to know everything regarding the photograph of the female and Sgt. Godere’s involvement from the onset. Sgt. Godere stated that he was concerned about being a “rat”. Sgt. Godere asked to be excused from Jebb’s office to talk to his union representative. After returning to the Jebb’s office, Sgt. Godere acknowledged that he received the photograph of the female from Sgt. KL and that he had then forwarded it to Officer CL. (Testimony of Chief Jebb and Sgt. Godere)⁸

42. That same day, on February 2, 2012, Sgt. Godere sent a written report to Jebb which read in part:

“... Sometime after clearing the scene [on August 26, 2011], between 7:00 P.M. and midnight, I received a picture message from Sgt. [KL] of the murder victim. I am not sure of the exact time I received the picture. On 8/27/11 at 00:40 hours, I forwarded a picture message to Officer [CL] (Exhibit R12)

43. Jebb, who was then Deputy Chief in charge of Internal Affairs, met with then-Chief Ferraro to review his findings. Chief Ferraro informed Jebb that he (Ferraro) did not want to charge any of the above-referenced officers with untruthfulness, but that Officer CL was deserving of more discipline than the other three individuals (Testimony of Chief Jebb)⁹

44. Jebb’s final report does not recommend charging any of the above referenced individuals, including Sgt. Godere, with untruthfulness. Rather, Sgt. Godere, Officer CL and Officer TD were charged with “incompetence” for “failing to conform to work standards established for the officers’ position.” (Exhibit R13)¹⁰

45. Officer MC was not charged with any rule violations. (Exhibit R13)

46. In April 2012, then-Chief Ferraro issued his disciplinary decisions. Officer CL was given three tours of punishment duty; Sgt. Godere and Officer TD received a written warning; Officer MC received no discipline. (Exhibits R13; A5-A7)

47. Then-Chief Ferraro sent a memorandum dated April 12, 2012 to Sgt. Godere which read as follows:

or twice. My finding represents what I believe to be the most probable exchange. Regardless, the parties both agree that Sgt. Godere, prior to providing the information about the text message exchanges regarding the female, first expressed concern about being a “rat” which is the most relevant take-away as it relates to this appeal.

9. Chief Jebb testified that, during this meeting with then-Chief Ferraro, he (Jebb) recommended charging Sgt. Godere and Officer CL with untruthfulness. There is no written documentation of this conversation that took place approximately eight years ago and I am unable to find whether that conversation (regarding untruthfulness) took place or not. Regardless, what is most relevant to this appeal is that then-Chief Ferraro did not want to charge any officers with untruthfulness and that Jebb’s report does not recommend charging any of the officers, including Sgt. Godere, with untruthfulness.

10. Sgt. KL, who took a photograph at the scene and forwarded it to Sgt. Godere, was also charged with incompetence and received a written warning.

“As a result of a recent Internal Affairs Investigation, information surfaced that your use of a cell phone during an ongoing investigation although it may or may not have done with ill spirit was not consistent with the mission of the Chicopee Police Department. Your duties are to assist in any way possible as requested or directed by those who were conducting the investigation. There has been no information that you were requested or directed to engage in such activity.

It is of the upmost importance that your duties are performed in a professional manner at all times. As you know cell phones are allowed on duty for work related activities or emergencies. This correspondence serves as notice to you that should you fail to meet the duties and responsibilities of your position in the future a more stringent form of discipline will be administered. Hopefully you will meet your duties and responsibilities in the professional manner of which I know you are capable of performing. This letter of reprimand will be placed in your personnel file.”

(Exhibit R13)

48. On May 4, 2012, Jebb sent correspondence to Mastroianni which read in relevant part:

“On [8/26/11], two uniformed officers while in the performance of their duties took a single photograph of the crime scene, which included the homicide victim with their cellular telephone cameras. It was determined that the officers forwarded this photograph to other officers within this department. All recipients of this photograph were contacted, and stated that they deleted the photograph. At this time, I don’t have any information that would indicate that this photograph is still in existence on any cell phone or social media outlet. However during my investigation I was able to retrieve and save this photograph to a disc, which will be maintained with [the internal investigation file].” (Exhibit A12)

49. After imposing his discipline in April 2012, Ferraro retired as Police Chief and Thomas Charette was appointed by Mayor Bissonnette as Provisional Police Chief. Charette served provisionally for approximately one year until he was appointed as Permanent Chief, serving in that role until his retirement in July 2014. (Testimony of Chief Charette)

50. On October 4, 2012, Judge Mastroianni, still serving as District Attorney at that point in time, sent correspondence to Mayor Bissonnette, stating that he had reviewed Jebb’s internal affairs report and was “deeply concerned” about the officers’ behavior. Relevant excerpts of that correspondence from Judge Mastroianni to Mayor Bissonnette are as follows:

“You have also made me aware that you are considering further available administration action for these officers, in addition to the sanctions imposed by the Police Department directly.”

“The officers who took a photograph of the victim created the very interference which they were obligated to protect. Additionally, by their behavior and later dissemination of the photographs, they subjected the victim and family of the victim to a great indignity.”

“Turning to the officer’s behavior during the internal affairs investigation, there is evidence of more than one officer’s reluctance to be candid about his activities relating to these photographs and a prolonged effort to hide the truth by misleading or false statements and/or reports. Such lack of honesty is very trou-

bling. In future court proceedings, I will be ethically obligated, under mandatory discovery requirements, to produce this material when relevant to the question of these officers’ credibility.”

(Exhibit R8)

51. Mayor Bissonnette forwarded Mastroianni’s October 4, 2012 letter to Charette, who was then the City’s Police Chief. Neither Bissonnette nor Charette took any further action at that time against the officers referenced in the internal affairs report. (Testimony of Chief Charette)

52. On January 10, 2013, Mastroianni issued a memorandum entitled “Discovery Related to Certain Chicopee Police Officers” to all assistant district attorneys. The memorandum identified only Officer CL and Sgt. Godere as individuals who were determined through an internal investigation to have made false statements and constructed a process that was to be applied in cases that involved either officer. Specifically, the memorandum indicated that when an assistant district attorney discovers that either officer is a potential witness in a case, the assistant district attorney should notify a supervisor and the assistant district attorney and supervisor then should determine whether disclosure of the material would be “relevant” in that particular case, a consideration that was to occur “on a case-by-case basis.” (Exhibit R9)

53. The memorandum notes the legal proposition, deriving from *Brady v. Maryland*, 373 U.S. 83 (1963), that exculpatory material in the possession of a prosecutor’s office is to be disclosed to the defense in a criminal prosecution. (Exhibit R9)

54. The memorandum also notes some of the limitations on that generalized notion, including that exculpatory evidence is evidence that may be used to impeach a “key” prosecution witness, that a witness’ “other bad acts generally cannot be used to impeach him/her as a witness on the issue of credibility[.]” and that a witness’ “prior false testimony in a collateral matter is not admissible to impeach him/her.” (Exhibit R9)

55. The memorandum concludes by stating that if, upon consideration of those legal principles, the assistant district attorney believes the information is subject to production, notification was to be made in writing to the Chief of Staff, who would follow through on the production subject to the execution of a protective order limiting disclosure either through an agreed upon protective order or motion practice. (Exhibit R9)

56. After reviewing relevant parts of the 2012 Internal Affairs report at the Commission hearing on March 13, 2019, Judge Mastroianni concluded that “clearly it appears” that Officer TD also gave false information during the investigation and that Officer MC was also not forthcoming during the internal affairs investigation. Having not reviewed those parts of the internal affairs investigation in approximately seven years, Judge Mastroianni could not recall how he made the determination to identify Sgt. Godere (and Officer CL), but not Officer TD or Officer MC. (Testimony of Judge Mastroianni)

57. Judge Mastroianni did recall, however, particular sections of the internal affairs report that concerned him, at the time, about Sgt. Godere, testifying in part that,

“... the use of the term not wanting to be a rat led me to the conclusion that his [Godere] not being forthcoming when initially asked about this was an intentional effort to mislead, to avoid having it being the perception that he disclosed something that would get another officer in trouble ... His response to question two was that he does not recall who sent the picture. His response to question three was that ‘I do not recall if I sent this particular picture to anyone.’ I don’t believe that. I didn’t believe that.”

(Testimony of Judge Mastroianni)

58. Judge Mastroianni never thought that his “Brady Letter” regarding Sgt. Godere created an impermeable barrier by which Sgt. Godere never could testify again. Making it clear that he was speaking on his own behalf, and not in any current or former official capacity, Mastroianni testified that, in a situation like this in which there is advance notice to the Department and the District Attorney’s Office, the situation often can be worked around as, in the first instance, the Police Department can assign the officer to duties that would not call upon the officer to testify regularly. For Mastroianni, an assignment to something like patrol duty may limit an officer having to testify regularly. Further, Mastroianni testified that the specific nature and details of the situation also must be considered in order to evaluate whether an officer could be “rehabilitated” in court. (Testimony of Judge Mastroianni)

59. The January, 2013 memorandum from Mastroianni was provided to Charette. (Testimony of Judge Mastroianni and Charette) Charette believes he put a copy of the notice in the personnel files of Sgt. Godere and Officer CL, although he could not say with certitude that he did so. (Testimony of Charette)

60. Sgt. Godere was not provided with a copy of the internal affairs report at the time and he was unaware of the Brady letter. He did not learn about its existence until 2015. (Testimony of Sgt. Godere)

61. Sgt. Godere never was advised, from an assistant district attorney or from any other source, that he was on any so-called Brady list. (Testimony of Sgt. Godere)

62. Then-Deputy Chief Jebb was unaware that a Brady letter had been issued at the time. (Testimony of Jebb)

63. On at least one occasion after receiving his reprimand in 2012, Sgt. Godere recalls testifying in an operating under the influence case. (Testimony of Sgt. Godere)

64. Charette discussed with Mayor Bissonnette the possibility of additional discipline for the officers involved after receiving the Brady letter. He questioned whether it was legal to impose discipline upon already disciplined officers and Charette sought guidance from the Massachusetts Chiefs of Police’s attorney who advised against such action as inappropriate. Charette shared his position with Mayor Bissonnette and, despite considering the option, Mayor Bissonnette ultimately took no further administrative

action following Chief Ferraro’s disciplinary action and following receipt of the communications from the District Attorney’s Office. (Testimony of Charette)

2015 Discipline Against Godere Regarding a Separate Matter

65. As of 2015, Richard Kos was the City’s new mayor (having defeated Bissonnette); Charette had retired and Jebb had become the Chief of Police. (Testimony of Jebb and Charette)

66. In May 2015, Sgt. Godere was suspended and demoted based upon determinations made by Mayor Kos that Sgt. Godere was untruthful, incompetent and neglected his duty in connection with his response to a call for service in February, 2015. (Respondent Exhibit 2) It was at this time that Sgt. Godere first became aware of Jebb’s 2012 internal affairs report. (Testimony of Sgt. Godere)

67. Sgt. Godere appealed that decision to the Commission and the Commission issued a decision on that appeal on February 4, 2016. *See Sgt. Godere v. City of Chicopee*, 29 MCSR 65 (2016). The Commission determined that the charge of untruthfulness was not proven, but that Sgt. Godere had failed to meet his responsibilities as a superior officer and thereby engaged in conduct amounting to incompetence and neglect of duty. Sgt. Godere’s five day suspension was affirmed, but his demotion in rank was rescinded and he was returned to the position of police sergeant. (Exhibit R4)

2017: Disciplinary Matter Regarding Officer CL that Triggered Discussion Re: Brady Letter

68. In October 2017, Officer CL was suspended for two days for abuse of sick leave. Officer CL appealed the two-day suspension to the Mayor who directed Jebb to provide him with all documentation leading up to the suspension that he could review at the hearing. In the process, Jebb spoke to two detectives who were involved in the 2011 homicide investigation and one of the detectives made a statement that there was a rumor that Officer CL was the subject of a “Brady Letter.” Subsequently, Jebb had a conversation with the two sergeants who are the assigned court officers for the Chicopee District Court. He raised the issue of the rumor concerning the “Brady Letter” and both court officers denied having heard anything about it. Jebb contacted the Office of the District Attorney at the Chicopee District Court and they denied having any knowledge about a “Brady Letter” pertaining to Officer CL. Jebb then contacted the First Assistant District Attorney and inquired about a “Brady Letter” pertaining to Officer CL. The First Assistant District Attorney eventually provided Jebb with the Brady letter related to both Officer CL and Sgt. Godere. (Testimony of Jebb)

69. This was the first time that Jebb, who was not the Police Chief in 2012, learned that Judge Mastroianni had issued a “Brady Letter” against Sgt. Godere and Officer CL. (Testimony of Jebb)

70. On November 1, 2017, Captain Lonny Dakin of the Chicopee Police Department sent a letter to then and current District Attorney Anthony Gulluni. That letter, in its entirety, reads as follows:

“Dear District Attorney,

While attending the International Chiefs of Police Conference this month, I spoke with a number of Massachusetts Chiefs of Police. One of the discussions related to Internal Affairs Investigations and the Brady decision. I explained the Sgt. Godere investigation and the Civil Service decision. A Chief recommended making my District Attorney aware of the investigation.

I have enclosed the following items related to Sgt. Jeffrey Godere for your review and awareness:

1. Internal Affairs Investigation completed on 2/26/2015,
2. Chicopee Mayor Richard J. Kos’s Notice of Disciplinary Decision dated 5/18/2015,
3. Civil Service Decision - *Jeffrey Godere v. City of Chicopee*
4. Brady letter written by Retired District Attorney Mark Mastroianni concerning Jeffrey Godere dated 10/04/2012.

The Internal Investigation concluded that Sgt. Jeffrey Godere violated Rules and Regulations-Truthfulness, Incompetence and Neglect of Duty.

After a hearing before Mayor Richard J. Kos, Mayor Kos concurred with the investigations findings and imposed discipline.

After a Civil Service hearing, Commissioner Christopher C. Bowman wrote a decision. Commissioner Bowman addressed the Truthfulness charge starting on page 26 of his Decision. Commissioner Bowman concluded on Page 35 that the City of Chicopee did not reach the burden of proof for the Untruthfulness charge.

On page 35 Commissioner Bowman starts to discuss the charges of incompetence and neglect of duty. Commissioner Bowman finds that the City of Chicopee has proven these two charges. In his discussion of his findings Commissioner Bowman writes **“Sgt. Godere now tries to cloak his failure to perform his duties and responsibilities that day under the guise of deferring to an officer’s discretion. No definition of this concept requires a superior officer to accept a police officer’s account of events which the superior officer knows, through his own observations, is not true.”** (emphasis in original)

Lastly, while speaking with Chief William Jebb about notifying you of the above, Chief Jebb provided me with a Brady letter written by Retired District Attorney Mastroianni. Chief Jebb has an upcoming hearing involving [Officer CL], so he obtained the document from the court today. Although Chief Jebb completed the investigation that resulted in the letter, he was never made aware of the fact that the letter dealt with more than [Officer CL]’s dishonesty. The second Officer’s dishonesty mentioned in the letter is Sgt. Godere.” (Exhibit R16)

71. On November 3, 2017, Jebb penned an email to four members of his command staff stating that, on October 16, 2017, he had received copies of the Brady letter regarding Sgt. Godere and Officer CL. Jebb’s email read in part:

“Now that I am aware of the letter and the fact that two of our officers cannot perform one of their most important duties, serving as a credible witness, I must take action to protect the credibility of the Chicopee Police Department and any further investigations ... [Officer CL] and Sgt. Godere will permanently be assigned to administrative duties from this day forward. The officers are not allowed to work overtime or extra details.” (Exhibit R11)

72. That same day, Sgt. Godere received a phone call at home from Captain Gawron, a member of the command staff, who advised Sgt. Godere that he had been placed on administrative duty and read Jebb’s email to Sgt. Godere. Sgt. Godere was baffled by the development, as he was unaware of the Brady letter. (Testimony of Sgt. Godere)

73. Within a couple of days, Sgt. Godere, along with a union representative, met with Jebb at which time Jebb discussed creating a position in the Traffic Bureau for Sgt. Godere to which Sgt. Godere could be assigned going forward. (Testimony of Sgt. Godere)

74. On January 26, 2018, District Attorney Anthony Gulluni penned a letter to Jebb indicating that, “[h]aving reviewed the materials recently provided to me by your department, including Mayor Richard Kos’s recent disciplinary decision, the Civil Service decision, and a letter dated October 4, 2012 from former District Attorney Mark G. Mastroianni to former Mayor Michael Bissonnette,” the statements of Mastroianni “continue to represent the opinions and current procedures of the Hampden County District Attorney’s Office.” (Respondent Exhibit 10)

75. During the second day of full hearing, counsel for the City advised on the record that, after the first day of hearing, he encountered the First Assistant District Attorney in the courthouse; according to the City’s counsel, he was advised by the First Assistant that District Attorney Gulluni had not reviewed the 2012 internal affairs investigative report of Jebb because it was his position that he could not revoke the prior Brady letter issued by Mastroianni and, therefore, there was no need for him to review the original source material on the issue.

76. On July 30, 2018, approximately nine months after Sgt. Godere was placed on administrative duties within the station, Sgt. Godere was issued a notice of contemplated discipline by Mayor Kos. (Exhibit R5)

77. Mayor Kos’s July 30th letter cites the 2012 Brady letter from Mastroianni and also reads in part:

“Furthermore, on January 26, 2018, current District Attorney Anthony Gulluni reviewed Chicopee Police Internal Affairs investigation report 11-05-IA and former District Attorney Mark Mastroianni’s “Brady Letter” and he reaffirmed the reasonable and appropriate decision to issue the “Brady Letter” and he reaffirmed it stating you ‘were not candid about activities related to the photograph of a murder scene and engaged in a prolonged effort to hide the truth by giving misleading or false statements and/or reports.’” (Exhibit R5)

78. On October 15, 2018, a disciplinary hearing was held before Mayor Kos. (Exhibit R7; Stipulated Fact)

79. Via correspondence dated November 2, 2018, Mayor Kos notified Sgt. Godere that he was terminated. The correspondence read in part:

“The requirement and expectation for police officers to be truthful is the lynch pin of every police officer’s credibility and reliability. Based upon your testimony at the October 15, 2018

hearing, as well as reading the exhibits submitted, I agree with the findings of former District Attorney Mastorianni and current District Attorney Gulluni that you were untruthful and impeded this investigation.” (Exhibit R7)

Current Status of Officer CL, Officer TD and Officer MC

80. Officer CL, who faced the same charges as Sgt. Godere, resigned prior to a local hearing being held. (Testimony of Jebb)

81. Officer TD has been assigned to the position of detective in the narcotics bureau. (Testimony of Jebb)

82. Approximately two weeks after Sgt. Godere was terminated, Officer MC was promoted to provisional sergeant. (Exhibit A9)

APPLICABLE LAW

G.L. c. 31, § 43 provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against [a tenured civil service employee] ... it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of the evidence establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” *Commissioners of Civil Service v. Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971). *See also Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” *School Comm. v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488 (1997). *See also Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

The Appointing Authority’s burden of proof by a preponderance of the evidence is satisfied “if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.” *Tucker v. Pearlstein*, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” *Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he commission’s task... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous

decision of the [appointing authority], but rather decides whether ‘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’,” which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority” *Id.*, quoting internally from *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. “Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to perform their official responsibilities.” *Police Commissioner of Boston v. Civil Service Commission*, 22 Mass. App. Ct. 364, 371 (1986).

ANALYSIS

In 2012, multiple Chicopee police officers engaged in egregious misconduct. Two police officers took an unauthorized photograph of a female murder victim at the scene and forwarded those photographs to other Chicopee police officers. Ultimately, a police officer who received one of the photographs, showed the photograph of the female to multiple parents at a youth sporting event.

As stated by the District Attorney at the time: “The officers who took a photograph of the victim created the very interference which they were obligated to protect. Additionally, by their behavior and later dissemination of the photographs, they subjected the victim and family of the victim to a great indignity.” There is no excuse for the reckless and distasteful actions of the police officers involved.

Officer CL, who received the photograph from Sgt. Godere and then showed it to parents at the youth event, repeatedly denied that he ever received the photograph and/or that he showed the photograph to the parents, even when told by then-Deputy Chief Jebb that reliable information contradicted his denials. His actions, including his repeated untruthfulness, distinguish him from the other officers referenced in Jebb’s internal affairs investigation. His decision to forego a disciplinary hearing and tender his resignation was a prudent one.

That leaves three other officers who were shown to be untruthful in Jebb’s investigation and impeded Jebb’s ability to determine who had possession of photographs of a murder scene. Officer TD, who took a photograph at the scene and sent it to several police officers in individual text messages, stated that he could not remember who he sent the photograph to and also falsely claimed that he sent only one group text of the photograph. Officer MC impeded Jebb’s investigation by first telling Jebb that he was “99% sure” that he received the photograph from Officer TD, but then, one day later, authored a letter to Jebb stating that he “could not remember” who the message was sent from. Sgt. Godere, in response to written questions from Jebb, initially stated that he could not remember who sent him the photograph or who he sent

it to. Although Sgt. Godere eventually provided the information to Jebb during an interview that followed, Sgt. Godere expressed reluctance to provide the names of officers out of fear of being labeled a “rat”.

Prior to being notified of his potential termination in 2018, Sgt. Godere had never had the opportunity to dispute the findings of untruthfulness in Jebb’s 2012 investigative report, which Sgt. Godere was not even aware of until 2015. Thus, more than eight years after the alleged untruthfulness occurred, the Commission must determine, as part of this *de novo* hearing, whether those allegations are supported by a preponderance of the evidence.

The City argues that Sgt. Godere’s untruthfulness began in November 2011 when, according to the City, then-Deputy Chief Jebb had a one-on-one meeting with Sgt. Godere at which time Sgt. Godere denied that he ever received a photograph of the female. Sgt. Godere adamantly denies that any such meeting took place and/or that he ever denied having received the photograph of the female. The eight-year interval of time here, and the potential of faded memories, makes a finding on this matter challenging. I believe that Sgt. Godere has a better recollection on this point and I credit his testimony that no such meeting occurred in November 2011, in large part because there is no documentation that this conversation occurred, whether in Jebb’s internal affairs reports, his multiple emails to Godere regarding this investigation in 2012 or, even more recently, in communications to the District Attorney’s Office. There also is no reference to it in the termination decision and Mayor Kos could not recall Jebb testifying to it during that hearing. If a November, 2011 meeting occurred, it is likely that it would have been included in the Jebb’s internal affairs report.

I have found, however, that Sgt. Godere was untruthful in his January 27, 2012 written reply to Jebb when he wrote that he could “not recall” who sent him the photograph or to whom he sent it. Sgt. Godere testified that he was only able to recall who sent him the photograph and to whom he sent it after he was able to retrieve his cell phone records. Jebb did not believe that. Judge Mastroianni did not believe that. Mayor Kos did not believe that. Neither do I.

I listened carefully to Sgt. Godere’s testimony at the hearing and reviewed the written transcript of that testimony as well. At a minimum, it is not plausible that, in January 2012, Sgt. Godere was unable to recall who sent him the photograph of the female on the night of August 26, 2011 without first checking his phone records. Sgt. Godere, for the first time in his career, had been called to the scene in which he discovered a murder victim. *That same night*, while back at the police station, a fellow police sergeant, who was the officer in charge that night, showed Sgt. Godere a graphic picture of the murder victim that the sergeant had taken at the scene. Sgt. Godere looked at the photograph on the sergeant’s phone and asked the sergeant to send it to him, which the sergeant did almost immediately. In that context, it is inconceivable to me that Sgt. Godere, in January 2012, could not recall who sent him the photograph without first checking his phone records. Rather, the more plausible explanation is that Sgt. Godere, rather than as-

sisting Jebb in his critical investigation, chose to be untruthful in an effort to avoid implicating another police officer. Finally, while he did eventually provide truthful information to Jebb during the February 2, 2012 interview and follow-up correspondence, he needed to be prodded to do so after expressing concerns about being labeled as a “rat”. Sgt. Godere’s conduct was a violation of the rules and regulations of the Police Department regarding untruthfulness and constituted substantial misconduct which adversely affected the public interest.

Having determined that Sgt. Godere did engage in the alleged misconduct, I must determine whether the level of discipline (termination) was warranted.

As stated by the SJC in *Falmouth v. Civ. Serv. Comm’n*, 447 Mass. 814, 823-825 (2006):

“After making its *de novo* findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], s. § 43 (‘The commission may also modify any penalty imposed by the appointing authority.’) Here the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘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.’” *Id. citing Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

“Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the ‘equitable treatment of similarly situated individuals.’” *Id. citing Police Comm’r of Boston v. Civ. Serv. Comm’n*, 39 Mass. App. Ct. 594, 600 (1996). However, in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system—“to guard against political considerations, favoritism and bias in governmental employment decisions.” *Id.* (citations omitted).

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“Unless the commission’s findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation.” *Id.* at 572. (citations omitted).

Similar to the City, I have found that Sgt. Godere was untruthful as part of an internal investigation in 2012. Several factors, however, warrant a modification of the penalty imposed here. My explanation follows.

The City was aware of Sgt. Godere’s untruthfulness in 2012 and, after careful review and consideration, chose not to charge Sgt. Godere with untruthfulness. Rather, they charged Sgt. Godere with incompetence and issued him a written reprimand. As he was not charged with untruthfulness, and was not provided with a copy of Jebb’s internal affairs report, Sgt. Godere had no ability at the time to refute the charge at that time. There is something inherently wrong with basing discipline on untruthfulness that the City has been aware of for seven years.

Further, Sgt. Godere has been treated differently than other similarly situated individuals. Two other police officers engaged in the same misconduct as Sgt. Godere. Officer TD took a photograph of the female victim, was not forthcoming about who he sent it to and was also untruthful when he stated that he sent out one group text, as opposed to sending the picture via several separate text messages. Officer MC at first acknowledged that he was “99% sure” that he received the photograph from Officer TD, but then submitted correspondence stating that he could no longer remember who sent it to him. Sgt. Godere has been terminated. Officer TD has been assigned to the position of detective in the narcotics division. Officer MC has been promoted to provisional sergeant. At the hearing, Chief Jebb sought to distinguish their misconduct from Sgt. Godere’s by stating that one of those officers was untruthful because he didn’t want to share the photographs of a romantic partner that were on his phone and the other didn’t want to share the photographs of family members. Even if I were to accept this head-scratching rationale, it ignores the fact that their untruthfulness was based their unforthcoming answers during the interview, as opposed to their reluctance to turn over pictures from their cell phones.

Finally, the City’s reliance on the fact that Sgt. Godere was the subject of a Brady letter is problematic for multiple reasons. First, as previously referenced, the City’s Mayor (Bissonnette) and Police Chief (Charette) at the time (2012) were both aware that Sgt. Godere was the subject of a Brady Letter and concluded that no disciplinary action was warranted. Effectively, what the City is arguing here is that the election of a new Mayor or the appointment of a new Police Chief can result in the reversal of prior decisions not to discipline a permanent, tenured civil service employee based on the same information that was available to their predecessors. The civil service system was designed to *prevent* these types of arbitrary decisions.

Second, Sgt. Godere was not informed of the 2012 Brady letter at the time. Over several years, it appears that many people, *except Sgt. Godere*, were aware of the Brady Letter. The District Attorney, with the assistance of the First District Attorney, wrote the letter and forwarded it to the Police Chief in 2012. The Police Chief shared the letter with the Mayor at the time. Years later, the new Police Chief was informed of a “rumor” of such a letter. The new Police Chief receives the letter from the First District Attorney. The Police Chief then notifies his command staff of the letter. Only then, after six years, did Sgt. Godere learn that he was the subject of a Brady Letter, when a Captain called him at home and notified him about the Police Chief’s email. Similar to the City’s failure to provide Sgt. Godere with the internal affairs report in 2012, there is an unfairness in requiring Sgt. Godere to defend allegations the City was aware of six years prior.

Third, the City’s Mayor testified that he principally relied upon the conclusion of the District Attorney’s Office in making his termination decision on Sgt. Godere and stated that, if others had been named in the Brady memorandum, they would be in the same position as Sgt. Godere. As referenced previously, the author of that Brady Letter could not explain why Officer TD and MC were not

named in the letter. Mayor Kos also testified that a basis for his determination was his conclusion that no officer, including Sgt. Godere, could effectively serve as a police officer on a going forward basis if they are the subject of a Brady Letter, as, according to Mayor Kos, the finding would render him either unable to testify or wrecked his credibility. As explained, that is not an opinion shared by the author of the memorandum, then-District Attorney Mastroianni.

For all of the above reasons, a downward modification of the penalty imposed here is warranted. In determining the appropriate level of discipline, I considered other relevant factors, including: the seriousness of the misconduct; Sgt. Godere’s prior discipline; and the insights offered by Judge Mastroianni regarding the potential challenges associated with the continued employment of a police officer who is the subject of a Brady Letter.

The appeal is *allowed in part* and the modified penalty is as follows:

1. Sgt. Godere shall be demoted from sergeant to police officer, effective November 2, 2018.
2. Sgt. Godere shall be returned to his position of police officer, effective November 2, 2018, without loss of compensation or other rights.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman; Stein and Tivnan, Commissioners [Camuso - Absent]) on February 13, 2020.

Notice to:

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* * * * *

STEPHENS P. LIMA

v.

CITY OF NEW BEDFORD

G1-19-258

February 13, 2020
Paul M. Stein, Commissioner

Commission Practice and Procedure—Timeliness of Appeal—General Interpretation of 60 Day Rule—The Commission gave a very generous interpretation of its 60-day appeal rule to a candidate for original appointment as a New Bedford firefighter in allowing extra time for the appeal where the Appellant missed a certified letter communicating the bypass. But the Appellant still filed his appeal more than 60 days after he had definitively been notified of his bypass by email and so his appeal was dismissed.

DECISION ON RESPONDENT’S MOTION TO DISMISS

The Appellant, Stephens Lima, acting pursuant to Mass. G.L.c.31, §2(b), brought this appeal to the Civil Service Commission (Commission), contesting his non-selection by the City of New Bedford (New Bedford) for appointment to the civil service position of Firefighter with the New Bedford Fire Department (NBFD).¹ New Bedford filed a Motion to Dismiss the appeal on the grounds that it was untimely, which the Appellant opposed. A pre-hearing conference and motion hearing was held on January 24, 2020 at the UMass School of Law in Dartmouth. For the reasons explained below, I conclude that Motion to Dismiss should be granted and the appeal be dismissed.

FINDINGS OF FACT

Based on the submissions of the parties and viewing the evidence most favorably to the Appellant, I find the following material facts are not in dispute:

1. On March 28, 2018, the Appellant, Stephens P. Lima, took and passed the written civil service examination for Firefighter administered by the Massachusetts Human Resources Division (HRD) and his name was placed on the eligible list for Firefighter established by HRD on or about December 1, 2018.
2. On March 18, 2019, and as amended on March 24, 2019, HRD issued Certification No. 066166 authorizing New Bedford to appoint up to ten (10) Firefighters.
3. Mr. Lima’s name appeared in a tie group in the 6th position on Certification No. 06166.

4. New Bedford eventually appointed seven (7) candidates from Certification No. 06166, including six ranked below Mr. Lima on the certification.

5. On September 17, 2019, NBFD Administrative Coordinator Amy Poitras mailed a letter from Acting NBFD Fire Chief Paul Coderre to Mr. Lima, via certified mail return receipt, to the address listed by Mr. Lima in his NBFD employment application. The letter informed Mr. Lima that he had been bypassed and, in compliance with civil service law, informed him of the reasons for the bypass and advised him of his right to appeal the bypass decision to the Commission.

6. Mr. Lima never received Chief Coderre’s September 17, 2019 letter. On or about October 10, 2019, the letter was returned, unopened, to the NBPD by the US Postal Service with the notation: “RETURN TO SENDER UNCLAIMED UNABLE TO FORWARD.”

7. Meanwhile, on October 9, 2019, Mr. Lima contacted the NBFD to inquire about the status of his application and spoke to Ms. Poitras. She informed him that a letter had been sent to him on September 17, 2019. On that same day, Ms. Poitras sent Mr. Lima an e-mail stating: “Attached are scanned copies of the contents of the envelope that was mailed certified mail on 09/17/19” to Mr. Lima. She included the tracking number and stated: “If you’d like when I receive the envelope “Return to Sender” I can give you a call to stop by the station and pick it up.”

8. Mr. Lima acknowledges that he received Ms. Poitras’s 10/9/19 email and read it that same day. He did not open the attachment containing the bypass letter.

9. On October 10, 2019, Mr. Lima emailed Ms. Poitras to request that she call him once the original September 17, 2018 letter was returned.

10. On October 15, 2019, Ms. Poitras left a voice message for Mr. Lima and emailed him indicating that the envelope containing the original September 17, 2019 letter had been received and that he could pick it up at the station.

11. On October 15, 2019, Mr. Lima went to the NBFD station to retrieve the letter but learned that Ms. Poitras had left for the day. He never returned to pick up the letter.

12. At some point on October 15, 2019, however, Mr. Lima opened the attachment to the email sent to him by Ms. Poitras on October 9, 2019 and reviewed its contents, and became aware of his bypass and right of appeal.

13. By letter to the Commission postmarked December 11, 2019, Mr. Lima filed this appeal.

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

STANDARD OF REVIEW

The Commission may dispose of an appeal summarily, as a matter of law, pursuant to 801 C.M.R. 1.01(7) when undisputed facts affirmatively demonstrate “no reasonable expectation” that a party can prevail on at least one “essential element of the case”. *See, e.g., Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 fn.6, (2008); *Maimonides School v. Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005)

APPLICABLE CIVIL SERVICE LAW

The Commission has established, by rule, a 60-day period within which a candidate must appeal to the Commission after notice of an “action or inaction” that resulted in an unlawful bypass is a jurisdictional matter that the Commission has strictly enforced. *See, e.g., Lane v. Newburyport Police Dep’t*, 28 MCSR 587 (2015), citing *Pugsley v. City of Boston*, 24 MCSR 544 (2011); *Gagnon v. Boston Fire Dep’t*, 28 MCSR 179 (2015). The sixty-day window commences upon “receipt of notice that makes the [applicant] aware of his or her non-selection and right of appeal to the Commission.” *Costa v. City of Brockton*, 28 MCSR 87 (2015).

The Commission is open to giving Mr. Lima the benefit of the doubt that he did not receive notice of any attempted delivery of the NBFD’s September 17, 2019 letter, despite the fact that the 2019 letter was properly addressed, and in the regular course of business it could be expected that the USPS delivered notice to him that it was holding a certified letter for him to pick up. There is no doubt, however, that on October 9, 2019, Mr. Lima received an email from the NBFD that contained an attachment with the complete contents of the September 17, 2019 letter and that the text of that email expressly identified the attachment as including the “contents of the envelope that was mailed certified mail on 09/17/19”. At that point, the NBFD had taken all steps necessary to make Mr. Lima aware of the NBFD’s bypass decision. Although Mr. Lima apparently chose not to open the attachment until October 15, 2019, that does not change the fact that he was placed on notice of the bypass decision upon receiving that email, any more than he would be excused if he had picked up the September 17, 2019 letter at some earlier date but never opened it until October 15, 2019.

As Mr. Lima’s appeal was filed outside the sixty-day mandatory window, it is untimely and the Commission lacks jurisdiction to hear his appeal.

CONCLUSION

Accordingly, for the reasons stated, New Bedford’s Motions to Dismiss is ALLOWED and the appeal of the Appellant, Stephens P. Lima, under Docket No. G1-19-258 is **dismissed**.

* * *

By vote of the Civil Service Commission (Bowman, Chairman, Camuso [absent], Ittleman, Stein & Tivnan, Commissioners) on February 13, 2020.

Notice to:

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* * * * *

ANTONIO McQUEEN

v.

BOSTON PUBLIC SCHOOLS

D-18-182

February 13, 2020
Paul M. Stein, Commissioner

Disciplinary Action-Suspension of Boston Public School Custodian-Poor Job Performance-Failure to Follow Orders-Poor Attendance—The Commission affirmed the 10-day suspension of a much disciplined Boston school custodian at the Lila Frederick Pilot School whose pattern of behavior included attendance and performance issues as well as a recurrent failure to follow directives and policies.

DECISION

The Appellant, Antonio McQueen, acting pursuant to G.L.c.31,§43, appealed to the Civil Service Commission (Commission), challenging the decision of the Respondent, the Boston Public Schools (BPS), to suspend him for ten (10) days from his tenured position as a BPS Junior Custodian.¹ The Commission held a pre-hearing conference in Boston on November 6, 2018, and held a full hearing at that location on January 16, 2019, which was digitally recorded.² The full hearing was declared private. Thirteen (13) Exhibits were received in evidence at the hearing (*Exhs. 1 through 13*). The Commission received Proposed Decisions on March 20, 2019. For the reasons stated below, the Appellant's appeal is denied. .

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the BPS:

- Pauline Lugira, BPS Principal, Lila Fredrick Pilot School
- Danny Glavin, BPS Custodial Services Area Manager
- Mike DiAngelis, BPS Custodial Services Area Manager

Called by the Appellant:

- Antonio McQueen, BPS Junior Custodian, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Antonio McQueen, is a tenured BPS civil service employee who has held the position of Junior Custodian since 2004, working primarily at the Lila Frederick Pilot School. (*Stipulated Facts; Testimony of Appellant*)

2. During his employment as a BPD Junior Custodian, prior to the 2017-2018 school year, Mr. McQueen received the following discipline:

a. May 31, 2007 - Written warning for unjustified absences and improvement plan re: same, including compliance with policies regarding sick time.

b. February 7, 2008 - Written reprimand for unjustified absences and improvement plan re: same, including compliance with policies regarding sick time and tardiness.

c. February 25, 2008 - Five-day suspension and transfer to another school for poor job performance (quantity and quality of work), threatening the Senior Custodian and falsifying daily time sign in/sign out attendance sheets; improvement plan to remediate this misconduct.

d. April 4, 2008 - Three-day suspension for unacceptable attendance and improvement plan to remediate attendance issues.

e. January 15, 2009 - Five-day suspension for poor job performance, threatening and insubordinate behavior toward Supervisor; improvement plan re: same and compliance with BPS policies regarding sign in/sign out and snow removal duties.

f. February 2, 2009 - One-day suspension for failure to follow snow removal policy and improvement plan to remediate this misconduct.

g. June 12, 2009 - Docked thirty (30) minutes pay for tardiness.

h. December 29, 2014 - Written reprimand for unsatisfactory attendance, including possible pattern of sick leave abuse on Mondays or Fridays; improvement plan to remediate attendance issues.

i. May 6, 2015 - Docked thirty (30) minutes pay for tardiness.

(*Exhs. 9 through 11*)

3. During the 2017-2018 school year, beginning in February 2018, Mr. McQueen also received verbal counseling from the BPS Custodial Services Area Manager Mike DiAngelis for (1) disrespecting Principal Lugira who directed him to clean up spilled food (initially reported as feces) dropped on the cafeteria floor and failing to comply with the directive immediately, waiting until the last lunch was finished and all students were gone; (2) failing to locate and remove a dead rodent from the library office (which the professional staff member ultimately was required to dispose of herself); and (3) malingering in the teacher lounge on multiple

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

2. CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

occasions during lunch periods when he was expected to remain on duty in the cafeteria. (*Exhs. 2, 3 & 5; Testimony of Appellant, Lugira & DiAngelis*)³

4. On May 15, 2018, after a disciplinary hearing, BPS Senior Manager of Buildings & Grounds John McIntosh issued Mr. McQueen a Written Warning regarding attendance issues, requiring that Mr. McQueen improve his attendance and comply with the BPS policies regarding medical documentation for absences of five days or more and/or when a pattern of sick leave abuse is suspected. (*Exhs. 6, 9 & 11; Testimony of McIntosh*)

5. On May 23, 2017, Mr. DiAngelis arrived at the Frederick School during a lunch period on May 23, 2018, and Mr. McQueen was nowhere to be found. After looking for him for over half an hour, Mr. DiAngelis spotted Mr. McQueen walking up the school driveway. Mr. DiAngelis docked Mr. McQueen thirty (30) minutes pay for leaving the school grounds without signing out as required. (*Exh. 5; Testimony of DiAngelis*)

6. The attendance record for Mr. McQueen for the remainder of the school year, after the May 15, 2018 written warning, includes the additional absences stated below.

Friday, June 29, 2018 - Personal Day

Monday, July 2, 2018 - Vacation Day

Tuesday, July 3, 2018 - Sick

Thursday, August 9, 2018 - Sick

Friday August 10, 2018 - Vacation

Week beginning 8/13 & 8/20 - Two week Vacation

Monday, August 27, 2018 - Sick

(*Exhs. 7 & 8; Testimony of McIntosh*)

7. By letter dated September 11, 2018, following an appointing authority hearing on August 30, 2018, BPS Assistant Director of Facilities Management P.J. Preskenis issued Mr. McQueen a ten-day suspension, ordered that he be reassigned to another school without recourse to re-bid to the Frederick School and imposed an improvement plan to remediate the quantity and quality of his work and attendance and compliance with directives of superiors. The reasons for discipline included: (a) poor job performance; (b) failure to follow the directives of both the principal and the area manager; (c) failure to sign in/out when leaving the school; (d) failure to improve attendance after the 5/9/18 attendance hearing, including calling out sick after a vacation day and before a holiday; and (e) overall poor disciplinary history. (*Exh. 1; Testimony of McIntosh*)

3. Mr. DiAngelis assumed the role of Area Manager after the regularly assigned manager, Danny Glavin, went out on injured leave in January 2018 and continued in that role until Mr. Glavin returned to work in September 2018. Mr. Glavin had also experienced similar performance issues with Mr. McQueen earlier in the 2017-2018 school year, beginning in August 2017, of which Frederick School Principal Pauline Lugira was later made Mr. DiAngelis aware. (*Exh. 2; Testimony of Glavin, Lugira & DiAngelis*)

8. On or about August 30, 2018, Principal Lugira prepared a performance evaluation of the custodian staff. She gave Mr. McQueen an overall rating of Unsatisfactory and graded him Unsatisfactory in every one of the ten categories of performance. Although Principal Lugira had complained previously about custodial performance across the entire school (especially the performance and supervision of the night staff), she had seen some improvement from others during the year. Mr. McQueen was the only custodian whom she rated as overall Unsatisfactory at the end of the school year. (*Exhs. 3, 4 & 1; Testimony of Lugira*)

9. This appeal duly ensued. (*Claim of Appeal*)

APPLICABLE LEGAL STANDARD

G.L.c.31, §41-45 requires that discipline of a tenured civil servant may be imposed only for “just cause” after due notice, hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of decision that states “fully and specifically the reasons therefore.” G.L.c.31, §41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L.c.31, §42 and/or §43, for de novo review by the Commission “for the purpose of finding the facts anew.” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited.

The Commission’s role 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 Comm’n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997). *See also Police Dep’t of Boston v. Collins*, 48 Mass. App. Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000); *McIsaac v. Civil Service Comm’n*, 38 Mass. App. Ct. 473, 477 (1995); *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331, *rev.den.*, 390 Mass. 1102 (1983).

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence⁴, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971); *City of Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928) *See also Mass. Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-65 (2001).

The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” *School Comm. v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488, *rev.den.*, 426 Mass. 1104

4. It is within the hearing officer’s purview to determine the credibility of live testimony. *E.g., Leominster v. Stratton*, 58 Mass. App. Ct. 726, 729 (2003). *See Embers of Salisbury, Inc. v. 37 Alcoholic Beverages Control Comm’n*, 401 Mass. 526, 529 (1988); *Doherty v. Ret. Bd. of Medford*, 425 Mass. 130, 141 (1997). *See also Covell v. Dep’t of Social Services*, 439 Mass. 766, 787 (2003) (where witnesses gave conflicting testimony, assessment of their relative credibility cannot be made by someone not present at the hearing).

(1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983) The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of “merit principles” which govern civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c.31, §1.

G.L.c.31, Section 43 vests the Commission with “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. *See, e.g., Police Comm’r v. Civil Service Comm’n*, 39 Mass. App. Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”) *Id.*, (*emphasis added*). *See also Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006), quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

ANALYSIS

The BPS proved just cause for the discipline imposed on Mr. McQueen based on the pattern of his behavior over the better part of an entire school year, which included attendance issues, performance shortcomings, and a stubborn refusal to acknowledge his shortcomings, bring his conduct into compliance with BPS policies and follow the reasonable orders of his superiors, including the school principal and the custodial staff management. The BPS is entitled to expect more from an experienced, long-tenured custodian. A ten-day suspension was appropriate remedial discipline for the cumulative and persistent level of misconduct established here by a preponderance of the evidence.

The Appellant argues that the evidence of his misconduct was substantially all circumstantial, third-hand information and should not be relied upon to justify the discipline imposed. I do not agree. All of the incidents were documented and reported to the BPS Custodial Area Managers in the regular course of business. Both Mr. Glavin and Mr. DiAngelis had first-hand knowledge of many of the incidents, including finding Mr. McQueen in the teachers’ lounge when he should have been on duty in the cafeteria, and his walking off school premises without signing out. The inference of attendance abuse (calling in sick just before and after a holiday and vacation days) is documented. Principal Lugira had direct knowledge of the failure to clean up a food spill in the cafeteria as well as Mr. McQueen’s insubordinate behavior toward her on that occasion. Finally, to the extent that no witness with first-hand knowledge testified about certain reported incidents (e.g., the mouse in the library office), I find the documented reporting and testimony by Mr. Diangelis and Principal Lugira before the Commission to be reliable and to credibly support the conclusion that those incidents occurred as they described them, not in the self-serving way described by Mr. McQueen.

The Appellant also contends that he was unfairly singled out for discipline because Principal Lugira was predisposed against him and wanted to get him removed from her school. I agree that Principal Lugira had made her dissatisfaction with Mr. McQueen’s recent performance quite clear, but that concern was the result of her professional observations of him during the 2017-2018 school year. Even Mr. McQueen agreed that he had known Principal Lugira for a long time and had enjoyed a cordial relationship until those recent series of incidents. As a school principal, Ms. Lugira is entitled to broad (although not unfettered) discretion in deciding in whom to hire and retain to work at the school and in whom she has confidence to interact with the staff and the students who attend there. *See* G.L.c.71, §59B (so-called “principal’s choice law); *Almeida v. New Bedford Schools*, 25 MCSR 467 (2012). Moreover, in this case, the decision to discipline and transfer Mr. McQueen was not one made by Principal Lugira alone, but was based on the consensus judgment of the BPS Facilities Management senior staff, which specifically took into account both Mr. McQueen’s recent misconduct in the 2017-2018 school year, along with his prior record of discipline, none of which was attributed to Principal Lugira.

Finally, I have considered whether there is any reason for the Commission to apply its authority to exercise discretion and modify the discipline imposed. The misconduct established at the Commission hearing does not materially differ from that found by the BPS after its appointing authority hearing and I find no unlawful motives, bias or disparate treatment. Accordingly, there is no reason to disturb the BPS’s choice of a ten-day suspension for the misconduct established by the evidence in this appeal.

CONCLUSION

For the reasons stated above the appeal of the Appellant, Antonio McQueen, in Case No. D-18-182 is hereby *denied*.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso [absent], Ittleman, Stein and Tivnan, Commissioners) on February 13, 2020.

Notice to:

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* * * * *

HUSSEN MOHAMMED

v.

DEPARTMENT OF TRANSITIONAL ASSISTANCE

C-19-127

February 13, 2020

Christopher C. Bowman, Chairman

Civil Service Commission Jurisdiction-Technical Pay Law-Time-liness of Appeal—The Commission dismissed a “reclassification” appeal from a DTA Management Analyst seeking to be classified to Technical Pay Law Data Analyst/Statistician because the Commission lacks jurisdiction under the TPL law. The law was enacted in 1983 with the purpose of attracting and retaining candidates with specific tech knowledge. The Commission rejected DTA’s argument that the appeal was untimely since the agency itself had asked the Appellant to delay filing his appeal while it consulted with EOTSS.

ORDER OF DISMISSAL

On June 6, 2019, the Appellant, Hussen Mohammed (Mr. Mohammed), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state’s Human Resources Division (HRD) to affirm the decision of the Executive Office of Health and Human Services / Department of Transitional Assistance (DTA) to deny his request to be “reclassified” from Management Analyst III (MA III) to Technical Pay Law (TPL) 013: Data Analyst / Statistician.

2. On June 25, 2019, I held a pre-hearing conference at the offices of the Commission that was attended by the Appellant and DTA representatives.

3. As part of the pre-hearing, DTA argued that:

A. The Appellant’s appeal was untimely as it was filed with the Commission more than 30 days after HRD denied his appeal.

B. TPL titles are not part of the classification plan and, thus, this reclassification appeal cannot be heard by the Commission.

C. Further, the Executive Officer of Technology Services and Security (EOTSS) only authorizes TPL titles to be used in IT divisions in state agencies and the Appellant does not work in the IT division of DTA, providing an additional reason why this appeal cannot be heard by the Commission.

4. The Appellant stated that he was told by DTA NOT to file an appeal with the Commission upon receiving the HRD denial, as DTA wanted additional time to consult with EOTSS or other officials about a possible resolution of this matter.

5. DTA subsequently filed a Motion to Dismiss and Mr. Mohammed filed a reply.

6. On August 2019, I held a motion hearing and heard oral argument from both parties as well as counsel for the state’s Human Resources Division (HRD).

ANALYSIS / CONCLUSION

DTA’s motion to dismiss based on timeliness is denied. At the motion hearing, DTA acknowledged that the Appellant was indeed asked by DTA to delay filing an appeal with the Commission until DTA had time to consult with EOTSS. I credit the Appellant’s testimony that his decision to wait approximately three months from receipt of HRD’s denial to file an appeal with the Commission was attributable to the request from DTA and was not the result of any fault of his own.

Based on the above, it is appropriate for the Commission to exercise its discretionary authority under Chapter 310 of Acts of 1993 to allow Mr. Mohammed to file his appeal, even if he failed to submit it within the thirty days required by Standard Adjudicatory Rules of Practice and Procedure. (*See Boston Police Dep’t v. Civ. Serv. Comm’n and Merced*, Suff. Sup. Ct. No. 16CV00748 (2018)).

DTA’s motion to dismiss based on jurisdictional grounds is allowed. I carefully reviewed the parties’ briefs; arguments from both parties and counsel for HRD at the motion hearing; and all documents included in the record.

I concur with DTA and HRD. The purpose of the TPL law, enacted in 1983, was to attract candidates and retain personnel with an expertise and experience in technology systems. The statute did not create new positions or titles, but, rather, allowed for certain titles to be designated as “TPL” titles based on the need for employees to have specific technical knowledge.

In summary, this is not a reclassification appeal under G.L. c. 30, s. 49. Rather, it is a request by an incumbent employee to receive a TPL designation and the higher salary that accompanies it. I am not aware of any prior Commission decision stating that the Commission has jurisdiction over such a TPL-related request.

For these reasons and the reasons stated in DTA’s Motion to Dismiss regarding the TPL-related matter, the Appellant’s appeal under Docket No. C-19-127 is *dismissed*.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso - Absent]) on February 13, 2020.

Notice:

Hussen Mohammed
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* * * * *

DENNIS MORIARTY

v.

CITY OF HAVERHILL

D-17-126

February 13, 2020
Cynthia A. Ittleman, Commissioner

Disciplinary Action-Haverhill Police Officer-Failure to Follow Procedures in Locking Prisoner in Cell-Disparate Punishment—The Commission affirmed the three-day suspension of 20-year Haverhill police officer who failed to physically check to see if a cell door was securely locked, thereby allowing the prisoner to leave his cell when the door sprung open. Hearing Officer Cynthia A. Ittleman rejected the Appellant's claim of disparately harsh treatment, finding that the comparators cited by the officer involved incidents that were different and the officers much less experienced than this Appellant.

DECISION

Dennis Moriarty (Mr. Moriarty or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on June 19, 2017, under G.L. c. 31, s. 43, challenging the decision of the City of Haverhill (Respondent) to suspend Mr. Moriarty for three (3) days. A prehearing conference was held in this regard on October 23, 2017 at the Mercier Community Center in Lowell. A hearing¹ was held on March 9, 2018 at the Commission's office in Boston. The hearing was deemed to be private since I did not receive a request from either party for a public hearing. The witnesses were sequestered. The hearing was digitally recorded and the parties received a CD of the recording.² The Respondent submitted a post-hearing brief; the Appellant did not. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Joint Exhibits (J.Ex.) 1 through 12 and the Respondent's Exhibits (R.Ex.) 1, 2A, 2B, 2C and 3 through 5 were entered into evidence at the hearing. At the hearing, the Respondent was ordered to produce the report of the Respondent's hearing officer. The Respondent produced the report thereafter and it is included in the record as Hearing Officer Report. Based on all of the exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Donald Thompson, former Deputy Chief, Haverhill Police Department (HPD)
- Paul Rennie, Rennie Detention Systems
- Alan DeNaro, Chief, HPD

Called by the Appellant:

- Dennis Moriarty, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, rules, regulations, policies, and reasonable inferences from the evidence; a preponderance of credible evidence establishes the following facts:

1. Dennis Moriarty has been a Patrol Officer in the HPD since July 27, 1997. (J.Ex. 10)
2. On April 16, 2016, Prisoner 1 and Prisoner 2 were arrested by the HPD for disorderly conduct. (*Id.*)
3. Lieutenant 1 was the Officer in Charge at the time Prisoner 1 and Prisoner 2 were arrested. (*Id.*)
4. The Appellant performed the booking procedure for Prisoner 1 and then placed him in cell No. M2 while Officers A and B stood near the Appellant as backup. (*Id.*)
5. Officer A has been an HPD Patrol Officer since June 30, 2014. (*Id.*)
6. Officer B has been an HPD Patrol Officer since on or about October 18, 1998. (*Id.*)
7. Surveillance camera footage following the arrests of Prisoners 1 and 2 on April 16, 2016 shows Officer Moriarty, with the aid of Officer B, placing Prisoner 1 in cell M2. Before the door can be closed, Prisoner 1 attempted to follow the officers out of cell M2. The Appellant reentered the cell with Prisoner 1. Officers A and B stood near the doorway but outside of cell M2. Officer Moriarty then exited the cell, took hold of the door handle with his right hand, to close the door. Surveillance footage does not show Officer Moriarty tugging on or otherwise checking the door handle to ensure it is locked. Immediately after Officer Moriarty released the door handle, the door began to swing open as the officers walked away, nearly making physical contact with Officer B. As the door swung open all the way, Prisoner 1 stood in the doorway. Prisoner 1 then tried to close the door from the inside the cell. When it still failed to close, Prisoner 1 exited the cell and walked around the cell area and the adjoining booking desk for nearly one-half hour. Prisoner 1 was then returned to his cell by Lieutenant 1. (J.Ex. 1; R.Ex. 1)

1. The Standard Adjudicatory Rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

8. Following this incident, Lieutenant 1 instructed the Appellant to write a report on the matter. (*Id.*) The Appellant filed Report No. 16012704, in which he stated that he placed Prisoner 1 in cell M2 with Officers A and B assisting/standing, that he closed the door to cell M2 as usual and that he tested the handle to ensure the door locked. (*Id.*)

9. On or about April 20, 2016, at the direction of a Captain, officers within the Department checked the door to cell M2 and did not find any problems with the door's locking mechanism. (*Id.*) There were no substantiated reports of cell lock malfunction to Chief DeNaro or Deputy Chief Anthony Haugh prior to the incident. (*Id.*; Testimony of DeNaro) Dep. Chief Thompson interviewed approximately five (5) other police officers who used cell M2 before and after the incident and they observed no malfunction. (Testimony of Thompson) The Respondent then requested that Rennie Detention Systems inspect all locks in the cell block area on or around April 21, 2016. (R.Exs. 11 and 12)

10. Paul Rennie ("Mr. Rennie") of Rennie Detention Systems had worked in the locksmith industry, specifically for jail cell doors, for more than ten (10) years at the time of this incident. (Testimony of Rennie). At that time, he had been servicing the Haverhill Police Department for approximately three (3) years, and had installed all cell doors and locks in the holding area. (*Id.*) Mr. Rennie is certified by the manufacturer of the cells/locks used at the HPD as to their purpose, design and function. Mr. Rennie inspected cell M2 on or about April 27, 2016 but did not find any malfunction with the door or its lock, nor any sticking of the door or cell lock related to recent painting. (*Id.*; J.Ex. 11)

11. On April 28, 2016, Chief DeNaro ordered an investigation to determine:

- a. Did the cell door malfunction?
- b. Was policy and procedure followed when placing Prisoner 1 in the cell?
- c. Was policy and procedure followed in reporting this incident?
- d. Why was Prisoner 1 not charged with escape or attempted escape? (R.Ex. 1)

12. Retired HPD Deputy Chief Donald Thompson ("Dep. Chief Thompson") conducted the investigation and reported his findings on June 12, 2016. (*Id.*)

13. As part of his investigation, Dep. Chief Thompson reviewed various booking reports, video surveillance footage and officer reports, in addition to interviewing various other officers of the Department to see if they had had a problem with the door or lock for cell M2 on April 5, 6, 10, 11, 15 or 16, 2016. (*Id.*; J.Exs. 1 - 3 and R.Ex. 1 (and attachments)).

14. Dep. Chief Thompson concluded that the cell door did not malfunction on the date of the incident, that the Appellant did

not follow policy and procedure when placing Prisoner 1 in the cell, and when he reported this incident, that Prisoner 1 was not charged with Escape or Attempted Escape because Lt. 1 did not believe that Prisoner 1 had escaped since he had remained in a secure area even though he was outside of his cell, and that Lt. 1 believed that the lock on cell M2 had malfunctioned. (R.Ex. 1)

15. HPD Policy and Procedure No. 72 governs "Booking-Prisoner Security." Article IV ("Procedures"), Section C ("Security and Control"), Subsection 2 ("Cell Block Procedure"), Part (d) states, "After placing a prisoner in a holding cell, the cell door will be closed, locked, and physically checked to ensure it is securely locked." (J.Ex. 4)

16. The Appellant electronically acknowledged receipt of Policy and Procedure No. 72 on April 2, 2015. (J.Ex. 5)

17. Following retired Dep. Chief Thompson's report, Chief DeNaro notified the Appellant by letter dated August 12, 2016 that he would be suspended for three (3) days as a result of the April 16, 2016 incident. (J.Ex. 6) The Appellant's suspension was imposed on August 17, August 29, and September 13, 2016. (*Id.*)

18. The Appellant appealed the discipline to Mayor James Fiorentini, who appointed Attorney David Grunebaum to be a hearing officer. Attorney Grunebaum submitted a detailed report to Mayor Fiorentini on May 25, 2017 recommending that the Mayor confirm the Appellant's three (3)-day suspension. (Hearing Officer Report)³

19. After receiving the hearing report from Attorney Grunebaum, Mayor Fiorentini upheld the three (3)-day suspension. By letter dated June 6, 2017 and hand-delivered to the Appellant, the Mayor informed the Appellant that his three (3)-day suspension was upheld. (J.Ex. 7)

20. The Appellant filed an appeal of the three (3)-day suspension with the Civil Service Commission on June 19, 2017. (Administrative Notice)

21. During the Commission hearing, in response to questioning, the Appellant testified,

"Q: What did you do to ensure that the lock to cell M2 had engaged?

A: I grabbed the handle, I closed it, I believe I heard it engage and click. I let go, I walked away. I thought it was engaged.

Q: Do you recall pulling on the door?

A: At the time it happened, in my mind's eye, I thought I had. After reviewing the videotape, I did not."

(Testimony of Moriarty)

22. Lt. 1 received a written reprimand for not properly reporting the April 16, 2016 incident. (Testimony of DeNaro)

3. Although the hearing officer reviewed the statements of the Appellant and witnesses by audio-visual recording, he did not observe them first-hand and, it appears, the Appellant did not have an opportunity to observe for himself the state-

ments of the witnesses and to cross-examine them at the hearing. Going forward, the Respondent should ensure that an Appellant is afforded such opportunities.

23. Officers A and B were not disciplined in connection with the April 16, 2016 incident because the Respondent determined that they were not responsible for placing Prisoner 1 in the cell. (*Id.*)

24. A prior incident at the HPD of a prisoner escape involved Officers D and E; each received a written reprimand. The prisoner on that occasion was arrested for theft of a saw; at the time of his escape, he was not secured or placed in a cell but was waiting to be interviewed, sitting on a bench in the holding cell area. The door to the HPD Sally Port opened and the prisoner escaped. At the time of the incident, Officers D and E had approximately five (5) years of experience working at the Department, and the written reprimands were the first offenses for each officer. (*Id.*; R.Exs. 3 and 4)

25. The Appellant's prior discipline includes a written reprimand in August 2010 for not properly completing a vehicle checklist, a ten (10)-day suspension in November 2010 for writing on a medical victim's forehead with black magic marker, and a thirty (30)-day suspension in June 2015 for conduct unbecoming a police officer and violation of policies pertaining to the use of fire arms, the use of force, and field reports. The Appellant signed a Last Chance Agreement in connection with the thirty (30)-day suspension in June 2015. (R.Exs. 2A, 2B, 2C and 5) The Appellant did not grieve these disciplines or appeal them to the Commission. (Testimony of DeNaro)

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, s. 43 provides:

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." *Commissioners of Civil Service v. Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971); *Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *School Comm. v. Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." *Tucker v. Pearlstein*, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited. However, "[t]he commission's task ... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether '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', " which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. *Id.*, quoting internally from *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

Also under section 43, the Commission has "considerable discretion" to affirm, vacate or modify discipline but that discretion is "not without bounds" and requires sound explanation for doing so. *See, e.g. Police Comm'r v. Civil Service Comm'n*, 39 Mass. App. Ct. 594, 600 (1996) ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio ... accorded the appointing authority.") *See also Town of Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006), quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

ANALYSIS

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant. Based upon the video surveillance footage, Dep. Chief Thompson's investigative report, and testimony of retired Dep. Chief Thompson, Chief DeNaro, Mr. Rennie, and the Appellant himself, the Appellant did not "physically check[] to ensure [the cell door was] securely locked" as required by Policy & Procedure No. 72, 72.4.2(d). The Appellant electronically acknowledged receipt of this policy on April 2, 2015. Moreover, as a nearly twenty (20)-year veteran of the HPD at that time, the Appellant was familiar with the cell doors, their locking mechanisms, and how to properly secure a prisoner inside a cell. In testimony at the Commission hearing, the Appellant admitted that during the incident in question he did not physically check to ensure the cell door was securely locked as in violation of Policy & Procedure No. 72, 72.4.2(d).

The Appellant avers that the door lock malfunctioned. However, there was no evidence at the time to support his contention. There had been no substantiated reports of any problems with the lock to cell M2 in the days prior to the April 16, 2016 incident or days immediately thereafter. When asked to inspect the lock, other Haverhill police officers were unable to find any malfunctioning of the door. When called in to inspect the lock, locksmith Paul

Rennie found no malfunction with the door or its lock, and testified that he “tested the lock, at least twenty times, and there was [sic] no issues.” Further, there is no evidence of any malfunctioning or repair of cell M2 on the Rennie Detention Systems invoice issued on or about April 27, 2016, following inspection of the lock. Mr. Rennie testified that if he performed any repair on cell M2, it “absolutely” would have been reflected on the subsequent invoice. (Testimony of Rennie) There is no mention of malfunction of the door or lock to cell M2 in subsequent email messages between Rennie Detention Systems and the HPD.

Moreover, the video surveillance footage revealed that the door did not close from the inside when Prisoner 1 attempted to lock himself into the cell. The fact that the door did not close from the inside is not indicative of malfunction. Mr. Rennie and Dep. Chief Thompson made clear that while technically possible under the right circumstances, the doors are not designed to close from the inside. This is a safety mechanism, designed to prevent suicides. Testimony of Rennie and Thompson. Similarly, the Appellant’s claim that the door to cell M2 was sticking as a result of a recent paint job performed on the door is refuted by the video surveillance footage showing the door bounce off its casing, rather than sticking, and Mr. Rennie’s testimony that he did not find any paint-related sticking when he subsequently inspected cell M2. Had he found any evidence based on the foregoing, I credit Mr. Rennie’s testimony and conclude that neither the door, nor the lock malfunctioned when the Appellant closed it on April 16, 2016; rather, the door bounced back open because it was not closed properly. It was not closed with sufficient force to engage the lock.

Even if the lock or door had malfunctioned, the result would be the same. Pursuant to Policy and Procedure No. 72, 72.4.2(d), the Appellant was supposed to “physically check[] to ensure [the cell door] is securely locked.” J.Ex. 4. The Appellant admitted that he did not physically check to ensure the door was securely locked. Had he done so, he would have noticed that the door immediately opened after he supposedly closed it. Whether the lock is fully functional or malfunctioning, this physical check would have alerted Officer Moriarty to the issue such that he could re-try securing the door properly, or move the prisoner to a different cell. The Appellant’s failure to physically secure the door to the cell resulted in a prisoner escaping his cell for nearly half an hour, moving around the cell block and booking area freely and could have caused harm to other officers.

The Commission has upheld discipline issued for failure to follow established workplace policies and procedures. *See, e.g., Caggiano v. Marshfield Fire Dep’t.*, 27 MCSR 638 (2014); *Tinker v. Boston Police Dep’t.*, 24 MCSR 551 (2011); *Lett v. Boston Police Dep’t.*, 23 MCSR 358 (2010); *Dambreville v. Boston Police Dep’t.*, 23 MCSR 333 (2010); *Welch v. Boston Police Dep’t.*, 19 MCSR 290 (2006); *Sabbey v. Cambridge Police Dep’t.*, 14 MCSR 172 (2001); *Crowley v. Dep’t. of Correction*, 12 MCSR 42 (1999); and *Zatoonian v. Waltham Police Dep’t.*, 10 MCSR 167 (1997). Since the Appellant here did not physically check the door, in violation of a clear and established policy, I find that his actions constitute substantial misconduct which adversely affects the pub-

lic interest by impairing the efficiency of the public service. As a result of the Appellant’s actions, Prisoner 1 was able to escape his cell unrestrained and walk around the area. This compromised the safety of other officers in the HPD, other prisoners, and could have compromised the safety of the public, had he found a way to escape the building. Accordingly, the Respondent has established that it had just cause to discipline the Appellant. Since the findings here are substantially the same as those found by the Respondent, I find no reason to modify the discipline, especially in view of his disciplinary record.

The Appellant alleges that he is the victim of disparate treatment on this occasion and others. In view of the testimony of the Appellant and Chief DeNaro, I find that the record does not support the Appellant’s allegation of prior disparate treatment by Chief DeNaro. Similarly, the record does not support the Appellant’s allegation that he was disciplined in a disparate manner in this case. The Appellant alleged that two (2) other officers (identified at the Commission hearing as Officers D and E) were treated differently when they were involved in a prisoner escape at a different time. However, the two (2) incidents are not comparable. In the prior incident, the prisoner was waiting to be interviewed in connection with the theft of a saw. The prisoner was sitting on a bench in the cell area, unrestrained and not locked in a cell and escaped from the department via an open Sally Port door. While Prisoner 1 in the April 16, 2016 incident involving the Appellant did not escape the building, he did escape from his cell, and was given the opportunity to escape from his cell because of the Appellant’s failure to secure the door. Prisoner 1 had access to the book desk and could have located an item to use as a weapon against the officers. However, in the case of Officers D and E, it was their first offense and it was much earlier in their careers. The Commission, in addressing a disparate treatment allegation, has upheld harsher punishment where an appellant had a lengthier disciplinary history than those with whom he compared himself. *See Draper v. Brookline School Dep’t.*, 26 MCSR 320 (2013). As a result, I find that the record does not support the Appellant’s allegation of disparate treatment or bias. For these reasons, modification of the discipline issued by the Respondent is not warranted.

CONCLUSION

Based on the findings herein, the Appellant’s appeal, docketed D-17-126, is hereby *denied*.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso [absent], Ittleman, Tivnan, and Stein, Commissioners) on February 13, 2020.

Notice to:

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* * * * *

BRIANNE CARNELL, DAVID HERNANDEZ, CONOR
 MOCCIA & CHASE ROBICHAUD

v.

BOSTON POLICE DEPARTMENT

G1-19-260 (Carnell)	G1-19-261 (Hernandez)
G1-19-262 (Moccia)	G1-19-263 (Robichaud)

February 27, 2020
 Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointments as Boston Police Officers-Rescission of Conditional Offers of Employment-Changing Physical Fitness Standards—In a decision by Chairman Christopher C. Bowman, the Commission allowed the appeals from four candidates for appointment to the Boston Police Department whose offers of employment had been rescinded after they failed more stringent physical fitness standards adopted by the Massachusetts Municipal Police Training Committee. MMPTC had effectively toughened the standards mid-way through the hiring process for these candidates after having initially told them that the sole requirement for entering the Police Academy was passing the PAT. The new criteria required them to meet additional progressive fitness standards administered over several weeks. These four candidates passed the PAT but failed the new standards with respect to either the number of required pushups, sit-ups, or the completion time for the 300 meter run.

DECISION ON APPELLANTS' MOTION FOR SUMMARY DECISION

On December 13, 2019, the Appellants, Brianne Carnell, David Hernandez, Conor Moccia and Chase Robichaud (Appellants), filed appeals with the Civil Service Commission (Commission), contesting the decision of the Boston Police Department (BPD) to rescind their conditional offers of employment and bypass them for original appointment to the position of permanent, full-time police officer. A pre-hearing was held at the offices of the Commission on January 14, 2020. The Appellants filed a Motion for Summary Decision on January 23, 2020 and the BPD filed an opposition on February 11, 2020.

Based on the Appellants' motion and the BPD's opposition and all other documents contained in the record, the following appears to be undisputed:

1. On March 25, 2017, the Appellants took and passed a civil service examination for police officer.
2. On September 1, 2017, the state's Human Resources Division (HRD) placed the names of the Appellants on an eligible list for police officer.

3. On March 29, 2019, HRD sent the BPD Certification No. 06203 from which the BPD was authorized to appoint 120 candidates as police officers.

4. Each of the Appellants signed the Certification as willing to accept appointment.

5. During April and May 2019, the Appellants each attended a BPD orientation for police officer candidates that would be considered for appointment from Certification No. 06203.

6. As part of the orientation session, BPD officials walked through the review and selection process. As part of that orientation, candidates were told that, if they received a conditional offer of employment, they would need to meet certain conditions, including completing the Boston Police Academy, which falls under the fall under the Massachusetts Municipal Police Training Committee (MMPTC).

7. The BPD candidates at the orientation session were explicitly told that passing the Physical Abilities Test (PAT), administered by HRD, would allow them to enter the Police Academy.

8. The BPD candidates at the orientation session were also told that, *once enrolled in the Academy*, they would need to meet *progressive* physical standards that increase over time. They were told that physical training would take place for two hours each day and that, failure to participate (and meet the progressive standards) would be considered a failure to participate in the physical training. Ultimately, failure to participate (and meet the progressive standards) in 30% of the physical fitness training hours would lead to dismissal from the Academy. Specifically, the BPD officials told the candidates, that, if, *after several weeks in the Academy*, they were not meeting the progressive standards, they would not be getting credit for the two hours of physical training and, thus, would be unlikely to meet the number of hours required to continue with the Academy.

9. BPD officials at the orientation *encouraged* the candidates to become familiar with the progressive standards and to train sufficiently to exceed the standards prior to joining the Academy.

10. BPD officials also told the candidates that, after undergoing a physical readiness test on the first day of the Academy, they would be divided into three separate groups based on their physical readiness with physical training customized for each group.

11. Separately, on June 21, 2019, the following events took place at the monthly meeting of the MMPTC, the group that oversees Police Academies in Massachusetts:

"At last month's meeting, concerns of a few of the Commonwealth's largest departments over the entry-level fitness standards that had been recently voted on for implementation July 1, 2019, produced a six-month moratorium on its implementation, moving it to January 1, 2020. Chairman Hicks commented that he has been receiving feedback that this was not a welcome change. He stated that the Committee needs to be sensitive to all cities and towns in the Commonwealth. There was much discussion about a lower entry standard, giving time to build to a

predetermined higher standard of fitness. It was suggested that MPTC might develop a training video on how to properly prepare for training, available to those who are considering pursuing this career. A lower entry level would allow more students entry and with an opportunity for coaching in Health and Wellness on how to build strength and stamina, with a reasonable goal. Those departments that have cadet programs could be mentoring these students and help prepare them for application. Several ideas were offered with regards to working with candidates during the hiring process. Ultimately, a new Motion was made to reconsider the Motion of last month's meeting regarding the moratorium on entry-level fitness testing to enter a police academy and instead revise the fitness standard to establish a 30th percentile entry level (based on the Cooper Institute norms) for any academy beginning after September 1, 2019. Students must also then attain the 40th percentile in all four events by week 8. Those who fail to do so will be retested by week 10. Failure to meet the standard by week 10 will result in dismissal for non-disciplinary reasons. Participation requirements remain in effect. The Motion was seconded and passed, one abstention (Vieira). Jason Shea, MPTC SWC will be asked to amend the daily PT regimen to reflect the new standards.” (emphasis added)

12. After attending the BPD orientation sessions in April / May 2019, each of the Appellants completed a student officer application and underwent a thorough background investigation by the BPD.

13. Each of the candidates received conditional offers of employment from the BPD on the following dates:

- Moccia: June 4, 2019
- Robichaud: June 18, 2019
- Carnell: August 30, 2019
- Hernandez: August 30, 2019

MOCCIA

Event	New Entry Level Standard	Applicant Completion	Pass / Fail
Push-Ups	26 in one minute	22 in one minute	Fail; 4 push-ups short
Sit-Ups	35 in one minute	33 in one minute	Fail; 2 sit-ups short
1.5 mile run / walk	13:16 minutes	12:42.9 minutes	Pass
300-meter run	52.6 seconds	52.6 seconds	Pass

ROBICHAUD

Event	New Entry Level Standard	Applicant Completion	Pass / Fail
Push-Ups	20 in one minute	26 in one minute	Pass
Sit-Ups	32 in one minute	29 in one minute	Fail; 3 sit-ups short
1.5 mile run / walk	13:46 minutes	13:06.2 minutes	Pass
300-meter run	63 seconds	56 seconds	Pass

CARNELL

Event	New Entry Level Standard	Applicant Completion	Pass / Fail
Modified Push-Ups	20 in one minute	18 in one minute	Fail; 2 push-ups short
Sit-Ups	30 in one minute	49 in one minute	Pass
1.5 mile run / walk	15:52 minutes	14:26.8 minutes	Pass
300-meter run	71 seconds	63.8 seconds	Pass

14. The conditional offers of employment for Moccia and Robichaud were contingent upon: 1) Successful completion of a medical examination; 2) Successful completion of a psychological examination; 3) successful completion of the PAT administered by HRD; and 4) successful completion of the Boston Police Academy.

15. The conditional offers of employment for Carnell and Hernandez were contingent upon all of the above, but also referenced successful completion of “the new Recruit Entry Fitness Standards Test.”

16. On August 20, 2019, *approximately two months after the MMPTC established the new physical fitness entry standards for police academies*, BPD applicants in this hiring cycle, including the Appellants, received the following email from the BPD’s Diversity Recruitment Officer & Exam Administrator:

“Recruit Applicant:

A recent decision by the Municipal Training Committee will have a direct impact on our (BPD) hiring process. Please note, after the successful completion of the Physical Abilities Test, all Recruit Applicants will be required to pass the new Recruit Academy Entry Level Fitness Standard. This fitness test will be administered by our Academy on or around November 2, 2019 and additional information will be sent or disseminated some time after the Physical Abilities Test. Please see the attached announcement for this decision and physical fitness requirements. If you have questions regarding this process, please contact BPD HR via email [].”

17. Each of the Appellants passed the medical, psychological and PAT screening.

18. The Appellants then each took the new entry level physical fitness test and failed as follows:

HERNANDEZ

Event	New Entry Level Standard	Applicant Completion	Pass / Fail
Push-Ups	20 in one minute	26 in one minute	Pass
Sit-Ups	32 in one minute	34 in one minute	Pass
1.5 mile run / walk	13:46 minutes	13:29.5 minutes	Pass
300-meter run	63 seconds	65.2 seconds	Fail; 2.2 seconds short

19. The BPD subsequently rescinded the Appellants' conditional offer of employment and notified them that they were being bypassed for appointment. These appeals followed.

ANALYSIS / RELIEF TO BE GRANTED

The undisputed facts here show that the Appellants are aggrieved persons. They were harmed through no fault of their own when the entrance requirements for police officer were effectively modified mid-way through the hiring process.

As part of their orientation in April / May 2019, the Appellants were explicitly told by BPD officials that passing the PAT was the sole requirement for entry into the Police Academy. That critical information was accurate at the time.

Unbeknownst to the Appellants, however, the MMPTC, the body that governs police academies in Massachusetts, was involved in an ongoing debate regarding whether new recruits should be required to meet new physical fitness standards prior to entering the Academy and what the effective date of those new requirements should be. The public minutes of those meetings show that the BPD's representative on the MMPTC had serious reservations about the new requirements and the effective date. As of May 2019, the BPD representative and others had convinced the MMPTC that the effective date for any new standards should be January 2020, months after the BPD's then-ongoing hiring cycle would be completed. One month later, however, in June 2019, the MMPTC reversed course - again - and moved the effective date up to September 1, 2019. That meant that the information provided to BPD recruits months earlier at the BPD orientation was no longer valid.

The MMPTC's June 2019 reversal was not communicated to BPD recruits until approximately two months later, on August 20, 2019. Although each of the Appellants completed a thorough background investigation and met all of the conditional requirements referenced at the BPD orientation, they (just barely) failed the new entry-level physical fitness standards established by the MMPTC.

I reviewed the entire audio / video recording of one of the BPD's orientation sessions that was submitted as an attachment to the BPD's brief. It shows a highly professional team of BPD officials providing new recruits with a detailed description of the Department, its role as *part* of community and the requirements needed to become a police officer. The BPD is correct that these officials informed the recruits of the strenuous fitness requirements of the Academy and encouraged the recruits to begin training to meet those strenuous requirements. Importantly, however, as referenced above, each of the recruits was explicitly told that

the only requirement for entering the Academy was passage of the Physical Abilities Test administered by HRD. Further, they were explicitly told that the Academy fitness standards, once enrolled, were progressive and would be administered / tested over several weeks. Finally, they were told that, upon entry, they would be divided into separate groups with training customized based on their physical fitness. That is *starkly* different from being told of the need to pass newly-established physical fitness standards *prior to admission* into the Police Academy.

Despite the changed conditions, and despite the two-month delay in notifying recruits of these changed conditions, the Appellants came frustratingly close to meeting those new conditions, with one of the Appellants meeting all of the new standards, with the exception of the 300 meter run, coming up *2.2 seconds short*. Based purely on commonsense, it is highly likely that the Academy's fitness training program, which begins on the first day of the Academy, would have allowed this Appellant to improve his time by at least 2.2 seconds or for the other Appellants to improve their performances (i.e. - 2 more sit-ups in a minute).

For these reasons, relief is warranted to ensure that the Appellants, now aware of the new physical fitness requirements, have at least one additional opportunity to be considered for appointment as a Boston Police Officer, a job for which the BPD already granted them a conditional offer of employment.

The Appellants' appeals are *allowed*.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders that:

1. HRD shall place the names of the Appellants at the top of any current or future Certification for permanent, full-time police officer in the Boston Police Department until such time as they are appointed or bypassed.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 27, 2020.

Notice to:

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* * * * *

WILLIAM CAVANAUGH

v.

WESTFIELD POLICE COMMISSION

G2-19-174

February 27, 2020
Christopher C. Bowman, Chairman

B*ypass Appeal-Promotion to Westfield Police Department Sergeant-Off Duty Alcohol Abuse*—The Commission affirmed the promotional bypass of a Westfield patrol officer, an attorney, who was an excellent officer and ranked first on the eligible list but whose record was tarnished by three recent incidents involving serious off-duty abuse of alcohol.

DECISION

On August 20, 2019, the Appellant, William Cavanaugh (Officer Cavanaugh), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Westfield Police Commission (City) to bypass him for promotional appointment to the position of police sergeant. On September 11, 2019, I held a pre-hearing conference at the Springfield State Building in Springfield, MA. I held a full hearing at the same location on November 13, 2019.¹ The full hearing was digitally recorded and both parties received a CD of the proceeding.²

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

On December 20, 2019, the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Thirty-seven exhibits were entered into evidence at the full hearing (Respondent Exhibits 1-13 (Exhibits R1-R13) and Appellant Exhibits 1-24 (Exhibits A1-A24). Exhibits R5 and R6, the personnel files of the Appellant and the selected candidate, were marked as confidential. Based on the documents submitted and the testimony of the following witnesses:

For the City:

- Lawrence Valliere, Chief, Westfield Police Department;
- Felix Otero, Commissioner, Westfield Police Commission;
- Leonard Osowski, Commissioner, Westfield Police Commission;
- Michael McCabe, Captain, Westfield Police Department;

For Officer Cavanaugh:

- William Cavanaugh, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences from the evidence, I find the following:

1. The City of Westfield, located in Hampden County in Western Massachusetts, has a population of approximately 41,000. A three-member Police Commission serves as the Appointing Authority for the City's Police Department. (<https://www.cityof-westfield.org/242/Demographics>)
2. The City's Police Department is comprised of a chief, two captains, five lieutenants, nine sergeants, sixty-four full-time police officers and ten reserve police officers. (Exhibit A2)
3. Officer Cavanaugh is thirty-one years old. He has lived in Westfield for most of his life. He received a bachelor's degree and a master's degree in criminal justice from Westfield State University. He received a juris doctor from Western New England School of Law in 2012. (Testimony of Appellant)
4. In 2012, Officer Cavanaugh was appointed by the City as a reserve police officer. He was appointed to a permanent, full-time police officer position in 2013. (Testimony of Appellant)
5. Officer Cavanaugh works principally within the patrol division and, since 2016, has served as a desk officer for two of his four assigned shifts. Since 2018, Officer Cavanaugh has also served as a Field Training Officer, helping train officers right out of the Police Academy. (Testimony of Appellant)

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

6. On October 15, 2016, Officer Cavanaugh took the promotional examination for police sergeant and received a score of 81. (Stipulated Facts)

7. As of June 17, 2019, after other candidates were promoted in prior promotional cycles, Officer Cavanaugh was ranked first on the eligible list; the second-ranked candidate had a score of 79. (Testimony of Appellant)

8. Three eligible candidates, including Officer Cavanaugh, were interviewed by two members of the Westfield Police Commission. All three candidates performed well during the interviews. (Testimony of Otero and Osowski)

9. The two Commissioners put great weight on the recommendations of the Police Department's senior command staff, including the incoming Police Chief, whose promotion was imminent. (Testimony of Otero and Osowski)

10. The senior command staff unanimously recommended the second-ranked candidate. (Testimony of Otero and Osowski)

11. On June 21, 2019, the Police Commission notified Officer Cavanaugh that he had been bypassed for promotion by the second-ranked candidate. (Exhibit R11)

12. The bypass letter read as follows:

"Dear Officer Cavanaugh,

The Westfield Police Commission has been impressed with you and your credentials from the time you were first appointed as a reserve police officer on September 8, 2012 and then to a full-time police officer on September 21, 2013. All reports from commanding officer have been positive, however, we feel that you don't have the experience and maturity level at this time and we are hoping that with a little more experience, you will mature into an excellent choice for a command position. Stay positive, circumstances can change overnight; be prepared to move forward. We are confident that you will have an excellent future with the department.

I have enclosed the bypass appeal form for your review, should you decide to appeal the appointment.

Respectfully,

Leonard M. Osowski, Police Commissioner" (Exhibit R11)

13. Captain McCabe and then-incoming Police Chief Valliere's assessment of Officer Cavanaugh's maturity was based in part on three off-duty incidents involving alcohol. (Testimony of Valliere and McCabe)

14. At the June 17, 2019 Commission meeting, Captain McCabe and Chief Valliere did not refer specifically to these off-duty issues, because they did not want to make a public record of those issues, which could potentially harm Officer Cavanaugh's future prospects. (Testimony of Valliere and McCabe)

15. One such incident was a 2:00 A.M. one-car crash in Southwick that occurred on August 27, 2017. Officer Cavanaugh admitted he had had 6 beers to drink in three hours earlier that evening, but

testified that the alcohol was not a factor, that he had dozed off behind the wheel after a long day of work. (Testimony of Appellant; Exhibits R7 and R9)

16. Another incident occurred in December, 2017, at a bar in Agawam, Massachusetts. According to Officer Cavanaugh, he had an altercation with a bouncer, in which he identified himself as a police officer. Mr. Cavanaugh admitted he was drinking that night and took an Uber home. (Testimony of Appellant, Exhibit R9)

17. The third incident occurred on January 13, 2019, about six months before the June 17 Commission meeting. That night, in Westfield, Officer Cavanaugh failed to pull over when pursued by a City police cruiser. He was followed by the police cruiser to a Westfield bar, which he then entered. The officer in the cruiser called the ranking shift Sergeant, who came to the scene. The sergeant called Officer Cavanaugh out from the bar, determined that he had been drinking, after which Officer Cavanaugh was given a "courtesy ride" home. (Exhibits R8 & R9; Testimony of Officer Cavanaugh)

18. Captain McCabe and Chief Valliere believed these incidents reflected a lack of maturity on Officer Cavanaugh's part, causing them to conclude that Officer Cavanaugh should not be in a leadership position in the City's Police Department at that time. (Testimony of Valliere and McCabe)

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259 (2001); citing *Cambridge v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300, 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1.

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* at 304. 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).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions (*City of Beverly v. Civil Service Comm'n.*, 78 Mass. App. Ct. 182, 189, 190-191 (2010) citing *Falmouth v.*

Civil Serv. Comm'n, 447 Mass. 814, 824-826 (2006) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. *Beverly*.

The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown (*Beverly* citing *Cambridge* at 305, and cases cited). However, when the reasons for bypass relate to alleged misconduct, the appointing authority is entitled to such discretion “only if it demonstrates that the misconduct occurred by a preponderance of the evidence.” (emphasis in original) (*Boston Police Dep’t v. Civ. Serv. Comm’n & Michael Gannon*, 483 Mass. 461 (2019) citing *Cambridge* at 305).

ANALYSIS

The City has proven, by a preponderance of the evidence, that Officer Cavanaugh, through his recent actions, has shown a lack of maturity required of a superior officer, justifying their decision to bypass him for promotional appointment to police sergeant.

The January 2019 incident, standing alone, provided the City with a valid reason to bypass Officer Cavanaugh for promotional appointment. The written reports regarding that incident, much of which Officer Cavanaugh did not contest during his testimony, paint a disturbing picture of a police officer who does not understand the high standard required of those holding his position. While intoxicated, the Appellant, driving at a high rate of speed, failed to stop for a fellow Westfield police officer who had activated the lights on his cruiser. The Appellant then pulled into the parking lot of a local bar, was dismissive of the on-duty police officer who had pulled in behind him - and then walked into the bar. The police sergeant that responded to assist the on-duty officer that night discovered a visibly intoxicated Cavanaugh who walked out of the bar and attempted to get back into the driver’s side of his vehicle. Rather than administer a field sobriety test of Cavanaugh, the sergeant gave Cavanaugh a ride home.

During his testimony before the Commission, Officer Cavanaugh didn’t seem to grasp the seriousness of his actions; the fact that the January 2019 incident appeared to be part of a pattern of poor judgment while intoxicated; or that a meaningful course correction on his part is needed. Until that occurs, the City will remain justified in bypassing him for promotional appointment.

I did not ignore or overlook the many positive attributes of Officer Cavanaugh, nor did the Police Commission. He is smart, motivated, personable and committed to a long career in law enforcement. That, however, does not outweigh the City’s well-founded judgment that it would be too high of a risk, at this time, to promote him to the position of sergeant, which inherently requires someone with the ability to make sound decisions.

Finally, I considered all of Officer Cavanaugh’s other arguments, including the argument that the selected candidate has also shown poor judgment involving past incidents. He has, but there has been a period of several years since these incidents occurred and that candidate has demonstrated to the command staff that he has

learned from his past mistakes. That distinguishes the selected candidate from Officer Cavanaugh.

For all of the above reasons, the Appellant’s appeal under Docket No. G2-19-174 is hereby **denied**.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 27, 2020.

Notice to:

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* * * * *

ANGELA HALCOVICH

v.

CITY OF REVERE

D1-17-158

February 27, 2020
 Cynthia Ittleman, Commissioner

Disciplinary Action-Discharge of Revere Police Officer-Permitting Injury to a Minor Child-Untruthfulness-Failure to Report a Crime-Conduct Unbecoming-Criminal Conviction—The Commission affirmed the discharge of a Revere police officer whose boyfriend had beaten and injured her younger child with a belt whereupon she lied about the events to the State Police, the Revere Police Department, and a mandated reporter (a nurse). The Appellant was convicted of the misdemeanor of permitting injury to a child, given two years probation, and therefore was unable to possess a license to carry a firearm or serve in a civil service position within a year of her conviction without her employer's consent.

DECISION

Angela Halcovich (Ms. Halcovich or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on August 8, 2017 under G.L. c. 31, s. 43, challenging the decision of the City of Revere (Respondent) to terminate her employment as a police officer. A prehearing conference was held on October 3, 2017 at the offices of the Commission in Boston. A full hearing¹ was held on January 10, 2018 at the same location. The hearing was deemed to be private since I did not receive a request from either party for a public hearing. The witnesses were sequestered. The hearing was digitally recorded and the parties received a CD of the recording.² The parties submitted post-hearing briefs. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Thirty (30) exhibits were entered into evidence at the hearing.³ At the hearing, the parties were ordered to produce court documents concerning a restraining order that the Appellant obtained at or about the time of the incidents that led to the Appellant's termination of employment and the transcript of the State Police interview of the Appellant. The Appellant produced the court record of the restraining order, which was entered into the record and marked as Appellant's Post-Hearing Exhibit (A.PH.Ex.) 1. The Appellant

advised that the transcript could not be prepared in a timely manner so the Appellant withdrew the request to include it in the record. Based on all of the exhibits, the testimony of the following witnesses:

Called by the Respondent:

- James Guido, Chief, Revere Police Department (RPD)
- John Goodwin, then-Lieutenant in the RPD, now Deputy Chief of the Winthrop Police Department (WPD)

Called by the Appellant:

- Angela Halcovich, Appellant

And taking administrative notice of all matters filed in the case and taking administrative notice of pertinent statutes, case law, regulations, rules, policies, and reasonable inferences from the evidence, a preponderance of the credible evidence establishes the following facts:

1. The Appellant was raised in Revere. She served in the U.S. Marines from 2003 to 2007 and was honorably discharged as a Staff Sgt. E-6, achieving five (5) promotions. While in the military, she obtained a Bachelor's degree and took courses toward a Master's degree, which she completed after she was hired by the RPD as a Patrol Officer in 2014. The Appellant has earned a number of training certifications as a member of the RPD. Prior to her termination, the Appellant was a tenured police officer. She is a single parent of two small children. (Testimony of Appellant; Respondent's Exhibit (R.Ex.) 1)
2. In the beginning of 2015, the Appellant began a friendship that developed into a romantic relationship with Mr. G, a fellow RPD Patrol Officer. On the evening of January 12, 2017, the Appellant was at her residence with her two children and Mr. G. (Testimony of Appellant; R.Ex. 7)
3. One of the children, Younger Child, refused to eat his dinner. Mr. G told the Appellant he was bringing Younger Child upstairs. (Testimony of Appellant)
4. Mr. G then brought Younger Child upstairs to his room where he struck him several times with a belt. (Testimony of Appellant; R.Ex. 7)
5. Mr. G then asked Appellant to come upstairs and she observed that Younger Child had bruises and welts on his back and was or

1. The Standard Adjudicatory Rules of Practice and Procedure, 810 CMR ss. 1.00, et seq., apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

3. The Respondent's exhibits are Exhibits 1, 1A, 1B, 2 through 5, 6A, 6B, 6C, and 7 through 13. The Appellant's exhibits are Exhibits 14, 15A, 15B, 15C, 16, 17, 18A, 18B, 19, 20, 21A, 21B, 21C, 22A, 22B, 22C and 23. As noted above, the

Appellant also provided a post-hearing document that was entered into the record. In addition, I take administrative notice of two (2) decisions that the Respondent submitted with its post-hearing brief: *Lawrence v. Lawrence Firefighters, Local 146 IAFF*, Essex Superior Court C.A. No. 2017-0163-B and *Clancy v. Brockton Public Schools*, 18 MCSR 66 (2005).

Given the amount of personal information in many of the admitted Exhibits, at the end of the hearing I returned the parties' Exhibits to them for the purpose of redacting them and they returned them, redacted, to the Commission. Exhibits 6A - 6C, which are photographs of Younger Child depicting his pertinent injuries, are completely redacted. The other evidence in the record suffices to render this decision.

became aware that the injuries were inflicted by a belt. (Testimony of Appellant).

6. Mr. G remained at the residence for approximately twenty (20) minutes then left. (Testimony of Appellant, R.Ex. 8)

7. The following morning, the Appellant put lotion on Younger Child's injury from being stricken with a belt by Mr. G, dressed him in a hoodie and instructed him to wear it all day and told both Younger Child and Older Child to say, if anyone asked them about the hoodie, that Younger Child fell down the stairs. (Testimony of Appellant; R.Ex. 8)

8. The Appellant then brought her children to school, and reported to work at RPD. (Testimony of Appellant)

9. That morning, Younger Child asked the school nurse for a band-aid for his back. The nurse observed extensive bruising on his front and back torso, arms, and neck and took photographs of his injuries.⁴ (R.Exs. 6A-6C)

10. Younger Child told the school staff that he fell down the stairs at home and that his mother, the Appellant, had put lotion on his injuries. (R.Exs. 5 and 7)

11. Younger Child's school contacted the Appellant, who arrived at the school shortly thereafter and was shown his injuries. The Appellant said that she was unaware of the bruising but stated that Younger Child must have injured himself when he fell down the stairs a few days ago. The Appellant told the school nurse she would be take him to his pediatrician at Beth Israel Hospital-Revere. (Testimony of Appellant; R.Exs. 5, 7 and 8)

12. The school nurse, as a mandated reporter under G.L. c. 119, s. 51A, contacted the Massachusetts Department of Children and Families ("DCF") to investigate the matter. (R.Exs. 5, 7 and 8)

13. DCF contacted the Suffolk County District Attorney's Office to investigate the physical abuse of Younger Child. Detective Lieutenant John Lannon ("Det. Lannon"), of the Massachusetts State Police, assigned to the District Attorney's Office, investigated the matter. (R.Exs. 7, 8 and 10)

14. When DCF and Det. Lannon arrived at Beth Israel Revere, the doctor treating Younger Child stated that the injuries were not consistent with falling down the stairs. DCF then took custody of both of the Appellant's children. (R.Ex. 10)

15. On January 14, 2017, Det. Lannon interviewed Mr. G about the events that occurred at the Appellant's residence on January 12, 2017. (R.Ex. 10)

16. Mr. G was subsequently arrested and charged with assault and battery on a child causing serious bodily injury and assault and battery with a dangerous weapon. (R.Exs. 7 and 10)⁵

17. On January 15, 2017, RPD Det. Lannon and Lt. Murphy interviewed the Appellant regarding the events at her home on January 12, 2017. (R.Ex. 8)

18. The Appellant told Det. Lannon and Lt. Murphy that:

- Mr. G would help discipline her children;
- on January 12, 2017, she found that Mr. G had taken Younger Child upstairs and struck him with a belt while she was downstairs; and
- the next morning, the Appellant instructed both her children to say that Younger Child fell down the stairs if anyone asked, and for Younger Child to keep his hoodie on to hide the marks from having been struck by Mr. G. (R.Ex. 8)

19. The Appellant applied for a domestic abuse restraining order against Mr. G on January 18, 2017. The order was set to expire on February 1, 2017. However, on January 31, 2017, apparently at the request of both the Appellant and Mr. G, the court extended the restraining order until May 3, 2017. (A.PH.Ex.1)

20. In the spring of 2017, the Appellant participated in weekly meetings with a domestic violence counselor and obtained psychotherapy at the VA. (A.Exs. 21A - C, 22A-C and 23)

21. On January 27, 2017, the Appellant was charged with two (2) counts of assault and battery with a dangerous weapon on a child under 14 under G.L. c. 265, s. 15A(c)(iv) (assault and battery with a dangerous weapon of a child under age 14) and two (2) counts of permitting another to commit an assault and battery upon a child under G.L. c. 265, s. 13J(b) (wantonly or recklessly permit another to commit an assault and battery which caused "bodily injury"). (R.Exs. 8 and 9)

22. On February 27, 2017, pursuant to G.L. c. 31, s. 41, then-Chief of the Revere Police Department, Joseph Cafarelli, suspended the Appellant for five (5) days without pay beginning February 28, 2017 and ending on March 6, 2017 for violating RPD rules regarding Required Conduct, Truthfulness, Reporting Violations, Situation Involving Off-Duty Officer, Prohibited Conduct, Criminal Conduct and Conduct Unbecoming. This letter informed the Appellant that she may request a hearing within 48 hours. (R.Ex. 2) The March 2017 hearing apparently was not conducted. (Administrative Notice)

23. Also on February 27, 2017, the Appointing Authority, Mayor Brian Arrigo, gave the Appellant a Notice of Hearing to be held on March 6, 2017 indicating that he was contemplating taking further disciplinary action against her, up to and including discharge. (R.Ex. 3)

24. On March 1, 2017, Lt. Goodwin submitted a detailed investigation report of his investigation of Mr. G and the Appellant in connection with the January 12, 2017-related events for which they were criminally charged. (R.Ex. 10)

4. The photographs of Younger Child are not in the record but there appears to be no dispute that he was injured as a result of being struck with a belt on the night of January 12, 2017.

5. News reports shortly thereafter stated that Mr. G resigned from the RPD.

25. On May 12, 2017, the Appellant pleaded guilty to one (1) count of permitting injury to a child and was sentenced to probation until May 10, 2019. The three (3) other charges against the Appellant, alleging that the Appellant committed an assault and battery on her children, were disposed of by nolle prosequi. (R.Ex. 9)

26. On June 26, 2017, Mayor Arrigo provided the Appellant with a Notice of Hearing that he was contemplating taking disciplinary action against her up to and including discharge for violating cited RPD rules in connection with the January 12, 2017 incident. (R.Ex. 4)

27. On July 18, 2017, Mayor Arrigo designated Assistant City Solicitor Daniel Doherty to conduct the Appellant's disciplinary hearing. (R.Ex. 1B)

28. On July 19, 2017, the hearing officer conducted the disciplinary hearing. (R.Ex. 1A)

29. On July 26, 2017, the hearing officer issued his detailed report and findings and held that the Appellant had violated the cited RPD rules regarding criminal conduct, truthfulness, reporting violations, conduct unbecoming an officer, and situations involving off-duty officers. The Appellant testified at this hearing. She asserted that Mr. G had attempted to control her personal and work life and, on five (5) occasions put his hands around her throat and/or pointed his service weapon at her. The hearing officer explicitly made no finding in that regard. (R.Ex. 1A)

30. Attorney Doherty's report found that,

As to whether Halcovich was aware of prior incidents where [Mr. G] had struck [redacted] with a belt, the evidence was conflicting, and I make no finding either way on this point. ... I do find, however, that Halcovich was aware that [Mr. G] was going to spank [redacted] with a belt on January 12, 2017....

... under G.L. c. 31, s. 50 ... a person shall not be employed or retained in any civil service position within one year after his conviction of any crime, [the Appellant], by virtue of her sentence of two years (sic) probation, qualifies for the exemption under the statute to be employed within such one-year period in the discretion of the appointing authority. (R.Ex. 1A)

... by virtue of [the Appellant's] convictions of a misdemeanor punishable by imprisonment for more than two years she is a prohibited person to be issued a license to carry firearms pursuant to G.L. c. 140, s. 131(d)(i).... I find, based on the testimony of former Revere Lieutenant John Goodwin, that it is discretionary with the Chief of Police whether to retain an officer who has been so disqualified from being issued a license to carry firearms, and that the Revere Police Department currently employs two officers who are so disqualified due to convictions for operating under the influence of alcohol. (R.Ex. 1A)

31. By letter dated August 1, 2017, Mayor Arrigo notified the Appellant that her employment at the RPD was terminated for violating cited RPD rules pertaining to truthfulness, failing to report violations, criminal conduct, and conduct unbecoming a police officer in connection with the January 12, 2017-related events. (R.Ex. 1)

32. Rule 301(c)(7), regarding truthfulness, mandates that "[a]n officer shall truthfully state the facts in all oral and written reports, including all log and record books, and in any judicial, departmental or other official investigation, hearing, trial or proceeding. He/she shall cooperate fully in all phases of such investigations, hearing, trials and proceedings except as the officer may elect not to testify or make statements otherwise pursuant to his/her constitutional or statutory rights, unless granted transactional immunity. No employee shall knowingly enter, or cause to be entered, any inaccurate, false or improper information." (R.Ex. 11)

33. The Appellant violated Rule 301(c)(7) on January 13, 2017, when she "falsely informed a mandated reporter... that [she was] not aware that [her] son was injured and that [she] did not see his injuries and that his injuries must have occurred when he fell down the stairs. [She] later reported similar false information to investigators from the Massachusetts State Police inquiring into the crime." (R.Ex. 1)

34. Rule 301(c)(19), regarding situations involving off duty officers, mandates that officers "confronted with a situation in which the conduct of an off duty police officer is in question shall take the proper police action and request a superior officer respond to the scene." (R.Ex. 11)

35. The Appellant violated Rule 301(c)(19) in that she was "aware that a crime had been committed, i.e., assault and battery by means of a dangerous weapon on a child under 14 and did not report that crime to the Chief of Police as required." (R.Ex. 1)

36. Rule 301(D)(1), regarding criminal conduct, mandates that "[e]mployees shall obey all laws of the United States, of the Commonwealth of Massachusetts, all City of Revere ordinances and by-laws and all ordinances and by-laws of other cities and towns. An employee of the Department who commits any criminal act shall be subjected to disciplinary action up to and including discharge from the Department. Each case shall be considered on its own merits, and the circumstances of each shall be fully reviewed before the final action is taken." (R.Ex. 11)

37. Appellant violated Rule 301(D)(1) in having "prior knowledge that a fellow officer, Mr. G, was going to spank [her] young child with a belt on the evening of January 12, 2017. Further, [she] pled guilty on May 12, 2017 to the charge of permitting injury to a child under 14." (R.Exs. 1 and 9)

38. Rule 301(D)(4), regarding conduct unbecoming an officer, states that "[a]ny specific type of conduct, which reflects discredit upon the member as a police officer, or upon his fellow officers, or upon the police department he serves. Employees shall conduct themselves at all times, whether on or off duty, in such a manner as to reflect most honorably on the Department. Conduct unbecoming an officer shall include conduct which tends to indicate that the employee is unable or unfit to continue as a member of the Department, or conduct which impairs the operation of the Department or its employees." (R.Ex. 11)

39. The Appellant violated Rule 301(D)(4) in that “all of the conduct noted...in the suspension letter and Hearing Officer’s Report and Findings is conduct which reflects discredit upon [her] as a police officer as well as to the entire Revere Police Department.” (R.Ex. 11)

40. The Appellant filed the instant appeal with the Commission on August 9, 2017. (Administrative Notice)

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, s. 43 provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” *Commissioners of Civil Service v. Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971); *Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” *School Comm. v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

The Appointing Authority’s burden of proof by a preponderance of the evidence is satisfied “if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.” *Tucker v. Pearlstein*, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” *Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he commission’s task ... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘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,’” which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority.

Id., quoting internally from *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

Also under section 43, the Commission has “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. *See, e.g. Police Comm’r v. Civil Service Comm’n*, 39 Mass. App. Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio ... accorded the appointing authority.”) *See also Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006), quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [Commission] upon which a court conducting judicial review treads with great reluctance.” *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 729 (2003); *see Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’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).

Truthfulness is essential for a police officer. To this end, the Commission has noted, for example, that,

... [t]he criminal justice system relies on police officers to be truthful at all times and an appointing authority is justified in bypassing a candidate who does not meet this standard. *See, e.g., LaChance v. Erickson*, 522 U.S. 262 (1998) (lying in a disciplinary investigation alone is grounds for termination); *Meaney v. Woburn*, 18 MCSR 129, 133-35 (discharge upheld for police officer based, in part, on officer’s consistent dishonesty and “selective memory” during departmental investigation of officer’s misconduct); *Pearson v. Whitman*, 16 MCSR 46 (appointing authority’s discharge of police officer who had a problem telling the truth upheld); *Rizzo v. Town of Lexington*, 21 MCSR 634 (2008) (discharge upheld based partially on officer’s dishonesty regarding a use of force incident); and *Desharnias v. City of Westfield*, 23 MCSR 418 (2009) (discharge upheld based primarily on officer’s dishonesty about a relatively minor infraction that occurred on his shift).

Wine v. City of Holyoke, 31 MCSR 19 (2018).

ANALYSIS

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant. In the spring of 2017, the Appellant pleaded guilty to permitting injury to one of her minor children by Mr. G in violation of G.L. c. 265, s. 13J(b)(third paragraph) on January 12, 2017, for which she was sentenced to two (2) years of probation. After investigations (first by the State Police regarding the criminal charges and the second by the RPD to determine if the Appellant violated RPD rules), the Respondent conducted a disciplinary hearing under G.L. c. 31, s. 41. The hearing officer issued a detailed report finding that the Appellant was untruthful when she falsely informed a mandated reporter at school that she was not aware that her son was injured and that his injuries occurred when he fell down the stairs and

later made similar false statements to State Police investigators in violation of the RPD rule concerning truthfulness. The hearing officer's report also found that she was aware that Mr. G, a fellow RPD officer, committed a crime against one of her children and failed to report the crime to the Chief of Police in violation of the RPD rule requiring officers to report such matters. The report found also found that on May 12, 2017, the Appellant pleaded guilty to permitting injury of a child under age 14 in violation of the RPD rule concerning criminal conduct by officers. Further, the report found that the Appellant's actions in these regards constitute conduct unbecoming a police officer that discredits her and the Department in violation of the pertinent RPD rule. This Appellant's actions and/or inactions constitute substantial misconduct which adversely affect the public interest by impairing the efficiency of public service.

The question that follows is whether the Respondent had just cause to discipline the Appellant by terminating her employment. G.L. c. 31, s. 50 provides, in part,

No person habitually using intoxicating liquors to excess shall be appointed to or employed or retained in any civil service position, nor shall any person be appointed to or employed in any such position within one year after his conviction of any crime except that the appointing authority may, in its discretion, appoint or employ within such one-year period a person convicted of any of the following offenses: a violation of any provision of chapter ninety relating to motor vehicles which constitutes a misdemeanor or, any other offense for which the sole punishment imposed was (a) a fine of not more than one hundred dollars, (b) a sentence of imprisonment in a jail or house of correction for less than six months, with or without such fine, or (c) a sentence to any other penal institution under which the actual time served was less than six months, with or without such fine.... (*Id.*)(emphasis added)

This statute bars certain people from civil service employment within a year after they have been convicted of certain crimes. However, the statute further provides civil service employers the discretion to hire or retain such persons within the year of their conviction if their conviction was for certain misdemeanors. Since the Appellant pleaded guilty to a misdemeanor and was sentenced only to probation and one \$50 fine, the Respondent could continue the Appellant's employment if it so chose. Here, the Respondent declined to exercise its discretion to retain the Appellant within the year following her conviction based on its findings the led to its termination of her employment or thereafter. However, the Respondent also declined to continue her employment as a police officer because she is not authorized to have a license to carry a gun. To that end, the Respondent cites G.L. c. 140, s. 131(d)(i). Subsection (d) states that certain people may apply for a license to carry firearms as long as they are not "prohibited persons". Subsection (d)(i) defines a "prohibited person" as someone who,

has, in a court of the commonwealth, been convicted ... for the commission of (A) a felony; (B) a misdemeanor punishable by imprisonment for more than 2 years; ... (*Id.*)(emphasis added).

Although the Appellant was sentenced to two (2) years of probation for a misdemeanor, a conviction of the crime of permitting the injury of a child is punishable for up to two and one-half years imprisonment.⁶ As a result, the Appellant is a prohibited person under the statute and she is unable to possess a license to carry a firearm. The Respondent's hearing officer's report indicates that, at the time, the Respondent employed two (2) officers "who are so disqualified due to convictions for operating under the influence of alcohol." (R.Ex. 1A) A first or second offense OUI (G.L. c. 90, s. 24(1)(a)(1)) sentencing ceiling is two and a half years, like the Appellant's conviction.⁷ However, the record here does not include sufficient information to determine whether the two (2) officers were so convicted, charged with untruthfulness, and are prohibited persons, like the Appellant, barred from possessing a license to carry a firearm under G.L. c. 140, s. 131(d)(i). While a police department may have the discretion to retain employment of officers who have been convicted of crimes and can no longer have a license to carry a firearm to perform the functions of an officer, they should have objective reasons for such decisions and equitably apply them, assuming that the officers are fit for duty. This is not a case in which a police department has suspended an officer's license to carry a firearm to discipline an officer and bias or other improper motive may be of concern. The Appellant's conviction, under G.L. c. 31, s. 50, and her status as a "prohibited person" under G.L. c. 140, s. 131(d)(i), determine her fate. The Respondent is not obliged to exercise its discretion to restore her to her position as police officer, without a firearms license, and a modification is not warranted. I find no evidence of bad faith on the part of the Respondent in refusing to exercise its statutory discretion to retain the Appellant's employment. *See Kraft v. Police Commissioner of Boston*, 417 Mass. 235 (1994)(In deciding whether a Police Commissioner violated a court order returning a police officer to duty, the standard was whether the Police Commissioner's decision was made in a "good faith effort to fulfil his statutory managerial function.").

CONCLUSION

Accordingly, for the above stated reasons, the discipline appeal of Ms. Halcovich, Docket No. D1-17-158, is hereby denied.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 27, 2020.

Notice to:

6. I take administrative notice that the Felony and Misdemeanor Master Crime List by MGL Reference, June 2018, issued by the Massachusetts Sentencing Commission, indicates that permitting injury to a child under age 14, pursuant to G.L. c. 265, s. 13J(b)(paragraph 3), with which the Respondent hearing officer indicated that the Appellant was charged, pertaining to "injury" to a child, constitutes a misdemeanor but that permitting "substantial injury"(paragraph 4) to a child un-

der 14 constitutes a felony. <https://www.mass.gov/doc/master-crime-list/download> (February 6, 2020). There is no indication in the record that the Appellant was charged with permitting "substantial injury" to a child pursuant to paragraph 4 of the statute, which the Master Crime List states is a felony.

7. *See* Felony and Misdemeanor Master Crime List by MGL Reference, June 2018, issued by the Mass. Sentencing Commission (*supra*).

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* * * * *

DAVID IRWIN

v.

TOWN OF LUDLOW

G2-18-167

February 27, 2020
Christopher C. Bowman, Chairman

B*ypass Appeal-Promotion to Ludlow Police Lieutenant-Successful Candidates*—The Commission affirmed the promotional bypass of a highly qualified and first-ranked candidate for promotion to lieutenant with the Ludlow Police Department. The third-ranked and successful candidate was equally impressive, being an adjunct professor of criminal justice at local colleges, bringing 25 years of community knowledge, and demonstrating progressive professional development. The process of appointments by the Board of Selectmen, while not perfect, was found to be fair and uniform.

DECISION

On August 31, 2018, the Appellant, David Irwin (Sgt. Irwin), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Ludlow (Town) to bypass him for promotional appointment to the position of police lieutenant. On October 24, 2018, I held a pre-hearing conference at the Springfield State Building in Springfield, MA. I held a full hearing at the same location on March 27, 2019.¹ The full hearing was digitally recorded and both parties received a CD of the proceeding.² On May 30, 2019 and May 31, 2019, the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Ten exhibits were entered into evidence at the full hearing (Town Exhibits 1-9 (Exhibits 1-9)) and Appellant Exhibit A (Exhibit A).

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

Based on the documents submitted and the testimony of the following witnesses:

For the Town:

- Pablo (Paul) Madera, Police Chief, Town of Ludlow;
- Derek DeBarge, Selectman, Town of Ludlow;

For Sgt. Irwin:

- David Irwin, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences from the evidence, I find the following:

1. The Town of Ludlow (Town), located in Hampden County in Western Massachusetts, has a population of approximately 21,000. A five-member Board of Selectmen serves as the Appointing Authority. (<https://www.census.gov/quickfacts/fact/table/worcester-citymassachusetts/PST045217>)

2. The Ludlow Police Department (LPD) has forty sworn officers including a Police Chief and two lieutenants, one who serves as an operations lieutenant and one who serves as an administrative lieutenant. The position that is the subject of this appeal is the operations lieutenant. (Testimony of Chief Madera)

3. The duties and responsibilities of the operations lieutenant include: patrol scheduling, supervision, training, accreditation, public information, special police force management, emergency management, K-9, dispatch training oversight, policy and procedure review and implementation and oversight of the day-to-day operations of the department. (Exhibit 8; Testimony of Chief Madera)

4. On September 16, 2017, Sgt. Irwin took the civil service promotional examination for police lieutenant and received a score of 90. (Stipulated Fact)

5. On November 1, 2017, the state's Human Resources Division (HRD) created an eligible list of candidates for Ludlow Police Lieutenant. Sgt. Irwin was ranked first and the candidate ultimately selected by the Town, Sgt. Daniel Valadas (Sgt. Valadas), was ranked third. (Stipulated Facts)

6. Sgt. Valadas commenced his employment as a Ludlow Police Officer in 1993; he was promoted to Sergeant in 2003. He served in the U.S. Army as a military police officer/staff sergeant and was honorably discharged after twelve years of service. Sgt. Valadas has a master's degree and a bachelors degree, both in criminal justice. He was a recipient of the political science excellence award from American International College; additionally, he is an adjunct professor (criminal justice departments) at Western New

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

England University and Holyoke Community College, and is an instructor for the Municipal Police Training Committee. During his employment with the LPD, Sgt. Valadas has performed many specialty assignments; there are 120 entries in his departmental training record. Sgt. Valadas served as Provisional Lieutenant for six months, ending in March 2014; he developed and implemented the Field Training Officer (FTO) Program, and he served as commander of the Department's Special Police Force, which, although comprised of volunteers, was a "department within the department," performing regular patrol functions and trained to the same standards as regular officers. (Testimony of Chief Madera; Exhibits 4 and 5)

7. Sgt. Irwin became a police officer in 2010. He served as a patrol officer in Longmeadow, Massachusetts for four years. He was ranked first in his class at the Western Massachusetts Regional Police Academy. Sgt. Irwin came to the Town of Ludlow in March 2014 as a patrolman and was promoted to sergeant in March 2016. He holds a bachelor's degree and a master's degree in criminal justice and was recognized as a summa cum laude student in both programs. Sgt. Irwin has held many specialized assignments throughout his career including field training officer, domestic violence coordinator, sexual assault investigator, field training officer, assistant court officer among others. (Testimony of Sgt. Irwin; Exhibit 3)

8. Throughout his career, Sgt. Irwin has availed himself of multiple and varied opportunities for specialized training including, among others, incident command, grant writing, use of force instructor, command training, child abuse and neglect and many others. (Testimony of Sgt. Irwin)

9. Following his promotion, Sgt. Irwin has regularly served as an acting lieutenant. This is because on the overnight shifts the scheduled shift sergeant was the senior ranking officer within the department on duty at least fifty per cent of the time and shared that same duty with another sergeant the balance of his weekly shift. (Testimony of Sgt. Irwin)

10. On June 19, 2018, the Board of Selectmen interviewed three candidates, including Sgt. Irwin and Sgt. Valadas. Prior to the interviews, the members of the Board received and reviewed the personnel packages of each candidate. (Testimony of Chief Madera; Exhibit 1)

11. The interviews were audio and video recorded. (Exhibit 1)

12. Each Board member asked their own questions of each candidate. There was no formal rating or scoring process used. (Testimony of Mr. DeBarge)

13. At the conclusion of the interviews, Chief Madera, who was present for the interviews, did not recommend any one candidate, but emphasized that the Board should take into consideration the candidates' level of experience, years of service and what they bring to the table in order to perform the duties of lieutenant on day one. (Exhibit 1; Testimony of Chief Madera)

14. With all three candidates present, each member of the Board of Selectmen stated his/her recommendation regarding who should be promoted to lieutenant. At times speaking directly to each candidate, the individual Board members provided specific reasons for their recommendation. The Board voted unanimously to promote Sgt. Valadas, the third-ranked candidate, to lieutenant. (Exhibit 1)

15. On July 25, 2018, the Town notified Sgt. Irwin of the reasons for his bypass. It was authored by the Human Resources Director who attended the interviews and deliberations of the Board. The reasons were:

- Lack of professional supervisory experience;
- The selected candidate brings 25 years of community knowledge;
- The selected candidate demonstrated progressive professional development;
- The selected candidate demonstrated organizational knowledge of the command structure and police operations. (Exhibit 2)

16. This appeal followed. (Stipulated Fact)

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass.256, 259 (2001), citing *Cambridge v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300, 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1.

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* at 304. 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).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions (*City of Beverly v. Civil Service Comm'n.*, 78 Mass. App. Ct. 182, 189, 190-191 (2010) citing *Falmouth v. Civil Serv. Comm'n.*, 447 Mass. 814, 824-826 (2006) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. *Beverly*. The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable

justification” shown. *Beverly* citing *Cambridge* at 305, and cases cited.

ANALYSIS

I listened carefully to the witness testimony and reviewed all of the exhibits, including the audio and video recorded interviews conducted by the Board of Selectmen and their public discussion at which time each Board member explained the reasons behind their recommendation. The process wasn’t perfect, but, generally, it was fair, uniform, impartial and refreshingly transparent.

The Board members appeared to carefully listen to and consider the responses of each candidate. They did not defer to, but, rather, gave appropriate consideration to the Police Chief’s recommendation regarding the need to give the candidates’ level of experience the most weight. Their public comments show that they did not simply decide to promote the candidate with more years of experience, but, rather, considered how Sgt. Valadas’s detailed and passionate responses demonstrated that he is more prepared and qualified for the position of lieutenant, the second-highest position in the Town’s Police Department.

The Board’s comments are supported by the audio and video recorded interviews that I reviewed. Sgt. Valadas’s responses showed a deep understanding of the history and current challenges of the Ludlow Police Department. Without hesitation, he was able to recount incidents that were directly related to the subject matter of the questions and the lessons he learned from each incident. Over a short period of time, he spoke positively of many other Ludlow police officers and their contributions, mentioning them specifically by name. He spoke with specificity about the duties and responsibilities of the operations lieutenant and how he would perform those duties, stressing the need to be a dependable and trustworthy leader.

I did consider that there was an 8-point differential in the scores between the two candidates, which is afforded significant weight by the Commission. Based on the facts in this particular case, however, the Board of Selectmen has shown that it had reasonable justification to bypass the two other higher ranked candidates. In short, Sgt. Valadas’s responses showed how his twenty-five years of experience and passionate commitment to the Department make him the best candidate for the position, providing the Board of Selectmen with reasonable justification to bypass the two other higher ranked candidates.

The Board’s high praise for Sgt. Irwin is also well supported by the record. His educational and professional background is impressive and he displayed a high degree of professionalism during these proceedings. The Town is fortunate to have someone of his caliber working in the Ludlow Police Department.

For all of the reasons stated above, the Appellant’s appeal under Docket No. G2-18-167 is *denied*.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 27, 2020.

Notice to:

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* * * * *

DAVID IZATT

v.

CITY OF CHICOPEE

D-20-010

February 27, 2020
Christopher C. Bowman, Chairman

Civil Service Commission Jurisdiction-Vacation Benefits-Collective Bargaining Agreement—An appeal by a reinstated Chicopee police officer over vacation benefits was dismissed for lack of jurisdiction as the subject matter fell squarely under the collective bargaining agreement.

ORDER OF DISMISSAL

On January 14, 2020, the Appellant, David Izatt (Mr. Izatt), a police officer in the City of Chicopee (City)’s Police Department, filed an appeal with the Civil Service Commission (Commission).

2. On the appeal submitted to the Commission, Mr. Izaatt stated that the basis of his appeal was that the City “refused vacation time after reinstated via c. 32.” He attached a denial of a Step 3 grievance from the City’s Mayor dated November 27, 2019 stating:

“As Mr. Izatt was previously fully compensated for his earned vacation time when he separated from the City’s employment in 2017 and he was not returned to service until the spring of 2019, he is not entitled to vacation time as claimed by the IBPO.

3. On February 12, 2020, I held a pre-hearing conference at the Springfield State Building in Springfield, MA which was attended by counsel for both parties. At that time, counsel for the City submitted a motion to dismiss, arguing that the Commission lacks jurisdiction over this matter, as it relates to a collective bargaining

issue regarding whether Mr. Izatt was entitled to certain vacation benefits in 2019.

4. At the pre-hearing conference, I heard oral argument from both parties regarding whether the Commission has jurisdiction over this matter.

ANALYSIS / CONCLUSION

The Commission does not have jurisdiction to hear this appeal. This is not a disciplinary matter and it does not relate to the discharge, removal, suspension; lowering in rank or compensation of Mr. Izatt.

Rather, it fits squarely into a collective bargaining issue related to if and when vacation time should have been accrued / credited to the Appellant.

For this reason, the City's Motion to Dismiss is allowed and the Appellant's appeal under Docket No. D-20-010 is hereby *dismissed*.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 27, 2020.

Notice to:

Karen Betournay, Esq.
NAGE / IBPO
1299 Page Boulevard
East Springfield, MA 01104

Thomas J. Rooke, Esq.
City of Chicopee Law Department
73 Chestnut Street
Springfield, MA 01103

* * * * *

MATTHEW McMANUS

v.

WALTHAM FIRE DEPARTMENT

G1-19-024

February 27, 2020

Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment as a Waltham Firefighter-Flawed Application Process-Untruthfulness—A flawed application process did not give this candidate for original appointment to the Waltham Fire Department an opportunity to address concerns about his arrest for DWI, placement in protective custody, or the conclusion that he had been untruthful and deceptive about these incidents. The majority also found it problematic that the bypass was based on unproven character flaws relating to drinking, racism, and disdain for law enforcement. Commissioners Bowman and Ittleman concurred that the Appellant warranted an additional opportunity for consideration but found that some of the underlying reasons for the bypass were supported by the evidence.

DECISION

The Appellant, Matthew McManus, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b), from his bypass for appointment as a Firefighter with the City of Waltham Fire Department (WFD).¹ A pre-hearing conference was held at the Commission's Boston office on September 4, 2018 and a full hearing was held at the Law Department of the City of Waltham on April 30, 2019 and May 11, 2019, which was digitally recorded.² Ten (10) exhibits (*Exhs. 1 through 9 & 11*) were received in evidence and one exhibit was marked for Identification (*Exh. 10*). I reserved *Exh. No. 12* to be submitted by Waltham after the hearing, but it was not received.³ As announced at the hearing, I have taken administrative notice of a Google® map of the Appellant's residence, marked as an additional exhibit (*PHExh. 13*).⁴ Proposed Post-Hearing Decisions were filed on October 8, 2019 by the WFD and on October 15, 2019 by the Appellant. For the reasons stated below, Mr. McManus's appeal is allowed.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Timothy Cadman, Police Officer, Waltham Police Department
- Scott Perry, Lieutenant, Waltham Fire Department

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of

the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

3. The document related to the application of one of the candidates who bypassed Mr. McManus. I draw no adverse inference, however, from Waltham's failure to produce the document. It would not change this Decision.

4. The neighborhood's geography is relevant to one of the disputed reasons stated in the WFD's bypass letter. (*Exh. 4*)

Called by the Appellant:

- Matthew McManus, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Matthew McManus, is a life-long resident of Waltham, MA. He resides with his parents in a home located on a wooded, sparsely populated dead-end street. (*Exhs. 3 & 13; Testimony of Appellant*).

2. Mr. McManus graduated from high school in 2008 and attended Nichols College and UMass Boston, where he earned 69 credits toward a Bachelor's Degree in Management. (*Exh. 3; Testimony of Appellant*)

3. While in college, Mr. McManus was involved in two alcohol-related incidents. In October 2009, he was found intoxicated in a dormitory stairway and fled from campus security officers who were then performing rounds. In February 2010, he had become intoxicated and engaged in a verbal argument with another student which required a campus security officer to intervene. In March 2010, Dudley police responded to a fist-fight between Mr. McManus and several others, in which Mr. McManus was kicked and his jaw broken. The police report indicated that assault and battery charges were going to be filed against McManus and one of the other parties, but no record of such charges appears on Mr. McManus's criminal record. (*Exh. 3*)

4. Mr. McManus works for a commercial construction company that performs site utility and related heavy construction work. Initially hired in 2005 as a laborer, he was recently promoted and currently holds the title of operator, which involves supervision of crews, dealing with "hazmat" abatement, as well as operation of heavy construction equipment (e.g., front-end loaders and large [12,000 lb.] excavators). He holds a Massachusetts Hoisting License and an Asbestos Abatement Supervisor's License. (*Exhs. 2 & 3; Testimony of Appellant*)

5. For about four years prior to his recent promotion to operator, Mr. McManus also held a second job with a towing company, where he operated a wrecking truck, towing over 1000 vehicles involved in break-downs, rollovers and other serious accidents. His assignment included covering accidents on the Mass. Pike, and required working side-by-side at accident scenes with State Troopers and municipal police and fire departments. (*Exhs 2 & 3, Testimony of Appellant*)

6. Both of Mr. McManus's employers are subject to the U.S. Department of Transportation mandatory drug testing protocols and have a zero-tolerance policy for alcohol and substance abuse. (*Testimony of Appellant*)

7. In September 2010, while still a minor, Mr. McManus was seen driving erratically in a residential neighborhood. The Waltham Police responded and administered a field sobriety test which he failed. He was arrested and taken into custody and, according to

the booking officer, yelled obscenities at him and was "arrogant and obnoxious." Although the booking officer stated that Mr. McManus "could not understand the OUI form even after I read it 3 times and he read it twice", he took a breathalyzer test and blew twice the adult legal limit. He was charged with DWI and required to complete a Youth Alcohol Program. In October 2010, after completing that program, his driver's license was reinstated and the criminal charges were continued without a finding for one year. The criminal case was dismissed in October 2011. (*Exhs. 2 & 3*)

8. In May 2012, Mr. McManus's father received a call from a friend of Mr. McManus (the Appellant), who had been drinking with him in a bar in Boston and said that the Appellant was too intoxicated to drive and needed a ride home. Mr. McManus (the father) drove to Boston and picked up his son (the Appellant). After they arrived home, Mr. McManus (the son) became angry and started acting out of control until he (the father) called the Waltham police. When the police arrived, Mr. McManus (the Appellant) was standing in the hallway with his back to the door and "screaming at the top of his lungs". He was escorted outside where he "started to calm down and stated that . . . he would cooperate with the Police." He was placed in protective custody and transported to the Waltham Police station, booked and placed in a cell. No criminal or civil complaints were issued. (*Exh. 3*)

9. In April 2016, Mr. McManus took the civil service examination for Firefighter and received a score of 100. He was placed on the eligible list established in November 2016 as the top scoring civilian candidate. (*Stipulated Facts; Testimony of Appellant*)

10. Mr. McManus's name appeared on Certification # 05032 dated October 27, 2017, issued by the Massachusetts Human Resources Division (HRD) to the WFD to hire a class of Firefighters. Mr. McManus's name appeared in 11th place, seventh in rank among the candidates who signed willing to accept appointment. (*Exh. 1*)

11. Mr. McManus attended an orientation for candidates held by the WFD at which he learned that the WFD application consisted of two parts, a 21-page application including 45 questions about his education, employment, personal relationships and references; and a second Supplemental Information form containing 42 additional questions about his personal life, criminal history, civil court cases and income tax filings. The first part was to be returned with all required documentation on or before November 20, 2017; the second part would be provided to the Waltham Police Officer later assigned to perform a background investigation of his application. His background interview date was his "Amnesty Day" and, if he discovered that he had made any mistakes in his application, he would be allowed to correct them at the interview and the mistakes would not be held against him. (*Testimony of Appellant*).

12. Mr. McManus completed the first part of the application and returned it to the WFD on or about November 16, 2017. Question 29 in the application asked "Has your license ever been suspended or revoked," to which he answered: "YES" and stated, the "rea-

son(s) for revocation” as “OUI resulted in a CWO in September 2010.” (*Exh. 2*)

13. The first part of the application contained several pages of disclosures, disclaimers and waivers, Most needed to be signed before a notary. These documents included the following:

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“I MATTHEW MCMANUS do hereby authorize a review of and a full disclosure of all records and information, or any part thereof, concerning myself, by and to any duly authorized agent of the Waltham Fire Department, where the said records and or information are public, private or confidential [in] nature.”

“The intent of this authorization is to give my consent for a full disclosure of any and all records and information . . . which may provide pertinent data for the Waltham Fire Department to consider in determining my suitability for employment by the Waltham Fire Department, including but not limited to . . . records of complaints, arrest, trial and/or convictions for alleged or actual violations of the law, including criminal, civil and/or traffic records . . . and to include the records and recollections of attorneys at law or other counsel, whether representing me or another person . . .”

I agree to indemnify and hold harmless the Waltham Fire Department . . . and its agents and employees, from and against all claims . . . arising out of or by reason of complying with this request.”

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“CORI REQUEST FORM. Waltham Fire Department has been certified by the Criminal History Systems Board for access to convictions and pending criminal case data. As an applicant/employee for the position of Firefighter I understand that a criminal record check will be conducted for convictions and pending criminal case information only and that is [sic] will not necessarily disqualify me.”

(*Exhs.2 & 3*) (*emphasis added*)

14. On January 17, 2018, Mr. McManus was interviewed by a five-member committee consisting of a WFD Fire Captain, two WFD Fire Lieutenants, a WFD Firefighter and the City of Waltham HR Director. A video recording of the interview was introduced into evidence. The interview, lasting approximately 35 minutes, followed a semi-structured format, with panel members asking several “stock” questions as well as engaging in personal colloquy particular to each candidate. The committee had the first part of Mr. McManus’s application, but his background interview had not been conducted and they did not have the Supplemental Information form. (*Exh. 7A; Testimony of Appellant & Lt. Perry*)

15. Toward the end of the interview, Mr. McManus was asked: “What do you want us to know, good or bad, that isn’t in the application” and “might come up in the background investigation”. Mr. McManus mentioned that, in high school, he did get disciplined a lot. (*Exh 7A; Testimony of Appellant & Lt. Perry*)

16. None of the committee members asked Mr. McManus about the DWI disclosed on the application or asked anything about his drinking habits, past or present. Mr. McManus (and each other candidate) was told that, after the background investigation was complete, candidates “may or may not” be called back if there were additional questions but, whether or not he was called back or whether others were called back and he was not, he shouldn’t read anything positive or negative about his status from that. (*Exh. 7A & 7B*)

17. On January 29, 2018, Waltham Police Officer Timothy Cadman conducted a background interview with Mr. McManus. Prior to the interview, Officer Cadman performed a criminal history check and obtained a number of incident reports from the Waltham Police Department and other law enforcement agencies. (*Exh.3; Testimony of Appellant & Officer Cadman*)

18. At the outset of the interview, Mr. McManus was asked to review the first part of the application packet he had submitted and was told that he could make any changes or corrections prior to beginning the interview. Mr. McManus said that the application was accurate, which it was. (*Exh. 3; Testimony of Appellant & Officer Cadman*)

19. Mr. McManus then provided Officer Cadman with his completed Supplemental Information form. Upon reviewing it, Officer Cadman saw that Mr. McManus checked off “NO” to a question that asked if he had ever been placed in “protective custody for alcohol.”⁵ Having already obtained the Waltham Police incident report on that matter, Officer Cadman asked Mr. McManus about the discrepancy. Mr. McManus apologized for the omission, stating that “he and his father have not talked about the incident since” and he had forgotten about it. (*Exh. 3; Testimony of Officer Cadman*)

20. Officer Cadman had Mr. McManus complete the following handwritten statement which he attached to the application packet and noted in his report, without comment:

“I am writing this to acknowledge that I made a mistake on my application because I forgot that I had been placed in protective custody in 2012 due to an argument with my dad. I blocked out this incident because it is not one of my proudest moments in life.”

(*Exh. 3; Testimony of Appellant & Officer Cadman*)

21. Officer Cadman formed an opinion that Mr. McManus “appeared to be forthcoming and honest.” He reported: “When discussing details about his operating under the influence arrest, he appeared remorseful and it was apparent to me that he took the matter seriously. He answered all my questions without hesitation.” (*Exh.3; Testimony of Officer Cadman*)

22. Officer Cadman also interviewed Mr. McManus’s father and learned that the May 2012 incident was the “one and only time

5. This question was one in a series of eight questions which asked him to disclose whether he had ever been convicted of a felony, misdemeanor or “sexual offense”, had any criminal charges pending, or was ever imprisoned after conviction for a

crime, the subject of a c.209 restraining order or currently on parole or probation. (*Exhs. 3 &5*)

Matthew has ever acted that way” and that “he hardly sees his son drink anymore.” (*Exh. 3; Testimony of Officer Cadman*)

23. Officer Cadman conducted a phone interview with a former girlfriend identified in the application (who Mr. McManus started dating in high school). She never knew him to use illegal drugs and said he “drank like a normal college kid.” She has not stayed in touch since they broke up in 2009 but said that “while he was growing up”, he had “problems with people who were not white Americans” or who were “different from him”. She could not give any specific examples. (*Exh. 3; Testimony of Officer Cadman*)⁶

24. Officer Cadman also came across a 2014 Beverly Police incident report about an altercation involving Mr. McManus, his current girlfriend (Ms. A) and neighbors in her apartment’s elevator. The neighbors alleged that Mr. McManus called them out, using the “n” word. Mr. McManus admitted that there had been an argument, but adamantly denied ever using racist comments. The police report notes that Ms. A’s “child [from a former relationship] is biracial.” The responding officers filed a report but took no other action. (*Exh. 3*)

25. Officer Cadman interviewed Ms. A, who has been dating Mr. McManus for about 5 years. They have one daughter together for whom Mr. McManus is a “wonderful father”. She also confirmed that she has an 11-year old daughter from a prior relationship who is bi-racial and “Mr. McManus is great with her as well.” (*Exh. 3*)

26. Asked about the 2014 Beverly incident, Ms. A took responsibility for getting angry with the neighbors, which she attributed to anxiety about her pregnancy (she delivered the next day). Mr. McManus actually intervened to diffuse the situation. Neither of them used any racist language. She has never heard Mr. McManus use negative language about another person’s race, gender or sexual orientation. She would not be with him if that were the case. (*Exh. 3*)

27. Officer Cadman’s background investigation produced positive interviews with every one of more than two dozen persons, including several law enforcement officers, a former college roommate (who is Hispanic), past and current employers and co-workers (including one African-American who called Mr. McManus a “close friend” and “stand-up guy” without “any negative feelings about anyone based on race”), as well as other personal references and neighbors. (*Exh. 3*)

28. Officer Cadman had several follow-up conversations with Mr. McManus after his initial interview. He “spoke at length” with Mr. McManus about the Beverly incident. Mr. McManus confirmed that the argument was between his pregnant girlfriend and a female party in the elevator. He denied that he or his girlfriend ever used any racial remarks. (*Exh. 3; Testimony of Appellant & Lt. Perry*)

6. When Officer Cadman spoke on the phone with the former girlfriend’s mother, she called Mr. McManus “a sweetheart” and a “hard worker” who always “treated her daughter with respect” and would recommend him for hire by the WFD. (*Exh. 3; Testimony of Officer Cadman*)

29. In his final report 23-page report dated February 20, 2018, Officer Cadman concluded:

“While performing the background investigation of Mr. McManus, I found him to be very responsive and quick to do anything I asked of him. He appeared to be very honest and forthcoming at all times that we spoke.”⁷

“After speaking with Mr. McManus, his girlfriend, his family and his friends and co-workers I have found nothing that led me to believe that he is a racist, sexist or is in any way prejudice [sic] against anyone. I spoke to people of different backgrounds and who have known Mr. McManus at different points of his life. They all described him as being friendly, nice and easy going. Besides his ex-girlfriend, no one mentioned anything about Mr. McManus having any sort of prejudice. I spoke with several people who are in law enforcement who know Mr. McManus personally. No one had anything negative to say about him and no one thought that he had any negative views on anyone based on race, gender or sexual orientation.”

“All of Mr. McManus’s co-workers described him as being extremely hard working and family oriented. He is usually the first one to the job site each day and appears to be respected amongst his peers and supervisors. Mr. McManus holds two (2) jobs and appears to be excelling in both.”

“In my opinion, Mr. McManus had an issue with alcohol when he was younger which led him being in several difficult situations. He has admitted to his mistakes and has said that he has learned from them. Since 2012, Mr. McManus has not received a traffic citation or been in trouble with law enforcement. He appears to be family driven and doing his best to achieve his goal of becoming a firefighter or police officer.”

(*Exh 3 (emphasis added); Testimony of Officer Cadman*)

30. The WFD ultimately appointed seven candidates to the position of Firefighter from Certification #0503, one candidate who was ranked above Mr. McManus and six candidates from the 13th tie group ranked below him. The higher ranking candidate and two of the lower-ranked candidates were appointed on October 29, 2019; one lower-ranked candidate was appointed on November 7, 2018; the remaining candidates were appointed on December 2, 2018. (*Exhs. 1 & 11*)

31. As of November 15, 2018, at least four of the candidates had started their training at the Massachusetts Firefighting Academy. (*Exhs. 8 & 9*)

32. By letter dated December 3, 2018 to Mr. McManus from the Waltham Human Resources Director, he was informed that “[t]he hiring committee had very difficult decisions to make, and, in the end, I regret to inform you that you were not selected for hire.” (*Exh. 4*)

33. Attached to the December 3, 2018 letter was a letter dated November 28, 2018 entitled “Certification #05032 - PAR.09

7. At the Commission hearing, Officer Cadman testified that, his report notwithstanding, he found it “hard to believe” that Mr. McManus would have forgotten being placed in a jail cell. I gave that statement some, but diminished weight compared to the contemporaneous opinions provided in his written report. (*Testimony of Officer Cadman*)

Removal Request” addressed to HRD’s Civil Service Unit.⁸ The letter was drafted by WFD Lt. Scott Perry after a discussion among the five members of the interview panel and, then, presented by the Fire Captain who headed the interview committee for signature by WFD Fire Chief Thomas MacInnis. There was no evidence as to when the committee reached its final conclusion or when the letter was drafted. No other documentation was known to have been provided to Chief MacInnis. (*Exh.4; Testimony of Lt. Perry*)

34. The November 28, 2019 letter stated that the WFD “is bypassing, non-selecting applicant Matthew McManus from Certification #05032 for appointment to the Waltham Fire Department” for the following specific reasons:

Omissions/Veracity . . . “[E]ach applicant is asked if there is anything not listed on the application that may turn up during the background investigation, good or bad, that the [hiring committee] board should know about or anything the applicant would like to explain. The question is designed to afford the interviewee . . . an opportunity to offer a description or explanation for anything negative that may come up during the background investigation. [Mr. McManus] confidently stated, “No”. However, during the background investigation, it was revealed that in May of 2012 Mr. McManus had been placed in police protective custody due to being intoxicated and creating a public disturbance, a fact that Mr. McManus failed to mention during the interview. . . . This omission . . . was gleaned and discussed during the initial meeting with his assigned background investigator. When asked about this omission, Mr. McManus stated he was extremely ashamed of the event but also stated that he simply forgot about the protective custody incident. . . .”

[Quoting the background investigator’s report in which he reports that Mr. McManus had “blocked it out of his memory” and “apologized for the omission”]

“The omission during the hiring committee interview gives the impression of being intentional and deceiving. To say it was an embarrassing moment in your life and then say you forgot about it appears to be both contradictory and contrived. Further, to compound this by deliberately answering, “No” when asked directly about protective custody demonstrates an intentional deception on Mr. McManus’s part so as to not provide a negative image of himself.”

Conduct not Becoming, Maturity and Character . . . “Another area of concern is Mr. McManus’s lack of accounting for an OUI arrest. Mr. McManus was involved in [a] motor vehicle crash where he drove off the road while intoxicated. The background investigator asked Mr. McManus about this incident and Mr. McManus stated that he made a huge mistake and he learned from it. Operating a motor vehicle while intoxicated [sic] is concern enough especially for persons who would be responsible for operating oversized, extremely heavy fire apparatus during emergency situations. However, the police accounting of Mr. McManus’s attitude and conduct during this arrest brings about further concern.”

[Quoting the booking officer’s observations about Mr. McManus’s arrogant, obnoxious and obscene behavior while being booked]

“Police, Fire and EMS are all public servants working side-by-side with each other. A requisite level of [sic] trust and respect between these branches of public service must exist and is required to mitigate various challenging incidents every day. Mr. McManus’s comments during booking demonstrate a particular bias against law enforcement, one which could be viewed as problematic for a public servant.”

“Still, adding to the concern is the timing of the aforementioned and omitted intoxication/public disturbance protective custody episode. . . . approximately six months (6) months after the OUI continuance tolled. Mr. McManus’s actions contradict his statement that he learned from his mistake. It appears the lessons of the OUI were not heeded.”

“Another troubling issue pertaining to Mr. McManus’s character which revolves around statements by a background reference who mentioned Mr. McManus may have issues with differing cultures.”

[Quoting background investigation report of telephone interview with former girlfriend]

(*Exh. 4*)

35. At the Commission hearing, Lt. Perry (the only committee member to testify) explained that, the November 28, 2018 letter intentionally listed only negative concerns about Mr. Manus that the committee “as a group” had agreed upon as reasons for the bypass because he understood that was what civil service bypass rules required. The committee made no record of its assessment, took no formal vote, and Lt. Perry could not recall the specific views, positive or negative, of any particular committee member. Speaking solely for himself, his opinions were as follows:

- Neither the DWI nor protective custody incident or any other “youthful indiscretion” was “in and of itself”, disqualifying.
- The conduct that refuted Mr. McManus’s claim that he had “learned his lesson” included his silence during the committee interview about the DWI and the protective custody incident when asked by the committee if there was “anything they should know about him”, and lying about the 2012 protective custody incident on the Supplemental Information form. Lt. Perry also took into account that he believed the protective custody incident had involved a “public disturbance”, as stated in the bypass letter, and believed that, had it been a few months earlier, while Mr. McManus was still serving his one-year “continuance”, the CWOFF would have been changed to a conviction.
- Mr. McManus’s conduct while being booked in for DWI in 2010 also showed another “troubling” character flaw, namely, a “bias against law enforcement” which “could be viewed as problematic”, making it hard for him to be respected by police officers with whom he would be required to work in responding to emergency calls. However, when asked how Mr. McManus could be held accountable for behavior in custody while extremely intoxicated, Lt. Perry did not have any clear explanation. He conceded that Mr. McManus’s intoxication was a factor that could “tip the balance” and explain why his behavior might not equate to intentional bias.
- Mr. McManus’s explanation that he had forgotten about the protective custody incident until Officer Cadman brought it up was “potentially” true, but Lt. Perry disbelieved it because he “assumed” Mr.

8. There was no evidence that HRD received the November 28, 2019 letter or took any action on it. Insofar as the letter was intended to request a PAR.09 removal, or

if HRD had done so, that action would now be moot because the relevant eligible list expired prior to the bypass.

McManus would have researched all the Waltham Police incident reports and must have seen the protective custody report before he completed his application.

- As far as the alleged character flaw that Mr. McManus was, in effect, a bigot, Lt. Perry did not, personally, share that opinion, nor could he identify any other committee member who supported that finding.
- The decision was not based on any single negative factor, but on the “general gist” of the “totality” of all of them.

(*Testimony of Lt. Perry*)

36. Two other candidates (from the 13th tie group) who bypassed Mr. McManus were not disqualified despite incidents that reflected patterns of immaturity and disregard for the law.

- Candidate A, was charged in 2012 with disturbing the peace, after police responded to an “out-of-control” house party in progress. He was taken into protective custody in 2013 after becoming intoxicated at a music concert and causing a public disturbance. In 2016, police found him fishing with friends on land he “knew they were not supposed to be on”, and the officers “took their information”, but Candidate B claimed he “never knew that [he] had been summoned to court for trespassing.” (*Exh. 6A*)
- Candidate B admitted to being a regular marijuana user for years. He was the subject of three substance abuse incident reports while in college during 2011-2012. He was put on academic probation and later dropped out of school. He also dropped out of another college in 2014 because he still “wasn’t driven to succeed”. He had several driving citations, including a 2010 citation for leaving the scene of an accident. He said the “light went off” in 2016 after deciding to become a firefighter and that turned his life around. One of his references, who knew him his entire life, thought he “had issues dealing with his immaturity and purpose in life and it’s taking him a long time to grow up.” The background investigator also noted: “It appears on the surface that [Candidate B] did in fact have a time period of immaturity; irresponsibility and uncertainty . . .” (*Exh. 6B*)

37. During the Commission hearing, Lt. Perry was asked why (in the nine months between the background interview and the bypass) Mr. McManus was not invited back for a follow-up interview with the committee to allow him to address matters uncovered during the background investigation. Lt. Perry said, if the committee had called Mr. McManus back, they would have to have called all other potentially bypassed candidates back as well. (There were five candidates ranked above Mr. McManus). He claimed that the committee lacked the time or the resources to conduct all those additional interviews. (*Exh. 1; Testimony of Lt. Perry*)

38. At the Commission hearing, Mr. McManus renewed his denial that failure to disclose his 2012 protective custody incident on the application was an intentional or deceitful concealment. He stood by his statements to the background investigator that the episode was never mentioned at home, that he had totally forgot about it until the background investigator reminded him of it and the omission was an oversight. He knew that the Waltham Police Department would generate and maintain an incident report on every call. (*Testimony of Appellant*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, §1. *See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); *MacHenry v. Civil Serv. Comm’n*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den.*, 423 Mass. 1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L. c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons - positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L. c. 31, §2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. *Boston Police Dep’t v. Civil Service Comm’n*, 483 Mass. 474-78 (2019); *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Service Comm’n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’” *Brckett v. Civil Service Comm’n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere v. Civil Service Comm’n*, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”)

Appointing authorities are vested with discretion in selecting public employees of skill and integrity. The commission “cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority” but, when there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy,” then the occasion is appropriate for intervention by the commission.” *City of Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 426 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L. c. 31, §2(b), also gives the

Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action"; it is not necessary for the Commission to find that the appointing authority acted "arbitrarily and capriciously." *Id.*

ANALYSIS

The WFD's bypass of Mr. McManus was the product of a flawed application process and is not reasonably justified as required by basic merit principles. The WFD did not conduct an accurate, reasonably thorough, impartial review of the critical facts and circumstances relevant to his suitability; it did not give him fair notice and opportunity to address their concerns; and it did not prove by a preponderance of the evidence that Mr. McManus was intentionally untruthful about his past, that Mr. McManus has a bias against law enforcement or that he may harbor racial and ethnic prejudice.

The Application Process

Massachusetts law imposes specific limitations on an employer's ability to access and use information about the criminal history of a candidate for employment. G.L. c. 151B, §4(9) and §4(9½), contained within the state's antidiscrimination law and applicable to both private and public employers, prohibits an employer from asking a candidate to disclose information about his criminal record save for certain enumerated offenses. That statute makes it unlawful:

"For an employer, himself or through his agent, in connection with an application for employment . . . or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred 3 or more years prior to the date of such application for employment or such request for information"

"No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection."

...

"For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for

which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses;"

Id. See G.L. c. 151B, §1 ("The term 'employer' . . . shall include . . . the commonwealth and all political subdivisions, boards, departments and commissions thereof.")

The Commission has been clear that no public employer is exempt from the requirements of this law and, specifically, that "broad questions . . . designed to obtain information from the applicant, beyond what is provided for under Chapter 151B, are not permissible." See *Kodhimaj v. Department of Correction*, 32 MCSR 377 (2019) and cases cited. Thus, an employer may ask a candidate about a specific matter which came to the employer's attention through an independent lawful source other than the candidate.⁹ However, no employer may directly or indirectly, ask a candidate for employment to disclose information about prohibited matters contained within G.L. c. 151B, §4 and may not charge him or her with untruthfulness for failing to volunteer such a disclosure. Compare *Kraft v. Police Comm'r of Boston*, 410 Mass. 455 (1991) (police officer could not be terminated for providing a false answer to a prohibited matter (medical condition) covered by G.L. c. 151B, §4); *Kerr v. Boston Police Dep't*, 31 MCSR 25 (2018) (BPD impermissibly disqualified candidate for untruthfulness who answered "NO" to the question: "Is there anything not previously addressed that may cause a problem concerning your possible appointment as a police officer?") with *Bynes v. School Comm. of Boston*, 411 Mass. 264 (1991) (school committee lawfully obtained CORI information independently, not from employee); *Ryan v. Chief Admin. Justice*, 56 Mass. App. Ct. 1115 (2002) (information about a 209A restraining order reported in the media)

Second, when an employer intends to use negative information about a candidate lawfully obtained about the candidate's criminal record, the law also requires that the candidate be informed of that intention, provided a copy of the relevant documentation on which the employer relies, and be afforded an opportunity to address the information. See *Kodhimaj v. Department of Correction*, 32 MCSR 377 (2019) citing G.L. c. 6, §171A and Governor Patrick's Executive Order 495, "Regarding the Use and Dissemination of Criminal Offender Record Information by the Executive Department" (2008).

The WFD's application process that led to the decision to bypass Mr. McManus did not comply with these requirements. He was expected to elaborate at the committee interview on the facts and circumstances surrounding his arrest for DWI, as to which no conviction resulted, in response to a broad, subjective question and without being provided a copy of the documentation that the WFD relied upon. He was then considered untruthful for not addressing the arrest, an inference that the law expressly prohibits the WFD from drawing.

9. I note that "criminal justice agencies", such as police departments, are authorized to access a broader scope of CORI information than typical employers. G.L. c. 6, §172. Although, here, the WFD delegated to the Waltham Police Department responsibility to conduct its criminal background checks, the key information involved in this appeal comes from police incident reports available to any employer.

Thus, I did not consider that open question in this appeal, which would have arisen if the CORI information were available only to a criminal justice agency, as to whether the law permits the Waltham Police Department to share such specialized CORI information that would not otherwise be lawfully available to the WFD.

Although the WFD may have correctly accessed Mr. McManus's DWI criminal history, if it wanted to use information about his arrest to make an adverse decision about his suitability, it still needed to apprise him specifically of what it intended to rely and afford him an opportunity to address them. The WFD's failure to do so taints the process and requires that Mr. McManus be afforded a further consideration in compliance with this requirement. I do not accept the WFD's explanation it did not have the time or resources to call Mr. McManus in for a follow-up interview and, therefore, be excused from complying with these requirements of the law.

The WFD's right to rely on Mr. McManus's "untruthful" response to the question on the supplemental application about whether he was ever "taken into protective custody for alcohol" is a closer call. As the Appellant points out, detention of an individual in protective custody is an action taken for the safety of a person in "need of medical assistance"; it is not considered an "arrest" and the person so detained "shall not be considered to have been charged with any crime." G.L. c. 111B, §8. Thus, on the one hand, protective custody fits expressly within a definition of "detention . . . in which no conviction resulted" under G.L. c. 151B, §4(9) (i); on the other hand, it is not a "detention . . . regarding any violation of law . . ." I do find relevant that the question appears in the WFD's supplemental application in the section devoted primarily to other impermissible disclosures about an applicant's criminal history. The question is further complicated by the express provision in the civil service law that bars public employment, or retention in public employment, of any person who is "habitually using intoxicating liquors to excess." G.L. c. 31, §50.

On balance, I agree that alcohol abuse is relevant to the suitability of a candidate for public employment, especially for a public safety position. It is also true that the police incident record of a protective custody action is available to any employer. Thus, while requiring an applicant to voluntarily disclose a prior protective custody seems to be prohibited by the spirit and, possibly, the letter of Chapter 151B's protections (including absolute exclusion of first offenses for drunkenness and all convictions more than three years old), the strong public policy regarding workplace substance abuse tends to support a rationale for allowing inquiry into this particular type of non-criminal behavior.¹⁰ I also find troubling that the WFD's application process did not document and ensure that all relevant information about Mr. McManus, both positive and negative, was shared with the final decision maker, i.e. the Fire Chief, who received only a recommendation that he be bypassed, supported by a letter stating the negative aspects in his background. It does not appear that the Fire Chief was ever provided with any of the extensive positive facts about Mr. McManus, including, among other things, a background investigator's findings that Mr. McManus was forthcoming, truthful and honest, that he had learned from his past mistakes and presented a clean record with no other criminal or driving infractions since 2010, no

subsequent alcohol related incidents save for the one in 2012, and an extensive and positive record of employment, including two jobs which included responsibility to operate heavy motor vehicles, work alongside public safety personnel (who recommended him highly), and adhere to a "zero tolerance" policies for alcohol and substance abuse. As a general rule, basic merit principles require that a bypass decision be based on a thorough review of all of the relevant facts by the appointing authority. As noted below, the obligation to weigh carefully and thoroughly all positive facts along with negative ones becomes especially imperative when the bypass reasons include potentially career-ending charges such as presented here.¹¹

Finally, I address the Appellant's procedural argument that the timing of Mr. McManus's bypass, which apparently post-dated the appointment of at least some of the candidates who bypassed him, violates civil service procedure requiring that a bypassed candidate must be informed "immediately" when a decision to bypass him or her is made, that no appointment of any other candidate of lower rank is permitted until such notice is given, and that this violation automatically requires allowing Mr. McManus's appeal, citing G.L. c. 31, §27 as interpreted by the decision of the Superior Court (Wilkins, J.), in the case of *Otero v. City of Lowell*, Suffolk No. SUCV2016-3429 (Sup. Ct. 2019). The Commission has not applied the ruling in the *Otero* case, a promotional bypass appeal, to any other bypass appeal and, as there are other reasons to allow this appeal, the Commission need not consider the Appellant's *Otero* argument at this time.

Untruthfulness

The WFD claimed that Mr. McManus was intentionally untruthful and deceptive during the application process in two respects: (1) he was not forthcoming with the interview committee about his DWI and protective custody incidents, and (2) he answered "NO" to the supplemental question about protective custody. Putting aside the legal issue addressed above, as to whether imputing untruthfulness for those reasons is prohibited as a matter of law, the WFD's claim also fails because neither claim of untruthfulness was proved by a preponderance of the evidence.

To be sure, an appointing authority is entitled to bypass a candidate who has "purposefully" fudged the truth as part of the application process. *See, e.g., Minoie v. Town of Braintree*, 27 MCSR 216 (2014). However, providing incorrect or incomplete information on an employment application does not always equate to untruthfulness. "[L]abeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and [informed] review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety." *Kerr v. Boston Police Dep't*, 31 MCSR 35 (2018), citing *Morley v. Boston Police Department*, 29 MCSR 456 (2016)

10. Although there is no legal impediment to including the protective custody question on the application, this conclusion does not change this decision, as I find below that, as a substantive matter, neither Mr. McManus's written response to the question, nor his failure to bring up the issue during his committee interview, were intentional or deceptive.

11. A bypass letter is available for public inspection upon request, so the consequences to an applicant of asserting serious misconduct in a bypass letter can extend beyond the original bypass. *See* G.L. c. 31, §27, ¶2.

As the Commission explained in *Kerr, supra*, a charge of untruthfulness becomes especially problematic when it derives from a candidate's non-disclosure of information in response to the very type of broad question relied on by the WFD here:

The final question on the student officer application that BPD considered as part of this bypass asks: "Is there anything not previously addressed that may cause a problem concerning your possible appointment as a police officer?" The BPD found Mr. Kerr's "no" answer to this question was untruthful, citing his arrests in high school for offenses of minor in possession of alcohol and driving without a license, as well as his reprimand from the Marines. First, this question is highly subjective and provides no guidance as to what may be considered a problem concerning possible appointment. For example, for many of the reasons previously cited, Mr. Kerr could have reasonably concluded that one (1) 'administrative remark' while serving in the United States Marines would not 'cause a problem concerning [his] possible appointment as a police officer.' Rather, Mr. Kerr could have (rightfully) concluded that his exemplary service in the military would be beneficial to the Boston Police Department, as opposed to being a "problem". Similarly, Mr. Kerr could have reasonably concluded that arrests in high school, prior to his military service, would not 'cause a problem' concerning his appointment as a police officer." (*emphasis added*)

Thus, in addition to the question being improper, Mr. McManus cannot be charged with untruthfulness for not bringing up his DWI or protective custody at the committee interview in response to such a subjective and ambiguous question. Indeed, when these subjects later came up in the background interview, Mr. McManus answered all relevant questions "without hesitation".

The second instance of alleged untruthfulness, i.e., Mr. McManus's state of mind in answering "NO" to the written question about protective custody, is a separate matter. At the Commission hearing, Lt. Perry agreed that it was a close call and that Mr. McManus's statement that he had simply forgotten the incident "potentially" could be true. In deciding this close question, neither the committee nor the appointing authority had the benefit, as I did, to assess Mr. McManus's credibility when he testified under oath, to observe his demeanor as he credibly withstood rigorous cross-examination, and to thoroughly review the evidence corroborating that testimony provided by the background investigator and the law enforcement references and others he interviewed, all of whom vouched for Mr. McManus's good character.

In sum, the preponderance of the evidence persuades me that Mr. McManus's omission was, as he testified, an oversight, and not, as the bypass letter claimed, an intentional deception "so as to not provide a negative image of himself." I credit the consensus of all those who knew him, including the background investigator who described Mr. McManus as "forthcoming", "honest" and "trustworthy". He took full responsibility for the serious lapse of judgment that resulted the more serious criminal DWI charges against him. I cannot reconcile his truthfulness and candor in being fully forthcoming about that criminal matter with an allegation that he

intentionally tried to hide having too much to drink while out socially with friends and, then, "cooperating" with police when he was placed in protective custody.¹² I also credit Mr. McManus with knowing the risk of lying and knowing that there would be a record of every encounter with the Waltham police. He is too savvy to think he could hide such information from the police investigator or the WFD.

Character and Immaturity

The WFD's bypass letter asserted that Mr. McManus possessed three disqualifying character flaws: (1) a "lack of accounting for an OUI arrest", specifically, his "attitude and conduct during this arrest" which suggested a "bias" against law enforcement; (2) the "timing and omitted intoxication/public disturbance protective custody episode . . . contradict[s] his statement that he learned from his mistakes" and proved that the "lessons of the OUI were not heeded"; and (3) "Mr. McManus may have issues with differing cultures." These disputed facts must be considered under the "preponderance of the evidence" standard of review as set forth in the SJC's recent decision in *Boston Police Dep't v. Civil Service Comm'n*, 483 Mass. 461 (2019), which upheld the Commission's decision to overturn the bypass of a police candidate, expressly rejecting the lower standard espoused by the police department.

"[T]he department may not rely on demonstrating a "sufficient quantum of evidence" to substantiate its "legitimate concerns" about the risk of a candidate's misconduct. . . . Instead, it must, as required by G.L. c. 31, §2(b), demonstrate reasonable justification for the bypass by a preponderance of the evidence."

Id., 483 Mass. at 333-36.

As to the issue of "bias" against law enforcement, the WFD relies on the statements of the booking officer that Mr. McManus swore at him and was "arrogant and obnoxious" during his DWI booking. Mr. McManus did not expressly dispute this evidence because he does not specifically recall his behavior while in custody, which is likely, as he was, by all accounts, then highly intoxicated (twice the legal limit). Indeed, the booking officer confirmed how severely incapacitated and mentally disoriented Mr. McManus was during his booking. Yet, the WFD proffered no other evidence apart from Mr. McManus's inebriated behavior on this one occasion to support the allegation in the bypass letter that Mr. McManus's behavior then, or at any other time, evidenced a "bias" against law enforcement. Moreover, there is considerable evidence to the contrary.

For example, the background investigator found Mr. McManus was "forthcoming" and "remorseful" about the DWI incident and "took the matter seriously". He "took responsibility for his actions", admitted he was "an idiot" who had made a "huge mistake" and "now hardly drinks at all" (the latter fact confirmed to the background investigator by others and in Mr. McManus's testimony to the Commission). As the testimony and the background investigation also confirmed, Mr. McManus holds an unblem-

12. I find no nexus between the DWI and the protective custody incidents, or any basis to believe that the protective custody would have turned the DWI into a conviction had it occurred a few months earlier, as Lt. Perry assumed. In fact,

until the May 2012 incident, Mr. McManus had no further driving infractions or drinking incidents.

ished criminal and driving record since 2010. Finally, of particular significance to the issue of police “bias”, Mr. McManus has held a job as a tow-truck operator, which involved 1000 vehicle tows, working side by side with State Troopers, municipal police and fire department first responders, some of whom were interviewed and all gave positive references.

Similarly, the WFD’s interpretation of the protective custody incident rests on material errors of fact that distort the severity of that incident. It did not involve a public disturbance as the bypass letter alleged, but was confined to the McManus residence located on secluded property. There was no evidence that any neighbors or any other member of the public took notice. Also, no evidence supports Lt. Perry’s assumption that protective custody is equivalent to a violation of the terms of his DWI continuance and would have converted his CWOFF into a conviction.

The WFD is certainly entitled to consider indicia of a candidate’s character, but not without making an accurate, impartial and thorough review of the facts, including the considerable evidence over an eight year period following the DWI and protective custody incidents that detract from a conclusion that Mr. McManus is “biased” against law enforcement or cannot be trusted not to drink and drive. Moreover, there were at least two successful candidates ranked lower than Mr. McManus who presented with records of disregard for the law, substance abuse and other indicia of even more recent immaturity, who, inexplicably, unlike Mr. McManus, were hired despite that evidence.

In sum, the preponderance of evidence presented to the Commission showed that the WFD’s bypass decision was made without the required accurate, impartial and thorough review of the relevant facts by the appointing authority and falls short, both as a matter of law and for lack of the quantum of proof needed to support its conclusion that Mr. McManus had not been forthcoming about his drinking behavior or that he harbored a “bias” against law enforcement, two of the three stated reasons used to bypass him.¹³

Similarly, the WFD’s third contention that Mr. McManus harbors racial and ethnic animus was not proved. This claim is based solely on multi-layer hearsay attributed a former girlfriend of Mr. McManus who last saw him in 2009 and could offer no specific examples. The background investigator actually did make a thorough review of this suspicion and found it was not true. The overwhelming evidence to that effect is stated in the findings of fact and will not be repeated here. I add only that Mr. McManus learned of this accusation when he received the bypass letter. I find it especially disappointing that the WFD included such a thinly supported charge in a bypass letter that is available for public inspection without giving Mr. McManus the courtesy of a follow-up interview and the opportunity to preserve his good name.

In sum, Mr. McManus was bypassed without reasonable justification. His application process was fatally flawed and the reasons for his bypass were not proved by a preponderance of the evidence. He deserves another opportunity to be considered for appointment as a WFD Firefighter under circumstances consistent with basic merit principles as outlined in this Decision.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Matthew McManus, is allowed.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/or the Waltham Fire Department in its delegated capacity take the following action:

- Place the name of Matthew McManus at the top of any current or future Certification for the position of Firefighter with the Waltham Fire Department (WFD) until he is appointed or bypassed after consideration consistent with this Decision.

OPINION OF COMMISSIONERS BOWMAN AND ITTLEMAN

We concur with the conclusion that the Appellant should be afforded one additional opportunity for consideration, but for more limited reasons than outlined by Commissioner Stein. We agree that the deficiencies in the review process here were prejudicial to the Appellant, thus justifying the Commission’s decision to provide him with reconsideration. That reconsideration should include the opportunity for the Appellant to address the full complement of reasons put forward by the Appointing Authority to justify his bypass, including two separate allegations related to intolerance.

We disagree with Commissioner Stein’s conclusion, however, that none of the underlying reasons put forward by the Appointing Authority are supported by a preponderance of the evidence. Thus, after, correcting the prejudicial procedural flaws, we believe the Appointing Authority maintains its broad discretion to determine whether the Appellant presents too high of a risk to serve as a firefighter.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 27, 2020.

Notice to:

Joseph G. Donnellan, Esq.
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13. The WFD’s bypass letter does not address whether Mr. McManus’s history of alcohol abuse, per se, was deemed sufficient to disqualify him, or was too stale to be of concern. That issue remains an open question. This Decision is not intended to preclude (or encourage) the WFD, in any future application process, from re-

considering that issue, so long as it does so through a thorough review and decision by the appointing authority that includes both the past negative history and Mr. McManus’s subsequent positive record.

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* * * * *

MARC SAVAGE

v.

HUMAN RESOURCES DIVISION & SPRINGFIELD FIRE
DEPARTMENT

E-19-217

February 27, 2020
Christopher C. Bowman, Chairman

Commission Practice and Procedure-Timeliness of Appeal-Promotional Bypass—The Commission dismissed the promotional bypass appeal from a Springfield Fire Captain where he had actual notice of the exam posting between June 5 and June 18, 2019 and did not file his appeal until October 15, approximately three months after the expiration of the 30-day appeal period. The filing of the appeal would be considered late whether it were treated as a bypass appeal or a non-bypass equity appeal since the Appellant never took the exam.

ORDER OF DISMISSAL

On October 15, 2019, the Appellant, Marc Savage (Captain Savage), a Fire Captain in the Springfield Fire Department (SFD), filed an appeal with the Civil Service Commission, regarding a promotional examination for Springfield Deputy Fire Chief, administered on June 18, 2019.

2. On November 13, 2019, I held a pre-hearing conference at the Springfield State Building which was attended by Captain Savage, counsel for the SFD and the City's collective bargaining agent. Counsel for the state's Human Resources Division (HRD) participated via phone.

3. Based on the statements made at the pre-hearing, the following appear to be undisputed:

A. HRD delegated responsibility to the SFD to administer an assessment center-promotional examination for Deputy Fire Chief.

B. The promotional examination was scheduled for, and was indeed held, on June 18, 2019.

C. The initial deadline for applying for the promotional examination was June 4, 2019.

D. As of June 4th, only 3 District Fire Chiefs (next lower title) had signed up for the promotional examination.

E. Since less than 4 eligible individuals signed up for the examination, HRD opened the examination up to Fire Captains, the next lower title in succession, with a deadline of June 12, 2019.

F. A sufficient number of Fire Captains signed up for the promotional examination and it was held on June 18, 2019.

G. Captain Savage did not sign up for or take the promotional examination.

H. 2 applicants (a District Fire Chief and a Fire Captain) passed the examination.

I. An eligible list for Deputy Fire Chief was established on August 1, 2019.

J. As referenced above, Captain Savage, on October 15, 2019, filed an appeal with the Commission, arguing that the administration of the examination was procedurally flawed, as there were only six (6) days between the new filing deadline for the examination and the examination date.

4. As part of the pre-hearing conference, HRD argued that G.L. c. 31, s. 19, which relates to the posting of promotional examinations, does not establish any statutory cut-off date for the posting of the examination, as compared to Section 18, which requires that the examination announcement for original appointment examinations be posted at least three (3) weeks prior to the examination filing deadline.

5. I informed the parties that there was a threshold issue here regarding whether the Commission has jurisdiction to hear this appeal, both in regard to: a) whether Captain Savage, who did not sign up to take the examination, is an aggrieved person; and b) whether the appeal here is timely.

6. In regard to the timeliness issue, G.L. c. 31, s. 22 states in relevant part that: "An applicant may request the administrator [HRD] to conduct a review of whether an examination taken by such applicant was a fair test of the applicant's fitness actually to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination." (emphasis added)

7. In the alternative, 801 CMR 1.01 (6)(b) states: "Any person with the right to initiate an adjudicatory proceeding may file a notice of claim for an adjudicatory proceeding with the agency within the time prescribed by statute or Agency rule. In the absence of a prescribed time, the notice of claim must be filed within 30 days from the date that the Agency notice of action is sent to a Party."

8. I set a briefing schedule and received HRD's Motion for Summary Decision and Captain Savage's opposition.

ANALYSIS / CONCLUSION

For the reasons stated in HRD's motion, Captain Savage's appeal is dismissed as it is untimely.

Here, Captain Savage had actual notice of the exam posting at some time between June 5, 2019 (the date of the posting) and June 18, 2019 (the date that the Deputy Fire Chief Examination was conducted).

Even accepting Captain Savage's argument that his appeal is not an examination appeal, but, rather, a non-bypass equity appeal, he failed to file an appeal with the Commission until October 15, 2019, approximately three months after the expiration of the thirty-day appeal period.

For this reason, Captain Savage's appeal under Docket No. E-19-217 is hereby *dismissed*.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 27, 2020.

Notice to:

Marc Savage
[Address redacted]

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* * * * *

KRYSTA SKRODZKI

v.

TOWN OF WEST SPRINGFIELD

G1-19-225

February 27, 2020

Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointment as a West Springfield Police Officer-Maximum Age Requirement-Chapter 310 Relief—This is an unusual appeal where a bypassed candidate, a single mother with limited resources, withdrew her initial bypass appeal after the West Springfield Police Department offered to sponsor her training at a police academy to make her candidacy more competitive. The candidate ended up paying for the academy out of her own funds, applied again, but was once again bypassed because she was over 32 years old as of the final date for the filing for her second examination. The Commission found this unjust and exercised its equitable powers under Chapter 310 of the Acts of 1993 to order West Springfield to place her name at the top of the next list. West Springfield argued that it had sufficient reasons unrelated to her age to bypass this candidate that included a poor interview and driving record.

DECISION ON MOTIONS

On December 20, 2017, the Appellant, Krysta M. Skrodzki (Appellant), filed an appeal with the Civil Service Commission (Bypass Appeal I), contesting the decision of the Town of West Springfield (Town) to bypass her for appointment as a permanent, full-time police officer.

2. On January 24, 2018, I held a pre-hearing conference regarding Bypass Appeal I at the Springfield State Building, which was attended by the Appellant and counsel for the Town.

3. As part of the pre-hearing in Bypass Appeal I, the Town indicated that the reasons for bypassing the Appellant included: a) a poor interview in which the Appellant's lack of knowledge of criminal justice issues was apparent; and b) issues related to driving history. The Appellant pointed to her score of 91 on the civil service examination, her attempt to gain experience by applying to be a dispatcher for the Town and, that, as a single mother, she did not have the time or resources to attend a police academy to gain the experience shown by other candidates.

4. At the Commission's encouragement, the Town provided the Appellant with suggestions regarding how to gain experience which could improve her chances in a subsequent hiring cycle. The Town's Police Chief also offered to sponsor the Appellant for participation in a Police Academy.

5. The Appellant subsequently withdrew her bypass appeal regarding Bypass Appeal I and, at her own expense of \$3,000, completed Police Academy training.

6. On March 23, 2019, the Appellant took a subsequent examination for police officer.

7. On September 1, 2019, the state's Human Resources Division (HRD) established the eligible list for police officer, which included the Appellant's name.

8. On September 4, 2019, HRD issued Certification No. 06547 to the Town. The Appellant's name appeared with referred rank #17.

9. On October 16, 2019, the Town notified HRD by correspondence that the Appellant did not meet the age requirements in G.L. c. 31, s. 58.

10. G.L. c. 31, s. 58 states in relevant part: "... No person shall be certified for original appointment to the position of ... police officer in a city or town which has not accepted sections 61A and 61B if that person has reached 32 years of age on or before the final date for the filing of applications, as stated in the examination notice, for the examination used to establish the eligible list from which the certification is to be made."

11. On October 29, 2019, the Appellant filed a second bypass appeal with the Commission (Bypass Appeal II).

12. On November 27, 2019, I held a pre-hearing conference via conference call, which was attended by the Appellant, counsel for the Town and counsel for the state's Human Resources Division (HRD).

13. Prior to the pre-hearing conference, the Town filed a Motion to Dismiss Bypass Appeal II, arguing that, based on her age, the Appellant was ineligible for appointment. The Town's motion cites the Town's recent adoption of G.L. c. 31, s. 58A, which is not applicable as the Appellant's name was certified for appointment prior to the Town's adoption of Section 58A. However, the Town's argument remains the same under Section 58.

14. As part of the pre-hearing conference, the Town stated that it had not accepted the provisions of Sections 61A and 61B.

15. Also, as part of the pre-hearing conference, the parties agreed that the Appellant reached 32 years of age in February 2018; and the examination from which the current eligible list, as referenced above, was given in March 2019. It was agreed that the filing deadline for this examination would have been weeks prior to this date, either in February or March 2019.

16. Based on the above information, it is undisputed that, as of the time of the final date for the filing of the March 2019 examination, the Appellant had attained the age of 32.

17. At the pre-hearing, the Appellant argued that, since she had not attained the age of 32 at the time of the final date for the filing of the examination for the *prior* hiring cycle (Bypass Appeal I), she should not be statutorily disqualified for appointment as a police officer for the Town.

18. As part of the pre-hearing conference, I asked whether the Town, based on the unique circumstances here, including that the Appellant had completed police academy training at her own expense of \$3,000, would be amenable to the Commission granting

the Appellant relief under Chapter 310. Said relief would place the name of the Appellant at the top of the next Certification for West Springfield Police Officer, effectively making her eligible for appointment, notwithstanding the provisions of Section 58.

19. It was agreed, by both the Appellant and counsel for the Town, that counsel for the Town, after inquiry, would touch base directly with me regarding the possibility of the Town assenting to Chapter 310 relief.

20. On December 4, 2019, counsel for the Town contacted me and indicated that the Town would not assent to 310 relief, in part because, even if the Appellant had not been deemed ineligible for appointment based on her age, it is likely that the Town would have bypassed her for appointment for what they argue are sound and sufficient reasons.

21. On December 5, 2019, counsel for the Town, via correspondence to the Commission, confirmed that it would not assent to 310 relief.

22. The Town submitted a modified Motion to Dismiss, citing Section 58, as opposed to Section 58A and the Appellant filed an opposition which I have deemed a motion for summary decision.

ANALYSIS / CONCLUSION

Both parties have acted in good faith here. As part of Bypass Appeal I, the Town, at my request, worked with the Appellant to identify ways for her to gain the type of experience they found lacking as part of the review of her application and the Appellant's interview. As part of those discussions, the Town's Police Chief offered to sponsor the Appellant for a Police Academy.

Importantly, the Appellant, based on the Town's offer to sponsor her for the Police Academy, opted to forego a full hearing and withdrew her appeal that was pending before the Commission. Put another way, the Appellant, expecting that she would receive serious reconsideration for the position in the future, agreed to withdraw her appeal.

Since that time, the Appellant paid for and completed the Police Academy and, according to her brief, has obtained employment at a security company. Further, she took another civil service examination and scored high enough to be among those eligible for consideration for appointment in the most recent hiring cycle. She completed the application process and participated in the background investigation.

In that context, relief by the Commission is appropriate. The Appellant's appeal is *allowed*.

Pursuant to its authority under Chapter 310 of the Acts of 1993¹, the Commission hereby orders the following:

1. Chapter 310 of the Acts of 1993 states: "If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, not-

1. Notwithstanding the provisions of G.L. c. 31, ss. 58 and 58A, the Appellant shall be eligible for appointment as a West Springfield Police Officer

2. The state's Human Resources Division (HRD), or the Town of West Springfield, in its delegated capacity, shall place the name of Krysta Skrodzki at the top all current or future certifications for the position of West Springfield Police Officer until she is appointed or bypassed.

This relief does not guarantee that the Appellant will be appointed. Rather, it simply allows the Appellant to receive the consideration that she anticipated receiving after withdrawing her appeal from the Commission.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 27, 2020.

Notice to:

Krysta Skrodzki
[Address redacted]

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Town of West Springfield
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West Springfield, MA 01089

Philip Brown, Esq.
Human Resources Division
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Boston, MA 02114

Regina Caggiano
Human Resources Division
100 Cambridge Street: Suite 600
Boston, MA 02114

* * * * *

withstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights."

ERIC SUNNY

v.

HUMAN RESOURCES DIVISION

B2-19-186

February 27, 2020

Christopher C. Bowman, Chairman

Examination Appeal-Promotion to Chicopee Police Sergeant-Length of Service—A Chicopee police officer could not sit for the sergeant's exam having not yet served three years in the lower title of patrol officer. The Appellant argued that the three years should include the time he spent in the Police Academy, a position that goes against HRD's interpretation and Commission precedent that only counts service after an officer has graduated from the Academy, been sworn in, and issued a badge and firearm.

DECISION ON HRD'S MOTION FOR SUMMARY DECISION

On August 29, 2019, the Appellant, Eric Sunny (Mr. Sunny), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) that he was not eligible to sit for the September 15, 2018 promotional examination for Chicopee Police Sergeant. A pre-hearing conference was held on September 25, 2019 at the Springfield State Building in Springfield, MA. I heard oral argument from counsel for the Appellant and HRD and the parties subsequently submitted written briefs upon which the Commission would render a decision.

The following facts are not in dispute:

1. An eligible list is "a list established by the administrator, pursuant to the civil service law and rules, of persons who have passed an examination...from which certifications are made to appointing authorities to fill positions in the official service." G.L. c. 31, § 1.
2. A certification is "the designation to an appointing authority by the administrator of sufficient names from an eligible list or register for consideration of the applicants' qualifications for appointment pursuant to the personnel administration rules." *Id.*
3. Chicopee has a population of over 50,000.
4. In 2013, Mr. Sunny sat for and passed the civil service examination for police officer.
5. In October 2013, Mr. Sunny's name appeared on a statewide eligible list for police officer.
6. On March 31, 2014, Mr. Sunny's name appeared on Certification No. 01645 for the position of Chicopee Police Officer. He was not appointed from that Certification.

7. On December 12, 2014, Mr. Sunny's name appeared on Certification No. 02332 for the position of Chicopee Police Officer. He was appointed on May 4, 2015 and thereafter entered the Police Academy.

8. On October 9, 2015, Mr. Sunny graduated from the Police Academy and was sworn in as a Chicopee Police Officer.

9. On September 15, 2018, the written portion of an examination for Chicopee Police Sergeant was held. The Assessment Center portion of the examination was held on June 25 and 26, 2019. Mr. Sunny participated in both portions of the promotional examination.

10. On July 5, 2019, nine Chicopee Police Officers, all of whom were appointed prior to Mr. Sunny, filed an appeal with the Commission, contesting whether Mr. Sunny was eligible to sit for the promotional examination. Those officers had also raised objections directly to HRD.

11. HRD subsequently determined that Mr. Sunny, pursuant to G.L. c. 31, s. 59, was not eligible to sit for the promotional examination; notified him of such; and did not score his examination.

12. This appeal by Mr. Sunny followed.

APPLICABLE LAW

G.L. c. 31, s. 59 states in relevant part:

"An examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such force, except that if the number of such employees, or the number of applicants eligible for the examination is less than four, the examination shall be opened to permanent employees in the next lower titles in succession in such force until either four such eligible employees have applied for examination or until the examination is open to all permanent employees in lower titles in such force; provided, however, that no such examination shall be open to any person who has not been employed *in such force* for at least one year after certification in the lower title or titles to which the examination is open; and provided, further, that no such examination for the first title above the lowest title in the police or fire force of a city or town with a population in excess of fifty thousand shall be open to any person who has not been employed in such force in such lowest title for at least three years after certification.

Persons referred to in this section as being permanent employees in the lowest or lower title shall include only full-time members of the regular force and shall not include members of the reserve or intermittent police or fire force or members of the call fire force unless the appointing authority certifies to the administrator that the number of permanent full-time members of the regular force is insufficient to allow adequate competition in an examination and the administrator determines that the circumstances warrant opening the examination to permanent members of the reserve, intermittent or call force, as the case may be. Upon the request of the appointing authority, the administrator may include service actually performed while a permanent member of a reserve, intermittent, or call force in computing length of service required for admission to an examination for promotional appointment to the first title above the lowest title. The appointing authority shall submit with such request payroll records proving that such

service was actually performed. For purposes of this section, two hundred and fifty days, or *the equivalent thereof*, of such service shall be equivalent to one year of service on a full-time basis in such regular force."

PARTIES' ARGUMENTS

First, the Appellant argues that he was employed *in the force* as of May 4, 2015, the day that he entered the Police Academy. Thus, as of September 15, 2018, the date of the written examination for police sergeant, the Appellant argues that he had served in the force for approximately 3 years, 4 months.

In the alternative, the Appellant, relying on the language in Section 59 which states that "... two hundred and fifty days, or the equivalent thereof, of such service shall be the equivalent to one year of service on a full-time basis", argues that, based on additional overtime and other hours works, he meets the three-year requirement.

HRD argues that the time spent in the Police Academy as a student police officer does not constitute having been employed in the force. Rather, HRD argues that the Appellant began being employed *in the force* upon graduating the Police Academy and being sworn in as a Chicopee Police Officer.

In regard to the Appellant's alternative argument, HRD argues that the reference to the two hundred and fifty days, or the equivalent thereof, pertains only to exam applicants who served as reserve, intermittent or call police officers and thus, is not applicable here.

ANALYSIS

At issue here is whether HRD is correctly applying G.L. c. 31, § 59 consistent with the Court's decision in *Weinburgh v. Civil Service Commission & City of Haverhill*, 72 Mass. App. Ct. 535, 538 (2008). The Commission, consistent with the *Weinburgh* decision, has consistently ruled that there is a two-prong test to determine if a candidate is eligible to sit for a promotional examination for public safety. See *O'Donoghue v. HRD*, 27 MCSR 485 (2014), *Nicholas v. HRD*, 29 MCSR 358 (2016). Applied here, the candidate must be serving in the next lower title on the date of the promotional examination. Second, the candidate must have been "employed in the force" for at least three years after the candidate's name was first certified for appointment as a police officer.

Both parties agree that the Appellant meets the first prong of the eligibility test in that he is a police officer and was serving in that title as of the date of the written examination. As referenced above, the parties disagree on whether the Appellant met the second prong, reaching different conclusions on whether the Appellant was "employed in the force" for three years as of the date of the written examination. Central to this dispute is whether the time spent by the Appellant in the Police Academy, from May 4, 2015 to October 9, 2015, should be counted as time "employed in the force".

HRD's interpretation is more logical and is supported by the Court's decision in *Weinburgh*, the law regarding student officers and prior Commission decisions.

In *Weinburgh*, the Court effectively overturned a then-longstanding HRD interpretation that required applicants to have been employed for [one year or three years] *in the next lower title* in order to sit for the promotional examination. The Court concluded that the applicant need only have been employed *in the force* for [one year or three years] since being certified for the lower title. In reaching that conclusion, however, the Court explicitly stated that Section 59 requires that an employee “... actually serve in the force for one year after certification, but not necessarily in that lower position.” (emphasis added)

In order to *actually serve* in a police force, it is reasonable to conclude that a police officer must first complete and graduate from a police academy and then be sworn in as a police officer, at which time he/she is issued a badge and firearm. G.L. c. 41, s. 96B specifically exempts “student officers” enrolled in the Police Academy from the civil service law and any collective bargaining agreement and prohibits such student officers from exercising any police powers. Further, accepting the Appellant’s argument would cause an illogical result of requiring HRD to count *any* time served in *any* position (i.e. - dispatcher, administrative assistant, custodian) in a police force toward the Section 59 promotional examination requirement. For example, a candidate could take and pass an examination for police officer, have his/her name placed on an eligible list; appear on a Certification; and then not be selected for appointment. That candidate could take a future examination and not be appointed for months or years later. If that candidate, during the intervening time, served as a custodian in the police force, the Appellant’s reading of Section 59 would require HRD to have that time counted as having been “employed in the force.” That illogical result could not have been the intent of the Legislature.

In regard to the Appellant’s alternative argument, the reference to one year of service being equal to two hundred and fifty days, or the equivalent thereof in Section 59 is clearly, when read in the proper context, meant to apply to candidates who had actually performed the duties and responsibilities of a police officer while holding the title of permanent or reserve officer, which is not the case here.

HRD’s decision to deem Mr. Sunny ineligible for the promotional examination for sergeant is supported by their logical interpretation of Section 59 and was not arbitrary or capricious. For these reasons, the Appellant’s appeal under Docket No. B2-19-186 is hereby *dismissed*.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 27, 2020.

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

Notice to:

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* * * * *

PAUL A. TUROWSKI

v.

CITY OF QUINCY

D-18-234

February 27, 2019
Paul M. Stein, Commissioner

D*isciplinary Action-Five Day Suspension-Quincy Police Lieutenant-Civility and Insubordination*—The Commission affirmed the five-day suspension of a Quincy police lieutenant who lost his temper and insulted the Chief and a captain after they questioned his eligibility for an election day detail because of a violation of the 16-hour work rule. The Appellant had suffered severe medical issues during his career and felt the hierarchy had not been supportive.

DECISION

The Appellant, Paul A. Turowski, acting pursuant to G.L.c.31,§43, appealed to the Civil Service Commission (Commission) from the decision of the Respondent, the City of Quincy (Quincy), suspending him for five (5) days from his position of Police Lieutenant with the Quincy Police Department (QPD).¹ The Commission held a pre-hearing conference in Boston on January 8, 2019 and held a full hearing on February 11, 2019 at that location, which was digitally recorded.² The hearing was declared private with witnesses sequestered. Fourteen (14) exhibits were received in evidence (*Exhs. 1 through 11*; *CityExhs. 1 through 3*). One post-hearing exhibit was received and marked *PHExh. 1*. Neither party filed proposed decisions. For the reasons stated below, Officer Turowski’s appeal is denied.

2. CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by Quincy:

- QPD Police Sergeant Jennifer Tapper
- QPD Police Captain John Dougan
- QPD Police Chief Paul Keenan

Called by the Appellant:

- QPD Officer Paul A. Turowski, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Paul A. Turowski, has over 36 years of tenured service as a sworn member of the QPD. He held the rank of Lieutenant since 2012 and at the time of this appeal was a Last Half (midnight - 11:30 pm-7:00am) shift commander. (*Testimony of Appellant*)

2. In 2003, then Sergeant Turowski received a five (5) day suspension for violating the QPD Conduct Regulations concerning Civility and Insubordination. His only other discipline, prior to the incident that gave rise to this present appeal, were two written reprimands, one in 2000, also when he was a Sergeant, for failing to obey a lawful order, and one as a Lieutenant in 2012 for sick time abuse. (*CityExhs. 1 through 3*)

3. Lt. Turowski has a long history of serious medical issues, going back at least to 2012, which flared up again in the middle of 2018, causing him to take regular, intermittent sick leave that summer, for which he routinely submitted the required medical documentation. (*Exh. 8; Testimony of Appellant*)

4. On September 4, 2018, Lt. Turowski worked a paid detail at the polls for Primary Election Day. (*Exh. 1; Testimony of Appellant & Chief Keenan*)

5. The election detail is a desired assignment and officers must successfully bid for the assignment. In addition, the QPD is subject to a so-called “16-hour rule” (meant to prohibit an officer from fatigue by working more than 16 hours in a 24 hour period without an eight (8) hour rest period). Under this rule, Lt. Turowski knew he would not be eligible to work that detail and also work his regular night shift at 11:30 pm following the completion of his election detail assignment. (*Exhs. 1 6, 7 & 9, Testimony of Appellant & Chief Keenan*)

6. Lt. Turowski understood that he was eligible to bid for and perform the September 4, 2018 election detail duty because, based on past practice, he had previously scheduled a medical appointment on September 5, 2018, planned to return home and take a sick day after the detail to rest up before the appointment and, thus, knew he would not be working the Sept 4/Sept 5 night shift; thus, he would not be violating the “16 hour rule.” (*Exhs 1 & 8; Testimony of Appellant*)

7. As planned, upon completing the election-day detail, Lt. Turowski went home, attended his medical appointment on September 5, 2018 and next reported for duty for the Sept 5/Sept 6 midnight shift. (*Exh. 8; Testimony of Appellant*)

8. Immediately after completion of his shift, shortly after 7:00 am on September 6, 2018, as was his usual practice, Lt. Turowski went to see Captain Dougan, the QPD Executive Officer, with the intent of delivering the medical leave documentation covering the prior midnight shift and obtaining a copy of the “stamped” document for his own records. (*Testimony of Appellant & Capt. Dougan*)³

9. Lt. Turowski walked upstairs to Capt. Dougan’s office and saw him seated at his desk. Also present in the office was Chief Keenan, who just completed a work-out and was still in gym attire, seated in a chair to the left of Capt. Dougan’s desk. Also present was Sgt. Jennifer Tapper, of the Professional Standards Unit, seated in another chair in front of Capt. Dougan’s desk. (*Exh. 11; Testimony of Appellant, Chief Keenan, Capt. Dougan and Sgt. Tapper*)

10. Before Capt. Dougan could respond to Lt. Turowski, Chief Keenan (who regularly reviews the detail and attendance records) asked Lt. Turowski “why he worked the election detail when he was not eligible”, implying that, because he had been assigned to work the midnight shift that same night, he would be violating the “16-hour rule” by doing both. (*Exhs. 1, 2, 5 through 8; Testimony of Appellant, Chief Keenan, Capt. Dougan & Sgt. Tapper*)

11. Lt. Turowski responded that he was eligible, and Chief Keenan repeated that Lt. Turowski was not eligible. Lt. Turowski then explained that he had a scheduled medical appointment and knew that he would be taking a sick day and not working the Sept 4/ Sept 5 midnight shift, to which Chief Keenan replied that he could not do that. (*Exhs. 1, 2, 5 through 8; Testimony of Appellant, Chief Keenan, Capt. Dougan & Sgt. Tapper*)

12. Lt. Turowski became upset and complained that he was being picked on and harassed because of his medical condition, which he believed was not the first time Chief Keenan had done so.⁴ Lt. Turowski then told Chief Keenan “I did not go through three [life-threatening medical crises] to take” this harassment. (*Exhs.*

3. QPD procedure required that officers promptly deliver a sick note documenting the absence by bringing it to the Chief Keenan’s secretary who stamps it and forwards it for processing. As the secretary does not arrive until 9:00 am, however, some officers, including Lt. Turowski, preferred to bring the note to Capt. Dougan, who would stamp it and provide a copy to the officer, if requested. (*Testimony of Appellant, Capt. Dougan & Sgt. Tapper*)

4. Chief Keenan was the Chief who issued Lt. Turowski’s written reprimand in 2012 for sick time abuse. (*CityExh. 3*)

5 through 8; Testimony of Appellant; Chief Keenan & Capt. Dougan)

13. At this point, Chief Keenan told Lt. Turowski to leave and get his note stamped. Lt. Turowski did not move. Chief Keenan rose from his chair, approached Lt. Turowski and repeated that he was ordering Lt. Turowski to leave. When Lt. Turowski still did not comply, Chief Keenan repeated the order on pain of suspension for non-compliance. (*Exhs. 5 through 8; Testimony of Chief Keenan. Capt. Dougan & Sgt. Tapper*)

14. After observing how the situation had escalated, Capt. Dougan, got up from his desk, told Lt. Turowski to “take it into the hall”, at which point, he and Lt. Turowski proceeded to leave the office and head to the secretary’s office where Capt. Dougan stamped the sick note as Lt. Turowski requested. (*Exhs. 5 through 8; Testimony of Appellant & Capt. Dougan*)

15. Even after leaving Capt. Dougan’s office, Lt. Turowski had not calmed down, admitting that he was still “infuriated.” At some point while Capt. Dougan was attending to the sick note, Lt. Turowski returned to Capt. Dougan’s and, while standing at the door, again addressed Chief Keenan. (*Exhs. 5 through 8 & 11; Testimony of Appellant*)

16. On September 7, 2018, Lt. Turowski sent an e-mail complaint to the night patrol Captain, Greg Goyette, entitled “Work Place Harassment, Chief Keenan/Capt. Dougan. 9-6-18.” The complaint outlined Lt. Turowski’s version of the confrontation with Chief Keenan as well as recited how Lt. Turowski believed this encounter was part of a pattern of workplace harassment directed against him in the past. (*Exh. 8*)

17. On September 6, 2018, on Capt. Dougan’s order, Lt. Turowski submitted a “To/From” report to Capt. Goyette containing an explanation for why he understood he was eligible to work the election-day detail and reiterating his claims of workplace harassment. (*Exh. 6*)

18. On September 12, 2018, after reviewing Lt. Turowski’s report to Capt. Goyette, Capt. Dougan prepared a report of the September 6, 2018 encounter. His report concluded that “it is clear that [Lt. Turowski] does not understand that he was ineligible to work the [election-day] detail” and that Lt. Turowski’s conduct on September 6, 2018 violated QPD General Order 91-18 (Conduct Regulations, Section 4.1 (Duty to Obey), Section 4.3 (Civility) and Section 4.9 Insubordination. Capt. Dougan’s report did not cite Lt. Turowski for any violation of the “16-hour rule”, General Order 16-03 (Detail Regulations) or for any sick leave abuse or other infraction attributable to Lt. Turowski taking sick leave from work on the Sept.4/Sept 5 midnight shift. (*Exhs. 7, 9 & 10; Testimony of Capt. Dougan*)

19. By “To/From” dated September 25, 2018, Chief Keenan concurred with the Capt. Dougan’s conclusions, finding Lt. Turowski had violated the QPD’s Conduct Regulations 4.1, 4.3 and 4.9, based on Lt. Turowski’s “verbal tirade” in Capt. Dougan’s office on September 6, 2018 and his refusal to obey “two (2) direct orders

to leave the office.” The memo also stated that Chief Keenan was requesting a further review by the Mayor of Quincy “or possible further disciplinary action up to and including termination”. Chief Keenan forward that request to Quincy Mayor Thomas Koch on October 29, 2018. (*Exhs. 2 & 5; Testimony of Chief Keenan*)

20. On November 9, 2018, a Hearing Officer appointed by Mayor Koch conducted a hearing on the five (5) day suspension imposed by Chief Keenan and the Chief’s request for consideration of further discipline. (*Exh. 1*)

21. By letter dated November 15, 2018, the Hearing Officer submitted her report to Mayor Koch, finding that “respect and civility are vital components to the successful running of a police department”, that Lt. Turowski’s “actions to the contrary” during the September 6, 2018 incident in Capt. Dougan’s office justified the five-day suspension, but recommended that no further discipline be imposed. (*Exh. 1*)

22. By letter dated November 20, 2018, Mayor Koch accepted the Hearing Officer’s recommendations, upheld the five-day suspension and ordered that “no further disciplinary action will be taken at this time.” (*Exh. 1*)

23. This appeal duly ensued. (*Claim of Appeal*)

APPLICABLE LEGAL STANDARD

G.L.c.31,§41-45 requires that discipline of a tenured member may be imposed only for “just cause” after due notice, hearing (which must occur prior to discipline for any suspension from the payroll for five days or less) and a written notice of decision that states “fully and specifically the reasons therefore.” G.L.c.31,§41. An employee aggrieved by that decision may appeal to the Commission, pursuant to G.L.c.31,§43, for de novo review by the Commission “for the purpose of finding the facts anew.” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited.

The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” *School Comm. v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488, *rev.den.*, 426 Mass. 1104 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983) The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of “merit principles” which govern civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c.31,§1.

The Commission also must take into account the special obligations the law imposes upon police officers, who carry a badge and

a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to adhere to the law, both on and off duty. “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. . . . they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” *Attorney General v. McHatton*, 428 Mass. 790, 793-74 (1999) and cases cited. *See also Falmouth v. Civil Service Comm’n*, 61 Mass. App. Ct. 796, 801-802 (2004); *Police Commissioner v. Civil Service Comm’n*, 39 Mass. App. Ct. 894, 601-602 (1996); *McIsaac v. Civil Service Comm’n*, 38 Mass. App. Ct. 473, 475-76 (1995); *Police Commissioner v. Civil Service Comm’n*, 22 Mass. App. Ct. 364, 371, *rev.den.* 398 Mass. 1103 (1986) *See also Spargo v. Civil Service Comm’n*, 50 Mass. App. Ct. 1106 (2000), *rev.den.*, 433 Mass. 1102 (2001).

ANALYSIS

Quincy had just cause to discipline Lt. Turowski for his disrespectful and insubordinate behavior toward Chief Keenan on September 6, 2018. The Hearing Officer’s conclusion that a five-day suspension was warranted for Lt. Turowski’s failure to meet his obligation to comply with these “vital components to the successful running of a police department”, and to impose no further discipline, demonstrate the type of measured, appropriate remedial discipline that basic merit principles of civil service law require.

As a ranking officer with over thirty years of service, Lt. Turwoski should serve as an example of the standard of conduct required of all QPD officers. His outburst against Chief Kennan, in the presence of another superior officer and a subordinate, during which he admitted to using highly offensive language, cannot be condoned. His lack of self-control was not limited to one isolated

outburst, but continued for some minutes. Even after leaving the office, Lt. Turwoski returned to repeat his earlier statements and then, by his own admission, uttered what may have been his most offensive remark.

I have not overlooked the fact that Lt. Turowski has faced more than his fair share of challenges in his personal life. However, this appeal concerns a lapse in judgment and failure to perform the essential duties of a police officer, i.e., to follow orders and maintain civility and self-control at all times. An appointing authority does not violate basic merit principles when it enforces its right to expect performance of such essential duties, especially, those of a sworn law enforcement officer who carries a badge and a gun and must be held to the highest standard of performance at all times.

CONCLUSION

For these reasons, the appeal of the Appellant, Paul A. Turowski, Case No. D-18-234 is hereby denied.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 27, 2020. .

Notice to:

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* * * * *

DYLAN BOGART

v.

CITY OF LYNN

G1-19-145

March 12, 2020

Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointment as a Lynn Firefighter-Inconsistent Responses on Application and During Interview—The Commission dismissed the bypass appeal from a candidate for original appointment to the Lynn Fire Department, finding that the City had not acted unreasonably given the Appellant’s inconsistent answers to questions both on the employment application and during the interview. The successful candidate had not suffered from similar deficiencies.

DECISION

On July 12, 2019, the Appellant, Dylan Bogart (Mr. Bogart), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Lynn (City) to bypass him for appointment to the position of permanent, full-time firefighter in the City’s Fire Department. On September 10, 2019, I held a pre-hearing conference at the offices of the Commission in Boston. I held a full hearing at the same location on November 6, 2019.¹ The full hearing was digitally recorded and both parties received a CD of the proceeding.² On December 11th and 13th 2019, the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Twenty-six (Exhibits 1-5 & Exhibits A-U) were entered into evidence at the hearing; Six post-hearing exhibits (Exhibits PH1 - PH6) were entered after the full hearing at my request. Based on the documents submitted and the testimony of the following witnesses:

Called by the City:

- Lt. Michal Smith, Lynn Fire Department;
- Officer Michael McEachern, Lynn Police Department
- Fire Chief Stephen Archer, Lynn Fire Department;
- Drew Russo, Personnel Director, City of Lynn;

Called by Mr. Bogart:

- Dylan Bogart, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences from the evidence, I find the following:

1. The City of Lynn, located in Essex County, has a population of approximately 94,000. (<https://www.census.gov/quickfacts/lynn-city-massachusetts>)

2. The City’s Mayor serves as the Appointing Authority for the Fire Department. (Exhibit 4)

3. At the time he was bypassed, Mr. Bogart was twenty-eight years old. He is married; resides in Lynn; and served as a United States Army Infantryman from 2013-2016 and was honorably discharged. He has been a driver for a local non-profit that serves children since 2017. (Testimony of Appellant and Exhibit E)

4. On March 24, 2018, Mr. Bogart took the civil service examination for firefighter and received a score of 97 or 98. His name appeared on an eligible list for firefighter that was established by the state’s Human Resources Division (HRD) on November 1, 2018. (Stipulated Facts)

5. On December 13, 2018 and May 30, 2019, HRD issued Certification No. 05971 to the City from which the City appointed one candidate to the position of firefighter. The selected candidate was ranked below Mr. Bogart. (Stipulated Facts)

6. Among the reasons for bypass were the following positive reasons associated with the selected candidate.

- i. Good prior work performance;
- ii. Accomplishments or skills in past job performance;
- iii. Personal characteristics observed during interview, background investigation and references, including self-control, community relations, and the ability to get along with others;
- iv. Commitment (i.e. - volunteer activity);
- v. Education, training and special skills.

(Exhibit 4)

7. The City’s Fire Chief elaborated on the above, writing that the selected candidate:

“Came across as honest and believable during the oral interview. He has a good employment record and is an EMT-Basic. He has a good credit history and driving record. He has a bachelor of science degree ... He answered all questions fully during interview He provided a complete and thorough employment application. and responded appropriately to the hypothetical questions. He demonstrated the appropriate level of maturity and reliability.”

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

(emphasis added)

(Exhibit 5)

8. Mr. Bogart received all positive references (i.e. - from neighbors, employers etc.) (Exhibit H)

9. As referenced above, Mr. Bogart served as an infantryman in the United States Army and was honorably discharged. (Exhibit H)

10. Also, as referenced above, Mr. Bogart has been employed as a driver for a local non-profit serving the City's youth population. (Exhibit H)

11. Unlike the selected candidate, Mr. Bogart is not a certified EMT. (Exhibit H)

12. Unlike the selected candidate, Mr. Bogart has not obtained a college degree. He has not performed well in many college classes that he has completed. (Exhibit H)

13. Unlike the selected candidate, Mr. Bogart does not have a superior credit history. (Exhibit H)

14. Unlike the selected candidate, Mr. Bogart did not answer all questions on the employment application. (Exhibit H)

15. Unlike the selected candidate, Mr. Bogart did not provide clear and consistent answers to all of the questions on the employment application. (Exhibit H)

16. Unlike the selected candidate, Mr. Bogart did not perform well during an oral interview. Some of the answers he provided were vague and inconsistent. (Testimony of Lt. Smith)

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. at 259, citing *Cambridge v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300, 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1.

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* at 304. 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).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions (*City of Beverly v. Civil Service Comm'n.*, 78 Mass. App. Ct. 182, 189, 190-191 (2010) citing *Falmouth v. Civil Serv. Comm'n.*, 447 Mass. 814, 824-826 (2006) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. *Beverly*.

The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown (*Beverly* citing *Cambridge* at 305, and cases cited). However, when the reasons for bypass relate to alleged misconduct, the appointing authority is entitled to such discretion "only if it demonstrates that the misconduct occurred by a preponderance of the evidence." (emphasis in original) (*Boston Police Dep't v. Civ. Serv. Comm'n. & Michael Gannon*, 483 Mass. 461 (2019) citing *Cambridge* at 305).

ANALYSIS

I have carefully reviewed the entire record, including all of the exhibits and testimony. There are many positive aspects to Mr. Bogart's application, including his distinguished military service; his consistently positive references and his employment for a local non-profit.

Based on the witness testimony, it is clear that the City's primary concern here was Mr. Bogart's inconsistent answers regarding substantive questions posed in the application and during an interview. The documents, as well as the credible testimony of the City's witnesses, support this conclusion. Even Mr. Bogart, during his testimony before the Commission, candidly acknowledged that he has provided inconsistent responses on various applications for employment and interviews regarding multiple, substantive issues. Further, parts of Mr. Bogart's testimony left *me* confused regarding these issues.

At best, Mr. Bogart was unable to provide— either verbally or in writing—clear, detailed, and consistent answers to certain questions regarding issues that are germane to his background investigation. That contrasted sharply with the selected candidate, who provided clear, complete and accurate responses to the questions posed to him on the written application and verbal interview. While this justified the City's decision to bypass Mr. Bogart in favor of the selected candidate during this hiring cycle, it should not be viewed as a permanent disqualification against appointing Mr. Bogart in the future, should he be able to provide more accurate and supportable answers to the City's questions.

For all of the above reasons, the Appellant's appeal under Docket No. G2-19-145 is hereby **denied**.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 12, 2020.

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* * * * *

MARC HAYHURST and BRIAN SUMMERING

v.

BOSTON FIRE DEPARTMENT

D-19-123 (Hayhurst)
D-19-124 (Summering)

March 12, 2020
Christopher C. Bowman, Chairman

Disciplinary Action-Modification of Penalty by Commission-Lack of Evidence-Failure of Boston Fire Lieutenants to Follow Procedures Involving Reporting Offensive and Inappropriate Behavior—The Commission annulled the two-tour suspension of duty and reprimands of two Boston Fire Department lieutenants who had been charged with failing to following reporting procedures after a drunken off-duty firefighter engaged in racist and obnoxious behavior. The Commission found that the actions that the lieutenants took to manage the situation were reasonable and that the firefighter in question had not been shown to have spat on a colleague or threatened to “fuck him up.”

DECISION

On June 6, 2019, the Appellants, Marc Hayhurst (Lt. Hayhurst) and Brian Summering (Lt. Hayhurst) (Appellants), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission) contesting the decision of the Boston Fire Department (BFD) to suspend them for two tours or twenty-four hours each.

On July 16, 2019, I held a pre-hearing conference at the offices of the Commission. I held a full hearing at the same location on September 9, 2019.¹ The hearing was digitally recorded and both parties were provided with a CD of the recording.² The hearing was private. The parties submitted post-hearing briefs on November 22, 2019.

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 Code Mass. Regs. §§ 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

FINDINGS OF FACT

Thirty-six Respondent Exhibits (Exhibits R1 - R36) and six Appellant Exhibits (Exhibits A1-A6) were entered into evidence. Exhibits A4 & A5 were deemed confidential and are impounded. Based on these documents, the testimony of:

Called by the BFD:

- Connie Wong, Deputy Commissioner of Labor Relations, HR & Legal Affairs;
- Robert Calobrisi, Deputy Fire Chief, Division 1 / Group 3;
- David Walsh, Deputy Fire Chief, Personnel;
- John Walsh, Deputy Fire Chief, Operations;

Called by Appellants:

- Brian Summering, Appellant;
- Marc Hayhurst, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, policies and reasonable inferences drawn from the evidence; I make the following findings of facts:

1. Lt. Hayhurst has been employed by the BFD for twelve years and has served as a fire lieutenant since 2016. He has no prior discipline. (Testimony of Hayhurst & Exhibit A2)
2. Lt. Summering has been employed by the BFD for twenty-eight years and has served as a fire lieutenant since 2017. He has no prior discipline. (Testimony of Summering and Exhibit A1)
3. On December 13, 2018, the Appellants were the superior officers on duty for the night tour at the fire station on Hanover Street in the North End of Boston. (Testimony of Appellants)
4. FF CB, a black male, was assigned to the North End fire station on December 13, 2018. He has been a Boston firefighter for about twelve (12) years, and is also currently employed as a nurse at several local hospitals. Previously, FF CB served eight years as an Army Reservist, specializing in nuclear, biological, and chemical warfare. (Exhibit R35: Testimony of CB)
5. Between 12AM and 1AM on December 13, 2018, FF CB was in the station's TV room sitting in a recliner playing a video game called “Ark” on his Playstation gaming console. (Exhibit 35: Testimony of FF CB)
6. A white firefighter (GL), who was not on duty that night, entered the TV room with Chinese food, stumbling and smelling strongly of alcohol on his person and breath. GL sat in a chair

2. If there is a judicial appeal of this decision, the plaintiff becomes obligated to use the copy of the CD provided to the parties to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

to the right of the recliner, and asked FF CB if he would like any Chinese food. FF CB declined and FF GL left the room. (Exhibit 35: Testimony of FF CB)

7. Shortly thereafter, FF GL returned to the TV room, and sat in a recliner chair approximately nine (9) feet behind FF CB. FF CB heard the sounds of FF GL eating food from a bowl. (Exhibit 35: Testimony of FF CB)

8. FF CB stood up from his recliner, and exited the TV room to inform his commanding officer that night, Lt. Summering, of the incident. Lt. Summering was in his quarters located down a hallway outside the TV room. (Testimony of FF CB and Lt. Summering)

9. When FF CB knocked on Lt. Summering's door, Lt. Hayhurst, commanding officer on the engine that night, also opened the door to his adjacent quarters. (Testimony of Lt. Summering and Lt. Hayhurst)

10. FF CB told Lt. Summering: "You better get fucking [FF GL] out of the TV room before I punch him in the face. He's drunk, he's saying [n-word] this, [n-word] that, and spitting on the floor." (Testimony of Lt. Summering and Lt. Hayhurst)

11. Lts. Summering and Hayhurst walked down the hall to the TV room, followed by FF CB. FF GL was slouched on a couch. One of the Lts. said "come on, [FF GL], get up," or similar words to that effect. FF GL complied, and they guided him out of the TV room to the bunk room. (Exhibit 35: Testimony of FF CB, Lt. Summering and Lt. Hayhurst)

12. When the Lts. addressed him as he was slouched on the couch, FF GL's demeanor indicated that he was intoxicated. (Exhibit 35: Testimony of Lt. Summering).

13. Lt. Summering told FF CB that the incoming Captain would handle the situation in the morning. FF CB informed Lt. Summering that he wanted FF GL to transfer out of the firehouse. (Exhibit 35: Testimony of Lt. Summering)

14. Approximately an hour after this incident, FF CB called his girlfriend to tell her he was fine and to say good night. (Exhibit 35: Testimony of CB)

15. FF CB slept in the TV room that night, which is his normal practice. (Exhibit 35: Testimony of FF CB)

16. Lt. JS arrived at the firehouse at around 6:30AM on December 13, 2018. Firefighter CB recounted to Lt. JS that FF GL, who was off-duty, had come into the TV room, intoxicated, started using the n-word and spat in FF CB's direction. (Exhibit 35: Testimony of Lt. JS)

17. Fire Captain JR also arrived at the firehouse around 6:30 A.M. on December 13, 2018. Lt. Summering met him on the street outside the station and told Captain JR about the events of the early morning hours. Specifically, Lt. Summering told Captain JR that FF CB had knocked on his door and told him that FF GL was in the TV room "using the N-word and spitting all over the place."

Around that same time, Lt. Hayhurst confirmed Lt. Summering's version of events to Cpt. JR. (Exhibit 35: Testimony of Captain JR)

18. Captain JR then saw FF CB on the apparatus floor, and asked FF CB to accompany him to his office upstairs. Once in his office, FF CB told Cpt. JR that, earlier in the morning, FF GL entered the TV room intoxicated, with Chinese food and started calling FF CB the n-word multiple times. FF CB told Captain JR that he wanted FF GL to transfer out of the station. (Exhibit 35: Testimony of Captain JR)

19. Captain JR and Lt. JS then met with FF GL to question him about what had occurred. Captain JR told FF GL that FF CB had accused FF GL of using the n-word and spitting in his direction hours earlier in the TV room. In response, FF GL: a) said he had been trying to watch a movie in the TV room at the time; b) referenced a movie by the name of *Once Upon a Time in America*; and c) said "no, I didn't say that" in reference to the n-word. (Exhibit 35: Testimony of Captain JR)

20. FF GL acknowledged to Captain JR and Lt. JS that he had been drinking the night before and that he had just lost a close friend. (Exhibit 35: Testimony of Captain JR)

21. Captain JR observed that FF GL looked "out of it" and he (Captain JR) could smell alcohol on FF GL's breath. (Exhibit 35: Testimony of Captain JR)

22. After that meeting, FF GL approached FF CB on the apparatus floor of the firehouse. FF GL stated "I could kiss you right now," which FF CB interpreted as being "fake nice." FF GL further stated "I'm sorry if I said something that offended you," or something similar, referring to the incident in the early morning hours. (Exhibit 35: Testimony of FF CB)

23. FF GL told FF CB that Cpt. JR had asked to see the two of them, and so FF CB agreed to accompany FF GL back to Cpt. JR's office upstairs. (Exhibit 35: Testimony of FF CB)

24. In Cpt. JR's office, FF CB stated that FF GL called him the n-word and spit in his direction while drunk earlier that morning in the TV room, adding that he could not work with FF GL anymore, and wanted him to transfer. FF GL told FF CB that he was sorry if he said anything to offend FF CB. (Exhibit 35: Testimony of Cpt. JR)

25. When FF GL returned to work, the BFD placed FF GL on paid administrative leave while the BFD conducted an investigation of FF CB's allegations. (Exhibit 35: Testimony of Dep. Walsh)

26. The BFD asked everyone with information to complete a "5A" report and then interviewed each of them. (Exhibit 35: Testimony of Dep. Walsh).

27. FF CB's 5A report, completed on December 14, 2018 states in part:

"I was in the TV room on my playstation 4 wearing headphones and talking to my girlfriend in a party chat ... Around 12:10, I

observed FF [GL] stumble into the TV room with a plate of food in his hand, visibly intoxicated. It was then confirmed through the smell of alcohol on his breath when he asked me ‘if I wanted some Chinese food’ to which I shook my head no.

Around 12:20, I was sitting on the brown leather recliner chair approximately 9 feet from FF Lavalle. He then said with a loathsome tone, ‘N****r...fucking n****r’ and then proceeded to hock a loogie and spit twice. FF then follows with ‘N****r...I’ll fuckin’ fuck you up right now n****r.’ He continued this rant for approximately 30-40 seconds. I then turned around to see if FF [GL] was possibly on the phone or watching a video, to which he was not.

My girlfriend who heard the entire interaction because FF [GL] wasn’t quiet about it asked me if ‘she heard what she thought she just heard’ to which I replied ‘yes, I’m gonna go now.’ I then ended the playstation party chat and proceeded to walk to the officers quarters.” (Exhibit R6)

28. During an interview on January 18, 2019, FF CB’s statement to investigators largely mirrored his 5A report, except that he told investigators that Mr. LaVallee also said “Do you want to fight me?” while in the TV Room. (Exhibit R16)

29. The BFD prepared a written summary of its investigation at the conclusion of the investigation. Under the heading “Findings” on the final page of the 8-page summary dated February 20, 2019, it states:

“The investigators find that FF [GL] violated BFD’s Rules and Regulations, including, but not limited to Rule 18.41, the City of Boston’s Policy on Discrimination, Harassment and Retaliation and Zero Tolerance for Violence Policy when he made the following racial, threatening comments:

- “N****r...fucking n****r”
- “N****r...I’ll fuckin’ fuck you up right now n****r” and
- “You fucking n****r...do you want to fight me, I’ll fuck you up”

and spit at FF [CB]. We base this finding on the totality of the information collected during

the investigation, not merely on FF [GL]’s inability to remember the incident and his resulting inability to contradict or deny FF [CB]’s report. Rather, for the reasons detailed above, we find FF [CB]’s report credible.” (Exhibit R16)

30. The BFD’s February 20, 2019 investigative report does not make any finding that the Appellants violated any BFD rules or regulations, but does state that “the investigators hereby refer this matter to BFD’s Personnel Division for further follow up, including a review of additional violations of BFD Rules and Regulations.” (Exhibit R16)

31. Two (2) days later, on February 22, 2019, FF CB signed and submitted an Equal Employment Opportunity Commission (EEOC) charge of discrimination with the Massachusetts Commission Against Discrimination (MCAD). That charge states in part:

“In or around December 12, 2018 I was working on Group 3 at the Boston Fire Department. Another firefighter, Mr. [GL]

(White), entered the fire house after having been out drinking. [GL] was noticeably drunk, stumbling while walking around. At this point, I was speaking with my girlfriend, [CH], via headset.

[GL] began to say ‘F****ing n****r’ or words to that effect and spitting towards me. [CH] overheard these comments and was surprised. I ended the call with [CH] and walked out of the room to inform Mr. [BS] and Mr. [MH] of what had happened. Mr. [BS] and Mr. [MH] removed [GL] from the room and put him into the bunkroom. Mr. Summering and Mr. Hayhurst did not inform the chief of this incident, as is standard protocol, stating that they would ‘deal with it in the morning’ or words to that effect.” (emphasis added) (Exhibit A4)

32. FF GL was terminated on March 15, 2019. (Exhibit 35)

33. Sometime after March 15, 2019, Chief David Walsh, Chief John Walsh and Deputy Chief Robert Calobrisi met to discuss the Appellants’ actions during the December 13, 2018 night tour in question. (Testimony of Chief David Walsh)

34. On April 22, 2019 and April 27, 2019, the Appellants were suspended for two tours of duty (i.e. - twenty-four hours each). (Exhibit R19 and R23)

35. The suspensions letters stated in relevant part:

“... On December 13, 2018 at approximately 0100 hours, an off duty member of the Engine Company 8 entered the firehouse, under the influence of alcohol and then threatened and spit at another on-duty member of the firehouse. When a member, on or off duty, threatens another member of the department, it is the officers responsibility to promptly report offensive and inappropriate behavior to their superior officer immediately. Consequently, you shall receive a two (2) tour suspension for violation of Rule 18.44 (k); §§ (1) and (2), accompanied by an Official Reprimand.” (Exhibits R19 and R23)

36. BFD Rule 18.44 states in full:

The following offenses are specifically forbidden:

- a. Conduct unbecoming a member, whether on or off duty, which tends to lower the service in the estimation of the public.
- b. Being intoxicated or under the influence of liquor, drugs, or controlled substances, while on duty or in uniform.
- c. Bringing intoxicating liquors or narcotic drugs onto department property or buildings or keeping or using the same thereon.
- d. Violation of any criminal law. Disrespect or insolence to a superior.
- e. Absence without official leave.
- f. Disrespect or insolence to a superior.
- g. Neglect of, evading, or shirking duty.
- h. Failure to respond with the apparatus or to respond at all to an alarm.
- i. Misdirecting apparatus by announcement of wrong box number or otherwise.
- j. Conduct prejudicial to good order.
- k. *Abusive or threatening language*

Threats and intimidating conduct jeopardize the safety of members of the department and interferes with the order and teamwork which is essential to a fire company. The department will not tolerate threatening and abusive conduct. Disciplinary action, including discharge, will be imposed for violations of 18.44(k).

Procedure for Investigating Threatening Conduct:

1. *When a member of the department threatens an officer or fire fighter with physical harm, the officer or fire fighter shall immediately notify his/her superior officer.*

2. *The District Chief will be notified and promptly investigate the incident. If warranted, he shall notify the on-duty Deputy Fire Chief who will respond to the location. The Deputy Chief may relieve, with loss of pay, the member making threats for the remainder of the tour pursuant to G.L. c. 31, Section 41.*

3. If the member making threats refuses to leave quarters and/or becomes disruptive, the District Chief shall request an immediate response from the Fire Investigation Unit (FIU). If the FIU is not available, the Boston Police Department shall be notified.

4. The company officer shall prefer charges for the following violations: 18.44 (a), (e), (j), (k), and any other rule or regulation, which may be violated.

5. The FIU shall accompany any fire fighter or officer who appears in court as a witness in a criminal matter concerning threats made by a member of the department. The FIU shall remain with the witness as long as necessary. Before the member is allowed to return to duty, he/she shall report to the department medical examiner to determine fitness for duty.

6. Obscene, indecent, or profane language, particularly if habitually indulged in.

7. Untruthfulness or willful misrepresentation in matters affecting the department or its employees.

8. Loss, injury, or damage to department property through willfulness or carelessness.

9. Substance Abuse.

(Exhibit R1)

37. The BFD's "Harassment Free and Respectful Workplace Employment Rights and Responsibilities" guidelines, distributed to firefighters between January and March of 2019, references when an employee experiences "discrimination, harassment or retaliation, threats, bullying or other inappropriate conduct ..." Those guidelines outline "What [an] Officer [receiving a complaint] Must Do" stating: "When Officers become aware of such incidents, they must immediately (within 24 hours) notify the Deputy Chief of Personnel and/or Director of Human Resources." (Exhibit A3)

LEGAL STANDARD

G.L. c. 31, § 43 provides:

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful

error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law;" *Commissioners of Civil Service v. Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971); *Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service;" *School Comm. v. Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there;" *Tucker v. Pearlstein*, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew;" *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited. However, "[t]he commission's task. . . is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether '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'," which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority; *Id.*, quoting internally from *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

ANALYSIS

This matter began when an off-duty firefighter (FF GL), walked into the North End firehouse during the early morning hours so intoxicated that he could not remember what transpired in the TV room where on-duty Firefighter CB, a black firefighter, was sitting. FF GL entered the TV room in a drunken state, sat down in a chair next to FF CB, smelling of alcohol and eating Chinese food. FF GL left, then re-entered the TV Room, sitting down on recliner chairs approximately nine (9) feet behind FF CB; began spitting on the floor; and then said, "fucking n-word."

FF GL was subsequently terminated and appealed his termination to the Commission. I heard that appeal; made findings consistent with the above and, based on his abhorrent behavior, recommend-

ed that the Commission affirm the BFD's decision and deny FF GL's appeal. A unanimous Commission decision denying FF GL's appeal was issued on December 5, 2019 [*LaVallee v. Boston Fire Department*, 32 MCSR 396 (2019)].

The BFD, here and in the prior appeal, also found that FF GL spat at FF CB in the TV Room that morning; and that FF GL stated: "N****r...I'll fuckin' fuck you up right now n****r" and "You fucking n****r...do you want to fight me, I'll fuck you up." Those findings are not supported by a preponderance of the evidence for the same reasons stated in the Commission's decision regarding FF GL. First, a review of the record shows that FF CB never actually stated (verbally or in writing) that FF GL spat at him. It appears that the word "at" was first used by the BFD in its investigative report. FF CB has, at different times, reported that FF GL was "spitting"; "spitting all over the place"; and/or "spitting toward me." Further, based on FF CB's own testimony and the enlarged color photographs he submitted during his testimony, FF CB was sitting in a large recliner chair with a tall back, facing in the opposite direction of FF GL, who was sitting on recliner chairs approximately nine (9) feet away. While the unsavory act of FF GL spitting on the floor while eating Chinese food and uttering the n-word, standing alone, represents substantial misconduct, the record doesn't support the allegation that FF GL was spitting at FF CB that morning.

The preponderance of the evidence also does not support the finding that FF GL stated "I'll fuck you up" and/or that he challenged FF CB to a physical fight. Based on FF CB's own 5A statement, his girlfriend heard the entire interaction between FF CB and FF GL. As referenced above, she testified only to hearing FF GL: "you fucking n-word," but did not testify to hearing the additional statements referenced above. FF CB has offered divergent statements and testimony in an apparent attempt to explain this discrepancy, including belated statements that he was "muting" and "unmuting" the headphones or that he temporarily removed the headphones at one point. That's not consistent with his 5A statement and didn't ring true to me—at all. Further, based on the credible testimony of Fire Lt. Summering and Fire Lt. Hayhurst, FF CB, immediately after the interaction, did not tell them that Mr. FF GL had made these additional threatening statements. Finally, although FF CB made this allegation regarding the additional comments in this 5A report, his own EEOC complaint does not allege that Mr. FF GL made these additional threatening comments.

That turns to the instant appeals regarding the Appellants. The BFD's notice of discipline to the Appellants states:

"...On December 13, 2018 approximately 0100 hours, an off duty member of the Engine Company 8 entered the firehouse, under the influence of alcohol and then threatened and spit at another on-duty member of the firehouse. When a member, on or off duty, threatens another member of the department, it is the officers responsibility to promptly report offensive and inappropriate behavior to their superior officer immediately. Consequently, you shall receive a two (2) tour suspension for violation of Rule 18.44 (k); §§ (1) and (2), accompanied by an Official Reprimand." (emphasis added)

As referenced above, the preponderance of the evidence does not support the BFD's conclusion that FF GL "threatened and spit" at FF CB. Nor does the preponderance of the evidence support the BFD's conclusion that FF CB made those allegations to the Appellants. Rather, the preponderance of the evidence supports the credible testimony of the Appellants, that FF CB told Lt. Summering, with Lt. Hayhurst nearby: "You better get fucking [FF GL] out of the TV room before I punch him in the face. He's drunk, he's saying [n-word] this, [n-word] that, and spitting on the floor."

The rules cited by the BFD as allegedly having been violated here state:

"When a member of the department threatens an officer or fire fighter with physical harm, the officer or fire fighter shall immediately notify his/her superior officer."

"The District Chief will be notified and promptly investigate the incident. If warranted, he shall notify the on-duty Deputy Fire Chief who will respond to the location. The Deputy Chief may relieve, with loss of pay, the member making threats for the remainder of the tour pursuant to G.L. c. 31, Section 41."

Since FF GL did not threaten FF CB with physical harm, nor did FF CB make such an allegation to the Appellants, the Appellants did not violate these rules. Likely sensing that potential outcome, the BFD, as part of the proceedings before the Commission, sought to expand the reasons why the Appellants may have violated these rules.

For the first time, the BFD argued that the Appellants violated this rule by failing to immediately notify the Deputy Fire Chief that FF CB told the Appellants that he (FF CB) would punch FF GL in the face if the Appellants did not get FF GL out of the TV Room. First, the notice of discipline never referenced this allegation. Rather, the notice specifically references the alleged failure by the Appellants to notify the Deputy Fire Chief about FF GL's threats against FF CB, which never happened. Second, after conducting a thorough investigation, and viewing FF CB's statements in the proper context, the BFD exercised wise judgment and chose not to pursue charges against FF CB for making these statements. That is precisely the same type of sound judgment that the Appellants used that night when they did not immediately report FF CB's "threats" to the Deputy Fire Chief.

What the Appellants did do, both immediately, and within hours, appears both reasonable and consistent with BFD rules and guidelines. They acted immediately to diffuse a volatile situation and remove FF GL from the TV Room. They checked in with FF CB at least twice during the shift. Between 6:30 and 7:00 A.M. that same morning, they both immediately notified their incoming superior officers about what occurred, knowing that this serious matter would need to be reported up the chain of command.

Remarkably, one of the first actions taken by the incoming superior officers was to bring FF CB and FF GL together, in the same room, a head-scratching decision that had the potential of escalating a situation that the Appellants had effectively de-escalated hours earlier. Yet, the Appellants, neither of whom had previous-

ly faced discipline in their combined forty years of service, were each suspended for two tours. After carefully reviewing the entire record and all of witness testimony, it appears, to me, that the only logical explanation for the BFD's decision to pursue discipline against the Appellants, months after the events of December 13, 2018, relates to the allegation in FF CB's MCAD filing in which he states in part: "Mr. Summering and Mr. Hayhurst did not inform the chief of this incident, as is standard protocol, stating that they would 'deal with it in the morning' or words to that effect."

As stated above, FF GL engaged in egregious misconduct when he made racist comments to FF CB. The Appellants, however, did not engage in misconduct that night, and the BFD's decision to make them collateral damage, for what appears to be a strategic move to counter FF CB's MCAD complaint against the City, is inconsistent with basic merit principles—and good conscience.

The Appellants' appeals are *allowed*. The BFD's decision to discipline them is vacated forthwith. They shall be returned to their positions without any loss of pay or other benefits. The BFD shall reimburse the Appellants for defense expenses to the extent permitted by G.L. c. 31, s. 45.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on March 12, 2020.

Notice to:

Leah Barrault, Esq.
Pyle Rome, LLP
Two Liberty Square, 10th Floor
Boston, MA 01209

Robert J. Boyle, Jr., Esq.
City of Boston
Boston City Hall, Rm. 624
One City Hall Plaza
Boston, MA 02201

* * * * *

1. The Appellant was initially represented by Attorney Christopher M. Buckley, of the Law Office of Christopher M. Buckley, who attended the pre-hearing conference held on September 11, 2017. Attorney Bowers represented the Appellant at the full hearing.

2. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

RONALDO MEDEIROS¹

v.

CITY OF LAWRENCE

G1-17-161

March 12, 2020

Cynthia Ittleman, Commissioner

Bypass Appeal-Original Appointment as a Lawrence Police Officer-Lying About Age When Dating-Inconsistent Answers During Interview-Lying About Applications to Other Police Departments—A majority of the Commissioners voted to unconditionally affirm the bypass of a candidate for original appointment to the Lawrence Police Department based on his lack of candor both about charges of sexual assault and a restraining order taken out against him by a former girlfriend. Lawrence officials also found that the Appellant had lied about whether these issues had come up in his interviews with other police departments. Commissioners Stein and Bowman concurred but did so on narrower grounds, finding that Lawrence had not proven all of the allegations of untruthfulness.

DECISION

Mr. Ronaldo Medeiros (Appellant or Mr. Medeiros), acting pursuant to G.L. c. 31, §2(b), filed an appeal with the Civil Service Commission (Commission) on August 11, 2017 challenging the decision of the City of Lawrence (Respondent or City) to bypass him for appointment to the position of permanent, full-time Police Officer with the Lawrence Police Department (LPD). A pre-hearing conference was held on September 11, 2017 at the Mercier Community Center in Lowell, Massachusetts and a full hearing was held on November 13, 2017 at the Mercier Center and on December 4, 2017 at the Commission's office in Boston.² The proceedings were digitally recorded and copies of the recording were sent to the parties.³ Witnesses were sequestered. The parties submitted proposed decisions on January 9, 2018. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Exhibits 1 through 18 were entered into evidence.⁴ Based on all of the exhibits, the testimony of the following witnesses:

Called by the Respondent:

- James X. Fitzpatrick, then-Chief, LPD
- Thomas Cuddy, Detective, LPD
- Joseph Cerullo, Sergeant, LPD

3. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

4. The exhibits entered into the record are: Joint Exhibits (Jt.Exs.) 1, 2, 2A3, 3A, 4A, 4B, 4C, 5 through 7 (with Jt.Ex. 7 being a stipulation); and Respondent's Exhibits (R.Exs.) 8 through 18. R.Ex. 18 contains the application file of each of the thirteen (13) candidates who bypassed the Appellant. The Appellant offered no exhibits.

- John Horvath, Chief, Rockport Police Department (RPD)

Called by the Appellant:

- Ronaldo Medeiros (Appellant)

and taking administrative notice of all matters filed in the case, pertinent statutes, case law, rules regulations, policies, and reasonable inferences from the evidence; a preponderance of the credible evidence establishes the following facts:

1. The Appellant is a veteran of the U.S. Army National Guard, having entered the Guard in 2009. He served a tour of duty in Afghanistan from March 2011 to March 2012. At the time of this hearing, the Appellant was in the U.S. Army National Guard reserves. He has received a number of awards and commendations including, for example, the U.S. Army Achievement Medal, the Army Good Conduct Medal, Global War on Terrorism Service Medal, the NATO Medal and the Driver and Mechanic with Driver Wheeled Vehicle(s) Clasp. (Jt.Ex. 5; Testimony of Appellant)

2. The Appellant possesses a number of certifications including in the Basic Reserve Intermittent Program (MPTC), Defensive Tactics (New England Law Enforcement Training), Basic Life Support, and First Responder Provider (MPTC). (Jt.Ex. 5; Testimony of Appellant)

3. In late 2016, the City sought to appoint a number of full-time police officers to the LPD. (Jt.Ex. 2)⁵

4. On December 16, 2016, the Respondent received Certification 04204 from the state Human Resources Division (HRD). The Appellant's name appeared second on this Certification. (Jt.Ex. 2)

5. Among the candidates who were ultimately appointed, thirteen (13) ranked below the Appellant on the Certification. (Jt.Exs. 3, 3A)

6. As part of the application process, the Appellant completed a Police Applicant Questionnaire Form. (Jt.Ex. 5)

7. Question 4 on the application form asks candidates whether they have applied for a public safety position with any other city, town, agency, etc. The Appellant answered that he had applied to positions in other police departments, including the Rockport Police Department and North Adams Police Department. (Jt.Ex. 5; R.Exs. 16 and 17))

8. Question 18(b) of the LPD application form asks candidates A) whether there have been any civil actions pending against them and B) whether there had been any civil actions concluded against them in the past seven (7) years (favorably or unfavorably). (Jt. Ex. 5)

9. The Appellant checked off the box next to question 18(A) indicating that his answer was “no” and he checked off the box next to question 18(B) indicating that his answer was “yes.” The question asked for details if the candidate answered “yes” to 18(A) or 18(B). On a separate page, the Appellant provided the following information:

Date: 09/03/2009

Location of court: Lawrence, MA Incident Number:

2009xxxxxxx Plaintiff Details: Ex-girlfriend's father [Ms. A's father] wanted to cause harm to me at my place of work at the time. District Attorney dismissed the case. Date: 08/31/2009 Location of court: Salem, MA Docket Number: xxxroxxxx Defendant Details: Ex-girlfriend [Ms. A] stated two years after we broke up, that I raped her. Judge dismissed the case.

(Jt.Ex. 5)

10. From December 2006 to on or about June/July 2008, the Appellant dated Ms. A. For some time while they were dating, Ms. A was sixteen (16) years old. While they dated, the Appellant was not honest with Ms. A and her parents about his age. (R.Exs. 10 and 11)

11. When asked at the Commission hearing how old he was when he started dating Ms. A, the Appellant first stated that he was nineteen (19) years old. However, he also testified that he was born in 1985. (Testimony of Appellant; Jt.Ex. 5) Thus, the Appellant was twenty-one (21) years old when he started to date Ms. A in 2006. (Administrative Notice)

12. On July 17, 2009, approximately one year after the relationship between the Appellant and Ms. A ended, Ms. A's father was involved in an altercation with the Appellant in North Andover, MA, which was the subject of a police incident report based on the Appellant's allegations. This is one of the two (2) matters to which the Appellant referred in his answer to application question 18(B) regarding civil matters. (Jt.Ex. 5 and R.Ex. 11) However, the July 17, 2009 incident is documented as a North Andover police incident report. (R.Ex. 11)

13. According to the police report, on July 17, 2009 Ms. A's parents saw the Appellant and a woman in a shopping plaza in North Andover. It was the first time Ms. A's father had seen the Appellant since the Appellant's relationship with his daughter had ended. They were upset because the Appellant did not tell them his age while he was dating Ms. A and Ms. A's father wanted to warn the woman with the Appellant about him. A verbal altercation ensued. The police report states that the Appellant alleged that he was the victim of an assault and battery committed by Ms. A's father. The Appellant did not report the matter to the police until ten (10) days later. (R.Ex. 11)

5. Prior to the first day of hearing in this case, the Respondent submitted that it sought to appoint eight (8) full-time police officers in the hiring cycle at issue here but subsequently (and prior to the second day of hearing) the Respondent realized that it had requested additional candidates' names on the list in order to appoint more officers and that thirteen (13) had bypassed the Appellant. (See November 20, 2017 email from Respondent's counsel, attaching email messages between HRD and the Respondent's Human Resources office.) At the outset of the case,

the certification that the Commission received from HRD related only to filling the initial eight (8) vacancies that the Respondent sought to fill. The subsequent certifications that the Respondent requested and HRD provided appear to be incomplete. However, there can be no question that the Appellant was bypassed since the subsequent certifications provide additional names that are lower on the certification than the Appellant. Thus, thirteen (13) candidates ranked below the candidate were selected and bypassed the Appellant.

14. The second matter the Appellant referred to in his LPD employment application in response to question 18(B) was a restraining order that Ms. A obtained against the Appellant on August 7, 2009. (Jt.Ex. 5; R.Ex. 10)

15. In her affidavit in support of her request for a restraining order, Ms. A stated that the Appellant did not disclose his age during their relationship and she felt pressured into sexual relations with the Appellant when she was sixteen (16) years old because he would threaten her and her family if she refused. She also wrote that after their relationship ended, the Appellant continued to call her and show up at her place of work, which statements are consistent with the statements that Ms. A's parents made to the North Andover Police in connection with the verbal altercation that her father had with the Appellant on July 17, 2009. (R.Exs. 10 and 11) The initial restraining order was to end on August 17, 2009 but on that date, the court extended it to August 31, 2009. The restraining order was not extended beyond August 31, 2009. (R.Ex. 10; Testimony of Appellant)

16. On August 26, 2016, the Appellant applied to the Rockport Police Department. Question 25 in the application asks the candidate 1) if there are any civil actions pending against the candidate and 2) if there have been any civil actions against the candidate in the last seven (7) years. The Appellant wrote "no" in response to both of these questions. (R.Ex. 16) At an initial Rockport interview, the interview panel asks a variety of questions, including whether the candidate would like to disclose anything negative and the Appellant mentioned the restraining order against him. (Testimony of Horvath) At an unknown date, the Appellant withdrew his application to the Rockport Police Department, which had not yet notified the Appellant whether he was hired, not hired or bypassed. (Testimony of Appellant)

17. On September 5, 2016, the Appellant applied to the North Adams Police Department. Question 34 in the application asks the candidate if he or she is now or ever been a defendant in a civil court action. The Appellant answered "yes" and he listed 1) the report he made to the police about the alleged criminal incident in 2009 and 2) that his ex-girlfriend "stated two years after we broke up, that I raped her. Judge dismissed the case." (R.Ex. 17) The Appellant did not indicate that he was the defendant in a temporary civil restraining order involving his ex-girlfriend. (Administrative Notice) At an unknown date, the Appellant withdrew his application to the North Adams Police Department, which had not yet notified the Appellant whether he was hired, not hired or bypassed.

Processing of Appellant's LPD Application

18. In January 2017, Det. Cuddy of the LPD was assigned to conduct a background investigation of the Appellant as part of the employment application process. (Jt.Ex. 4C; Testimony of Cuddy)

19. Det. Cuddy reviewed the Appellant's application materials, including his responses to Question 18(B). (Testimony of Cuddy)

20. Det. Cuddy checked the Appellant's Board of Probation (BOP) record, which showed that the Appellant was the defen-

dant in a restraining order issued by a court in Salem. (Jt.Ex. 4C; Testimony of Cuddy)

21. Det. Cuddy obtained a copy of the restraining order from the court, the affidavit submitted in support of the request for the restraining order and the police report from the North Andover police. He found that the North Andover Police report that the Appellant mentioned in his application in his response to Question 18(B) and the restraining order were connected. (Jt.Ex. 4C; Testimony of Cuddy)

22. Knowing that the Appellant also applied for positions with the North Adams and Rockport Police Departments, the LPD contacted them and confirmed that the restraining order had been brought up in the Appellant's application processes with these departments. (Jt.Ex. 4C; Testimony of Fitzpatrick, Cuddy and Horvath) Specifically, Det. Cuddy spoke to a Detective at the North Adams Police Department who was investigating the Appellant and that the Detective said that the restraining order came up after they found it on a Board of Probation record check but that the NAPD was "going in a different direction" so it did not pursue the matter. (Testimony of Cuddy) Then-LPD Chief Fitzpatrick spoke to Rockport Police Chief Horvath, who indicated that the subject of the restraining order came up in considering the Appellant's application there. (Testimony of Fitzpatrick and Horvath)

23. Thereafter, the LPD contacted the Appellant and asked him to come to the police station to clarify his responses to Question 18(B) and to discuss the restraining order. (Jt.Ex. 4C; Testimony of Cuddy and Appellant)

24. On or about January 9, 2017, Detective Cuddy and Sgt. Cerullo met with the Appellant at the LPD police station. (Testimony of Cuddy, Cerullo and Appellant)

25. In the meeting, Detective Cuddy asked the Appellant about his responses to Question 18(B). (Testimony of Cuddy, Cerullo and Appellant) After the Appellant commented about the circumstances regarding Ms. A and her father, Det. Cuddy and Sgt. Cerullo asked the Appellant at least twice whether the issue of the restraining order came up in the screening process of any other police departments to which the Appellant had applied for employment. The Appellant repeatedly said that it had not come up in the screening process of the other police departments. (Jt.Ex. 4C; Testimony of Cuddy and Cerullo)

26. After the meeting with the Appellant, Det. Cuddy reported to then-Chief Fitzpatrick regarding the Appellant's responses to the questions. (Testimony of Cuddy) Chief Fitzpatrick instructed Det. Cuddy to draft a report about the meeting with the Appellant. Det. Cuddy wrote the report three (3) days after the meeting with the Appellant, referring to the "serious nature of the allegations" involving the restraining order and the Appellant's allegations against Ms. A's father in the police report and that he and Sgt. Cerullo asked the Appellant if these matters "were raised" by the other police departments to which the Appellant was applying and the Appellant said that they had not come up in his consideration elsewhere. (Testimony of Cuddy; Jt.Ex. 4C)

27. Thereafter, Chief Fitzpatrick met with Mayor Daniel Rivera (the Appointing Authority), the Mayor's Chief of Staff, and the City's Personnel Director and recommended which of the candidates to hire and which of them to bypass. (Testimony of Fitzpatrick)

28. In the discussion regarding the Appellant, Chief Fitzpatrick expressed concern about the Appellant's lack of candor when the Appellant met with Det. Cuddy and Sgt. Cerullo and with Ms. A's statements about the Appellant in her affidavit in support of her request for a restraining order against the Appellant. (Testimony of Fitzpatrick)

29. The LPD regards truthfulness as a requirement for police officer candidates because police officers write reports that may be used as evidence in court proceedings and they are called upon to testify in court where their credibility may be challenged. (Testimony of Fitzpatrick)

30. Given the information in the restraining order application and the Appellant's lack of candor about the restraining order, the Appointing Authority decided to bypass the Appellant for employment as a police officer with the LPD. (Jt.Exs. 1, 4A and 4B; Testimony of Fitzpatrick)

31. By letter dated January 26, 2017, Mayor Rivera requested approval of the bypass of the Appellant, stating that in the Appellant's interview, he was "not found to be forthcoming and truthful" regarding an ex-girlfriend's allegations of sexual assault and regarding a restraining order. (Jt.Ex. 1)

32. By email dated June 14, 2017, HRD informed the Appellant that it accepted the Respondent's reasons for bypassing the Appellant, attaching the January 26, 2017 letter to HRD requesting approval to bypass the Appellant. (R.Ex. 4A)

33. The Appellant filed the instant appeal with the Commission on August 11, 2017. (Administrative Notice)

Candidates Who Bypassed the Appellant

34. Thirteen (13) candidates bypassed the Appellant. Their LPD employment applications and background investigations indicate⁶:

civil cases - none of the 13 had civil cases against them

employment terminations - candidates 3, 6 and 7 of the 13 were terminated or left by mutual agreement

driving records - candidates 1 - 6, 10 and 13 had such records

criminal records - candidates 2, 7, 12 and 13 had such records

6. The Respondent produced, at my request, the voluminous files of the candidates who bypassed the Appellant. The files were to include, as available, the investigation reports, applications, driver's records, criminal records, credit records and other documents considered in the files. Some of the files are missing pages here and there, some pages are duplicated and the files are not necessarily in the same order but there is no consistency in these occasional shortcomings suggesting ill intent. Rather, I find that production of the significant volume of documents and their organizing, copying, collation and transmission was the likely cause of the occasional shortcomings and that they do not affect the outcome here.

35. The record provides the following criminal record information about candidates 2, 7, 12 and 13:

Candidate 2 - pleaded guilty in another state in 2012 to public drunkenness, disorderly, failure to disperse and paid a \$164 fine

Candidate 7 - was charged with rape years ago and the case was "dismissed, nolle prosequi, no probable cause, not guilty" and the record was sealed by the court and probation department. The candidate took and passed a polygraph test about the case. At the LPD, the candidate acknowledged that the case came up in discussions when he applied to other police departments.

Candidate 12 - charged with assault with a dangerous weapon in 2014 in Lawrence but a detailed police investigation and report indicates that the case was dismissed because of mistaken identity and written corroboration by his employer indicating that he was at work in Andover at the time of the alleged incident. The record was sealed.

Candidate 13 - charged with OUI in 2010. The case with continued without a finding and then dismissed.

36. The Appellant's information provides the following:

criminal record - restraining order against the Appellant 8/7/09 through 8/31/09⁷

driving record - 2007 speeding, 2006 speeding (with surchargeable accident), and 2005 speeding

civil matters against the candidate - the candidate answered that a restraining order was issued against him in 2009 and that he reported to police the incident involving Ms. A's father in 2009⁸

employment - the Appellant wrote on his application that he was terminated from a job in 2009 for not writing a report that was not assigned to him.

(Jt.Ex. 5)

APPLICABLE CIVIL SERVICE LAW

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,

7. I take administrative notice that although the Board of Probation record contains criminal record information, it also maintains information about civil restraining orders, which, if violated, may be a criminal offense. Ms. A obtained the restraining order approximately a year after her relationship with the Appellant had ended, alleging that the Appellant was harassing her. There is no indication in the record here that the Appellant violated the temporary restraining order.

8. There is no indication in the record indicating that Ms. A's father was criminally charged for the incident that the Appellant alleged occurred.

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).

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).

The Commission recognizes that law enforcement officers are vested with considerable power and discretion and must be held to a high standard of conduct: “Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” *Police v. Comm’r v. Civil Service Comm’n*, 22 Mass. App. Ct. 364, 371, 494 N.E.2d 27, 32 *rev.den.* 398 Mass. 1103, 497 N.E.2d 1096 (1986). An appointing authority is justified to refuse to hire and/or to terminate a police officer who repeatedly demonstrates his “willingness to fudge the truth.” *See City of Cambridge v. Civil Service Comm’n*, 43 Mass. 300, 303 (1997) (“a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.”). *See also Everton v. Town of Falmouth*, 26 MCSR 488 (2013) and cases cited, *aff’d*, SUCV13-4382 (2014); *Gonsalves v. Town of Falmouth* and cases cited, 25 MCSR 231 (2012), *aff’d*, SUCV12-2655 (2014); and *Keating v. Town of Marblehead*, 24 MCSR 334 (2011) and cases cited.

ANALYSIS

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. The Appellant was untruthful in December 2006 when he began a dating relationship with Ms. A and during the relationship. At the time, Ms. A was sixteen (16) years old and was led to believe by the Appellant that he was nineteen (19) years old, when he was actually twenty-one (21) years of age. He continued this conduct during their relationship. The affidavit submitted by Ms. A in support of her request for the restraining order against the Appellant and a separate police report regarding the incident between the Appellant and Ms. A’s father both indicate that the Appellant was dishonest to Ms. A and her parents. Worse still, this conduct was designed to deceive a young woman in high school (and her parents) into dating him and from finding out that the person who is romantically interested in her is years older than her. The Respondent was justified in being concerned that someone who is

willing to be untruthful about his age in such circumstances may also be untruthful about other matters.

In the course of considering the Appellant’s application to the LPD, Det. Cuddy checked the Appellant’s Board of Probation record. The search revealed that a restraining order was issued against the Appellant in 2009 at the request of Ms. A. Det. Cuddy invited the Appellant to a meeting to discuss the restraining order. At the interview, Det. Cuddy and Sgt. Cerullo asked the Appellant on multiple occasions whether the restraining order had arisen at other police departments to which the Appellant had also applied. The Appellant repeatedly answered that the subject had not come up with the other departments. To verify the Appellant’s responses to these questions, Det. Cuddy called a member of the North Adams PD who said that they had discussed the restraining order with the Appellant after they found it on a check of the Board of Probation records. LPD Chief Fitzpatrick called Rockport Chief Horvath to inquire about the Appellant’s restraining order. Although the Appellant did not disclose the restraining order on his Rockport PD application, he mentioned it at an initial interview at Rockport. The Appellant subsequently withdrew his applications to the North Adams and Rockport PDs. Given the importance of the truthfulness of police officers, it was valid for the Respondent to bypass him therefor.

Further, at the Commission hearing the Appellant testified inconsistently about his and Ms. A’s ages during the relationship. On direct examination, the Appellant testified that he told Det. Cuddy and Sgt. Cerullo that he was twenty-one (21) years old and Ms. A was seventeen (17) years old when they started dating in December 2006. Having been born in 1985, the Appellant was truthful in regard to his own age but he was not truthful about Ms. A’s age because she was only sixteen (16) years old when they began dating in December 2006. The Appellant also falsely testified that when his relationship with Ms. A ended in the summer of 2008, she was nineteen years old (at which time the Appellant would have been twenty-three (23) years old). However, Ms. A was only eighteen (18) years old when their relationship ended. When asked about this on cross-examination, the Appellant contradicted himself by claiming on one hand that Ms. A had lied to her parents about his age while they were dating and, on the other hand, alleging that Ms. A’s parents had always known his age because he had been honest with them about it. Additionally, at one point during cross-examination, the Appellant testified that he was nineteen (19) years old when he and Ms. A began dating in December 2006, the age that he had claimed to Ms. A and her parents to be at the start of the relationship. The Appellant’s erroneous responses on direct examination and contradicting testimony on cross-examination seriously diminish his credibility.

The Appellant alleges that he should not have been bypassed because some of those who bypassed him had similar backgrounds. Specifically, the Appellant references Candidate #7 above. However, the charges against Candidate #7 were dismissed (“dismissed, nolle prosequi, no probable cause, not guilty”) and sealed after the victim indicated that she would not go forward and a witness apparently undermined the allegations. Candidate #7 was lat-

er being considered for hire at an out-of-state police department, he told them about the matter, he took and passed a lie detector test and was subsequently hired by the out-of-state police department, where he was working when he applied to the LPD. Candidate #7 disclosed the charges and results to the LPD during the hiring process and the LPD hired him. He otherwise had no driving record violations, no civil matters against him, and had not been terminated from employment. Thus, it appears that the Respondent carefully perused Candidate #7's background, was satisfied that he had not committed the crime with which he was charged and, unlike the Appellant, they found that Candidate #7 was forthcoming with them.

As a result, the Appellant did not receive disparate treatment.

The hearing record also indicates that (3) other candidates had criminal records. Specifically, Candidate #12 was charged with assault in Lawrence a few years prior to the hiring cycle at issue here. The case was dismissed and sealed after a detailed police investigation found that it was a case of mistaken identity and the candidate's employer in Andover provided a written report that the candidate was at work at the time of the alleged incident. Candidate #13, was charged with an OUI in 2010, which was continued without a finding and then dismissed. Candidate #2 pleaded guilty to an incident in another state in 2012 involving public drunkenness, disorderly conduct and failure to disperse, for which he paid a \$164 fine. There is no indication in the record that any of these candidates, as well as the others who bypassed the Appellant, presented concerns about their truthfulness to the Respondent. In addition, I find that there is no indication in the record that the Respondent's hiring in the hiring cycle at issue here was biased or the subject of other inappropriate motive, nor were the Respondent's hiring decisions arbitrary or capricious.

CONCLUSION

For all the above-stated reasons, the bypass appeal of Ronaldo Medeiros, under Docket No. G1-17-161, is hereby *denied*.

CONCURRING OPINION OF COMMISSIONERS BOWMAN & STEIN

We concur with the conclusion of Commissioner Ittleman that there was reasonable justification to bypass the Appellant, but on much narrower grounds. We do not believe that all of the allegations of untruthfulness have been proven by a preponderance of the evidence. However, deferring to Commissioner Ittleman's credibility assessment of the Appellant at the hearing, and because it appears to be undisputed that the Appellant gave an incorrect answer to investigators regarding the screening process in Rockport, we voted to deny his appeal.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 27, 2020.

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* * * * *

WILLIAM MURRAY

v.

DEPARTMENT OF CORRECTION

C-17-165

March 12, 2020
Cynthia A. Ittleman, Commissioner

Reclassification Appeal-Department of Correction-Scope of Responsibilities-Program Officer—A Correctional Program Officer C failed in his bid for an upward reclassification to D where he did not perform the duties in the desired classification a majority of the time. The appeal did not specify how the five functions the Appellant claimed to perform were, in fact, in the D classification or show that he performed the complex skills, processes, or consulting required.

DECISION

William Murray (Mr. Murray or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on August 23, 2017, under G.L. c. 30, s. 49, challenging the decision of the state's Human Resources Division (HRD) and the state Department of Correction (DOC or Respondent) to deny his request for reclassification from Correctional Program Officer (CPO)-C to CPO-D. A prehearing conference was held in this regard on September 26, 2017 at the offices of the Commission. On October 26, 2017, the DOC filed a Motion to Dismiss (Motion) the appeal. On November 27, 2017, the Appellant filed an opposition to the Motion. On March 1, 2018, the Commission denied the Motion ("at this time") and a full hearing was scheduled to take place on May 18, 2018. Subsequently, however, the Appellant requested, and the DOC agreed, that the case shall be decided on the papers to be submitted by both parties

instead of having a full hearing.¹ The parties submitted numerous documents in support of their respective positions. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Based on the fourteen (14) Exhibits submitted by the DOC, thirteen (13)² Exhibits submitted by HRD, and the many³ documents submitted by the Appellant, and taking administrative notice of all matters filed in the case, as well as pertinent statutes, case law, rules, regulations, policies, and reasonable inferences from the evidence, a preponderance of evidence establishes the following facts:

1. The Appellant was hired by the DOC approximately twenty (20) years prior to his request for reclassification in 2016. (Stipulation)

2. At the time that the Appellant requested reclassification, his classification was CPO-C, a title he had held for approximately seven (7) years) and the Appellant worked at Mass. Correctional Institution Cedar Junction (MCI Cedar Junction). (Stipulation; R.Ex. 4))

3. On October 10, 2016, the Appellant submitted a request to be reclassified to CPO-D. (Stipulation)

4. At the request of the DOC, on December 6, 2016 the Appellant prepared and submitted an Audit Interview Guide (the Guide) to the DOC, stating, in part,

“[i]n the absence of a CPO D in the CHRI Unit that historically has had one ... I have assumed all the duties of a CPO D, in addition to the historical duties of a CPO C.”

he supervises five (5) CPO-A/Bs;

in April 2016, the Appellant again states that he assumed the CPO-D responsibilities because of the departure of the CPO-D, including processing speedy trial papers;

the specific duties he performs include:

1. Supervision of CHRI
2. Court Trips/legal issues
3. DNA
4. IAD⁴

5. Monitor staff work from distribution pile

6. OV⁵ Reviews for sex offenses

7. Average 131 OV reviews per month

8. Sex offender Liaison - interact with [Sex Offender Registry Board] to give inmates paperwork from SORB

9. SO unit liaison - interact with Sex offender unit concerning IMS⁶ Screens send inmate fingerprints when requested

10. New men screening for sex offenses daily

11. Parole violate sex offense screening (former records duty assigned to me)

12. Register sex offenders (records aspect assigned earlier this year ...

13. Transfer checks

14. Statistics - monitor and maintain a monthly statistical spread sheet of productivity.

15. Sign and approve time when Director [G] not here.

(R.Ex. 5)

5. On April 27, 2017, the DOC Director of Personnel, Carol Thomas, signed her analysis, recommending that the Appellant's reclassification be denied, which was accepted by then-Commissioner Turco on May 9, 2017. Director Thomas reviewed the Appellant's Guide, the Form 30 for a CPO-C, the Appellant's EPRS, the pertinent organizational chart and the Specification Series (Spec) for the CPO title. She found that the Appellant is appropriately classified because:

a. many of the functions the Appellant indicated that he performs are common to all of the CPO positions in the Series;

b. although the Appellant is the Criminal History Record Information (CHRI) Sex Offender Coordinator in his office, the “overall duties and responsibilities of a CPO-D are not consistent with what Mr. Murray is performing”;

c. the Commitment Manager who supervises Mr. Murray is also responsible for all aspects relating to inmate legal issues and sex offender matters;

d. “the basic purpose of Mr. Murray's work is to be responsible for tracking the receipts of Habeas by departmental personnel, identifying and processing sex offender information” in accord with existing statutes and DOC policies, and “inputting and monitoring legal issues in IMS,” not for “coaching and developing others by identifying development needs of others and

1. The Standard Adjudicatory Rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

2. The DOC also submitted a Prehearing Memorandum, a Motion to Dismiss and an Amended Motion to Dismiss (May 14, 2018)(Amended Motion)(adding that the case should be dismissed because there was an eligible list from which a CPO-D may be selected but that the Appellant was not reached). There is no ruling in the file on the Amended Motion but it is denied in conjunction with this decision. In addition, the DOC filed a hearing memorandum and exhibit list.

3. By U.S. mail, the Appellant submitted a list of 26 documents and the cited documents except that at least numbers 15, 16 and 26 appear to be missing. The Appellant submitted additional documents through many email messages, which documents are unnumbered, some of which appear to be duplicates. I have con-

firmed to the DOC and the Appellant receipt of whatever documents I received from the *pro se* Appellant by email. The DOC objected to at least some of the documents that the Appellant submitted by email because of the handwriting on them of unknown origin. The handwriting on such documents has been given no weight since their origin is unknown.

4. IAD appears to refer to Interstate Agreement on Detainers, involving agreements between states who have custody of an inmate wanted in another state. *See, e.g.*, https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DOC_PS_4356_IC_Interstate_Agreements_on_Detainers.pdf (February 20, 2020).

5. There is no information in the record indicating the meaning of “OV.”

6. I infer that IMS is the unit's Information Management System.

coaching or otherwise helping others to improve their knowledge or skills.” (R.Ex. 4)

6. On May 19, 2017, the DOC denied the Appellant’s request for reclassification. (Stipulation)

7. On June 2, 2017, the Appellant appealed the DOC’s denial of his reclassification request. (Stipulation)

8. On August 17, 2017, HRD affirmed the DOC’s denial of the Appellant’s request for reclassification. (Stipulation)

9. On August 23, 2017, the Appellant timely filed an appeal at the Commission. (Stipulation)

10. On September 19, 2017, the Appellant resigned, retiring from DOC. (R.Ex. 14)

CPO Series Classification Specification (Spec)

11. The 2007 CPO Spec describes the work performed at all levels in this Series, in part, as follows:

Based on assignment, employees ... provide non-therapeutic counseling, rehabilitation, or custodial care and treatment to inmates; ... interview inmates; obtain inmate criminal histories through correspondence with other Law Enforcement agencies such as the Criminal Justice Information System and the FBI, from institution and court records, ... collect and analyze assessment information; counsel inmates on programming and placement recommendations ...; and describe, explain, or answer inquiries regarding institutional rules, regulations, policies, procedures, programming, custody levels, classification and institutional placement. Employees in this series shall perform Re-Entry duties: obtaining information and completing all required data entry on IMS relevant to inmate work history, programming, treatment, education, community resources and successful release; transport all released inmates to regional re-entry sites; ...; upon release, will identify those individuals who are required to register as Sex Offenders ... As a liaison to the Parole Board, employees will attend Parole hearings, provide inmate criminal history and will provide a summary of evaluative information to the Parole Board ...”

(R.Ex. 11)

12. The “competencies” required at the CPO-C level and above are critical thinking, deductive reasoning, inductive reasoning, resolving conflict and negotiating with others. (R.Ex. 11)

13. The “competencies” required at the CPO-D level are complex skills and processes in law, government and jurisprudence and making decisions and solving problems and supervisory, staff development and consulting skills. In addition, CPO-Ds are required to have the following “competencies”: “Identifying developmental needs of others and coaching or otherwise helping others to improve their knowledge or skills, coordinating members of a work group to accomplish tasks”; “encouraging and building trust, respect, cooperation among team members; and providing guidance and direction to subordinates, including setting performance standards and monitoring subordinates.” (R.Ex. 11)

14. The required work experience for a CPO-C is four (4) years of experience in counseling, guidance, criminal justice or social

work that included counseling and/or rehabilitation of criminal offenders, inmates, or prisoners and one (1) year of experience in counseling and/or rehabilitation of criminal offenders, inmates, or prisoners with certain education substitutions. CPO-D candidates are required to have five (5) years of such experience, and two (2) years of experience counseling and/or rehabilitation of criminal offenders, inmates or prisoners with certain education substitutions. (R.Ex. 11) There appears to be no dispute that the Appellant has the requisite work experience for both the CPO-C and CPO-D positions. (Administrative Notice)

Form 30 Job Descriptions

15. The Form 30 job descriptions of CPO-Cs and CPO-Ds are similar. Their few differences include:

CPO-Cs are supervised by a CPO-D and/or Director of Classification whereas a CPO-D is supervised by the Director of Classification and/or Deputy Superintendent;

Of the ten (10) duties and responsibilities in each, the only differences between the duties for a CPO-C and a CPO-D are in duties 7 and 9. Duty 7 for a CPO-C provides, “[s]erve as member/chairperson of inmate Classification and Disciplinary Boards as needed.” Duty 7 for a CPO-D provides, “Act as chairperson of classification Boards and ensure quality control of classification reports.” Duty 9 for a CPO-C provides, “[p]erform administrative functions including assigning caseloads, maintaining accurate records and generating various reports. Duty 9 for a CPO-D provides, “[o]versees and coordinates counseling activities to ensure effective operations and compliance with establishes (sic) standards.”

Minimum entrance requirements for both CPO-C and CPO-D are four (4) years of experience but a CPO-C is required to have one (1) year of experience counseling and/or rehabilitation of inmates but the CPO-D is required to have two (2) years counseling and/or rehabilitation, in addition to one (1) year as a supervisor.

(R.Exs. 9 and 10)

Employee Personal Evaluations (EPRS)

16. The Appellant received “meets” or “exceeds” ratings in his 2015-2016 EPRS as a CPO-C. His duties are listed as:

1. Verifies informational sources that reflect inmate legal issues:
 1. Initiates contacts with prosecution confirming the accuracy of identified legal issues
 2. Utilizes the CJIS network to affirm rendition statuses
 3. Tracks the receipts of Habeas by department personnel
 4. Utilizes CJIS information to identify legal issues to include ... outstanding and resolved charges, probation matters, fines, CORI, immigration issues and restraining orders
 5. Ensures that all relevant legal issues are entered into IMS
2. Serves as the CHRI Coordinator
 1. Identifies those inmates who are sex offenders ...
 2. Acts as liaison to the [SORB]
 3. Identifies and processes sex offender information in accordance with existing statutes and DOC policies

4. Reviews and screens inmate official versions for sexual content.
5. Enters current official version inmate IMS when applicable
3. Serves as a departmental liaison with institution and court personnel ...
 1. Provides technical assistance to institutional and court personnel
 2. Keeps institutional personnel abreast of information changes in legal issues
 3. Inputs and monitors legal issues in IMS
 4. Possess the ability to follow oral and written instructions
4. Adheres to the rules and regulations of CORI
 1. Exercises discretion in dealing with confidential information
 2. Ability to deal tactfully with others
 3. Ability to communicate effectively in oral expression
5. Screens all inmates prior to placement to a minimum facility.
 1. Utilizes CJIS information to identify legal issues to include ... outstanding and resolved charges, probation matters, fines, CORI, immigration issues and restraining orders ...
 2. Reviews all relevant information to ensure placement in a minimum facility is appropriate.
6. Provides supervision of the CPO A/B's (sic) in the [CHRI]
7. Other duties as assigned

(R.Ex. 7)

17. On the Appellant's 2015-2016 EPRS, his supervisor, Mr. G (CPO-D), wrote on his annual review: "Bill has really come a long way as a supervisor in the CHRI Unit. With the absence of a CPO-D, Bill has stepped up to the plate taking on more roles and helping out whenever needed." (R.Ex. 7)

18. On August 3, 2016, the Appellant wrote to his superior asking if he has "been stripped of [his] supervision duties." His superior replied, "No you are still supervising the CHRI Unit." (A.Ex. August 3 and 4, 2016 email)

19. An EPRS (with ratings and any written comments redacted) for Mr. G, who was a CPO-D and supervised the Appellant for some period of time, shows that Mr. G had the following duties:

1. serves as Chairman on Classification hearings
2. supervise and train CPO-A/B and CPO-C staff assigned to Unit Team
3. Institution Transfer Coordinator
4. perform duties of Emergency Escorted Releases Coordinator
5. prepare performance evaluations of CPO-C and CPO-A/B (subordinate staff)

6. supervisor for reentry CPO

7. prepare statistical reports for administrative (sic) review and use (Classification Hearing Statistics, SMU Admission Statistics, Furlough Quarterly Report)

(A.Ex. 17)⁷

APPLICABLE LAW

Under G.L. c. 30, s. 49, any state manager of state employee may seek to have their titles reclassified under appropriate circumstances. Specifically, this statute provides,

Any manager or an employee of the commonwealth objecting to any provision of the classification affecting the manager or employee's office or position may appeal in writing to the personnel administrator. If the administrator finds that the office or position of the person appealing warrants a different position reallocation or that the class in which said position is classified should be reallocated to a higher job group, he shall report such recommendation to the budget director and the house and senate committees on ways and means in accordance with paragraph (4) of section forty-five. Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it. If said commission finds that the office or position of the person appealing warrants a different position reallocation or that the class in which said position is classified should be reallocated to a higher job group, it shall report such recommendation to the budget director and the house and senate committees on ways and means in accordance with paragraph (4) of section forty-five. If the personnel administrator or the civil service commission finds that the office or position of the person appealing shall warrant a different position allocation or that the class in which said position is classified shall be reallocated to a higher job group and so recommends to the budget director and the house and senate committees on ways and means in accordance with the provisions of this section, and if such permanent allocation or reallocation shall have been included in a schedule of permanent offices and positions approved by the house and senate committees on ways and means, such permanent allocation or reallocation shall be effective as of the date of appeal to the personnel administrator....

Id.

A history of Commission decisions has established that in an appeal of the denial of a request for reclassification, the Appellant must prove, by a preponderance of evidence, that they perform the functions of the reclassification they seek a majority of the time. *See, e.g., Roman v. Department of Revenue*, 14 MCSR 184 (2001) (Counsel II - appeal denied); *Gruber v. Department of Revenue*, 14 MCSR 100 (2001) (Attorney - appeal denied); *Formichella v. Massachusetts Highway Department*, 21 MCSR 261 (2008) (Engineer - appeal denied); *Straub v. Department of Conservation and Recreation*, 22 MCSR 689 (2009) (Environmental Analyst III - appeal denied) *aff'd*, *Straub v. Civil Service Commission & another*, Superior Court C.A. No. SUCV2010-04143 (2013); *Kurker v. Department of Conservation and Recreation*, 22 MCSR

7. Another CPO-D whose EPRS (with ratings and any written comments were redacted) was included in the record here shows the same duties as Mr. G ex-

cept there is one (1) less duty and it includes a duty, in part, to be Supervisor of Specialized Units.

357 (2009)(Ranger II - appeal allowed); *Guidmond v. Department of Correction*, 27 MCSR 327 (2014)(Correction Program Officer - appeal denied); *Messier v. Department of Correction*, 13 MCSR 204 (2000)(Clerk III - appeal denied); *Lefebvre v. Department of Early Education and Care*, 22 MCSR 149 (2009)(Administrative Assistant II - appeal allowed); *McCollum v. Department of Environmental Protection*, 15 MCSR 23 (2002)(Environmental Engineer VI - appeal denied); *Towns v. Department of Mental Retardation*, 21 MCSR 17 (2008)(Vocational Instructor C - appeal denied); *Palmieri v. Department of Revenue*, 26 MCSR 180 (2013)(Management Analyst II - appeal denied); *Skinner v. Department of Revenue*, 21 MCSR 379 (2008)(Systems Analyst II - appeal denied); *O'Neill v. Department of Revenue*, 19 MCSR 149 (2006)(Tax Auditor I - appeal denied); *Erb v. Department of Revenue*, 18 MCSR 202 29 (2005)(Program Coordinator III - appeal denied); *Cote v. Department of Revenue*, 18 MCSR 189 (2005)(Tax Examiner III - appeal denied); *Vélez v. Department of Revenue*, 14 MCSR 93 (2001)(Child Support Enforcement Worker - appeal denied); *Kasprzak v. Department of Revenue*, 13 MCSR 120 (2000)(Child Support Enforcement worker - appeal denied); *Guidara v. Department of Transitional Assistance*, 24 MCSR 133 (2011)(EDP Systems Analyst III - appeal allowed); *Baddeley v. Bristol Community College*, 12 MCSR 103 (1999)(Clerk - appeal denied); *Guarente v. University of Massachusetts at Lowell*, 27 MCSR 102 (2014)(Clerk IV - appeal denied); *Kimball v. Metropolitan District Commission*, 12 MCSR 155 (1999)(Park Foreman - appeal allowed) and *Straub v. Civil Service Commission & another*, Superior Court, C.A. No. SUCV2010-04143 (2013).

ANALYSIS

The Appellant has not proved by a preponderance of the evidence that he performed the functions of a CPO-D a majority of the time before he resigned from the DOC. The Appellant's main contention is that there is no CPO-D left in his Unit and, as a result, he performs the functions of a CPO-D (in addition to his functions as a CPO-C). In addition, the Appellant asserts that he performed each of a number of CPO-D functions 100% of the time. Clearly, someone cannot perform each of a number of duties simultaneously 100% of the time.

The Appellant submitted a number of documents that he asserts support his contentions. As indicated above, a couple of the Appellant's submitted documents are statements indicating that the Appellant has improved as a supervisor and concurs that he retains his supervisor duties. However, the Spec indicates that supervision of CPO-A/Bs is part of the job of a CPO-C. In addition, a number of the other documents that the Appellant submitted here are documents that he wrote, which do not provide objective proof that the Appellant performs the function of a CPO-D a majority of the time and/or they refer to documents not in the record.

In his Interview Guide, the Appellant listed fifteen (15) tasks that he performed, five (5) of which he asserted are the duties of a CPO-D (tasks 2, 3, 4, 14 and 15). However, the Appellant did not indicate how those few functions qualify as the tasks of a CPO-D, nor did he prove that he performs them most of the time. In addition, in his Interview Guide and other documents he sub-

mitted, the Appellant refers to various duties in his EPRS as "level distinguishing duties" when it is the level distinguishing duties between the various levels of the Spec that determine their distinctions. In fact, the Spec indicates that a CPO-D is required to have certain "competencies," including Complex Skills and Processes and Supervisory, Staff Development and Consulting Skills. While it is clear that the Appellant supervised a number of CPO A/Bs, as required of a CPO-C like himself, there is no indication in the record, for example, that he helped identify staff development needs and trained them. There is also no indication in the record that the Appellant is authorized and/or required to prepare EPRSs for the CPO-A/Bs he supervises, which is a requirement for a CPO-D. There is also no indication in the record that the Appellant performed the complex skills and processes or consulting required of a CPO-D. Moreover, even comparing the Appellant's EPRS to the EPRS of a CPO-D who had supervised him shows that the two had different sets of duties, although their Form 30 job descriptions appear to be similar.

Even if the Appellant had established by a preponderance of the evidence that he had performed the duties of a CPO-D a majority of the time prior to his resignation, it is highly unlikely that there would be a financial remedy. Specifically, G.L. c. 30, s. 57 provides,

The decision of the civil service commission shall be final and binding on all agents and agencies of the commonwealth; provided, however, that any such decision may have retroactive effect pursuant to the applicable provisions of section forty-nine and also pursuant to rules made under the provisions of section fifty-three; and, provided further, that *no such decision shall require any payment to be made as of any date before the beginning of the fiscal year in which such decision shall be rendered*, except to the extent such payment is permitted pursuant to the provisions of said section forty-nine and subject to appropriation for the purposes thereof. *If such decision shall require the payment of money to any employee of the commonwealth, the civil service commission shall notify the appointing authority, the personnel administrator, the budget director, and the comptroller of the amount or amounts thereof, and such amount or amounts shall be paid from available appropriations if in accordance with law.*

Id. As a result, even if the Commission allowing this appeal was warranted, which it is not, a retroactive payment is unlikely and it is unlikely that funding therefor would be available. Moreover, the statute requires the recipient of such payment to be an employee and the Appellant retired from the DOC in 2017.

While this decision finds that the Appellant did not perform the duties of a CPO-D a majority of the time, it should not be read to undermine the important, difficult and professional work that the Appellant performed as a CPO-C and in his prior titles during his significant tenure at the DOC.

CONCLUSION

Accordingly, for the above stated reasons, the discipline appeal of Mr. Murray, Docket No. C-17-165, is hereby **denied**.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 12, 2020.

Notice to:

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* * * * *

MARY ELLEN SCLAFANI-ABRAMS

v.

DEPARTMENT OF REVENUE

C-19-106

March 12, 2020

Christopher C. Bowman, Chairman

Reclassification Appeal-Department of Revenue-Scope of Responsibilities-EDP Computer Operations Supervisor to Program Coordinator III—In an unusual favorable action on a DOR reclassification petition, Commissioner Cynthia A. Ittleman allowed the reclassification of the Appellant from EDP Computer Operations Supervisor to Program Coordinator III, citing primarily the overlap between the duties and responsibilities of the two positions. The decision also notes that the Appellant exercises significant supervisory functions, implements standards for program monitoring and evaluation, and took additional responsibilities with the rollout of DOR's new tax software over the last four years.

DECISION

On April 26, 2019, the Appellant, Mary Ellen Sclafani-Abrams (Appellant), pursuant to G.L. c. 30, § 49, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to deny her request for reclassification from an EDP Computer Operations Supervisor position to Program Coordinator III (PC III). On May 21, 2019, I held a pre-hearing conference at the offices of the Commission. I held a full hearing at the same location on July 8, 2019.¹

The hearing was digitally recorded and both parties were provided with a usb drive containing a recording of the hearing.²

FINDINGS OF FACT

Twenty-three (23) joint exhibits (Exhibits 1-23) and nine (9) Appellant Exhibits (Exhibits A1 - A9) were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by DOR:

- Sandra Antonucci, Classification Analyst, Human Resources Bureau
- Judith Johnson, Chief, Data Integration Bureau

For the Appellant:

- Mary Ellen Sclafani-Abrams, Appellant

and taking administrative notice of all matters filed in the case, and pertinent rules, statutes, regulations, case law, policies, and reasonable inferences from the credible evidence; a preponderance of credible evidence establishes the following facts:

1. The Appellant is employed with the Department of Revenue in the Data Integration Bureau (DIB), and is classified as an EDP Computer Operations Supervisor. (Exhibits 3, 13; Testimony of Antonucci & Appellant)
2. The Appellant began her employment with the Department of Revenue in 2001 as a Data Entry Supervisor in DIB. (Testimony of Appellant) Her official title at that time was Research Analyst II.
3. The Appellant was placed into her current title of EDP Computer Operations Supervisor via a maintenance reclassification in 2007. (Testimony of Antonucci) She has remained in the role of a Data Entry Supervisor since that time.
4. On February 21, 2018, The Appellant submitted a classification appeal to the Department's Human Resources Bureau ("HRB"), seeking the title of PC III. (Exhibit 3).
5. HRB Classification Analyst Sandra Antonucci (Ms. Antonucci) handled the Appellant's appeal. (Exhibits 3 & 4; Testimony of Antonucci).
6. In 1987, HRD approved Classification Specifications for the EDP Computer Operations Supervisor series and the Program Coordinator Series (Exhibits 11 & 12).
7. The EDP Computer Operations Supervisor classification specifications cover one title—the EDP Computer Operations Supervisor, which is a NAGE Unit 6, Grade 13 title. (Exhibit 11).

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. The Commission subsequently had a written transcript of the hearing prepared.

8. The EDP Computer Operations Supervisor exercises direct supervision over 1-6 employees and indirect supervision of 16-34 employees. (Exhibit 11)

9. The general responsibilities of incumbents in the EDP Computer Operations Supervisor title are to “plan, supervise and coordinate the best use of resources for electronic data processing (EDP) computer operations; schedule daily production runs based on program priorities; supervise and implement system and program operation; evaluate performance of computer systems and peripheral data processing equipment; determine causes of system and program failure; and perform related work as required.” The basic purpose of the position is “to achieve efficient use of computer systems.” (Exhibit 11).

10. According to the EDP Computer Operations Supervisor classification specifications, the duties an incumbent in that title performs include the following relevant duties:

“1. Reviews operating logs to identify equipment status and/or job streams; . . . scheduling duty rosters; . . . determines appropriate response to error conditions by stopping jobs, changing instructions, restarting runs, etc; evaluates production sheets, logs, etc., to identify production problems and determine whether work is being performed as scheduled.”

“2. Scheduling test times for analysts and programmers; schedules daily production runs based on program priorities . . . ; and reassigns priorities and reschedules computer runs due to cancellations and unavailability of input data or devices to ensure maximum and efficient utilization of computer time.”

“3. Develops and or revises standard operating procedures for data processing operations and coordinates activities of own section with other data processing sections for efficiency of operations.”

“5. Recommends expansion or revision of operations by evaluating the performance of operating systems and hardware, including disc channel balance, idle time and load averages.”

“7. Communicates with on-line users, technical personnel, utility companies and vendor representatives about existing or potential problems and/or to identify and resolve problems.”

“8. Prepares reports on equipment and computer use, work plans, and work status; meets with employees to discuss progress, goals or priorities; plans and designs physical layout of computer room to accommodate equipment; and coordinates the acquisition of hardware, software and computer services.” (Exhibit 11).

11. The Program Coordinator classification specifications cover three titles, all of which are NAGE Unit 6 titles: Program Coordinator I (PC I) - Grade 10; Program Coordinator II (PC II) - Grade 12; and PC III - Grade 14. (Exhibit 12).

12. Under the Program Coordinator Specification, incumbents in the Program Coordinator series “coordinate and monitor assigned program activities; review and analyze data concerning agency programs; provide technical assistance and advice to agency personnel and others; respond to inquiries; maintain liaison with various agencies; and perform related work as required.” The basic purpose of the work is to “coordinate, monitor, develop and implement programs for an assigned agency.” (Exhibit 12.)

13. According to the Program Coordinator Specification, an incumbent in any title in the Program Coordinator series may provide direct supervision and perform the following relevant duties:

“1. Coordinates and monitors assigned program activities to ensure effective operations and compliance with established standards.

2. Reviews and analyzes data concerning assigned agency programs to determine progress and effectiveness, to make recommendations for changes in procedures, guidelines, etc. and to devise methods of accomplishing program objectives.

3. Provides technical assistance and advice to agency personnel and others concerning assigned programs to exchange information, resolve problems and to ensure compliance with established policies, procedures and standards.

4. Responds to inquiries from agency staff and others to provide information concerning assigned agency programs.

5. Maintains liaison with various private, local, state and federal agencies and others to exchange information and/or to resolve problems.

6. Performs related duties such as attending meetings and conferences; maintaining records; and preparing reports.” (Exhibit 12.)

14. The PC III exercises direct supervision over 1-5 employees and indirect supervision over 6 - 15 employees. (Exhibit 12)

15. The PC III is set apart from lower titles in the PC series in that incumbents perform the following additional duties:

“1. Develop and implement standards to be used in program monitoring and/or evaluation.

2. Oversee and monitor the activities of an assigned work unit.

3. Confer with management staff and others in order to provide information concerning program implementation, evaluation and monitoring and to define the purpose and scope of proposed programs.” (Exhibit 12).

16. The Appellant completed an Interview Guide (the Guide), which was signed on March 22, 2018 by the Appellant and her supervisor, Glenda Rivera, Deputy Chief, DIB. (Exhibit 4).

17. In the Guide, the Appellant listed the following as her duties:

- “Maintain the production standards of the data entry area by performing necessary supervisory functions in order to ensure all established deadlines.
- Develop and train immediate staff.
- Improve and maintain quality of the Data Entry staff.
- Train all employees on work procedures by explaining and providing written instructions.
- Test systems to ensure compliance with business rules.
- Evaluate and review progress of employees by completing the EPRS forms.
- Monitor and maintain reports.

- Request and maintain Account Requests utilizing the WEB Forms Flow for seasonal and full time employees.
- Utilize the Remittance systems and applications to prepare end of day reports and balance the deposit.
- Approve Employee Self Serve for each employee.
- Forms Committee” (Exhibit 4).

18. In a follow-up email on April 5th, the Appellant clarified that she spends 80% of her time on the duties of maintaining the production standards of the data entry area by performing supervisory functions, developing and training immediate staff, improving and maintaining the quality of Data Entry staff, evaluating and reviewing employee progress by completing EPRS forms, and approving Employee Self-Service for each employee. She also spends 5% of her time training employees on work procedures by explaining and providing written instructions; 5% of her time testing systems to ensure compliance with business rules, 5% of her time monitoring and maintaining reports, 3% of her time on Forms Committee work, 1% of her time maintaining account requests, and 1% of her time utilizing the Remittance systems and applications to perform end of day reports. (Exhibit 5).

19. Developing program goals and performance evaluation criteria, such as accuracy standards, are the responsibility of DIB management. (Testimony of Johnson).

20. The Appellant meets for one hour weekly with her manager, Judith Johnson (Ms. Johnson) and the Fairfax Imaging Team to discuss potential improvements to the Imaging system. (Testimony of Johnson).

21. The Appellant also works closely with the Forms Committee to make sure that DOR forms are compatible with the systems. (Testimony of Johnson).

22. The Appellant spends about 95% of her time supervising staff and about 5% of her time meeting with managers and other groups. (Testimony of Johnson).

23. Ms. Antonucci interviewed the Appellant on April 5, 2018. (Exhibit 6).

24. The Department concluded that the Appellant was appropriately classified and notified the Appellant of its preliminary decision to deny the appeal in a letter dated November 9, 2018, which informed the Appellant of the basis for denial and notified the Appellant of her right to submit a rebuttal for consideration. (Exhibit 7).

25. As the basis for its denial, the Department informed the Appellant that it found that she “does not perform the duties of the PC III a majority of the time.” (Exhibit 7; *see also* Exhibit 11).

26. DOR’s November 9, 2018 letter to the Appellant states in part: “Justification: Incumbent does not perform the duties listed below a majority of the time:

- Must supervise staff;

- Must develop and implement standards to be used in program monitoring and/or evaluation;
- Must oversee and monitor activities of the assigned unit;
- Must confer with management staff and others in order to provide information concerning program implementation, evaluation and monitoring and to define the purpose and scope of proposed programs.” (Exhibit 7)

27. The Appellant submitted a rebuttal by letter dated November 16, 2018. (Exhibit 8).

28. The Department notified the Appellant that her appeal was denied by letter dated January 2, 2019. (Exhibit 9).

29. The Appellant submitted an appeal to HRD by letter dated November 6, 2018. (*See* Exhibit 10).

30. HRD denied the appeal by letter dated April 8, 2019, explaining that the duties being performed “do not warrant the reallocation of [her] position.” (Exhibit 10).

31. The Appellant filed an appeal with the Commission on April 26, 2019.

LEGAL STANDARD

“Any manager or employee of the commonwealth objecting to any provision of the classification of his office or position may appeal in writing to the personnel administrator and shall be entitled to a hearing upon such appeal Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it.” G.L. c. 30, § 49.

The Appellant has the burden of proving that she is improperly classified. To do so, she must show that she performs the duties of the CSES II title more than 50% of the time, on a regular basis. *Gaffey v. Dep’t of Revenue*, 24 MCSR 380, 381 (2011); *Bhandari v. Exec. Office of Admin. and Finance*, 28 MCSR 9 (2015) (finding that “in order to justify a reclassification, an employee must establish that he is performing the duties encompassed within the higher level position a majority of the time”)

PARTIES’ ARGUMENTS

DOR argues that the Appellant is appropriately classified as an EDP Computer Operations Supervisor, as her duties, according to DOR, are perfectly in line with her current classification. DOR concluded that where the Appellant’s duties overlapped with the duties in the Program Coordinator classification specification, those duties aligned either with the duties common to all levels in the series or with the duties of the PC II. Further, DOR determined that the vast majority of the Appellant’s time is spent supervising and training data entry staff and the data entry function, and that those duties are common to the EDP Computer Operations Supervisor classification specification and the PC II level of the Program Coordinator classification specification. In DOR’s deter-

mination, the Appellant does not perform the duties of a PC III, even some of the time.

The Appellant argues that she does perform the level distinguishing duties of a PC III a majority of the time as: she has taken on additional duties with the launch of new software systems, including GeniSys and Fairfax; she supervises a group of 13 full-time employees and up to 15 seasonal employees, depending on the time of year; she has a direct role in the performance criteria for her employees; including identified keystrokes, rather than number of returns entered, as a more equitable way to evaluate employee performance; she has customized instruction manuals for DOR use of the GeniSys and Fairfax systems within the Processing Bureau; and she meets regularly with her managers to discuss department goals.

Further, the Appellant points to the recommendation of bureau chief Judith Johnson, who believes that the Appellant should be granted reclassification, as she believes that the Appellant duties include program evaluation and assisting with developing standards (i.e. - keys strokes v. returns completed); and because the job has evolved and the specifications are so old and do not reflect the breadth of the duties the Appellant performs.

Finally, the Appellants argues that she has more duties and responsibility of the mailroom supervisor, who is classified as a PC III.

ANALYSIS

This is a very close call, primarily because of the overlap between the duties and responsibilities of an EDP Computer Operations Supervisor and a Program Coordinator. However, the Appellant has shown, by a preponderance of the evidence that she spends a majority of her time performing the duties and responsibilities of a PC III for the reasons discussed below.

First, the Appellant does indeed coordinate a finite program. She oversees a unit with a defined mission: ensuring that tax returns which require manual review before they are input into the system are processed in a timely and efficient manner.

Second, the Appellant does provide direct and/or indirect supervision over more than a dozen employees, including seasonal employees. In contrast, DOR acknowledges that certain PC IIIs working at DOR supervise no employees, mainly PC IIIs whose functional title is Executive Assistant to a senior DOR manager. Further, I see no basis for the conclusion by DOR, raised during the hearing, that the employees being supervised by a PC III must themselves be coordinating a project. That is not stated in the PC job specifications and appears to be a somewhat illogical conclusion reached by DOR during this review process.

Third, it appears to be undisputed that the Appellant oversees and monitors activities of this unit.

Fourth, although it is a closer call, the Appellant has shown that she does develop and implement standards to be used in program monitoring and/or evaluation. I gave significant weight to Bureau Chief Judith Johnson who has decades of experience at

DOR and is intimately familiar with the duties and responsibilities of the Appellant. In her opinion, the Appellant *does* play an important role in the development and implementation of standards. Specifically, it was the Appellant who recommended changing the fundamental way in which employees in the unit are evaluated, moving away *from* measuring how many returns are keyed *to* measuring how many key strokes are entered by employees on a daily and weekly basis. Further, the Appellant also implements performance standards by doing a quality control check of random returns each week for each employee to identify any potential errors and meets with employees to prevent any reoccurrence.

Fifth, the Appellant does meet with management staff and others, including vendors, in order to provide information regarding program implementation, evaluation and monitoring and, to an admittedly lesser extent, to define the purpose and scope of the program.

Sixth, I did consider that the Appellant has taken on additional responsibilities with the rollout of the Department's new tax software over the last four years, including supervision of additional operators and the development of manuals to complete work in new systems, both of which are indicative of someone performing higher-level program coordination duties.

While I concur with DOR that there is a significant overlap with the EDP Computer Operations Supervisor job specifications, I believe it would not be fair or equitable to effectively harm the Appellant because the program that she coordinates happens to involve the oversight of technical personnel performing technical duties. In fact, it appears that is precisely what is happening here, with the mail room coordinator, who does not supervise technical staff, being classified as a Program Coordinator III.

For all of the above reasons, the Appellant's appeal under Docket No. C-19-106 is hereby ***allowed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on March 12, 2020.

Notice to:

Mary Ellen Sclafani-Abrams
[Address redacted]

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* * * * *

IMRE SERFOZO

v.

FRAMINGHAM HOUSING AUTHORITY

D1-19-027

March 12, 2020

Paul M. Stein, Commissioner

Disciplinary Action-Discharge of Framingham Housing Authority Maintenance Worker-Job Abandonment-Unsafe Workplace—

In a decision by Hearing Commissioner Paul M. Stein, the Commission vacated the discharge of a Framingham Housing Authority maintenance worker where the employer failed to prove that he had abandoned his job. The evidence showed that the Appellant was afraid to return to the workplace after being threatened by a coworker and had supplied two letters from his doctor supporting his absence for medical reasons related to stress and a heart condition.

DECISION

The Appellant, Imre Serfozo, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 121B, §29 & G.L. c.31, §43, from the decision of the Framingham Housing Authority (FHA) discharging him from his position as Maintenance Aide.¹ The Commission held a pre-hearing conference in Boston on March 12, 2019 and a full hearing at that location, which was digitally recorded,² on May 7, 2019 and June 21, 2019. The full hearing was declared private, with witnesses sequestered. Stipulated Facts and nineteen (19) exhibits were received in evidence (*Exhs.1-19*). The Commission received Proposed Decisions on September 18, 2019. For the reasons stated below, the Appellant's appeal is allowed.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by Framingham Housing Authority:

- Paul Landers, FHA Executive Director
- Stephen Starr, Chair, FHA Board of Commissioners
- David Camerato, FHA Maintenance Director

Called by the Appellant:

- Donald Casali, FHA Housing Manager
- Darlene Herwick, retired FHA employee
- Imre Serfozo, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Imre Serfozo, is a native-born Hungarian who was trained as a carpenter and holds a college-level degree in restaurant management. He immigrated to the United States in 1984, at the age of 24. (*Testimony of Appellant*)

2. The FHA is a municipal corporation established under Mass. G.L. c.121B to serve low- and moderate-income, disabled and elderly individuals and families residing in the City (formerly the Town) of Framingham, MA (Framingham) by providing them with safe and affordable rental housing. FHA is governed by a five-member board of commissioners (Board), which appoints an Executive Director to oversee approximately 30 employees who perform the day-to-day management, administrative and maintenance services necessary to operate FHA's properties at nine (9) sites containing approximately 1100 federally-subsidized and state-subsidized elderly, disabled and family housing, as well as supporting tenants placed in private rental units under the federal "Section 8" voucher program and in private rental units receiving state-subsidized vouchers. (*Testimony of Landers & Starr & Camerato; Administrative Notice* [<https://framinghamhousing-authority.org/>])

3. Mr. Serfozo was hired by the FHA on May 16, 2011 as a Maintenance Aide by David Camerato, the FHA Maintenance Director. Because of a medical restriction at the time he was hired and throughout his employment, Mr. Serfozo was accommodated with light duty assignments and excused from such duties as snow shoveling and heavy lifting (over 50 pounds), which duties were then spread across the other three Maintenance Aides. Mr. Serfozo performed at the basic "entry level," responsible for janitorial services, which include cleaning common areas, removing trash, escorting vendors who come to perform work in the units and mowing grass. According to Mr. Camerato, Mr. Serfozo also "assists mechanics at times." (*Stipulated Facts; Exh. 3; Testimony of Appellant, Landers & Camerato*)

4. Prior to the events that gave rise to this appeal, Mr. Serfozo had not received formal discipline, although he had been verbally counseled by Mr. Camerato for quality of work issues. (*Testimony of Appellant, Landers & Camerato*)

5. Due to a non-work-related automobile accident, Mr. Serfozo went out on sick leave on November 26, 2018. (*Exhs. 3 & 7; Stipulated Facts*)

6. Mr. Serfozo was cleared for duty on December 10, 2018, and returned to work on December 11, 2018. (*Exhs. 3 & 7; Stipulated Facts; Testimony of Appellant, Landers & Camerato*)

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

2. CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

7. As he was punching out for the day on December 11, 2018 (approximately 3:55), one of the FHA mechanics confronted Mr. Serfozo and made offensive comments, stating, repeatedly, in front of approximately six (6) other coworkers: “You piece of s---,” used the word “kill” and stated: “If I didn’t have kids, I would smash your face right now.” Mr. Serfozo attempted to ignore this outburst, but the mechanic approached and appeared about to strike Mr. Serfozo when co-workers intervened and grabbed the mechanic by the arm and pulled him away. (*Exhs. 12 & 14; Testimony of Appellant*)

8. Mr. Serfozo went to the Framingham Police station to report the incident and was told it was a “civil” matter and he should follow-up with the FHA. He then spoke to the Framingham Police officer assigned as the FHA liaison officer. He also submitted a written complaint to the FHA through his supervisor, Mr. Camerato. (*Stipulated Facts; Exh. 14; Testimony of Appellant & Camerato*)

9. After speaking with the mechanic, but performing no other investigation, Mr. Camerato, imposed a two-day suspension on the mechanic. (*Testimony of Camerato*)

10. Mr. Serfozo took a personal day from work on December 12, 2018. (*Exh. 7; Testimony of Appellant & Camerato*)

11. After visiting his doctor’s office on December 12, 2018, Mr. Serfozo received a prescription to relieve anxiety. He also received a doctor’s note which stated: “Please excuse Imre Serfozo from work 12/12/18 through 12/16/18 due to medical reasons.” (*Exhs. 16 & 19; Testimony of Appellant*)³

12. Mr. Serfozo gave the December 12, 2018 doctor’s note to his neighbor and fellow FHA coworker Donald Casali for delivery to Mr. Camerato. (*Testimony of Appellant, Casali & Herwick*)

13. Mr. Casali brought the December 12, 2018 note to work and placed it in the mailbox he understood to be assigned to Mr. Camerato. (*Testimony of Casali*)⁴

14. Mr. Camerato denied ever receiving the December 12, 2018 doctor’s note. (*Testimony of Camerato*)

15. On December 16, 2018, Mr. Serfozo sent a text message to Mr. Camerato which stated: “Hello David! I call sick tomorrow 12/17/2018 Thanks Imre,” to which Mr. Camerato texted the reply: “Ok.” (*Exh. 15; Testimony of Appellant & Camerato*)

16. On December 17, 2018, Mr. Serfozo sent a text message to Mr. Camerato which stated: “Hello David I call sick for this week. I send you Doctor’s Note thx imre 12/17/2018 to 12/21/2018 thx,”

to which Mr. Camerato texted the reply: “Ok” (*Exh. 15; Testimony of Appellant & Camerato*)

17. On December 18, 2018, Mr. Serfozo saw his doctor who noted “Severe Stress, High Pressure readings, Headaches” and prescribed an increase in his medication. He provided Mr. Serfozo a doctor’s note stating: “Imre Serfozo is my patient. He has a heart condition. There has been severe stress in the workplace. This is affecting his health. Please excuse him from work from 12/17/2018 until Dec. 31, 2018.” (*Stipulated Facts; Exhs. 9, 17 & 19; Testimony of Appellant*)

18. Mr. Serfozo provided the December 18, 2018 doctor’s note to Mr. Casali for delivery to Mr. Camerato. (*Testimony of Appellant, Casali & Herwick*)

19. Mr. Casali brought the December 18, 2018 note to work and placed it in the mailbox he understood to be assigned to Mr. Camerato. (*Testimony of Casali*)

20. Mr. Camerato denied ever receiving the December 18, 2018 doctor’s note. (*Testimony of Camerato*)

21. On December 19, 2018, a private attorney wrote to Mr. Serfozo’s doctor stating that he was “assisting” Mr. Serfozo “in matters relating to his work-related stress claim,” stating, in part:

“I am currently in receipt of your note dated 12/18/18 stating that Mr. Serfozo is experiencing work related stress and that he should remain out of work until December 31, 2018. It is my suspicion after speaking with him, that you and he most likely discussed a return to work date and possibly you both agreed upon December 31. What I would like to know from you is whether he would be disabled due to the aforementioned work stress past the date of December 31st? After speaking with Mr. Serfozo, it is apparent that he would like to perhaps downplay the significance of his condition in favor of returning to work sooner than he should. I told him I would contact you to discuss just that and he agreed with me that he probably should not return to work that soon.”

“Therefore, I would appreciate it if you would dictate a short narrative commenting on whether you believe this work-related disability would extend beyond December 31st.”

(*Exh. 9*)⁵

22. On December 24, 2018, Mr. Serfozo sent a text message to Mr. Camerato which stated: “Hello David im out for sick for further notice I give you doctors note thank you! imre.” (*Exh. 15; Testimony of Appellant*)

23. Mr. Camerato’s reply, if any, to Mr. Serfozo’s December 24, 2018 note was included in the e-mail trail introduced in evidence and not otherwise produced. (*Exh. 15*)

3. According to the applicable Collective Bargaining Agreement, “To receive compensation when on sick leave, an employee must notify the Authority prior to, or within one-quarter (1/4) hour, after the time set for the beginning of the regular work day” and “For sick leave of five (5) days or more a physician’s certificate may be required.” (*Exh. 1, Article 19.1.E & 19.1.I*)

4. Mr. Camerato’s mailbox is one of approximately 24 mailboxes, each assigned to an FHA management or staff member, where they receive both inter-office and outside mail. (*Testimony of Landers, Casali & Camerato*)

5. The attorney’s letter refers to an ongoing pattern of harassment “on a fairly regular basis” due to Mr. Serfozo’s “Polish heritage” as well as a heart attack he suffered in 2013 while “shoveling snow.” There was no evidence introduced to support these assertions and I give none of them any weight. (*Exh. 9*)

24. For the period from December 13, 2018 through December 31, 2018, Mr. Serfozo's personnel time records reflected twelve (12) days of absence for "Sick - no doc." (*Stipulated Facts; Exh. 7*)

25. On December 27, 2018, Mr. Landers contacted Mr. Serfozo and told him that his complaint about the mechanic "was all taken care of." Mr. Serfozo was not satisfied with the explanation and, later that day, Mr. Serfozo contacted the FHA HR office and requested that Mr. Camerato refrain from contacting him again directly. (*Testimony of Appellant, Landers & Camerato*)

26. On January 2, 2019, the private attorney spoke by telephone with FHA counsel and informed the counsel that Mr. Serfozo was scheduled to see his doctor again the next day and that he would request a medical note to provide to the FHA following that visit. (*Exh. 4 & 19; Testimony of Appellant*)

27. On January 3, 2019, Mr. Serfozo saw his doctor who provided him with a doctor's note which stated:

"My understanding is that Imre Serfozo was attacked at work, his coworker attempted to strike him but was kept off by other coworkers."

"This is not a reasonable work situation. Imre Serfozo has a heart condition and no one should have to work alongside [a person] who has attempted to attack him."

"It is medically necessary for Imre Serfozo not to work with his attempted attacker."

(*Exhs. 10 & 19; Testimony of Appellant*)

28. Mr. Serfozo provided the January 3, 2019 doctor's note to Mr. Casali for delivery to Mr. Camerato. (*Testimony of Appellant, Casali & Herwick*)

29. Mr. Casali brought the January 3, 2019 note to work and placed it in the mailbox he understood to be assigned to Mr. Camerato. (*Testimony of Casali*)

30. Mr. Camerato denied ever receiving the January 3, 2019 doctor's note. (*Testimony of Camerato*)

31. On January 8, 2019, FHA counsel wrote to the attorney, stating that the FHA had not received the promised medical documentation and "is at a loss to understand Mr. Serfozo's absence, which is unsupported and undocumented." The letter further stated that unless Mr. Serfozo produced "appropriate supporting medical documentation" by Friday January 11, 2019 or appeared for work as scheduled on or before January 14, 2019, the FHA "will be forced to consider disciplinary action based on Mr. Serfozo's apparent decision to abandon his job." (*Exh. 4*)

32. On January 17, 2019, FHA counsel sent an e-mail to Mr. Serfozo's counsel stating, as that neither he nor the FHA had received any reply to the January 8, 2019 letter, Mr. Serfozo's "apparently abandoned his job. If this is not the case, immediate communication and an explanation of events is essential." (*Exh. 5*)

33. The private attorney never replied to the January 8, 2019 letter or the January 17, 2019 e-mail from FHA counsel. (*Exh. 6*)

34. Mr. Serfozo's personnel attendance records for January 2, 2019 show the following entry:

"Sick - no doc" and "Doc Note due on the 3rd -Only Atty for contact."

The entry for January 3, 2019 stated: "Sick -no doc." Beginning on January 4, 2019 through January 22, 2019, the entries stated:

"Sick - no doc" and "started using vacation time."

The evidence does not establish who authorized or directed that these entries be made. Upon being shown the personnel attendance record, Mr. Landers believed that Mr. Serfozo must have called the HR department, at least, as to the use of vacation time, but Mr. Serfozo did not do so. (*Stipulated Facts; Exh. 7; Testimony of Appellant & Landers*)

35. By letter dated January 22, 2019, FHA Deputy Executive Director informed Mr. Serfozo that the FHA "effective immediately has terminated your employment, as evidenced by your job abandonment." The letter recited the chronology of Mr. Serfozo's absence from December 12, 2018 through the date of the letter, during which he "never notified the FHA of an illness or other reason for your absence" and, despite promises by "your attorney" that medical documentation would be forthcoming, that none was received, and concluded that the FHA "is left with no option but to conclude you are no longer interested in working for the Authority and have abandoned your job." (*Stipulated Facts; Exhs. 6 & 7*)

36. On January 23, 2019, Mr. Serfozo, through his union, filed a grievance protesting his termination. (*Stipulated Facts; Exh. 10*)

37. On January 24, 2019, Mr. Camerato filed the Step 1 Maintenance Supervisor's Answer as: "Employee abandoned his job" (*Exh. 11*)

38. On February 8, 2019, a "Step 2" grievance hearing was held before the FHA Executive Director, Paul Landers. Mr. Serfozo appeared with union representation. During this hearing, Mr. Landers received a copy of the December 19, 2018 letter from the private attorney, which referred to the doctor's note of December 18, 2018, as well as a copy of the January 3, 2019 letter from Mr. Serfozo's doctor. The union representative also argued that, under civil service law, Mr. Serfozo was entitled to a hearing before the FHA Board prior to any termination of his employment. (*Stipulated Facts; Exhs. 8, 11 & 13; Testimony of Appellant & Landers*)

39. On or about February 11, 2019, Mr. Landers issued his decision: "Jan 22, 2019 notice rescinded. Disciplinary proceeding to commence immediately." (*Stipulated Facts; Exhs. 8, 11 & 13; Testimony of Landers*)⁶

6. [See next page.]

40. By letter dated February 13, 2019, FHA Executive Director Paul Landers informed Mr. Serfozo that, pursuant to civil service law, the FHA Board will hold a hearing on February 21, 2019 to consider “the termination of your employment as a maintenance aide for just cause, your decision to abandon your job.” The letter recited the events beginning with Mr. Serfozo’s automobile accident in November 2018, through the confrontation with the mechanic upon his return on December 11, 2019, his subsequent complaint, his absence thereafter, alleged failure to inform the FHA as to his intention to return to duty or provide medical documentation to justify the absence, and the recession of the January 22, 2019 termination. He concluded by stating:

“It is my opinion that you abandoned your job and thus resigned from the Authority. The behavior constitutes just cause under the civil service statute for the FHA to formally end your employment by accepting your resignation. It also constitutes just cause for this purpose as the term is used in the Maintenance Employees Agreement. At the hearing on February 21, 2019, I will propose to the Board of Commissioners that the Authority do so.”

(*Stipulated Facts; Exh. 11*)

41. The hearing before the FHA Board was convened, as scheduled, on February 21, 2019, with four of the five FHA Commissioners present. Mr. Serfozo appeared with union representation, testified and presented a written statement. He attributed his absence to the stress that he was under after being verbally harassed and physically threatened by an FHA coworker who “still works here” and his concern that the FHA’s response did “not make me feel comfortable to return back to work” unless the FHA could “promise me a safe working environment and that this would not happen again.” (*Stipulated Facts; Exh. 12*)

42. Immediately following the hearing, the FHA Commissioners deliberated in executive session and voted to discharge Mr. Serfozo from his position with the FHA. (*Testimony of Starr*)

43. By letter dated February 22, 2019 from Stephen Starr, Chairman of the FHA Board, Mr. Serfozo was informed that the Board found that “you ignored the Authority’s several requests to provide medical information to support your absence, knew that medical information was necessary and broke your promises to supply it, decided not to request a leave of absence, did not give any indication that you wished ever to return to work, and refused to communicate about your absence while cavalierly assuming the Authority would use your sick and vacation time benefits to pay your regular salary.” The Board concluded that Mr. Serfozo “abandoned [his] job by failing to appear for work for a roughly six-week period, without explanation or excuse, despite the Authority’s repeated requests for supporting medical information” and, therefore, his employment with the FHA was terminated effective immediately. (*Stipulated Facts; Exh. 13*)

44. This appeal duly ensued. (*Claim of Appeal*)

APPLICABLE LEGAL STANDARD

A tenured housing authority employee (with at least five years’ service) may be discharged only for “just cause” after due notice, hearing (which must occur prior to discipline if it involves a suspension of more than five days) and a written notice of decision that states “fully and specifically the reasons therefore.” G.L. c.121A, §29; G.L. c. 31, §41. An employee aggrieved by that decision may appeal to the Commission, pursuant to G.L. c. 31, §43, for de novo review by the Commission “for the purpose of finding the facts anew.” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited.

The Commission’s role 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 Comm’n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997). *See also Police Dep’t of Boston v. Collins*, 48 Mass. App. Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000); *McIsaac v. Civil Service Comm’n*, 38 Mass. App. Ct. 473, 477 (1995); *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331, *rev.den.*, 390 Mass. 1102 (1983).

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence⁷, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971); *City of Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928) *See also Mass. Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-65 (2001).

The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” *School Comm. v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488, *rev.den.*, 426 Mass. 1104 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983) The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of “merit principles” which govern civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c.31, §1.

6. Based on colloquy with counsel, the FHA has not, however, provided Mr. Serfozo, back pay or adjust his sick time and vacation time balances for any period after January 22, 2019.

7. The credibility of live testimony lies within the purview of the hearing officer. *See Covell v. Dep’t of Social Services*, 439 Mass. 766,787 (2003); *Doherty v. Ret. Bd. of Medford*, 425 Mass. 130,141 (1997); *Embers of Salisbury, Inc. v. Alcoholic Bev. Control Comm’n*, 401 Mass. 526,529 (1988); *Leominster v. Stratton*, 58 Mass. App. Ct. 726,729 (2003).

G.L. c.31, Section 43 vests the Commission with “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. *See, e.g., Police Comm’r v. Civil Service Comm’n*, 39 Mass. App. Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”) *Id.*, (*emphasis added*). *See also Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006), quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

ANALYSIS

The FHA failed to prove that it had just cause to terminate Mr. Serfozo from his employment as a Maintenance Aide. The preponderance of the evidence proved that he did not abandon his job. His absence from work after the December 11, 2018 incident in which he was threatened by a coworker was due to his fear of returning to duty without assurance that the offensive behavior to which he was subjected would not be repeated in the future. He put the FHA on notice of his concerns and procured two letters from his doctor that supported his absence for medical reasons. He kept his supervisor personally informed of his absences through the end of December and, upon learning that the FHA had “taken care of” the incident (by a two-day suspension) without interviewing him or other witnesses, he engaged an attorney to advocate for his “safe” return to work, and obtained a third doctor’s note to excuse his continued absence until further notice. I find his concerns were reasonable and made in good faith.

I find credible the testimony of the Appellant and Mr. Casali, Mr. Serfozo’s neighbor and co-worker to whom Mr. Serfozo entrusted the delivery of the three doctor’s notes he procured. I find less credible the testimony by Mr. Camerato that he never received those documents, as there is no follow-up to that effect (inquiring about the lack of receipt of the promised medical notes) neither in the text messages he exchanged with Mr. Serfozo for several weeks thereafter nor in any of the phone conversations they had. I am also perplexed that the attorney who Mr. Serfozo retained stopped communicating with the FHA sometime in early January 2019, without explanation and without evidence that Mr. Serfozo had been so informed.

I have considered whether or not Mr. Serfozo should bear some responsibility if, in fact, the notes provided to Mr. Casali in December 2018 and January 2019 somehow did go astray, and for the failure of the private attorney to respond to the FHA after speaking with FHA counsel on January 2, 2019. The preponderance of the evidence, however, convinces me that such snafus do not materially change the conclusion that there is no just cause for the FHA to doubt, at the time of the decision to terminate his employment on February 21, 2019, that Mr. Serfozo remained out of work on his doctor’s orders and that he did not abandon his job but wanted to return to duty only after he was assured that the FHA took appropriate measures to protect him from further verbal and physical threats from the co-worker who confronted him on December 11, 2018, and that he would be able to return to a “safe” working environment. No later than January 22, 2019, the date of

his union’s grievance, FHA knew that Mr. Serfozo disputed Mr. Lander’s contention that he had abandoned his job and that the union, not the attorney was now acting on Mr. Serfozo’s behalf. By February 8, 2019, the FHA was fully aware that Mr. Serfozo had procured contemporaneous medical documentation supporting his absence from December 12, 2018 through that date. The FHA does not dispute the bona fides of that documentation. Whatever uncertainty may have existed regarding Mr. Serfozo’s intentions prior to February 8, 2019, that uncertainty was fully clarified by the date of the initial hearing on February 8, 2019.

CONCLUSION

Accordingly, for the reasons stated, the appeal of the Appellant, Imre Serfozo, in Appeal D1-19-027 is **allowed**. The discharge is vacated and the Appellant shall be restored to all compensation and benefits to which he is entitled.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on March 12, 2020.

Notice to:

S.L. Romano, Dispute Resolutionist
Mass. Laborers’ District Council
7 Laborers’ Way
Hopkinton, MA 01748

Jack K. Merrill, Esq.
KSR Law
160 Gould Street, #201
Needham, MA 02494

* * * * *

DANIELE BARRASSO

v.

HUMAN RESOURCES DIVISION

B2-20-019

March 26, 2020

Christopher C. Bowman, Chairman

Examination Appeal-Fair Test Appeal-Promotional Exam to Fire Lieutenant-Flawed Test-Anxiety Disorder and Dyslexia—Although HRD’s promotional exam for fire lieutenant was a fiasco with many questions unrelated to the reading material, and others to which multiple answers were correct, the Commission declined to grant the appeal from a candidate who claimed to have failed the exam due to exacerbated anxiety with the flawed test caused by his dyslexia and anxiety disorder. The decision takes note of the fact that HRD removed some of the flawed questions from the exam (but refused to say how many) and gave credit to any right answers where multiple answers were correct. As to the candidate’s claim to anxiety undermining his performance, the Commission found the claim too speculative and did not fail to note that the candidate was given the accommodations of extra time to complete the exam and to do so in a separate room to avoid distractions. The Commission did urge HRD to conduct a thorough review of the process used to validate examinations.

DECISION ON HRD’S MOTION TO DISMISS

On November 21, 2019, the Appellant, Daniele Barrasso (Mr. Barrasso), filed a “fair test” appeal with the Civil Service Commission (Commission) regarding the November 16, 2019 promotional examination for Fire Lieutenant.

2. On December 10, 2019, I held a pre-hearing conference at the offices of the Commission which was attended by Mr. Barrasso, his union representative, and counsel for the state’s Human Resources Division (HRD).

3. As part of the pre-hearing conference, the parties stipulated to the following:

A. On November 16, 2019, Mr. Barrasso took the promotional examination for fire lieutenant.

B. Based on his diagnosed anxiety disorder and dyslexia, he was granted accommodations by HRD, which included having more time to complete the examination and taking it in a separate room to avoid distractions.

C. On November 18, 2019, Mr. Barrasso filed a fair test appeal with HRD

D. On November 21, 2019, Mr. Barrasso filed an appeal with the Commission, prior to HRD issuing a determination on his appeal.

4. At the pre-hearing conference on December 10th, it was agreed that Mr. Barrasso’s appeal to the Commission was premature; and that the appeal would be dismissed with a future effective date, allowing Mr. Barrasso to file a new appeal, with no filing fee, after he received his examination score.

1. In his subsequent brief, Mr. Barrasso estimated that 12 of the multiple choice questions did not correspond with the reading material. Another appeal, heard the same day, and for which a decision is also being issued the same day as this appeal, estimates the number to be 13. On March 24, 2020, I conducted pre-hearing

5. On December 19, 2019, the Commission issued an Order of Dismissal with a Future Effective Date.

6. On January 17, 2020, HRD denied Mr. Barrasso’s fair test appeal.

7. On or about February 3, 2020, HRD notified Mr. Barrasso that he had failed the written portion of the examination, having received a score of 63.

8. On February 4, 2020, Mr. Barrasso filed a renewed appeal with the Commission.

9. On February 25, 2020, I held a pre-hearing conference which was attended by Mr. Barrasso, his union representative and counsel for HRD.

10. At the pre-hearing conference, Mr. Barrasso stated that his fair test appeal to HRD was based on his conclusion that many¹ of the 80 multiple choice questions did not correspond with the suggested reading material. Further, he concluded that additional multiple choice questions could be answered correctly with more than one answer.

11. At the pre-hearing, counsel for HRD indicated that, after receiving Mr. Barrasso’s appeal (and others), HRD did a careful and thorough review of the examination and determined that some questions on the examination did not correspond with the reading material. Those questions were removed from the examination and were not counted in the score. For reasons attributed to confidentiality and the integrity of the testing process, HRD has opted not to indicate how many such questions were removed.

12. Further, after the above-referenced review, HRD identified additional questions in which more than one answer would be considered correct. Those questions remained in the score with candidates being given credit for a correct answer if they responded with one of the multiple correct answers. The written correspondence from HRD to Mr. Barrasso indicates that 4 questions fell into this category.

13. Specific to his appeal, Mr. Barrasso argued that the high number of questions that did not correspond to the reading material exacerbated his anxiety, removed his “margin of error” and, thus, he argued that he should be deemed as having passed the promotional examination and placed on the eligible list for fire lieutenant.

14. Mr. Barrasso also argued that HRD should disclose how many questions were removed from consideration to determine if the test should be deemed an unfair test.

15. An eligible list for fire lieutenant was established by HRD on or around March 1, 2020.

conferences in separate appeals involving the same issue presented here. As part of those pre-hearing conferences, HRD indicated that the total number of questions removed entirely was “less than 13.”

16. As discussed at the pre-hearing conference, HRD filed a Motion to Dismiss and Mr. Barrasso filed a reply.

PARTIES' ARGUMENTS

HRD argues that, even if, after review, 12 (or 13) of the 80 test questions were effectively removed from the examination because those questions were not referenced in the reading list, the Appellant cannot show that this promotional examination was not a fair test of his abilities to perform the duties of a Fire Lieutenant.

Further, HRD argues that the Commission has no mechanism by which it could determine how much Mr. Barrasso's performance would have differed in the absence of the stress he claims adversely impacted his performance.

Mr. Barrasso argues that HRD has an obligation to ensure that all questions on the examinations are based on the reading material. He argues that the failure of HRD to do so exacerbated his clinical issues related to anxiety and dyslexia, thus causing him to fail the examination. As relief, Mr. Barrasso asks that the Commission grant him a passing score so that he may be placed on the eligible list.

APPLICABLE LAW

G.L. c. 31, s. 2(b) states in part:

"No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."

G.L. c. 31, s. 22 states in part:

"An applicant may request the administrator to conduct a review of whether an examination taken by such applicant was a fair test of the applicant's fitness actually to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination."

G.L. c. 31, s. 24 states in part:

An applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three relative to (a) the marking of the applicant's answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination taken by such applicant was a fair test of the applicant's fitness to actually perform the primary or dominant duties of the position for which the examination was held."

ANALYSIS

I carefully reviewed Mr. Barrasso's argument presented at the pre-hearing conference and stated in his written brief. Mr. Barrasso and many other firefighters spent considerable time preparing for the fire lieutenant examination by reviewing the reading material offered by HRD. He and others are frustrated that apparently up to 13 of the 80 questions on the examination were effectively re-

moved as they were not contained in the reading material. While that frustration is warranted, Mr. Barrasso has not shown that the overall test was unfair and/or that the Commission should invalidate the examination.

As referenced in HRD's brief, the Commission squarely addressed this issue in *O'Neill v. Lowell and Human Resources Division*, 21 MCSR 683 (2008). Although the appeal was dismissed based on timeliness, the Commission did still address the issue of certain questions being faulty and/or effectively removed from the examination. In *O'Neill*, 20% of the examination questions were determined to be faulty. The Commission concluded that the "defect rate" of 20% did not, standing alone, rise to the level of proof necessary to deem the test unfair. The underlying facts here are not distinguishable from *O'Neill*, nor should the result be.

In regard to the specific issue of whether Mr. Barrasso, if he did not, as alleged, experience additional anxiety during the examination because certain questions did not correspond to the reading material and, if he would have received a passing score if had not experienced the additional anxiety, I concur with HRD that the alleged harm is too speculative and it would be impossible for the Commission to measure the degree of any alleged harm. That is not to diminish or understate the seriousness of the challenges that Mr. Barrasso spoke so poignantly about at the pre-hearing conference. Rather, it points to how it would be contrary to basic merit principles to arbitrarily grant Mr. Barrasso enough additional points on the examination to ensure that he received a passing score. Also, to ensure clarity, when HRD effectively removed certain questions from the examination, the minimum number of correct answers needed to receive a passing score was also reduced.

While Mr. Barrasso has not shown that this examination was an "unfair test," he and others have raised legitimate concerns regarding how so many questions apparently were not contained in the reading material. At a minimum, that should prompt HRD to conduct a thorough review of the process used to validate examinations on a going-forward basis.

For all of the above reasons, HRD's Motion to Dismiss is allowed and Mr. Barrasso's appeal under Docket No. B2-20-019 is hereby **denied**.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 26, 2020.

Notice to:

Daniele Barrasso
[Address redacted]

Melinda Willis, Esq. Human Resources Division
100 Cambridge Street: Suite 600
Boston, MA 02114

* * * * *

WILLIAM KELLEY

v.

HUMAN RESOURCES DIVISION

B2-20-015

March 26, 2020

Christopher C. Bowman, Chairman

Examination Appeal-Fair Test Appeal-Fire Lieutenant Promotional Exam-Flawed Test—The Commission dismissed another fair test appeal from a disappointed candidate for promotion to fire lieutenant in connection with a testing debacle that included the withdrawal of approximately 13 of the 80 questions because they were not addressed in the reading material. Other questions were flawed by having multiple correct answers. The Commission was hamstrung by a prior decision from 2008 in which it had denied a fair test appeal where 20% of the examination questions were found to be flawed. HRD addressed the issues with the test in this appeal by striking the questions unaddressed by the reading and granting credit for any correct answers on questions which had multiple right answers. As such, the Commission determined this test was not shown to be unfair.

DECISION ON HRD'S MOTION TO DISMISS

On January 30, 2020, the Appellant, William Kelley (Mr. Kelley), filed a “fair test” appeal with the Civil Service Commission (Commission) regarding the November 16, 2019 promotional examination for Fire Lieutenant.

2. On February 25, 2020, I held a pre-hearing conference at the offices of the Commission which was attended by Mr. Kelley and counsel for the state’s Human Resources Division (HRD).

3. As part of the pre-hearing conference, the parties stipulated to the following:

A. On November 16, 2019, Mr. Kelley took the promotional examination for fire lieutenant.

B. On November 21, 2019, Mr. Kelley filed a fair test appeal with HRD

C. On January 27, 2020, HRD denied Mr. Kelley’s fair test appeal.

D. On January 30, 2020, Mr. Kelley filed an appeal with the Commission.

E. On February 3, 2020, Mr. Kelley received his score. According to Mr. Kelley, he received an 80.88 on the written portion of the examination; and an 89.70 on the E/E portion of the examination, for a combined score of 85.

4. At the pre-hearing conference, Mr. Kelley indicated that his fair test appeal to HRD was based on his conclusion that 13 of the 80 multiple choice questions did not correspond with the suggested reading material. Further, he concluded that an additional 3 multi-

ple choice questions could be answered correctly with more than one answer.¹

5. At the pre-hearing, counsel for HRD indicated that, after receiving Mr. Kelley’s appeal (and others), HRD did a careful and thorough review of the examination and determined that some questions on the examination did not correspond with the reading material. Those questions were removed from the examination and were not counted in the score. For reasons attributed to confidentiality and the integrity of the testing process, HRD has opted not to indicate how many such questions were removed.

6. Further, after the above-referenced review, HRD identified additional questions in which more than one answer would be considered correct. Those questions remained in the score with candidates being given credit for a correct answer if they responded with one of the multiple correct answers. As part of a separate appeal that was heard the same day, it was established that 4 questions fell into this category.

7. Mr. Kelley argued that HRD should disclose how many questions were removed from consideration and, if that number exceeds more than 1-2% of the total questions, the test should be deemed an unfair test and invalidated with a new examination administered to all candidates.

8. An eligible list for fire lieutenant was established by HRD on or around March 1, 2020.

9. As discussed at the pre-hearing conference, HRD filed a Motion to Dismiss and Mr. Kelley filed an opposition.

PARTIES’ ARGUMENTS

HRD argues that, even if, after review, 13 of the 80 test questions were effectively removed from the examination because those questions were not referenced in the reading list, the Appellant cannot show that this promotional examination was not a fair test of his abilities to perform the duties of a Fire Lieutenant.

Mr. Kelley argues that HRD has an obligation to ensure that all questions on the examinations are based on the reading material. He argues that, when questions appear on the examination that are not from the reading list, it can cause confusion and the triggering of “false memories.” He argues that candidates spend considerable time studying the reading material and that including questions that were not from the reading material is inherently unfair, warranting an order from the Commission invalidating the entire examination and calling for a new examination in which 100% of the questions are based on the reading material.

APPLICABLE LAW

G.L. c. 31, s. 2(b) states in part:

“No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations

1. On March 24, 2020, I conducted pre-hearing conferences in separate appeals involving the same issue presented here. As part of those pre-hearing conferences,

HRD indicated that the total number of questions removed entirely was “less than 13.”

in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."

G.L. c. 31, s. 22 states in part:

"An applicant may request the administrator to conduct a review of whether an examination taken by such applicant was a fair test of the applicant's fitness actually to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination."

G.L. c. 31, s. 24 states in part:

An applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three relative to (a) the marking of the applicant's answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination taken by such applicant was a fair test of the applicant's fitness to actually perform the primary or dominant duties of the position for which the examination was held."

ANALYSIS

I carefully reviewed Mr. Kelley's argument presented at the pre-hearing conference and stated in his written brief. Mr. Kelley and many other firefighters spent considerable time preparing for the fire lieutenant examination by reviewing the reading material offered by HRD. He and others are frustrated that apparently up to 13 of the 80 questions on the examination were effectively removed as they were not contained in the reading material. While that frustration is warranted, Mr. Kelley has not shown that the overall test was unfair and/or that the Commission should invalidate the examination.

As referenced in HRD's brief, the Commission squarely addressed this issue in *O'Neill v. Lowell and Human Resources Division*, 21 MCSR 683 (2008). Although the appeal was dismissed based on timeliness, the Commission did still address the issue of certain questions being faulty and/or effectively removed from the examination. In *O'Neill*, 20% of the examination questions were determined to be faulty. The Commission concluded that the "defect rate" of 20% did not, standing alone, rise to the level of proof necessary to deem the test unfair. The underlying facts here are not distinguishable from *O'Neill*, nor should the result be.

While Mr. Kelley has not shown that this examination was an "unfair test," he and others have raised legitimate concerns regarding how so many questions apparently were not contained in the reading material. At a minimum, that should prompt HRD to conduct a thorough review of the process used to validate examinations on a going-forward basis.

For all of the above reasons, HRD's Motion to Dismiss is allowed and Mr. Kelley's appeal under Docket No. B2-20-015 is hereby *denied*.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 26, 2020.

Notice to:

William Kelley
[Address redacted]

Melinda Willis, Esq.
Human Resources Division
100 Cambridge Street: Suite 600
Boston, MA 02114

* * * * *

MALIK MORGAN

v.

BOSTON POLICE DEPARTMENT¹

G1-17-169

March 26, 2020

Cynthia Ittleman, Commissioner

By *bypass Appeal-Original Appointment as a Boston Police Officer-Domestic Violence and Criminal Conduct-Staleness-Disparate Treatment-Untruthfulness*—The Commission unanimously allowed the bypass appeal from a candidate for original appointment to the Boston Police, finding that the Department’s citation of felonious conduct and untruthfulness were unsupported. The criminal incident in question dated from 2001 and involved a dispute between the Appellant and his mother leading to charges that were ultimately dismissed. The Commission also found the candidate had been a victim of disparate treatment as the Department hired three candidates with criminal records stemming from more recent offenses. Also helping the cause of this Appellant were his ten years of successful employment as a police officer with Boston College and the Boston Housing Authority.

DECISION

Mr. Malik Morgan (Appellant or Mr. Morgan), acting pursuant to G.L. c. 31, s. 2(b), filed an appeal with the Civil Service Commission (Commission) on September 5, 2017, challenging the decision of the Boston Police Department (Respondent, Department or BPD) to bypass him for appointment to the position of permanent, full-time Police Officer with the Department. A pre-hearing conference was held on October 24, 2017 at the offices of the Commission in Boston and a full hearing was held on January 9, 2018 and February 14, 2018 at the Commission’s office in Boston.² The proceedings were digitally recorded and copies of the recording were sent to the parties.³ Witnesses were sequestered. The parties submitted proposed decisions. For the reasons stated herein, the appeal is allowed.

FINDINGS OF FACT

Seventeen (17) exhibits were entered into evidence.⁴ Based on all of the exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Karyn VanDyke, Detective (Det.), Recruit Investigation Unit (RIU), BPD; and
- Nancy Driscoll, Director, Human Resources, BPD

Called by the Appellant:

- Malik Morgan (Appellant)
- Ms. Elaine Morgan

and taking administrative notice of all matters filed in the case, pertinent statutes, case law, rules regulations, policies, and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

1. Mr. Morgan is a Black man with a minor daughter. He owns a home in Mattapan. At the time of the hearing, the Appellant was thirty-four (34) years old. He is a Boston native who grew up in Roxbury. (Testimony of Appellant)

2. At the time of the Commission hearing, the Appellant was a police officer for the Boston Housing Authority (BHA), where he had been working for five (5) years. Prior to working at the Boston Housing, the Appellant was a police officer at Boston College for approximately five (5) years. (Testimony of Appellant; Joint Exhibit (J.Ex.) 1) All told, the Appellant has been a law enforcement officer for at least ten (10) years. (Id.) There is no indication in the record that the Appellant has been disciplined as a law enforcement officer. (Administrative Notice)

3. The Appellant has completed a full-time municipal law enforcement training academy. (Testimony of Appellant)

4. The Appellant has a License to Carry a Firearm, which was issued by the Department in 2005. (Jt.Ex. 1; Testimony of Appellant)

5. As a child, the Appellant became interested in law enforcement because he was close to an aunt who was a Boston police officer. (Testimony of Appellant)

6. The Appellant took and passed the civil service exam for police officers on April 25, 2015. On November 1, 2015, the state’s Human Resource Division (HRD) established an eligible list of those who passed the civil service police exam, including the Appellant. At the Department’s request, HRD issued certification 04401 on February 22, 2017 and March 2, 2017. The Appellant was ranked 71st on certification 04401 among those willing to accept employment. (Stipulation) The Appellant had taken and passed the civil service police officer exam on previous occasions. (Testimony of Appellant)

7. Det. VanDyke, assigned to the Department RIU, conducted the Appellant’s background investigation in the spring and summer of 2017. Det. VanDyke prepared a Personal and Confidential

1. The Boston Police Department was previously represented in this case by Attorney Jaclyn Zawada.

2. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

3. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

4. The exhibits entered into the record at hearing are Appellant’s Exhibits 1 - 3; Respondent’s Exhibits 1 - 5; and Joint Exhibits 1 - 5. At the hearing, the Respondent was ordered to produce certain documents, which the Commission received after the full hearing and marked and entered them into the record as Respondent’s Post-Hearing Exhibits 1 - 4. Respondent’s Post-Hearing Exhibits 1 - 3 are the subject of a protective order providing that upon the final disposition of this case, including any judicial appeal process, the Respondent’s Post-Hearing Exhibits 1 - 3 shall be destroyed and the Appellant shall reference such exhibits in this litigation only. (See email messages between the parties and the Commission dated December 18, 2017 and February 16, 2018.)

Memorandum (PCM), which reported the results of her investigation including, *inter alia*, the Appellant's driver's record, credit history, employment history, references, criminal history and residence. (Jt.Ex. 1; Testimony of VanDyke)

8. The Appellant's driver's record indicated that he had a surchargeable accident in 2011 and an apparent license non-renewal in 2007. There were a few other charges prior to 2012, such as a seatbelt violation, no inspection sticker and improper equipment, but the Appellant was found not responsible for them. (Jt.Ex. 1)

9. With respect to the Appellant's employment history, Det. VanDyke spoke to BHA Sergeant M, the Appellant's supervisor. Det. VanDyke wrote that Sgt. M said that the Appellant is a "good guy and good employee who is dependable and gets along with co-workers and supervisors. [Sgt. M] stated that the applicant works well with children ... [Sgt. M] stated she trusts her life and her family's lives with the applicant." (Jt.Ex. 1) Det. VanDyke tried to obtain information about the Appellant's employment at the Boston College Police Department but was told that they are only permitted to provide a past employee's dates of employment and job title, stating that the Appellant had been a campus police officer who worked there from 2006 to 2011. Prior to Boston College, the Appellant worked for a year at the Boston Public Health Commission Police as a campus police officer; there was no disciplinary record in the Appellant's personnel file there. (Jt.Ex. 1)

10. Det. VanDyke interviewed a number of the Appellant's references who knew the Appellant for at least five (5) years. Multiple references stated that the Appellant is fair, not judgmental and he knows how to diffuse situations. There were no negative references. (Jt.Ex. 1)

11. The Appellant's credit report indicated that his credit accounts were all current. (Jt.Ex. 1)

12. Det. VanDyke checked the Appellant's criminal record, including the police report about an incident between the Appellant and his mother in 2001, the Appellant's Board of Probation record, the Department computer aided design (CAD) sheet concerning a call the Department received about the 2001 incident, and a copy of the court docket obtained by the Appellant, at the request of Det. VanDyke, regarding the 2001 incident.⁵ In 2001, the Appellant was eighteen (18) years old and he was living with his mother. Det. VanDyke discussed the Appellant's criminal record with the Appellant and, separately, with the Appellant's mother. The 2001 police report stated that in 2001, "officers responded to the [Appellant's] home due to a domestic violence call." (Jt. Ex. 1) The officers who responded reported that they spoke to the Appellant and Appellant's mother separately. The responding officers indicated that the Appellant's mother told them that the Appellant had thrown a shoe and a liquid at her, threatened her and damaged the house phone. Det. VanDyke informed the Appellant of the available information about the incident. The

Appellant denied that there was any physical altercation between him and his mother in 2001, stating that he only had a verbal altercation with his mother. Ms. Morgan, the Appellant's mother, told Det. VanDyke that she had a verbal altercation with the Appellant during the 2001 incident and she denied that she called police and told them that he assaulted her. The Appellant was arrested that night in 2001 and was charged with assault and battery/weapon, threats and destruction of property. The case was continued without a finding (CWO) and dismissed ten months later, after the Appellant performed community service and wrote an apology to his mother. (Testimony of VanDyke, Appellant and Ms. Morgan; Jt.Exs. 1 - 5) Det. VanDyke also spoke to Officer D, one of the officers who responded to the 2001 incident. Officer D stated that he had no recollection of the incident, that it "was probably and (sic) 18 year old, being an 18 year old ... and *hopefully he gets a job.*" (Jt.Ex. 1)(emphasis added)

13. Included in Det. VanDyke's 2017 report is information she obtained about the 2001 incident at the roundtable's request when the Appellant was being considered for employment in 2014. Specifically, Det. VanDyke also spoke to Officer B, another officer who responded to the 2001 incident; Officer B told Det. VanDyke that he did not recall the incident as memorable. Det. VanDyke also tried to speak to Officer G, whose name appears in the 2001 incident police report. However, Det. VanDyke found that that Officer G had either retired or was unidentifiable. (Jt.Ex. 1)

14. Det. VanDyke's 2017 PCM also reported an incident in 2011 when the Appellant's ex-girlfriend called the police because the Appellant appeared at her home late at night. Det. VanDyke spoke to both the Appellant and his ex-girlfriend in this regard. A responding officer determined that the Appellant and his ex-girlfriend had agreed that he could pick up some of his belongings that night when his work shift ended at 11p.m. The police allowed the Appellant to obtain his belongings and advised both the Appellant and his ex-girlfriend of their rights to obtain restraining orders. In addition, the Appellant's ex-girlfriend reported to Det. VanDyke that there was no domestic violence between her and the Appellant at any time, that he timely pays child support and that she wished him good luck in his application for employment at the Department. (Jt.Ex. 1)

15. In June, 2017, Det. VanDyke presented the Appellant's file to the Department roundtable, which was comprised of a superior officer and representatives of the Department Human Resources office, the Legal office, and the Diversity and Recruit Administrator. (Testimony of Driscoll)⁶

16. By letter dated August 31, 2017, the Department informed the Appellant that he had been bypassed because the Department "has significant concern with your felonious conduct and untruthful reporting[]," asserting that the pertinent Boston Police Incident report in 2001 states that he physically assaulted his mother in a dispute over the Appellant's loud music, he threatened his mother,

5. A copy of the 2001 phone call is no longer available at the Department. (Testimony of VanDyke)

6. There is no indication in the record that the Appellant was interviewed other than when investigators met with the Appellant during the requisite home visit to establish his residence. (Jt.Ex. 1)

threw things at her, damaged their home phone, he was arrested and charged with assault and battery with a weapon, threats and destruction of property, agreed to perform pre-trial probation and the criminal charges were later dismissed, which charges the Appellant denied. The letter reported that, during the recruit investigation process, the Appellant told investigators (as he told police at the 2001 incident) that the incident only involved a verbal argument, which the Department views as inconsistent with the pertinent report and the CAD dispatch log. Because of the alleged inconsistencies, the Department asserted, the Appellant was not credible and truthfulness is essential for officers to testify in criminal proceedings. Therefore, the letter asserts, the Department found the Appellant to be “ineligible for appointment ...” (Jt.Ex. 4)

17. The Department selected 130 candidates for appointment. Of the 130 who were selected, 68 were ranked below the Appellant. (Stipulation)

18. Included among the candidates whom the Respondent selected in 2017 were three (3) candidates:

1) one of the selected candidates admitted to purchasing alcohol for a minor in 2012, as indicated a police report but denied intending to do so during his background investigation, the candidate’s driver’s license was suspended in 2012 and 2015, he was found responsible for speeding and for a right of way violation in 2012 and a warrant was issued was issued regarding one of such violations;

2) another selected candidate was arraigned in 2007 for disturbing the peace which was continued without a finding. In 2006, the same candidate was arraigned for attempting to commit a crime, which was subsequently dismissed. The same candidate did not initially report that he had been fired from a job and he denied receiving a warning at another job; and

3) another selected candidate was arraigned in 2011 for assault and battery with dangerous weapon, which was dismissed in 2013. In 2009, this candidate was charged with assault with a dangerous weapon and breaking and entering in the nighttime with the intent to commit a felony, which charges were dismissed in 2010.⁷ Det. VanDyke was surprised that this candidate was hired. (Testimony of VanDyke)

(A.Exs. 1 - 3)

19. The Appellant timely filed the instant appeal. (Administrative Notice)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, s. 1. *See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); *MacHenry v. Civil Serv. Comm’n*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den.*, 423 Mass.1106 (1996).

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L. c. 31, ss. 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, s. 27; PAR.08(4).

A person may appeal a bypass decision under G.L. c. 31, s. 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. *Boston Police Dep’t v. Civil Service Comm’n*, 483 Mass. 474-78 (2019); *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Service Comm’n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’” *Brckett v. Civil Service Comm’n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere v. Civil Service Comm’n*, 31 Mass. App. Ct. 315, 321 (1991)(bypass reasons “more probably than not sound and sufficient”).

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The Commission,

“... cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority” but, when there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy,” then the occasion is appropriate for intervention by the commission.”

City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 426 Mass. 1102 (1997)(*emphasis added*) However, the governing statute, G.L. c. 31, §2(b), gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority’s action” and it is not necessary for the Commission to find that the appointing authority acted “arbitrarily and capriciously.” *Id.*

7. There is no information in the record indicating if they bypassed the Appellant or if they ranked higher than the Appellant on the certification.

ANALYSIS

The Department has not proved by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. Although the Department is entitled to considerable deference in deciding whom it finds suitable for appointment to the position of police officer, that deference is not absolute.

The Department's bypass letter to the Appellant states that it was bypassing the Appellant for "felonious conduct" and "untruthfulness." With respect to "felonious conduct," the Department relies on one (1) instance that occurred in 2001, sixteen (16) years prior to the Appellant's application to the Department in 2017. In 2001, the Appellant was eighteen (18) years old and still living with his mother. Following an apparently loud argument between the Appellant and his mother, police charged the Appellant with assault and battery/weapon, threats and destruction of property. After pretrial community service and writing an apology to his mother, the charges against the Appellant were continued without a finding (CWO) and later dismissed. A stale CWO does not provide reasonable justification for a bypass. *Finklea v. Civil Service Commission and Boston Police Department*, Suffolk Superior Ct. (Fahey, J.) 1784CV00999 (Feb. 5, 2018)(affirmed as to the CWO and remanded for further explanation of the Appellant's driving record). In addition, as noted by the Commission in *Kodhimaj v. DOC*, G1-18-131 [32 MCSR 377 (2019)], reliance on a candidate's conduct many years prior to the candidate's application for employment for a law enforcement position is not without limitation. Specifically, in *Kodhimaj* the Commission indicated,

In order for an appointing authority to rely on a record of prior misconduct as the grounds for bypassing a candidate, there must be a sufficient nexus between the prior misconduct and the candidate's current ability to perform the duties of the position to which he seeks appointment. While the Commission, when there is no evidence of political or personal overtones, owes substantial deference to the judgement of criminal justice appointing Authorities regarding hiring decisions, that deference is not without limits. (*Id.*)

The record here does not establish such a nexus by a preponderance of the evidence. At the time that the Appellant was bypassed, sixteen (16) years had passed, with no indication in the record that the Appellant repeated his conduct of 2001 or been charged with any other crimes. To the contrary, in the interim the Appellant has been a police officer for the BHA for five (5) years and, prior to that, he was a campus police officer for five (5) years and a medical facility security officer before that. Moreover, there is no indication in the record that the Appellant has even incurred any discipline for misconduct in these positions. In addition, all of the Appellant's references were positive. In fact, the Appellant's BHA supervising Sergeant reported to the recruit investigator that she trusts the Appellant with her life and that the Appellant deescalates difficult situations and works well with children. Further, the Appellant is a responsible adult who owns his own home in Boston and supports his minor daughter. Thus, the Commission finds no nexus between the charges against the Appellant in 2001 and his ability to perform the job when he applied for it sixteen (16) years later.

The Department also alleges, but has not established by a preponderance of the evidence that its bypass of the Appellant was justified for alleged untruthfulness. There is no question that police officers are required to report events and testify truthfully. The Respondent specifically alleges that the 2001 police report and printed CAD log indicate that the altercation between the Appellant and his mother was physical. However, the Appellant has consistently stated in 2001 and 2017 that the altercation was verbal, not physical. Ms. Morgan told the recruit investigator and testified at the Commission that the altercation was verbal, albeit loud. Further, the Department's reliance on the incident report and the CAD log is flawed. The incident is so old that the Department no longer has a copy of the recording of the 911 call that supposedly resulted in the police arriving at the Appellant's house during the argument between the Appellant and his mother. The recruit investigator reported that the only police officer who reportedly responded to the argument that she could find told her that the incident was not particularly memorable, probably involved an eighteen year old being an eighteen year old, and that he hoped the Appellant got the job.

The Appellant argues that his bypass was unfair because the Department hired candidates in 2017 with poor records. As noted herein, the Department hired three (3) candidates in 2017 with records that include multiple and more recent criminal offenses. In addition, one of these three selected candidates did not initially report that he had been fired from a job and denied that he received a warning at another job. Another one of the three also denied that he intended to purchase alcohol for a minor even though a police report stated that he admitted doing so. Further, one of the three previously had been the subject of a warrant. That the Respondent hired such candidates and bypassed the Appellant was indeed unfair, violating basic merit principles.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Malik Morgan, is allowed. Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/or the Boston Police Department, in its delegated capacity, take the following action:

- Place the name of Malik Morgan at the top of any current or future Certification for the position of permanent fulltime police officer at the Boston Police Department until he is appointed or bypassed after consideration.
- If Mr. Morgan is appointed as a permanent fulltime Boston police officer, he shall receive a retroactive civil service seniority date which is the same date as the the candidates who were selected from certification 04401, which certification was issued on February 22, 2017. This retroactive civil service seniority date is not intended to provide Mr. Morgan with any additional pay or benefits including, without limitation, creditable service toward retirement.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 26, 2020.

Notice to:

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* * * * *

SARAH STOWE

v.

DEPARTMENT OF CORRECTION

D-19-022

March 26, 2020
Paul M. Stein, Commissioner

Disciplinary Action-30 Day Suspension of Correction Officer II at Old Colony Correctional Center-Fraternization—The Commission let stand the 30-day suspension of a Correction Officer II at Old Colony Correctional Center for an inappropriate relationship with a childhood friend incarcerated at MCI-Framingham and the officer's ongoing lack of candor and good judgment in continuing the relationship without disclosing it to DOC or securing its approval. The inmate, a drug addict, had been a frequent overnight visitor at the Appellant's house, borrowed her cars, and received money orders and a prepaid phone account from the Appellant when incarcerated.

DECISION

The Appellant, Sarah Stowe, acting pursuant to G.L. c. 31, §42 & §43, appealed to the Civil Service Commission (Commission) from the decision of the Respondent, the Massachusetts Department of Correction (DOC), to suspend her for a total of thirty (30) days from her tenured position as a DOC Sergeant/Correction Officer II (CO-II).¹ The Commission held a pre-hearing conference in Boston on February 12, 2019 and held

a full hearing at that location on April 8, 2019 and May 15, 2019, which was digitally recorded.² The full hearing was declared private, with witnesses sequestered. Thirteen (13) Exhibits were received in evidence (*Exhs. 1 through 13*). The Commission received Proposed Decisions from each party. For the reasons stated below, Sergeant Stowe's appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the DOC:

- Erin Gaffney, DOC Assistant Deputy Commissioner (formerly Superintendent)
- Timothy Stott, DOC CO-I/Internal Affairs Unit Investigator
- Deborah Witherspoon, Treasurer, MCI-Framingham

Called by the Appellant:

- DOC CO-II, Sarah Stowe, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Sarah Stowe, is a tenured DOC employee, appointed as a CO-I in July 2009 and promoted to CO-II in 2014. She is assigned to the 3PM-11PM shift at the Old Colony Correction Center (OCCC). (*Stipulated Facts; Testimony of Appellant*)
2. Sergeant Stowe had one prior disciplinary action, a two-day suspension that is pending arbitration. (*Stipulated Facts; Exh. 8*)
3. On Wednesday, October 18, 2017, the DOC Office of Investigative Services received information that a motor vehicle owned by Sergeant Stowe and operated by a former DOC inmate (Ms. A) had been involved in a head-on collision in Watertown. Ms. A appeared to be overdosing on narcotics, was administered NARCAN and charged with OUI and other motor vehicle violations as well as multiple drug offenses. (*Exhs. 5 & 7; Testimony of Stott*)
4. Sergeant Stowe knew Ms. A "when they were growing up" but they had ended the relationship when Ms. A "had gotten into some trouble." After being reconnected with Ms. A through a mutual friend around the end of 2013, they became close personal friends (almost "family"). Sergeant Stowe assisted her in attending programs to address ongoing substance abuse issues. For a while, Sergeant Stowe spent the night at Ms. A's residence, initially, about once a week, and later, once or twice a month. (*Exhs. 5, 6, 8 & 9; Testimony of Appellant & Stott*)

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

2. CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

5. Within a few hours of the accident, Sergeant Stowe received a telephone call while on duty from Ms. A informing her of the accident. (*Exhs. 5, 6, 8 & 9; Testimony of Appellant*)

6. On October 19, 2017, Ms. A was arraigned on three criminal charges (Operating Under the Influence of Drugs, Possession of a Class B Controlled Substance and Operating Negligently) and transported to MCI Framingham where she was held in temporary custody, awaiting disposition of the criminal charges. (*Exhs. 5, 8 & 13*)

7. Ms. A listed Sergeant Stowe as her emergency contact upon incarceration. (*Exhs. 5 & 8; Testimony of Stott*)

8. On Friday, October 20, 2017, Sergeant Stowe spoke to OCCC Superintendent Gaffney (now Assistant Deputy Commissioner) and verbally requested that she be allowed to remain in contact with Ms. A. during her incarceration at MCI Framingham. Superintendent Gaffney did not act on the verbal request and instructed Sergeant Stowe to put her request in writing. (*Exh. 5; Testimony of Appellant & Comm'r Gaffney*)

9. By letter dated October 21, 2017, which was logged in as received by Superintendent Gaffney's office on October 24, 2017, Sergeant Stowe wrote: "I am writing to inform you that my close friend [Ms. A] was sentence (sic) to MCI Framingham on October 21, 2017 and that I would like to remain in contact with her (via mail, phone and possibly visits)." (*Exh. 5*)

10. On October 21, 2017, Sergeant Stowe purchased a \$100 money order and sent it to Ms. A. She wrote a letter to Ms. A informing her that "I set up the per-paid (sic) on my phone so you should be able to call me collect" and described other steps she took to get bills paid and bring toys for Ms. A's cat [Khloe], "trying to get over . . . every other day and hang out with her for a while so far so good I have all my fingers." She also offered to come to an upcoming court date in Norfolk Superior Court on November 6, 2017. (*Exhs 5, 6 & 10; Testimony of Appellant*)

11. On October 23, 2017, DOC Chief of the Office of Investigative Services, Internal Affairs Unit (IAU), opened an investigation into the Watertown accident and arrest of Ms. A while operating a vehicle owned by a DOC employee, i.e., Sergeant Stowe. (*Exh. 5; Testimony of Stott*)

12. By letter dated October 26, 2017, due in part to the pending IAU investigation, Superintendent Gaffney denied Sergeant Stowe's request and ordered that she was "not authorized to correspond, phone or visit with [Ms. A]." (*Exh. 5; Testimony of Comm'r Gaffney*)

13. Immediately upon receipt of Superintendent Gaffney's letter, Sergeant Stowe went to see the Superintendent. Sergeant Stowe said she thought that, since Ms. A was incarcerated in a different institution, it was a "given" that she would be approved to have contact with Ms. A. Superintendent Gaffney ordered Sergeant Stowe to write a CIR (Confidential Incident Report) explaining her actions, which she did on October 26, 2017, stating, in

part: "On Friday October 20, 2017, I Sgt. Stowe did . . . notify [Superintendent Gaffney] that one of my close friends [Ms. A] was incarcerated to M.C.I. Framingham on Thursday October 19, 2017 For (sic) the term of ninety days. . . . I thought from the meeting on Friday with the superintendent that I was approve (sic) to keep in contact with [Ms. A]. I did mail two letters address (sic) to [Ms. A] on Saturday October 21 and on Thursday October 26 prior to receiving the denial letter." (*Exhs. 5 & 6*)

14. Phone logs of sixteen calls placed by or to Ms. A and monitored by the DOC during her incarceration at MCI Framingham from November 1, 2017 through November 25, 2017, include numerous references to Sergeant Stowe and describe her continued activity on behalf of Ms. A, including facilitating money orders and other financial transactions and checking on Ms. A's residence. These records do not reflect any direct phone contact between Ms. A and Sergeant Stowe, save for one call placed by Ms. A to Sergeant Stowe's personal cell phone on November 1, 2017, which was blocked by the DOC. (*Exhs. 5 & 7A-7C; Testimony of Stott*)

15. Logs maintained by the Treasury at MCI Framingham show a total of four money orders received by Ms. A during her incarceration there, including the \$100 money order dated October 21, 2017 which Sergeant Stowe acknowledges she sent, as well as three other money orders dated November 4, 2017 (\$100), November 13, 2017 (\$180) and November 30, 2017, which, unlike the October 21, 2017 money order, were received by mail with no return address. (*Exh. 10; Testimony of Witherspoon*)

16. Sergeant Stowe did not believe, and the evidence is inconclusive, as to whether she did attend the November 6, 2017 court date, at which time Ms. A. was found guilty in Norfolk Superior Court stemming from an unrelated earlier arrest in December 2016 involving possession and distribution of cocaine and various multiple prescription drugs. At that point, Ms. A's inmate ID at MCI Framingham was changed from an "A" number (temporary custody) to a "T" number (inmate serving a sentence). (*Exhs. 5, 6, 8 & 13; Testimony of Appellant, Witherspoon & Stott*)

17. On November 27, 2017, Ms. A pled guilty in Waltham District Court to the October 16, 2017 charges of Possession of Class B Controlled substance and Operating Negligently and ordered to serve a one year probation; the OUI was continued without a finding. (*Exh. 13*)

18. Ms. A. remained incarcerated at MCI Framingham until December 29, 2017. (*Exh. 8*)

19. During the IAU investigation into the October 18, 2017 incident, the DOC obtained a copy of Ms. A's CJIS record which disclosed the December 2016 offenses as well as an August 2016 arrest and incarceration at MCI Framingham, and an additional "temporary custody" incarceration at MCI Framingham from April 25, 2017 to May 5, 2017, all when Sergeant Stowe acknowledged she and Ms. A were close friends. (*Exhs. 5, 6, 8, 9 & 13; Testimony of Appellant and Stott*)

20. The August 2016 arrest also involved alleged possession, distribution and trafficking of drugs. Ms. A was incarcerated at MCI Framingham from August 6, 2017 through August 9, 2017. This incident involved Ms. A's use of another vehicle borrowed from Sergeant Stowe and a search of Ms. A's residence, in both of which evidence of drugs and drug paraphernalia were found. Those charges were eventually dismissed (*nolle prosequi*). (*Exhs. 8 & 13*)

21. On January 23, 2018, IAU Investigator Stott conducted an investigatory interview with Sergeant Stowe, who waived the right to have a union representative present. She acknowledged that she had been friends with Ms. A for the past four years and had provided Ms. A with the vehicle involved in the October 18, 2017 accident. She had been in Europe in August 2016 and only learned of that prior incident after she returned and Ms. A had been released from custody. She did know about the April 2017 "temporary" incarceration. She admitted to sending Ms. A the October 21, 2017 money order but denied responsibility for the other three money orders sent in November 2017. (*Exhs. 5 & 6; Testimony of Appellant*)

22. By letter dated March 27, 2018, Sergeant Stowe was informed that the internal investigation into allegations of staff misconduct against her had been completed and that the matter had been referred for a Commissioner's Hearing. (*Exh. 5*)

23. By letter dated May 15, 2018, mailed to her home of record with a copy to her union representative, Sergeant Stowe was informed that a Commissioner's Hearing would be held on May 23, 2018, on charges involving eight particulars concerning her contacts with Ms. A after being prohibited from such contacts, her association with Ms. A despite knowledge of her incarcerations, the failure to report such contacts, and being less than truthful during the investigation, citing DOC Rules and Regulations (General Policy I and Rules 1, 8(c), 12(a), 19(b), 19(c), 19(d); and DOC Professional Boundaries Policy, 103 DOC 225). (*Exhs. 1 & 11*)

24. By letter dated May 21, 2017, Sergeant Stowe, through her attorney, requested that the scheduled Commissioner's hearing be postponed to afford him time to prepare. (*Exh. 12*)

25. In preparation for the deferred Commissioner's Hearing, new information surfaced regarding Ms. A's August 2016 arrest (which had also involved a motor vehicle provided by Sergeant Stowe to Ms. A) and her subsequent incarceration. This information suggested that, contrary to what Sergeant Stowe had stated, she was not in Europe at the time of this incident but, in fact, was on duty at the DOC. Accordingly, a new investigation into staff misconduct by Sergeant Stowe was initiated at the request of the IAU Chief to focus on the August 2016 incident. (*Exh. 8; Testimony of Stott*)

26. On June 15, 2018, IAU Investigator Stott conducted another investigatory interview with Sergeant Stowe, again, without union representation. Sergeant Stowe acknowledged that she had let Ms. A use her personal vehicles on multiple occasions and that, prior to going to Europe she did "swap" out a Ford Focus used by Ms. A since 2014 for a Nissan Rogue SUV, as she understood Ms. A was moving furniture at the time and Sergeant Stowe didn't want to leave her SUV at the airport for the week while she was on vacation in Europe. Sergeant Stowe knew that Ms. A had a "drug problem" and was trying to "get clean." Sergeant Stowe admitted that she had attended "two or three" court appearances concerning Ms. A, but denied ever seeing narcotics or illegal drugs in Ms. A's residence and denied having any knowledge that Ms. A was selling drugs from inside or outside her residence or that Ms. A was conducting drug transaction using one of Sergeant Stowe's vehicles. Sergeant Stowe learned of the August 2016 arrest and incarceration only when Ms. A told her about it several days after Sergeant Stowe returned from vacation. (*Exhs. 8 & 9; Testimony of Appellant*)

27. Further research confirmed that, although Sergeant Stowe's attendance calendar indicated that she was on duty from August 4, 2016 through August 6, 2016, the DOC shift rosters showed that she was "off on a swap" with another officer. (*Exh. 8*)

28. IAU Investigator Stott completed the second investigation on June 28, 2018. He concluded that the allegation that Sergeant Stowe was untruthful about her being off duty from July 31, 2016 through August 5, 2016 was unfounded, but also concluded that she continued to be less than truthful about her knowledge of Ms. A's incarcerations and illicit activities. (*Exh. 8; Testimony of Stott*)

29. By letter dated August 22, 2018, Sergeant Stowe was advised that the second investigation into her misconduct had been completed and that the matter was being referred for a Commissioner's Hearing. (*Exh. 8*)

30. By letter dated September 28, 2018, mailed to her home address of record, with a copy to her union representative, Sergeant Stowe was notified that a Commissioner's Hearing would be held before a hearing officer designated by the DOC Commissioner, scheduled for October 10, 2018, on the eight prior particular charges of misconduct contained in the May 15, 2018 notice and the same violations of DOC Rules and Regulations. (*Exh. 4*)

31. The Commissioner's hearing was held, as scheduled, on October 10, 2018.³ Sergeant Stowe was represented by counsel who cross-examined the DOC's witness, IAU Investigator Stott. Sergeant Stowe did not testify. The hearing officer filed her findings and conclusions on November 10, 2018, sustaining all alleged charges of misconduct. (*Exhs. 3 & 4*)

3. At the Commission hearing, Sergeant Stowe asserted that she did not receive the September 28, 2018 letter until October 5, 2018, when her union representative provided her a copy. She further asserted that, due to this late notice, she was unable to contact her private attorney until two days before the hearing. (*Testimony of*

Appellant) I am not persuaded by the evidence she presented that the DOC's letter was not delivered to her in due course but, even if that had been the case, it would not change any of my conclusions about the merits of the Appellant's claims, procedural or substantive, addressed in this Decision.

32. By letter dated January 17, 2019, hand delivered, DOC Commissioner Thomas Turco informed Sergeant Stowe that he concurred in the hearing officer's report and sustained all of the charges of misconduct as stated in the September 28, 2018 notice, finding that her conduct violated the following DOC Rules and Regulations, which provide, in relevant part:

General Policy I: "Nothing in any part of these rules and regulations shall be construed to relieve an employee . . . from his/her constant obligation to render good judgment and full and prompt obedience to all provisions of law, and to all orders . . . issued by the Commissioner, the respective Superintendents, or by their authority."

Rule 1: "You must remember that you are employed in a disciplined service which requires an oath of office. Each employee contributes to the success of the policies and procedures established for the administration of the Department of Correction and each respective institution. Employees should give dignity to their position and be circumspect in personal relationships regarding the company they keep and the places they frequent."

Rule 8(c): "You must not associate with, accompany, correspond or consort with any inmate or former inmate except for a chance meeting without specific approval of your Superintendent . . . All other outside inmate contact must be reported to your Superintendent . . . Treat all inmates impartially, do not grant special privileges to any inmate. Your relations with inmates, their relatives or friends shall be such that you should willingly have them known to employees authorized to make such inquiries. Conversation with inmates visitors shall be limited only to that which is necessary to fulfill your official duties."

Rule 12(a): "Employees shall exercise constant vigilance and caution in the performance of their duties. You shall not divest yourself of responsibilities through presumption and, must familiarize yourself with assigned tasks and responsibilities including institution and Department of Correction policies and orders."

Rule 19(b): "Effort will be taken to ensure that orders are reasonable and considerate, however, if you disagree with the intent or wording of an order, time permitting, you may be heard and the order withdrawn, amended, or it may stand. Without such prompt action on your part, no excuse will be tolerated that you did not comply with the order because it was faulty, unworkable, or for any other cause."

Rule 19(c): "Since the sphere of activity within an Institution or the Department of Correction may on occasion encompass incidents that require thorough investigation and inquiry, you must respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, a visitor, another employee or yourself."

Rule 19(d): "It is the duty and responsibility of all Institution and Department of Correction employees to obey these rules and official orders and to ensure they are obeyed by others."

Commissioner Turco imposed a suspension of 30 working days without pay. (Exhs. 1 & 2)

33. This appeal duly ensued. (*Claim of Appeal*)

4. It is within the hearing officer's purview to determine the credibility of live testimony. *E.g., Leominster v. Stratton*, 58 Mass. App. Ct. 726, 729 (2003). *See Embers of Salisbury, Inc. v. 37 Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 529 (1988); *Doherty v. Ret. Bd. of Medford*, 425 Mass. 130, 141 (1997). *See*

APPLICABLE LEGAL STANDARD

G.L. c. 31, §41-45 requires that discipline of a tenured civil servant may be imposed only for "just cause" after due notice, hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of decision that states "fully and specifically the reasons therefore." G.L. c. 31, §41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L. c. 31, §42 and/or §43, for de novo review by the Commission "for the purpose of finding the facts anew." *Town of Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited.

The Commission's role 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 Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997). *See also Police Dep't of Boston v. Collins*, 48 Mass. App. Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000); *McIsaac v. Civil Service Comm'n*, 38 Mass. App. Ct. 473, 477 (1995); *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331, *rev.den.*, 390 Mass. 1102 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence⁴, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971); *City of Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928) *See also Mass. Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-65 (2001).

The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *School Comm. v. Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488, *rev.den.*, 426 Mass. 1104 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983) The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" *Town of Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of "merit principles" which govern civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c.31, §1.

G.L. c.31, Section 43 vests the Commission with "considerable discretion" to affirm, vacate or modify discipline but that discre-

also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where witnesses gave conflicting testimony, assessment of their relative credibility cannot be made by someone not present at the hearing).

tion is “not without bounds” and requires sound explanation for doing so. *See, e.g., Police Comm’r v. Civil Service Comm’n*, 39 Mass. App. Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”) *Id.*, (*emphasis added*). *See also Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006), quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

ANALYSIS

The DOC has met its burden to establish just cause for the discipline imposed on Sergeant Stowe for her violation of DOC’s Rules and Regulations by her inappropriate contact with Ms. A. while she was incarcerated at MCI-Framingham without DOC approval, as well as her lack of candor and good judgment in continuing her outside contacts with Ms. A over a period of years without full disclosure or DOC approval. I find that DOC did not violate Sergeant Stowe’s procedural rights and, in particular, that she is not aggrieved by the alleged short notice of the Commissioner’s hearing that led to the discipline imposed by Commissioner Turco.

Procedural Issue

The Appellant argues that she did not receive the required three day’s prior notice of the Commissioner’s Hearing required by G.L. c. 31, §41,¶1, and that violation of her procedural rights requires that the discipline imposed must be overturned. I do not agree.

I am skeptical that Sergeant Stowe did not receive notice of the DOC’s notice of hearing dated September 28, 2018 prior to October 5, 2018 as she claimed. Except for her personal assertion to that effect, no evidence to support that contention was offered to corroborate it. Moreover, even if her assertion were true, that means she still received three day’s notice of the hearing (Friday Oct. 5 to Wed. Oct 10). Moreover, the specific charges against her remained substantially the same as those alleged charges about which she was fully apprised in May 2018. Sergeant Stowe was ably represented by counsel at the Commissioner’s Hearing and at the hearing before this Commission, with an opportunity to present evidence and cross-examine witnesses on both occasions. Accordingly, I find that Sergeant Stowe was not prejudiced or aggrieved by a lack of notice, if any, of the Commissioner’s Hearing on October 10, 2018.

Just Cause for Discipline

The preponderance of the evidence established that Sergeant Stowe maintained a close personal relationship with Ms. A over a period of four years. That relationship continued while and after Sergeant Stowe knew that Ms. A had been incarcerated on multiple occasions and had a “drug problem.” Sergeant Stowe was a frequent overnight visitor to Ms. A’s residence, frequently provided several motor vehicles to Ms. A for her personal use, and attended “two or three” court hearings involving criminal proceedings against Ms. A. These contacts were not merely “chance meetings” with Ms. A, but expressly fell within the type of contacts that DOC Rules and Regulations required her to disclose and to obtain DOC approval to continue. Yet she did not do so.

Sergeant Stowe’s poor judgment, undignified and indiscrete behavior in carrying on such a relationship and the failure to inform the DOC about it, alone, represents the type of misconduct that warranted the discipline imposed.

Second, even after Sergeant Stowe was ordered in October 2018 to disclose that she had a close relationship with Ms. A, she was less than forthcoming about the extent and scope of that relationship. Her initial request to remain in contact by “mail, phone and possibly visits” made no mention of her extensive prior contacts and failed to disclose that she had already sent Ms. A money, set up a pre-paid phone account for her to call Sergeant Stowe collect, was providing house-sitting services, and appeared to be engaged in (and intended to and would continue to engage in) substantial activities with mutual friends to take care of Ms. A’s legal, personal and financial affairs.

I do not credit Sergeant Stowe’s claim that she did not send all of the money orders to Ms. A that DOC records appear to show had been originated, or at least, facilitated by her. She acknowledged that she did send at least two money orders to Ms. A at MCI Framingham (October 21 and Oct 26) before getting approval to have contact (of any kind) with her while she was incarcerated. The preponderance of the evidence established that she sent or, at least facilitated, the other money orders as well, which were provided AFTER her request to maintain contact with Ms. A was denied.

Third, I agree with DOC that the requirements of the DOC Rules and Regulations that restrict contact with DOC inmates or former inmates, require discretion in associating with their relatives and friends, and mandate disclosure and prior approval to “associate with, accompany, correspond or consort” with an inmate or former inmate (save for a “chance meeting”) does not distinguish between persons incarcerated in “temporary” custody and those held after sentencing. The letter and spirit of the rules and regulations plainly apply to both types of incarceration. Nor do I accept the Appellant’s contention that she was entitled to assume that her request for contact with Ms. A would be approved; in fact, DOC Rule 12(a) expressly mandates that an employee may not “divest yourself of responsibility through presumption.”

Finally, I have considered whether the Commission should exercise its discretion to modify the discipline imposed. I find no evidence that the DOC acted here out of unlawful bias or disparate treatment of similarly situated employees. My findings do not vary substantially from the findings of the DOC Commissioner. Accordingly, the Commission is not warranted to modify the discipline imposed and the 30 day suspension is sustained.

For these reasons, Appellant’s appeal, in Case Nos. D-19-022 is hereby denied.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 26, 2020.

Notice to:

Gerard S. McAulliffe, Esq.
43 Quincy Avenue
Quincy, MA 02169

Julie E. Daniele, Esq.
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* * * * *

DAVID D. BEAUREGARD

v.

CITY OF CHICOPEE

G2-19-100

April 9, 2020

Christopher C. Bowman, Chairman

Bypass Appeal-Appointment as Chicopee Fire Chief-Poor Interview-Impressive Successful Candidate-Bias-Poor Performance—Ruling on a bypass appeal from a disappointed candidate ranked first for appointment as Chicopee Fire Chief, Chairman Christopher C. Bowman found that the Appellant's poor interview and the stellar performance of the successful candidate both on the job and at his interview justified the City's hiring preference. Chairman Bowman did not find that Chicopee officials were biased against the Appellant and agreed that the Appellant's contribution to a fiasco over smoke detector certificates for real estate closings gave the City yet another good reason for the bypass.

DECISION

On April 19, 2019, the Appellant, David D. Beauregard (Appellant or Deputy Beauregard), pursuant to G.L. c.31, §2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Chicopee (Respondent or City) to bypass him for promotional appointment to the position of Fire Chief in the City's Fire Department (Department). On May 8, 2019, I held a pre-hearing conference at the State Office Building in Springfield, Massachusetts. I held a full hearing at same location over the course of two days on July 24, 2019 and September 25, 2019.¹ The full hearing was digitally recorded and copies of the recordings were provided to the parties. The parties used those recordings to have a written transcript prepared which will serve as the official record of the hearing. The parties submitted post-hearing briefs on December 20, 2019 (Appellant) and December 23, 2019 (Respondent).

FINDINGS OF FACT

The Appellant submitted forty-five (45) exhibits (1 - 45) and the Respondent submitted fifteen (15) exhibits (R1 - R15).

Called by the City:

- Richard Kos, Mayor at the time of bypass, City of Chicopee;

Called by the Appellant:

- Evelyn Rivera-Riffenburg, Former City of Chicopee HR Director;
- John Fitzgerald, Assistant City Solicitor;
- Marshall Moriarty, City Solicitor;
- Dean Desmarais, Former Fire Chief;
- Mark Kosiorek, Fire Prevention Inspector;
- Richard Merchant, current City of Chicopee HR Director;
- David Beauregard, Appellant

and taking administrative notice of all matters filed in the case, pertinent statutes, case law, rules regulations, policies, and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

1. Chicopee is a city of approximately twenty-three square miles with a population of approximately 55,000 people located in Hampden County in Western Massachusetts. (<https://www.census.gov/quickfacts/fact/table/chicopeecitymassachusetts,US/PST045219>)
2. The Appellant is a resident of Chicopee; has been married for thirty-three years and has one child. After graduating from Chicopee High School, he joined the United States Navy and spent six years as an avionics technician working on the flight deck of an aircraft carrier and served during combat operations in the Middle East. After September 11, 2001, the Appellant enlisted in the Navy Reserve and served as an Intelligence Specialist from 2002 to 2005. From 2005 to 2008, the Appellant served in the Air Force Reserve, also as an Intelligence Specialist. (Testimony of Appellant; Exhibit 42)
3. The Appellant received numerous awards and certifications while serving in the military. (Testimony of Appellant; Exhibit 42)
4. The Appellant has completed sixty credits of college courses at Westfield State University. (Testimony of Appellant)
5. In 1994, the Appellant was appointed as a permanent, full-time firefighter in the City's Fire Department. He was promoted to lieutenant in 2000; fire captain in 2007; and Deputy Fire Chief / Executive Officer in 2017. (Testimony of Appellant; Exhibit 42)

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

6. During his tenure at the Fire Department, the Appellant has served as a Training & Security Officer; an instructor at the Massachusetts Firefighting Academy; and a member of the Western Massachusetts Technical Rescue Team. (Exhibit 42)

7. The Appellant has numerous certifications including certification as a Fire Officer I, II and III. (Testimony of Appellant; Exhibit 42)

8. The Appellant has received numerous awards during his fire-fighting career, including a Firefighter of the Year Citation for Meritorious Conduct in 2018. (Testimony of Appellant; Exhibit 42)

9. In 2016, the Appellant took the civil service examination for Fire Chief and received a score of 92, placing him first on the eligible list for Westfield Fire Chief. (Stipulated Fact)

10. During a previous hiring cycle in 2016, the City bypassed the Appellant for promotional appointment to Fire Chief, opting to promote Dean Desmarais as Fire Chief. (Testimony of Chief Desmarais)

11. The Appellant did not contest the bypass in 2016, as he concluded that Desmarais, who had served as Deputy Chief / Executive Officer, was more qualified for the position. (Testimony of Appellant)

12. The Appellant was subsequently promoted to Deputy Fire Chief in 2017 and was designated by Desmarais to serve as Executive Officer of the Department. In the absence of the Fire Chief (i.e. - when the Chief was on vacation, etc.), the Appellant, as the Executive Officer, was responsible for the day-to-day operations of the Department. (Testimony of Chief Desmarais and Appellant)

13. The Appellant, Desmarais and their respective spouses, have become friends. (Testimony of Chief Desmarais)

14. Months prior to his retirement in March 2019, Desmarais, on multiple occasions, encouraged the City's Mayor (Richard Kos) to promote the Appellant to the position of Fire Chief. (Testimony of Mayor Kos)

15. Richard Kos served as the City's Mayor from 1997 to 2004 and then from 2014 to 2020. He chose not to seek re-election in 2019. Relevant to this appeal, Kos was the City's Mayor (and Appointing Authority) when the Appellant was bypassed for promotion to Fire Chief in 2016 and 2019. (Testimony of Mayor Kos)

16. During the 2016 promotional process, Mayor Kos used an "enhanced interview process" in which Fire Chiefs from other communities participated in the selection process. The Appellant, after his interview in 2016, was rated poorly by the Panel, including in the area of communication. (Testimony of Mayor Kos)

17. Since 2016, the Appellant has enrolled in training programs to address the deficiencies cited by the Panel, including a training

program administered by the University of Maryland. (Testimony of Appellant)

18. At the time that Desmarais announced his plan to retire as Fire Chief in 2019, the eligible list for Fire Chief, established on September 20, 2016, was still active. While eligible lists typically expire two years after the establishment date, they are routinely extended to a date (on the first of the month) equal to three years after the date of the examination if no subsequent examination has been given. Applied here, the eligible list for Chicopee Fire Chief was set to expire on May 1, 2019. (Testimony of Merchant)

19. At the time that Desmarais announced his pending retirement in 2019, there were four names on the eligible list for Chicopee Fire Chief. The City, using the authority delegated by the state's Human Resources Division (HRD) to all civil service communities, created a Certification with the names of the top three candidates on the eligible list. Two candidates, including the Appellant, signed the Certification as willing to accept appointment. The third candidate on the Certification notified the City that he was not willing to accept the appointment. (Testimony of Merchant and Riffenburg)

20. The City's then-Human Resources Director mistakenly believed that the City was not permitted to consider the next candidate (then-Captain Stamborski) on the eligible list. Thus, the Mayor was presented with only *two* candidates to consider for promotional appointment, even though the statutory "2N+1" formula allowed for consideration of the top *three* candidates *willing to accept appointment*. (Testimony of Merchant)

21. On February 19, 2019, the Appellant and the second-ranked candidate were interviewed by Mayor Kos and his then-HR Director for consideration of promotion to Fire Chief. (Testimony of Mayor Kos and Riffenburg)

22. During his testimony before the Commission, the Appellant stated that: "... I do have a halting way of speaking. It's a stutter ... but in the past, you know, I articulate and I get my point across. People understand what I'm saying, and it is what it is." (Testimony of Appellant)

23. During the interview on February 19, 2019, both the Appellant and the second-ranked candidate were asked identical questions that were presented to them during the 2016 interview of Fire Chief, with three additional questions being asked during the February 19, 2019 interview. (Testimony of Mayor Kos)

24. Mayor Kos was looking to promote a fire chief who had a vision for the future of the Chicopee Fire Department and energy in a way that would move the department forward and take the opportunity to make this department more robust and deal with many of the issues, as well as current situations, whether it be manpower and how to allocate them and how to operate the fire and ambulance services and what creativity he could incorporate into the consolidation of services. Mayor Kos was looking for a fire chief who had a vision for consolidation of services, or making it more efficient and cost-saving, but not only maintaining the

services, but enhancing the services. Mayor Kos wanted to know what vision the candidates had for the department and what goals they had to improve the department. (Testimony of Mayor Kos)

25. While Mayor Kos found the Appellant's answers to be consistent with those of a person who had been on the job for a long time, he was concerned that, when he (Mayor Kos) delved into these questions further, the Appellant just "paused" and at one point, gave no response. After the interviews, Mayor Kos opined to the HR Director that the Appellant's interview was a "dud." (Testimony of Mayor Kos)

26. Specifically, Mayor Kos concluded that the Appellant was unable to express or articulate any insights or vision he had for the fire department; that he did not have any innovative ideas about implementing change within the fire department; and that he did not express any level of energy or level of interaction. The Mayor had similar concerns regarding the second-ranked candidate. (Testimony of Mayor Kos)

27. The City's then-Human Resources Director also participated in the interview of the Appellant. She (the HR Director) had worked with the Appellant over the past couple of years in his capacity as Executive Officer and, *based on her observations during those years*, she believed the Appellant was qualified for the position of Fire Chief and she shared that opinion with the Mayor. (Testimony of Riffenburg)

28. The HR Director, however, also found the Appellant's interview performance to be poor. She observed that there were many long pauses (up to what felt like 20 seconds) between answers; some of the questions were not answered fully; and some of the Appellant's answers required additional questions to get a more complete answer. (Testimony of Riffenburg)

29. Several days after the interview with the Appellant, the HR Director was at the Fire Department Headquarters and meeting with the Chief and his deputies, for her regular bi-weekly meetings. After the meeting, the Appellant asked to speak with her in his office. The Appellant then stated he was unhappy with his performance during the interview. He then stated that if he had to hire himself based on that interview, he wouldn't hire himself. (Testimony of Riffenburg)

30. Mayor Kos, based on his prior experience, had concluded that a candidate's interview performance was not always predictive of how they would perform in the position. He cited the example of a candidate for DPW head that had not performed well during her interview, but, ultimately, had proven to be a strong DPW head for the City. (Testimony of Mayor Kos)

31. In the case of the DPW head, Mayor Kos, based on the candidate's interview performance, first appointed that candidate as an "acting" or "temporary" agency head, followed by a permanent appointment after a period of successful performance by the candidate on the job. (Testimony of Mayor Kos)

32. Rather than letting the current eligible list expire, and calling for a new examination, Mayor Kos decided that he wanted to appoint the Appellant as a "temporary" Fire Chief; provide the Appellant with a list of duties to be accomplished during this temporary period; and then assess whether the Appellant should be appointed as a "permanent" Fire Chief prior to the expiration of the eligible list on May 1, 2019. (Testimony of Mayor Kos and Merchant)

33. During this same period of time, the City's Human Resources Director took a position with another community and Mayor Kos retained the services of someone who had served the City in that capacity in the past. Mayor Kos asked the (new) Human Resources Director and the City Solicitor to confirm that a temporary appointment was permitted. The HR Director, after consulting with the state's Human Resources Division (HRD), and the City Solicitor both advised the Mayor that a temporary appointment was permitted under the civil service law. (Testimony of Mayor Kos, Moriarty and Merchant)

34. After being offered the position of "temporary" Fire Chief by the Mayor, the Appellant consulted with then-Chief Desmarais, who had been strongly advocating for the Appellant's appointment and a local attorney familiar with civil service law. Based on his conversations with the attorney and Desmarais, the Appellant concluded that a temporary appointment, in these particular circumstances, was "illegal." He subsequently conveyed his opinion that the appointment was not permitted under the civil service law to the City Solicitor and the City's HR Director; told them that he would be "impugning his integrity" if he accepted a temporary appointment; and declined the temporary appointment. (Testimony of Appellant)

35. On March 12, 2019, the same day that Desmarais was set to retire, the Appellant attended a meeting with the City Solicitor and Human Resources Director at which time he (the Appellant) reiterated his opinion that a "temporary" appointment was not permitted under civil service law. Relevant to this appeal, there was also a discussion regarding the continuity of operations at the Fire Department, given that Desmarais would no longer be Fire Chief as of the close of business that day (March 12th). (Testimony of Appellant, Merchant and Moriarty)

36. The Appellant, the HR Director and the City Solicitor have somewhat different recollections of what was said regarding the issuance of certificates pending the appointment of a (permanent or temporary) Fire Chief. (Testimony of Moriarty, Merchant and Appellant) Based on a careful review of testimony at the hearing; a review of the transcript of their testimony; and the relevant exhibits, including the hand-written contemporaneous notes taken by the HR Director, I find the following. The Appellant, at this meeting, stated that he, as the Department's Executive Officer, would be responsible for the day-to-day operations of the Fire Department in the Chief's absence, *except for permitting issues*. The Appellant did not explicitly reference "smoke detector" inspection certificates, which must be issued by the City's Fire

Department prior to any real estate closing; and he did not state that the 15-20 certificates issued weekly would be put in limbo.

37. The Appellant spoke with the State Fire Marshall's office the next day and confirmed that the City would need to ask the Fire Marshall to designate someone other than Desmarais to sign-off on these certificates. He failed to communicate this information to Town Officials (Mayor, City Solicitor, HR Director) and directed the City's fire inspectors to stop issuing smoke detector inspection certificates forthwith. (Testimony of Appellant)

38. On Friday, March 15, 2019, the Mayor was at a bishop's luncheon when he received a phone call from the head of the Greater Springfield Realtors. He advised the Mayor there were not going to be any smoke detector inspection certificates issued until there is a fire chief appointed. (Testimony of Mayor Kos)

39. The Mayor informed the Law Department of this phone call and later learned that the City needed someone designated by the State Fire Marshal. Later that day, the State Fire Marshal granted a "Delegation of Authority" to the Mayor granting him the authority to delegate the responsibility of issuing smoke detector inspection certificates to members of the Chicopee Fire Department. Subsequently, Mayor Kos delegated that authority to fire prevention officers assigned to do smoke detector certificate inspections and the 10-15 certificates that were in limbo were issued. (Testimony of Mayor Kos and Exhibit R13)

40. On March 28, 2019, the Mayor issued the Appellant a written reprimand for the Appellant's failure to notify him of the need to obtain a change in delegated authority from the State Fire Marshall to ensure a continuity of services (issuance of smoke detector inspection certificates). (Exhibit R14)

41. Sometime after March 12, 2019, Mayor Kos learned from his new Human Resources Director that there was another candidate on the eligible list who: a) had not been notified of the vacancy; b) had not been given the opportunity to sign the Certification as willing to accept appointment to Fire Chief; and, thus, c) had not been considered for appointment by the Mayor. That person was Captain Daniel Stamborski. Captain Stamborski was contacted by the HR Department and he expressed an interest in being interviewed for the position of fire chief. He then presented to the HR Department and signed the Certification. (Testimony of Mayor Kos)

42. On March 14, 2019, Captain Stamborski submitted a cover letter to the HR Director, along with his resume, for consideration and review in anticipation of his upcoming interview for the fire chief position. (Exhibit R3)

43. Captain Stamborski was appointed as a fire fighter in Chicopee in 1997, promoted to lieutenant in 2007 and promoted to captain in 2010. In addition, he is the broker/owner of a real estate business since 2012 and he has been a licensed realtor since 1997. During the period of 2002 through 2007, he was a manager for a local business overseeing building development of homes in Chicopee and responsible for contractor supervision, sub-con-

tracting, budget management, scheduling and overall project and financial management for the company. He has taken over forty-six courses at the Massachusetts Fire Academy and is certified as an EMT, 911 dispatcher and a certified scuba diver. He received three certificates of recognition in 2011, 2012 and 2014 for saving a human life and other awards. (Exhibit R3)

44. In addition to Captain Stamborski's resume attached to the cover letter dated March 14, 2019, he attached an additional document citing eighteen separate bullets to address the immediate department needs, short-term goals and long-term goals. (Exhibit R3)

45. On March 20, 2019, Stamborski was interviewed by Mayor Kos in the presence of the new HR Director. Mayor Kos described the interviews between the Appellant and Stamborski as "day and night." The Mayor found that the difference was the energy level and the thought processes that went on during the interview with Stamborski. The Mayor found that there was no hesitation or pauses in Stamborski's responses; he answered all of the questions without hesitation; his answers were thoughtful and directly related to the vision and goals for the department. (Testimony of Mayor Kos)

46. On April 2, 2019, the City notified HRD that it was appointing Stamborski as Temporary Fire Chief. (Exhibit 34)

47. The Mayor, via the Human Resources Director, gave Stamborski the same duties to complete that he had intended on giving to the Appellant. Stamborski completed those tasks and both the Mayor and HR Director were impressed with his performance. (Testimony of Merchant)

48. Mayor Kos appointed Stamborski as permanent Fire Chief on April 29, 2019, just prior to the expiration of the eligible list. (Stipulated Fact)

49. By letter dated May 10, 2019, the Mayor notified the Appellant that he had been bypassed for promotional appointment including: a) the Appellant's poor interview performance, including his ability to articulate his vision for the Fire Department; b) Stamborski's superior interview performance, including his inability to articulate a vision for the Fire Department; and c) the Appellant's failure to ensure a continuity of services in the Fire Department and failing to notify the Mayor about the issues related to the interruption of smoke detector inspection certificates. (Exhibit R15)

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass.256, 259 (2001), citing *Cambridge v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300, 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration"

and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, § 1.

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* at 304. 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).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. *City of Beverly v. Civil Service Comm’n*, 78 Mass. App. Ct. 182, 189, 190-191 (2010) citing *Falmouth v. Civil Serv. Comm’n*, 447 Mass. 814, 824-826 (2006) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. *Beverly*. The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. *Beverly* citing *Cambridge* at 305, and cases cited.

Parties’ Arguments

The City argues that the Appellant’s inability to fully answer questions at the interview; his inability to articulate a vision for the Fire Department at that interview; and his failure to notify the Mayor about the interruption of services at the Fire Department, before and after they occurred, justified the Mayor’s decision to bypass him in favor of Stamborski, a lower-ranked candidate who performed well at the interview and articulated a clear vision for the Fire Department.

Further, the City argues that Stamborski’s strong performance during his temporary appointment, which the Appellant declined, justified the Mayor’s decision to appoint Stamborski as the permanent Fire Chief.

The Appellant argues that the Mayor’s decision to bypass him for promotional appointment was the result of the Mayor’s personal bias against him based on the Mayor’s mistaken belief that the Appellant acted deliberately to embarrass the Mayor in regard to the interruption of smoke detector inspection certificates. The Appellant argues that the Mayor’s decision to issue a written reprimand for this incident was a pretext for bypassing him for promotional appointment.

Further, the Appellant argues that the Mayor’s decision to make a temporary appointment was not consistent with the civil service law and that the Appellant’s rightful objection to this unlawful action created another impermissible reason for bypass.

Finally, the Appellant argues that the Mayor’s conclusion regarding his poor interview performance is inconsistent with the

Appellant’s testimony and demeanor at the hearing before the Commission as well as the Appellant’s presentation skills at prior City Council and other meetings and his ability to serve as an effective trainer / instructor.

Analysis

I carefully considered all of the witness testimony throughout the two days of hearing conducted at the Springfield State Building. I reviewed the testimony again by reading the transcripts. I reviewed all of the exhibits, the stipulated facts and the post-hearing briefs submitted by the parties. To ensure clarity, I have not overlooked any of the witness testimony, proposed findings or arguments. In those instances where I did not include all or parts of the testimony of a witness in my findings, I did so not by omission, but rather, because I did not find the testimony relevant and/or I did not credit that portion of his/her testimony.

A central question here is whether Mayor Kos, who served as the Appointing Authority at the time of this promotional appointment, had a personal bias against the Appellant. As referenced above, the Appellant argues that the Mayor developed a bias against him when the Mayor, according to the Appellant, mistakenly believed that the Appellant was trying to embarrass him by disrupting the City’s permitting process, which in turn would hold up real estate closings in Chicopee. Although it is clear that Mayor Kos was angered by what he believed was the failure of the Appellant to inform him about the disruption to the permitting process, that occurred almost one month *after* Mayor Kos had already concluded that he was dissatisfied with the Appellant’s interview (on February 19th) and well *after* he had told his then-Human Resources Director that he was hesitant to appoint either of the two candidates then under consideration to the position of Fire Chief.

Based on the credible testimony of Mayor Kos, he (Mayor Kos) was taken aback by the Appellant’s poor performance during the interview, in part because the majority of questions posed to the Appellant were the same questions asked of the Appellant when he sought promotion to Fire Chief approximately three years earlier. Further, the Mayor was troubled by the Appellant’s inability to articulate a vision for the Department’s future. In short, the Mayor’s reservations about the Appellant’s ability to serve as Fire Chief began well before the turn of events involving the smoke detector inspection certificates.

That turns to the Appellant’s argument that his interview performance could not possibly have been the proverbial train wreck recounted by the Mayor. Although, regrettably, that interview was not recorded, I did hear testimony from the City’s then-Human Resources Director, who also participated in the interview. Importantly, the HR Director had a good working relationship with the Appellant; she believed that the Appellant was qualified to serve as Fire Chief; and she communicated that opinion directly to the Mayor. Even she, however, concluded that the Appellant’s interview was poor and that he was unable to provide complete answers to standard questions. Finally, although the Appellant now describes the interview as more of an “interrogation” by the

Mayor, the Appellant himself acknowledges that, if based solely on his interview performance in February 2019, he would not be in favor of his promotion if he was the Appointing Authority.

Finally, in relation to the Appellant's interview, I did consider whether the Mayor's unvarnished—and unkind—description of the Appellant's demeanor during the interview was evidence of a personal bias against the Appellant. I credit the Appellant's candid testimony that he is challenged by a stutter that results in a temporary loss of words, or long pauses. I also credit the former Fire Chief's testimony that certain perceived or actual facial expressions by the Appellant are attributable to medical issues, making the Mayor's comments in this regard all the more regrettable. Based on the entirety of the Mayor Kos's testimony, however, I concluded that the Mayor's primary concern was the Appellant's overall inability to provide complete answers and/or articulate a vision for the future of the Fire Department, as opposed to the Appellant's demeanor or pauses between answers.

Next, the Appellant argues that the Mayor's decision to bypass him was impermissibly based on the Appellant's decision to challenge the Mayor's legal authority to make a "temporary appointment" prior to making a final decision regarding a "permanent" appointment. That issue is somewhat of a red herring here. First, the issue ultimately before the Commission is not whether the Mayor was permitted to make a *temporary* promotional appointment under the civil service law, but, rather, whether he had reasonable justification to bypass the Appellant for the position of *permanent* Fire Chief. As the decision-making process was still underway, the Appellant got himself lost in the issue of whether the civil service law, in these circumstances, permitted the use of a temporary appointment. I don't credit the Appellant's testimony that he, as he also stated to City officials at the time, was concerned that accepting a temporary appointment would "impugn his integrity." Rather, it is clear that the Appellant, focused on obtaining appointment as permanent Fire Chief at the time, believed it would be advantageous to him if he could show that the Mayor was not permitted to make a temporary appointment. The Appellant was apparently emboldened after purportedly obtaining advice from the Fire Chief at the time and a local attorney stating that the Mayor, based on the facts presented by the Appellant, was prohibited from making a temporary appointment. To the extent that it is relevant, albeit indirectly, to this appeal, the law is far from definitive on this issue and highly contextual, dependent in part on the motives of the Appointing Authority.

In *Somerville & another v. Somerville Municipal Employees Association*, 20 Mass. App. Ct. 594 (1985), the Appeals Court stated in part that "... the law vests considerable authority in the 'appointing authority', who retains the sole power to decide whether to fill vacancies on either a permanent or temporary basis, citing *Kenney v. McDonough*, 315 Mass. 689, 693 (1994). While some parties have argued that the Court's decision in *Somerville* stands for the proposition that Appointing Authorities have the sole authority to deem a vacancy as permanent or temporary, the

decision, read in the proper context, does not support that conclusion. Rather, when read in the proper context, it is clear that the Court in *Somerville* was stating that an Appointing Authority has the sole power to decide whether to *fill* vacancies, regardless of whether the vacancy in question is permanent or temporary. Put another way, the Court was clarifying that the civil service law does not require that every vacant civil service position be filled by the Appointing Authority.

In *Lee and O'Connor v. City of Springfield*, 17 MCSR 157 (2004), the Appellants challenged the City's decision to retain temporary employees over permanent employees. As part of its decision allowing the Appellants' appeals, the Commission stated: "Appointing authorities may use temporary appointments in limited circumstances for certain employees who: (1) serve for a specified period of time; or (2) serve for the duration of a temporary vacancy² ... Temporary and provisional appointments are the exceptions to the civil service laws; yet the Appointing Authority had made eight times as many temporary or provisional appointments as it had made permanent appointments." The Commission's decision went on to state that: "While this need may have existed for some of the temporary appointments, it is doubtful that it existed for all thirteen of the temporary employees, who remained employed ... The Appointing Authority's preference of making temporary appointments, instead of permanent appointments, is not in accord with the civil service laws, and the Commission does not approve of the Appointing Authority's actions." The Commission's decision in *Lee and O'Connor* confirms that the permissibility of temporary appointments is fact-specific, as opposed to formulaic and/or definitive.

Applied here, I must decide whether the Mayor's decision to make a temporary appointment to the position of Fire Chief, prior to making a permanent appointment, was an attempt to circumvent the civil service law and/or prevent the Appellant from becoming the permanent Fire Chief. A preponderance of the evidence proves otherwise. Having concluded that the two candidates under consideration for Fire Chief at the time may not be suitable candidates, the Mayor had the option of letting the eligible list expire within several weeks and calling for a new examination. Once the eligible list expired, and until such time as a new list was established, the Mayor would have been free to appoint a Provisional Fire Chief, choosing from any member of the Fire Department, or even looking outside the Department for a Provisional Fire Chief. Instead, leaving open the possibility that the Appellant's poor interview performance was not reflective of how he would perform as Fire Chief, the Mayor decided to offer the Appellant a temporary appointment. Although it did not involve a civil service position, the Mayor pursued a similar course of action regarding the appointment of a DPW Director, ultimately making the temporary appointment permanent after the candidate, who had not performed well during an interview, acquitted herself after a short period of time in the position. Having concluded that the Mayor's decision was not based on ulterior motives (i.e. - an attempt to prevent the Appellant from becoming the permanent Fire Chief), the

2. "Temporary vacancy" is not defined under G.L. c. 31, s. 1.

Mayor's decision to offer to appoint the Appellant as a "temporary" Fire Chief for a short, specified period of time was not a violation of the civil service law or rules. The Appellant's inability to see the proverbial forest through the trees at the time, or even now, caused him to decline an opportunity that may well have resulted in this permanent appointment as Fire Chief several weeks later.

That turns to the issue of the smoke detector inspection certificates. The Appellant is a model citizen. He served with distinction in the military on multiple occasions, including re-enlisting shortly after the attack on our country on September 11, 2001. He has dedicated his life to public service, including over twenty-five years in the City's Fire Department, where he has earned multiple commendations; obtained many certifications; and worked his way up from firefighter to Deputy Fire Chief. He is also a strong part of the community, having volunteered in several capacities. He is a proud father and has been married to his wife, who was present for every hour of the two-day hearing, for over thirty years. Here, however, in regard to the issuance of smoke detector inspection certificates, he made an uncharacteristically poor judgment.

The Appellant was intimately familiar with the nuanced process regarding the issuance of these certificates and he understood that any hiccup in the process would have an immediate, disruptive impact on real estate closings. At the time, the Fire Department was completing 15-20 smoke detector inspections weekly. After completion, the fire inspector would go online and verify that the property met the state and local requirements, automatically triggering the issuance of a certificate that is required prior to any real estate closing. For approximately three years, those certificates contained the automated signature of former Chief Desmarais. The Appellant (and Desmarais) knew this would need to be addressed to ensure continuity in the certification process. Rather than alerting City officials of this, the Appellant, during a meeting with the City Solicitor and Human Resources Director, made a vague reference to permits, stating that, until a new Fire Chief was appointed, he (the Appellant), as the Executive Officer, would be in charge of the day-to-day operations of the Department, with the exception of permitting. Apparently, the Appellant believed that this vague reference would be just enough to show that he had alerted City officials when the inevitable turmoil started. That is precisely what happened, as real estate brokers became aware of the inability to complete real estate closings at the Registry of Deeds. One of those real estate brokers contacted Desmarais on his cell phone, apparently unaware that his retirement had taken effect a day earlier. Desmarais, on vacation in Florida, suggested that no permits would be issued until a new Chief was appointed, and directed the broker to call the Mayor. By this time, the Appellant, who had still not explicitly alerted City officials of the chaotic situation, was contacting the State Fire Marshall's Office. I listened carefully to the Appellant's testimony regarding his communication with the State Fire Marshall's Office. The Appellant was not attempting to facilitate a quick resolution to this matter. Rather, the purpose of the call was to confirm that, given the Fire Chief's retirement, no certificates could be issued at that time. The fact that the Appellant, at the time, failed to tell the Mayor about his communication with the State Fire Marshall's Office, only

confirms that the Appellant was putting his own self interest over the best interests of the citizens of Chicopee. After carefully reviewing all of the testimony, I infer that the Appellant erroneously believed that the need to resolve this chaotic situation would force the Mayor's hand in regard to appointing him as a permanent Fire Chief. It was a serious error in judgment by the Appellant. It is also a valid reason for bypassing the Appellant for appointment as permanent Fire Chief.

Finally, the preponderance of the evidence supports the positive reasons put forth by the City regarding the selected candidate, Mr. Stamborski. Once notified that he should have been given the opportunity to sign the Certification for Fire Chief, Mr. Stamborski responded enthusiastically and took the interview process seriously, preparing a written outline of his vision for the Department along with a list of short term and long term goals. He expounded on those points during an interview with the Fire Chief and new Human Resources Director where he was asked the same questions posed to the Appellant during his interview. While the Appellant suggested that Mr. Stamborski may have been prompted to prepare the written outline by some heads-up by the Human Resources Director, the preponderance of the evidence does not support that assertion. Both the Mayor and the Human Resources Director were genuinely impressed by Stamborski's enthusiasm, his ability to provide thoughtful answers and his overall vision for the Department. Ultimately, the Mayor offered Stamborski the same temporary appointment that the Appellant had declined. Mr. Stamborski accepted, successfully completed the assignments that had been originally planned to be assigned to the Appellant and was made permanent Fire Chief one day prior to the expiration of the eligible list.

In summary, the decision to bypass the Appellant for promotional appointment was not based on any personal or political bias. Rather, the preponderance of the evidence shows that the City relied on valid reasons to bypass the Appellant including: a) the Appellant's poor interview performance in which he was unable to provide complete answers or articulate a vision for the Fire Department; b) the Appellant's error in judgement that caused the interruption of smoke detector inspection certificates; and c) Mr. Stamborski's strong interview performance and ability to articulate a vision for the Department, as well as the successful completion of duties during a permissible temporary appointment, which the Appellant had declined to accept.

For all of the above reasons, the Appellant's appeal under Docket No. G2-19-100 is *denied*.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 9, 2020.

Notice to:

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* * * * *

GREGORY LEWANDOWSKI

v.

TOWN OF CHARLTON

D1-18-196

April 9, 2020

Christopher C. Bowman, Chairman

D*isciplinary Action-Discharge of Charlton Police Lieutenant-Theft-Sick Time-Longevity Pay-Vacation Days-Bias-Disparate Treatment*—Ruling on an appeal he deemed “tragic,” Hearing Commissioner Christopher C. Bowman affirmed the discharge of a long serving Police Lieutenant found to have lied and deceived in order to obtain vacation days, sick pay, and longevity payments he had not earned. The Appellant argued that the Police Chief and Town Administrator were biased against him but the evidence was not compelling.

DECISION

On October 18, 2018, the Appellant, Gregory Lewandowski (Lt. Lewandowski), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission) contesting the decision of the Town of Charlton (Town) to discharge him from his position as the Lieutenant in the Charlton Police Department (CPD) on October 17, 2018. On January 8, 2019, I held a pre-hearing conference at the offices of the Commission and a full hearing was held at the Charlton Public Library on March 11, 12 and June 12, 2019.¹ When citing the hearing transcripts: I is March 11; II is March 12; III is June 12.

The parties had the private hearing transcribed by a Certified Court Reporter and Notary Public and the transcript was filed with the Commission as the official record of the proceeding. The witnesses were sequestered with the exception of Lt. Lewandowski and, after he testified, Charlton Police Chief Graham Maxfield. Following the close of the hearing, proposed decisions were submitted by the parties on August 2, 2019.

FINDINGS OF FACT

The Town submitted 74 separately numbered exhibits. (TE). The Appellant submitted Exhibits A-R. (AE). I left the record open for the Town to submit any written documentation prepared by Town

Administrator Robin Craver regarding the proposed termination of the Appellant and the Town reported that there was none. Based upon the documents admitted into evidence and the testimony of the following witnesses:

Called by the Town:

- Police Chief Graham Maxfield; (“GM” when citing testimony);
- MJ, Charlton Police Department (CPD) Administrative Assistant (“MJ”);
- Retired CPD Chief James Pervier (“JP”);
- Retired Interim CPD Chief Daniel Charette (“DC”);
- Charlton Human Resources Director (HRD) Jessica Lewerenz (“JL”);
- Former Charlton Assistant Treasurer/Accountant/Human Resources Director MR; (“MR”);
- Charlton Town Administrator Robin Craver (“RC”).

Called by the Appellant:

- Gregory Lt. Lewandowski, Appellant (“GL”);
- MP, former (CPD) Administrative Assistant; (“MP”);
- PR, former CPD part time Dispatcher; (“PR”);
- CPD Lieutenant DD, who replaced Lt. Lewandowski (“DD”);
- CPD Patrol Officer JM, also president of the Charlton Police Alliance collective bargaining unit (“JM”);
- CPD Patrol Officer TS (“TS”).

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, policies, and reasonable inferences from the evidence, a preponderance of credible evidence establishes the following facts:

1. The Town of Charlton, located in Western Massachusetts, has a population of approximately 15,000. The Charlton Police Department (CPD) has twenty (20) full-time sworn officers: fourteen (14) Patrol officers; four (4) Sergeants; the Lieutenant and the Chief. The Lieutenant, including when Lt. Lewandowski held the position, is second in command of the Department, essentially performing the duties of a Deputy Chief. (Testimony of JP-I, 245). There are four (4) full-time dispatchers, three (3) special officers, a dozen auxiliary officers and a full-time administrative assistant. The Department has an annual operating budget of \$2.4 million. (Testimony of GM-II, 318, 476-78).

2. Part-time and full-time Police Officers and Sergeants and full-time Dispatchers are the positions in the Charlton Police Alliance (“CPA”) bargaining unit, with their terms and conditions of employment covered by the collective bargaining agreement between the Town and the CPA. (TE 7; CPA CBA).

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

3. The positions of Lieutenant and Chief and the CPD Administrative Assistant position are listed in the Charlton Personnel Policies and Procedures, (Personnel By-Laws; TE 6, Article 220-2.1), which sets forth terms and conditions of employment for covered positions, including vacation, sick leave, personal days and holidays. (TE 6, Article 4-1. Benefits, Applicability and interpretation; Article 5-1. Policy, Definitions, Eligible Employee).

4. Lt. Lewandowski has a Bachelor's Degree in Exercise Science and two (2) Masters' Degrees, one (1) in Criminal Justice and the other in Public Administration. (Testimony of GL-II, 716).

5. Then-Chief James Pervier ("Pervier") appointed Lt. Lewandowski to be an Auxiliary Police Officer ("APO") in the Charlton Auxiliary Police Unit ("CAPU") effective **July 15, 2002**. (TE 9). The APO position is not included in the Personnel By-Laws. (TE 6, Article 220-2.1). An APO is an unpaid volunteer who can only exercise police powers when called to active duty by the Chief. Like all APOs, Lt. Lewandowski was allowed to work police details for private vendors, who would pay him through the CPD. (Testimony of GL-II, 807-08; Testimony of GM-I, 325-26; Testimony of JP-II, 235-37; Testimony of JM-II, 673-74).

6. Lt. Lewandowski's first employment as a full-time Police Officer was with the Millville Police Department from June 2, 2003 through August 4, 2005. (TE 11, 50).

7. On December 11, 2003, Lt. Lewandowski resigned from his Charlton APO position (TE 10, 50).

8. On **September 27, 2005**, about two (2) months after he left his position as a Millville Police Officer, the Charlton Board of Selectmen appointed Lt. Lewandowski as a full-time police officer. He was sworn in on or about October 11, 2005. (TE 12, 50).

9. On July 1, 2013, on the recommendation of then-Chief Pervier, the Town appointed Lt. Lewandowski to be the CPD Lieutenant. (TE 14, 50).

10. Upon his promotional appointment to lieutenant, Lt. Lewandowski was told by then-Chief Pervier that he would receive all the benefits that are given to Charlton police officers through the CBA, except that vacation and sick leave accrual would now be pursuant to the Personnel Bylaws. (Testimony of GL, 764-765)

11. Knowing that Chief Pervier was likely to retire within the next couple of years, Town Administrator Robin Craver encouraged Lt. Lewandowski to begin attending various town meetings, including meetings with the Finance Committee regarding the Police Department's budget. She was disappointed when Lt. Lewandowski appeared at a Finance Committee meeting wearing gym attire and counseled him to dress in more professional attire in the future. He accepted the advice but did not appear at future meetings. (Testimony of RC)

12. Pervier retired December 31, 2016. The Town appointed former Southbridge Chief Daniel Charette ("Charette") to be Provisional (Interim) Chief effective January 1, 2017. Charette

served as Chief until October 2, 2017. (TE 8; Testimony of DC-I, 100).

13. In 2017, Charette issued a two-day suspension against Lt. Lewandowski relating to problems with the Department's failure to invoice and collect payment from utilities and others for police details performed. (TE 55) Serving as the hearing officer, Ms. Craver inquired whether the penalty could be increased, but ultimately chose to simply affirm the two-day suspension. (Testimony of RC)

14. Following an assessment center, the Board of Selectmen appointed Sergeant Graham Maxfield ("Maxfield") to Chief. Maxfield started as Chief after signing an October 2, 2017 Employment Agreement with the Town that included some specific terms and conditions of his employment. (TE 8; Maxfield Employment Agreement).

Issues Related to Longevity Payment Made to Lt. Lewandowski

15. Prior to July 1, 2016, the pertinent part of the longevity article in the CPA CBA read:

- Upon implementation of this contract and on every July 1 thereafter, all full time employees covered under this Agreement shall be eligible for a longevity payment according to the terms set forth below:

<u>Years of Service</u>	<u>Annual Payment</u>
11 years	\$100
15 years	\$150
19 years	\$200

(TE 74, Article 30).

16. The Town and the CPA signed a Memorandum of Understanding June 28, 2016 reflecting the changes that would become part of the parties' July 1 2015-June 30, 2018 CBA, including the following longevity change:

- Beginning July 1, 2016 and thereafter, all full time employees covered under this Agreement shall be eligible for a longevity payment according to the terms set forth below:

<u>Years of Service</u>	<u>Annual Payment</u>
10 years	\$200
15 years	\$400
20 years	\$1,000

(TE 74, Article 30).

17. Longevity was a once annual payment intended to be given in the first week of July based upon a person's years of service as of July 1st. For example, if an employee had 19 years of service as of October 1, 2016 (FY17), he/she was entitled to a \$400 payment as of July 1, 2017 (FY18), even though he/she would have 20 years of service as of October 1, 2017 (FY18). The \$1,000 payment would not take effect until July 1, 2018. (Testimony of JP, JL GL and MR).

18. As of July 1, 2017, Chief Maxfield was a Sergeant on the Charlton Police Department with nineteen years of service, having a start date of September 20, 1997. (Ex. A).

19. As a Sergeant, Chief Maxfield, along with three other officers who had the same start date, received a longevity payment under the budget prepared by Interim Chief Charette on July 1, 2017 of \$1,000. The payroll submission for this longevity payment was prepared by the Chief's Administrative Assistant, MP, and signed by Lt. Lt. Lewandowski as required by the Town's policy. This represented an overpayment of \$600. (Testimony of MR pp. 87-88; Testimony of JL pp. 217-219).

20. Even though there was no longevity benefit in the Personnel By-Laws prior to October 16, 2017, Pervier learned that his predecessor, Chief Stevens, had received longevity under the provisions of the CPA CBA. From this, Pervier determined that the CPD Chief and Lieutenant were allowed to continue to get longevity under the terms of the CPA CBA. (Testimony of JP-II, 253-54).

21. Lt. Lewandowski did not earn a longevity benefit under the CPA CBA while a patrol officer. The first longevity payment that Lt. Lewandowski received from the Town was for \$200 in July, 2016/FY 17 (10 years of full time police service in Charlton). His second longevity payment was for \$200 he received in July, 2017/FY 18 (11 years of service).

22. With the hiring of its first Human Resources Director, JL, the Town established a Human Resources Department in March, 2017. MR, who was already employed as the Assistant Treasurer, began to also serve as Assistant Human Resources Director. (Testimony of JL-I, 169).

23. On October 16, 2017, Charlton Town Meeting added to the Personnel By-Laws the following longevity benefit:

As of every July 1 following completion of the applicable, minimum number of years of continuous service set forth below any eligible employee covered under this bylaw and still employed by the Town shall be eligible for an annual longevity payment (not added to the base salary) according to the terms set forth below:

10 years but less than 15 years	\$200.00 per year
15 years but less than 20 years	\$400.00 per year
20 years but less than 25 years	\$600.00 per year
25 years or more	\$1,000.00 per year

Such increases shall not be cumulative. Rather, for example, an employee having completed fifteen (15) years' continuous service shall receive a total, additional four hundred dollars (\$400) per year [rather than two hundred dollars (\$200) plus four hundred dollars (\$400)] until the July 1 following completion of twenty (20) years' continuous service, at which point the employee would receive a total additional six hundred dollars (\$600) per year [not four hundred dollars (\$400) plus six hundred dollars (\$600)]." (TE 6, Article 220-4.15; underlining added).

24. The Personnel By-Laws pre-existing definition of "eligible employee" was, "One who is currently employed by the Town and who is regularly scheduled to work a minimum of twenty (20) hours per week." (TE 6, Article 220-5.1).

25. Lt. Lewandowski understood that the new longevity provision was effectively codifying the longevity benefit that was already being paid to him and Pervier. (Testimony of GL-II, 797).

26. As referenced above, Lt. Lewandowski had already received his \$200 longevity payment in July 2017 based on the past practice of the Police Department to pay longevity to the Chief and Lieutenant, even though they were not covered by the CBA. The Town Meeting article, which now provided for all non-CBA employees (i.e. - managers) to receive a longevity payment, was adopted on October 2017.

27. Ms. Craver decided that the HR Department would process the new longevity payments under the Personnel By-Laws. JL assigned the task to MR. (Testimony of JL-I, 173).

28. MR's calculations were based on her assumption that as long as the employee was currently an "eligible employee," working 20 hours per week, all of the employee's past service would count, regardless of whether the employee worked less than 20 hours per week during some of those past years. (Testimony of MR-I, 30-34; Testimony of JL-I, 179-181, 188-189).

29. On November 15, 2017, MR sent an email to Department Heads and anyone in the affected Department involved in the payroll process. For Lt. Lewandowski, the Longevity Chart showed: "7/15/02" (the date he began his service as an auxiliary officer) as Date of Benefit Eligibility, "14" as Years of Service A/O 7/1/17 and "\$200.00" as what he would earn for FY 18 Longevity.

30. Using "7/15/02" instead of "10/11/05" did not change what MR determined that Lt. Lewandowski had earned for FY 18 because he was still at the "10 years but less than 15 years...\$200.00 per year" level under the new longevity provision. (TE 6, 18).

31. At the time, MR did not recall that, in July, when the Treasurer's office had processed the longevity checks for all of the Departments with unionized employees, it had issued a \$200 longevity check for Lt. Lewandowski. (TE 17; AE H: July 13, 2017 paycheck; Testimony of MR-I, 76-7).

32. MR informed the November 15 email recipients that longevity [Personnel] Action Forms ("Longevity PAF") had been sent to their interdepartmental mailboxes and, if they were signed and sent back to her by November 20, the longevity payments would be issued as a separate check in the following week's payroll. (TE 18; Testimony of MR-I, 38-9, 49-50).

33. On November 15, Lt. Lewandowski saw MR's email, including his information on the Longevity Chart. (TE 18, 19). Lt. Lewandowski's Longevity PAF was circulated and signed by Maxfield and Ms. Craver. On or about November 22, Lt. Lewandowski received the \$200 longevity payment in his paycheck. (TE 20).

34. In December of 2017, while working on the CPD FY 2019 budget submission with new Administrative Assistant MJ, Maxfield learned for the first time that, prior to the Personnel By-Laws longevity article, the Department had been processing longevity payments for Lt. Lewandowski and the prior Chief and Lieutenant. The Chief also learned that Lt. Lewandowski had received the most recent Department initiated longevity payment of \$200 in July, 2017, meaning that Lt. Lewandowski's payment that resulted from the Longevity PAF Maxfield had signed in November was Lt. Lewandowski's second \$200 payment in FY 18. (Testimony of GM-I, 341-44).

35. Maxfield asked Lt. Lewandowski why he had received two (2) longevity payments, one (1) in July and one (1) in November. Lt. Lewandowski responded that he was entitled to it because of his anniversary date with the Town. Maxfield directed him to submit a written response. In a memo to Maxfield dated January 29, 2019, Lt. Lewandowski wrote:

1. Why did I start receiving longevity pay before the town voted on giving longevity pay to non-contractual employees?

I was told by Chief Pervier that I hit my 10 (ten) year anniversary in September [2015] and he began paying me longevity pay in July of the next fiscal year [July 2016; FY 17].

2. Why did I accept the November longevity payment?

The Town paid non-contractual employees longevity pay in November of 2017. When we would calculate payroll for the next fiscal year, we would always compare our numbers to the town's numbers. If there were any discrepancies, I believe that we always went with the town's calculations. So we always checked our numbers to the Town's numbers.

Last November, I learned that the town had me reaching my fifteen (15) year mark in this past July. When I received the longevity pay in November, I didn't think much of it. I figured that it was an adjustment by the town, for hitting my fifteen (15) year anniversary. (TE 22).

36. It did not make sense to Maxfield that Lt. Lewandowski would get his very first longevity payment of \$200 (10 years) in July, 2016 and would then be eligible for a fifteen (15) year payment in July, 2017. He checked with HR Director JL, discovered that Lt. Lewandowski's actual start date as a full-time police officer was October 11, 2005 and sent Lt. Lewandowski an email asking him how he had learned that the town had him reaching the fifteen (15) year mark for longevity in November. In his response, Lt. Lewandowski attached and referenced the Longevity Chart that MR had sent him on November 15, which had him at "14" years of service as of July 1, 2017, not "15." (TE 19; Testimony of GM-I, 350-4).

Additional Week of Vacation

Article 6 of the CPA Contract reads in pertinent part:

- Vacations (Full Time); Full time officers shall be granted vacation leave, with pay, as follows...120 hours after five years...160 hours after ten years."
- Each member of the bargaining unit hired before January 1, 2012 with prior full time police service shall have such prior service time

added to creditable service with the Town of Charlton to determine the member's annual vacation allowance. (TE 7, Art. 6)

37. While in the CPA bargaining unit, under an agreement between the Town and the CPA, Lt. Lewandowski was given credit for two (2) years and two (2) months of full-time police service in Millville. In the document that Lt. Lewandowski signed as part of the agreement, his Charlton date of hire for service toward vacation was "9/27/05." (TE 13).

38. Lt. Lewandowski was promoted to Police Lieutenant July 1, 2013. The Personnel By-Laws, which covers managers such as the Police Chief and Police Lieutenant, states.

- After the first six months of continuous employment with Charlton—2 (two) weeks of vacation per year;
- After five years of continuous employment with Charlton—3 (three) weeks of vacation per year;
- After 10 years of continuous employment with Charlton—4 (four) weeks of vacation per year;
- After 15 years of continuous employment with Charlton—5 (five) weeks of vacation per year. (TE 6, 220-4.5; underlining added; (Testimony of JP-II, 240-2).

39. Unlike longevity, increases in vacation time under both the CPA CBA and the Personnel By-Law are credited when the employee reaches the anniversary of continuous employment that puts the employee at the next level of vacation.

40. In early December, 2017, Lt. Lewandowski went to MR's Office. As recounted by MR, "he (Lt. Lewandowski) said that, according to the longevity sheet that was dispersed, we had his start date as 7/15/02, therefore, he thinks we had an issue, an error in his vacation time, and wanted me to take a look at it." Lt. Lewandowski told MR that "we had not been processing the vacation start date the same as the longevity start date, therefore, he was owed an additional week of vacation time ... he asked me to look at it." MR reviewed the Longevity Chart, told Lt. Lewandowski that he was right and that she would prepare a vacation personnel action form. ("Vacation PAF"). Lt. Lewandowski said "Okay." MR prepared and signed the Vacation PAF. (Testimony of MR-I, 23-24; 54-62; TE 21).

41. The Vacation PAF still had to be signed by Chief Maxfield and Ms. Craver. Lt. Lewandowski brought the form to Maxfield while the Chief was in a meeting in his office with Administrative Assistant MJ. Lt. Lewandowski handed Maxfield the Vacation PAF form and stated that he had "hit an anniversary." Maxfield looked at the form and asked, "You've been here 15 years already?" Lt. Lewandowski said, "Yes." Maxfield joked about whether he was buying a car as he signed the Vacation PAF. (TE 21; Testimony of GM-I, 336-340; Testimony of MJ-I, 495-97). Ms. Craver subsequently signed the form and Lt. Lewandowski was credited with an additional forty (40) hours of vacation. (TE 21).

42. When Maxfield was reviewing the circumstance of Lt. Lewandowski's longevity payment for FY 18, he learned from the HR Director that "7/15/02" was the date Lt. Lewandowski

was appointed to the position of auxiliary police officer. Chief Maxfield was not aware, nor was he informed, at that time, that Lt. Lewandowski had resigned his position as an auxiliary officer with the Town in December 2003. (Testimony of GM-I, 354-55; Testimony of JL-I, 183-190).

43. Chief Maxfield then met with Lt. Lewandowski regarding the longevity issue. Chief Maxfield told Lt. Lewandowski: “the auxiliary time doesn’t count for purpose of benefits and longevity, and I knew that he was aware of that.” During that conversation, Chief Maxfield “remembered that I signed that vacation form and I asked him ‘Did you get another week’s vacation based on this date?’ and he said ‘yes’.” Chief Maxfield then told Lt. Lewandowski “to get over to HR and square this away, and to email [MR] and deduct that 40 hours of vacation from the form that he had me sign.” (Testimony of GM-I, 355-357, 475).

44. Lt. Lewandowski sent an email to MR on February 12 which read, “After speaking with my chief, he advised that vacation time does not count for auxiliary service and that we were at error with me attaining my 15 years of service time in Charlton. With that being said, could you please deduct the 40 hours from my vacation time, please?” Ultimately, CPD Administrative Assistant MJ deducted the forty (40) hours. (TE 23).

45. Chief Maxfield subsequently learned that there had been a break in service from when Lt. Lewandowski’s auxiliary time ended (December 2003) and when he became a full-time police officer for the Town (July 2005). When Chief Maxfield learned about this break in service, he concluded that Lt. Lewandowski had deliberately misled him. He re-assigned Lt. Lewandowski’s access to Department records and related duties to one of the Sergeants and determined that he would further investigate Lt. Lewandowski. (Testimony of Maxfield-I, 359-64). On April 5, 2018, Maxfield placed Lt. Lewandowski on paid administrative leave so that he could further investigate. (TE 24B).

Lt. Lewandowski’s written response during the investigation regarding a conversation he had with former Chief Pervier

46. On May 21, 2018, Chief Maxfield sent a notice and questions to Lt. Lewandowski stating:

- While I am not ordering you to provide the information under threat of discipline, I am ordering you as follows:
 - i. If you do choose to provide the information, you must tell the truth at all times. Untruthfulness includes making false statements and/or intentionally omitting significant or pertinent facts....
 - ii. Your failure to comply with these orders will constitute grounds for discipline, up to and including dismissal. This is separate and apart from discipline, if any, that arises from my investigation. (TE 42, pp. 1, 2).

47. Through counsel, Lt. Lewandowski provided his response to the questions on May 29, 2018, including signing a statement at the end of his responses that read, “These answers have been prepared with assistance of counsel and I have personally participated in responding to, and have reviewed each answer, and attest to their completeness and accuracy.” (TE 43, p. 11).

48. Question 2(b) and Lt. Lewandowski’s response to question 2(b) were as follows:

- Prior to July 1, 2017, did you know that you were first promoted to Lieutenant on July 1, 2013 and that, unlike your position as a Police Officer, the position was not covered by the collective bargaining agreement between the Town and Charlton Police Alliance?
- “No. [Former] Chief [James] Pervier discussed the differences between the Rank of Lieutenant and that of Patrol Officer...[I] was informed that the Chief and Lieutenant receive everything that “union” personnel receive with the exception of vacation and sick time caps. Chief Pervier also informed [me] that [I] would receive all the benefits that the previous Lieutenant received including credit for time on Millville Police Department for longevity calculations [as was in the union contract].”

(TE 43, p. 3; underlining added).

49. At the March 12 Commission hearing, Lt. Lewandowski provided the following testimony:

“Lt. Lewandowski: I had a conversation with Chief Pervier—right before I got promoted, I spoke with him about what the lieutenant would get—if I was to take the lieutenant’s position what I would get for benefits and stuff like that. He informed me that I would get everything that the union gets, anything that the past lieutenant had, himself also, up to an including whatever was in the union.

Commissioner: Okay. But didn’t you explicitly answer somewhere that he told you that you could use your Millville time for longevity purposes?

Lt. Lewandowski: In one of the questions that Chief Maxfield sent over back in, I believe it was May.

Commissioner: Yes

Lt. Lewandowski: Yeah, it’s added on at the end. I just thought—I just inferred that that was part of that discussion because we got everything that the union got.

Commissioner: All right. So he never explicitly said those words to you, ‘You can use your time as a Millville police officer for the longevity calculations’?

Lt. Lewandowski: I just inferred that.”

(Testimony of GL-II, 765-67)

Sick Leave Audit

50. From September 27, 2005 to July 1, 2009, Lt. Lewandowski, like all other CPD employees accrued eight (8) hours - (1 day) of sick leave a month. Effective July 1, 2009, the accrual rate increased to ten (10) hours - (1.25 days) a month.

51. Since Lt. Lewandowski has been in the Department, an employee’s sick day has been recorded by CPD Dispatchers into the Department’s Sick Book. If a Dispatcher took a call from an employee calling in sick, that would also be included in the dispatcher logs. The Sick Book was the source of information for payroll records that recorded an employee’s sick leave use in each pay period.

52. On July 1, 2008, the Department also started to enter used sick time into the “Tritech IMC” Program, in the Department’s computer system. (Testimony of GM-II, 390-391). Lt. Lewandowski has been in charge of the Tritech Records IMC System since he became the CPD Lieutenant on July 1, 2013. (TE 14A; AE O; Testimony of GL-II, 720-721).

53. Prior to when Lt. Lewandowski was promoted to the CPD Lieutenant, the Town had to pay a departing employee a large sum of money for unused leave the Town did not know the employee had accrued. (Testimony of DC-II, 102-03). In 2014, Ms. Craver asked Pervier to audit the accrued leave of Department employees, including sick leave, so that any discrepancies between Department records and Town Hall records could be reconciled. (Testimony of JP-I, 249-50). Administrative Assistant MP gathered the data from Department records and completed the calculations. MP made sure that the audit included sick leave use recorded in the Department Sick Book. (Testimony of MP-II, 598-599). Lt. Lewandowski, relying on MP’s work, put the audit for each employee on letterhead and submitted the document to each employee. The document for Lt. Lewandowski stated, “As of 10/09/2014, Lieutenant has accrued the following hours...Sick: 626.” (Testimony of GL & TE 33).

54. In February 2017, Charette directed Lt. Lewandowski to conduct another accrued leave audit. Lt. Lewandowski completed the audit and attached the Department “Sick Time as of 3-1-17” document to an email he sent to Charette dated March 14, 2017. Lt. Lewandowski listed his accrued sick leave as of March 1, 2017 as 844 hours. After verifying the hours with all employees by posting them on the CPD bulletin board, Charette submitted them to Town Hall. (TE 34; Testimony of DC-I, 108-12).

55. In December, 2017, another sick leave audit was completed. New Administrative Assistant MJ and Assistant HRD MR completed the sick leave audit to reconcile CPD records with HRD records. (Testimony of GM-II, 390).

56. Starting with the March 1, 2017 sick leave accrual balances from the most recent audit, MJ added/subtracted sick leave accrued and used through December 28, 2017. (Testimony of MJ-II, 498-99). She then prepared a standard notice for each employee, which Chief Maxfield signed, and placed it in the employee’s department mailbox. The notice to Lt. Lewandowski read in pertinent part, “Please take a look at the following balances for time off that we have for you as of December 28, 2017. If you believe there is an error, please see me as soon as possible...Sick Time: 904 hours. If the above balances are correct, please sign here.” (TE 35).

57. Based on his pay advice dated December 28, 2017 showing that he had 912 hours of sick leave, which Lt. Lewandowski accepted as correct, Lt. Lewandowski made a handwritten note of 912 on the correspondence and brought it to Chief Maxfield. The Chief reviewed the handwritten note and said “prove it.” (Testimony of GL, 731)

58. In response Lt. Lewandowski went back and audited his sick leave by calculating the total possible amount of hours that could have accrued *since starting full-time employment in 2005*, but only deducted the amount of hours logged into the IMC / Tritech dispatch software, which the Department began using to track sick time usage in July 1, 2008. Thus, he failed to deduct any of the sick time usage from 2005 through July 1, 2008, which had been logged manually, and which had been deducted in the first audit conducted by former Administrative Assistant MP. Thus, instead of 904 (or 912) hours, Lt. Lewandowski represented that his sick time balance should be 1186 hours as of December 28, 2017. Chief Maxfield, his new administrative assistant and the Town’s Assistant HR Director accepted Lt. Lewandowski’s representation and his employment records were updated. (TE 36, 38, Testimony of GL, GM, MJ and MR)

59. In preparation for this proceeding before the Commission, the Town searched and found sick book pages in the basement of the Police Department showing that Lt. Lewandowski had taken 20 sick days or 160 hours that were not accounted for in his analysis. (Testimony of MJ, 523) If those 160 hours were subtracted from Lt. Lewandowski’s tally of 1186, his correct sick leave balance would have been 1026 hours.

60. Although Lt. Lewandowski did his sick leave calculation with the omission of sick leave he had used prior to July 1, 2008, he held other Department employees to the prior audit, which took into account sick leave used prior to July 1, 2008. (Testimony of GL-II, 783). An example was Dispatcher GF to whom Lt. Lewandowski sent a January 8, 2018 notice referring to the October, 2014 audit:

After review, I made a correction of your Sick Time balance from what was in the letter of December 28, 2017. During further reconciliation of time off it was discovered that there were time off sheets that were signed off on in 2014. This gave us a better starting point on which to base current time off calculations. After recalculating the numbers, it showed that your Sick Time balance was different than what was originally thought. Please see the new balances below that are correct as of December 28, 2017. (TE 41).

61. Lt. Lewandowski wrote further to GF that she had 116.25 hours of accrued sick leave as of December 28, 2017, and she signed off on that number. (TE 41). GF had been employed by the Department since September 28, 1990. If Lt. Lewandowski had applied the same calculation method he used for himself—i.e., only considering her sick leave use that had occurred since sick leave began to be entered in the Tritech IMC System July 1, 2008, GF’s sick leave balance as of December 28, 2017 would have been 1646.75 hours—1200 hours because of the maximum accumulation. (TE 41; Testimony of GM-II, 403-07).

Use of 6 Vacation Days that were not recorded in payroll system

62. When Pervier was Chief, Lt. Lewandowski would make a written request to the Chief to use a vacation day, usually by email, and the approval would get copied to the Administrative Assistant by the Chief or Lt. Lewandowski so she could enter it into the payroll system. (Testimony of JP-I, 293-94).

63. During his nine (9) months as Interim Chief, Charette had Lt. Lewandowski sign the weekly payrolls. Charette would only sign a payroll document if Lt. Lewandowski was not available. (Testimony of DC-I, 112-13; Testimony of GL-II, 812-13, 818).

64. In a chain of emails dated May 1, 2017, Lt. Lewandowski told Charette that he had sixteen (16) accrued vacation days and two (2) accrued personal days. He asked the Chief:

- To be allowed to use 6 (six) of the days on May 5, 19 and 26; June 9, 16 and 30;
- To be allowed to roll over 5 (five) of the days into the next fiscal year; and
- For the Town/Department to buy back 7 (seven) days of vacation from him.

65. After he asked Ms. Craver whether Town policy allowed an employee to sell back vacation days, and she said no, he denied Lt. Lewandowski's buyback request. Charette approved Lt. Lewandowski's other two (2) requests. (TE 25). (Testimony of DC-I, 164-65).

66. Lt. Lewandowski took vacation days on May 5, 19, 26 and June 9, 16 and 30, 2017. Lt. Lewandowski received a paycheck "advice" with each of his paychecks which included the employee's current accrued sick (SPCS), personal (PPCS) and vacation time (VCPS) in hours, as well as the number of hours used during the pay period and in the year to date. Lt. Lewandowski's paycheck advices for the six (6) pay periods that included the six (6) vacation days did not show that he had used any vacation hours. (TE 32).

67. Each of the six (6) vacation days was in a separate payroll period. None of the six (6) days were documented in the six (6) separate payrolls. Lt. Lewandowski personally signed five (5) of the payrolls. Charette signed one (1) of the payrolls in Lt. Lewandowski's absence without noticing that Lt. Lewandowski's May 6 vacation day wasn't recorded. (TE 26; TE 166-67).

68. On September 7th and 12th, 2018, a local appointing authority hearing was held by a hearing officer designated by the Town. (Stipulated Facts)

69. Lt. Lewandowski did not testify at the local appointing authority hearing. (Stipulated Fact)

70. On October 16, 2018, the Board of Selectmen, serving as the appointing authority, voted to adopt the recommendations of the hearing officer and terminate Lt. Lewandowski from his employment. (Stipulated Fact)

71. The termination letter, dated October 17, 2018 states in relevant part:

- "You accepted a \$200 longevity payment in November 2017 that you knew you had not earned and that the Town had paid by mistake.
- Instead of taking steps to correct the error in Town records that had your hire date as July 15, 2002—not September 27, 2005—for pur-

poses of benefit accruals, you took advantage of it to obtain an extra week of vacation you had not earned.

- You took six (6) days of vacation in May and June 2017 and did not deduct it from your accrued vacation, including on payrolls that you signed.
- The evidence shows that you purposefully inflated your accrued sick leave by at least 240 hours in Department records.
- After being warned under threat of dismissal to tell the truth in Chief Maxfield's investigation, you failed to tell the truth when you claimed that former Chief James Pervier told you that you would receive Charlton service credit toward longevity for your prior employment with the Millville Police Department."

The last page of the termination letter states in part: "... [Y]ou chose to engage in a pattern of deception and outright lying with the goal of securing benefits to which you were not entitled. While you only pocketed \$200, that alone would justify your dismissal. The vacation and sick leave benefits that you were caught attempting to obtain were worth thousands of dollars. And you lied in the investigation." (TE 1)

APPLICABLE LAW

G.L. c. 31, § 43 provides:

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against [a tenured civil service employee] ... it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of the evidence establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." *Commissioners of Civil Service v. Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971). *See also Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *School Comm. v. Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488 (1997). *See also Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding

ing any doubts that may still linger there.” *Tucker v. Pearlstein*, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” *Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he commission’s task... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘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’,” which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority” *Id.*, quoting internally from *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. “Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to perform their official responsibilities.” *Police Commissioner of Boston v. Civil Service Commission*, 22 Mass. App. Ct. 364, 371 (1986).

Parties’ Arguments

In its post-hearing brief, the Town argues that the preponderance of the evidence supports each of the charges against Lt. Lewandowski; that the Commission should draw an adverse inference against Lt. Lewandowski for not testifying at the local hearing; and that, given the serious nature of the charges, including untruthfulness, termination was the appropriate level of discipline to be imposed here.

In his post-hearing brief, Lt. Lewandowski argues that the longevity issue that led to the investigation and his ultimate termination was the product of unfair and disparate treatment among similarly situated employees; the investigation into peripheral matters and the findings were erroneous and merely a pretext to support a termination decision; and that Lt. Lewandowski has committed no wrongdoing.

Analysis

I carefully considered all of the witnesses’ testimony throughout the three days of hearing conducted at the Charlton Library. I reviewed the testimony again by reading the transcripts. I reviewed all of the exhibits, the stipulated facts and the post-hearing briefs submitted by the parties. To ensure clarity, I have not overlooked any of the witness testimony, proposed findings or arguments. In those instances where I did not include all or parts of the testimony of a witness in my findings, I did so not by omission, but rather, because I did not find the testimony relevant and/or I did not credit that portion of his/her testimony.

First, the evidence does not show that the investigation into Lt. Lewandowski was a pretext to bring about his termination. The

investigation began based on a legitimate inquiry that arose when Chief Maxfield, as he was preparing to submit his first budget proposal as Police Chief, became aware that Lt. Lewandowski had received a longevity payment of \$200 in July 2017. This piqued Chief Maxfield’s interest for two reasons. First, Chief Maxfield was not aware that, even prior to the Town Meeting vote in October 2017, the Police Chief and Lieutenant (non-CBA employees) were receiving longevity payments. Second, even if there was such a past practice, Chief Maxfield didn’t understand why Lt. Lewandowski would have received a second \$200 payment in November 2017. Thus, he took the reasonable step of asking Lt. Lewandowski to provide an explanation. When Lt. Lewandowski replied with a partially non-responsive reference to anniversary dates, Chief Maxfield asked him to put his reply in writing. Rather than providing clarity, the written response by Lt. Lewandowski raised even further questions which justified, if not compelled, the Chief’s decision to inquire further, and, ultimately, conduct a full investigation regarding all issues related to longevity payments, sick time accrual and usage of vacation time.

I did consider Lt. Lewandowski’s testimony that Chief Maxfield may have had a personal animus against him based on an incident over a decade ago when Chief Maxfield, then a police sergeant, was apparently encouraging auxiliary police officers not to work paid details in a show of solidarity with the police union. Apparently, Lt. Lewandowski may have provided information to the Police Chief at the time regarding Maxfield’s actions. Even if true, I don’t believe that this incident, which occurred over a decade ago, was a factor in Chief Maxfield’s decision to conduct an investigation regarding the matters related to the instant appeal. Rather, based on the testimony of both Lt. Lewandowski and Maxfield, the two men appeared to have at least a cordial, working relationship when Maxfield was first promoted to Police Chief.

I also considered Lt. Lewandowski’s argument that Ms. Craver targeted him for termination. As discussed in more detail below, there are indeed multiple examples of how, in regard to some of the individual charges (i.e. - the longevity payment), Ms. Craver seemed to inexplicably give certain other employees, including the Police Chief, the benefit of the doubt about their actions or inactions regarding similar circumstances, while simultaneously concluding that Lt. Lewandowski was acting in bad faith. Importantly, however, as laid out in the findings and discussed further below, there were multiple allegations against Lt. Lewandowski, most of which came about and/or were compounded by Lt. Lewandowski’s then-ongoing statements and actions. Ms. Craver would have been negligent in her duties if she did not authorize and/or encourage an investigation into the multi-faceted unfolding allegations.

Having determined that the investigation was not a pretext to terminate Lt. Lewandowski, I turn to the issue of whether the Town has proven, by a preponderance of the evidence, that Lt. Lewandowski engaged in misconduct which warrants discipline. I address the charges in the same order in which they are referenced in the findings.

Longevity payment

Multiple Town employees received erroneous longevity payments including, but not limited to, Chief Maxfield when he was serving as a sergeant. On July 1, 2017, then-Sergeant Maxfield erroneously received a \$1,000 longevity payment when he was only due \$400. Based on his own testimony, he questioned, at the time, whether the payment was made in error. Yet, he failed to inform the Police Chief at the time, the Town Administrator, or any other Town official about this overpayment or, at a minimum, his question regarding whether the payment was made in error.

The issue of erroneous payments continued when Town Meeting, in October 2017, voted to provide longevity payments to non-CBA personnel. To implement this new benefit, the Town Administrator delegated the task to the HR Director. The HR Director then delegated the task to the Assistant Human Resources Director, providing no guidance or oversight. The resulting errors were inevitable. One of those errors involved Lt. Lewandowski who received a second longevity payment of \$200 in October 2017. Even if the 7/15/02 auxiliary start date applied and even if the time worked in Milbury was counted; and even if the employment did not need to be continuous, Lt. Lewandowski would still have only been eligible for a total payment of \$200. The payment of an additional \$200, for a total of \$400, was an error. Like Chief Maxfield, however, when he was a sergeant, Lt. Lewandowski took no action to correct this error when it appeared in his pay invoice. The Town went to painstaking efforts, both during the hearing and in its post-hearing brief to distinguish the two circumstances up to that point. In short, the Town argues that Chief Maxfield did not know that the \$1,000 payment he received in July 2017 was an overpayment of \$600, while Lt. Lewandowski did know that the payment he received in October 2017 was an overpayment of \$200. This argument is not supported by the record. As referenced above, Chief Maxfield knew that he had received an overpayment of \$600, or, at a minimum, questioned whether it was an error, but did not alert Town officials.

What occurred next, however, did distinguish what occurred with Chief Maxfield from Lt. Lewandowski. Chief Maxfield, at the time he received the overpayment, was not asked for an explanation regarding the overpayment he received. In short, the error went unnoticed by Town officials at the time. The erroneous payment made to Lt. Lewandowski, however, was noticed when the Chief's new administrative assistant was reviewing accounts in preparation for the following year's budget submission. Ironically, it was Chief Maxfield who asked Lt. Lewandowski to explain why he (Lt. Lewandowski) had received his overpayment. I listened carefully to Lt. Lewandowski's testimony and reviewed his written responses to determine if he could offer a credible explanation as to why the second \$200 payment was not an error and, if not, why he didn't notify Town officials of the error. He could not. If Lt. Lewandowski had simply acknowledged, at the time, that he, like others, had failed to notify Town officials of the overpayment, the matter likely would have been closed. Instead, he offered non-responsive and vague answers that appeared designed to obfuscate and confuse those individuals, including the Police Chief, who were looking for a valid explanation.

The Town's termination letter to Lt. Lewandowski, referring to the longevity payment, states in part: "While you only pocketed \$200, that alone would justify your dismissal." Given the glaring disparity regarding how the Town handled the overpayment received by Lt. Lewandowski as opposed to others, including Chief Maxfield, this would not, standing alone, justify Lt. Lewandowski's termination, even when taking into account his non-responsive and vague answers.

Unfortunately for Lt. Lewandowski, however, he (Lt. Lewandowski) subsequently took further actions which called into question his honesty, as discussed below.

Additional Week of Vacation

As referenced above, the Assistant HR Director, when calculating the longevity payment, listed 7/15/02 as Lt. Lewandowski's date of hire with the Town, as opposed to 9/27/05, when he was appointed as a full-time police officer. Lt. Lewandowski knew the difference between the two dates and he knew that his employment as an auxiliary police officer with the Town ended on December 11, 2003. Knowing that he only had twelve years of continuous service toward vacation credit, he asked the Assistant HR Director to credit him with an additional week of vacation time. Even if I were to accept Lt. Lewandowski's argument, which I don't, that he thought he did qualify for the additional vacation credit, he still made an untruthful statement to the Police Chief. When Chief Maxfield, prior to signing off on the additional week of vacation, expressly asked him whether he had been with the CPD for fifteen (15) years, Lt. Lewandowski answered "Yes" when he knew the answer was "No."

Sick Leave Audit

The most troubling actions and statements by Lt. Lewandowski related to the sick leave audit. The sequence of events is laid out in the findings. Similar to how the new personnel bylaw regarding longevity payment was implemented, much of the heavy lifting regarding sick time audits was relegated to administrative staff. In this case, MP, the former administrative assistant in the Police Department, appeared to conduct a fairly comprehensive sick time audit, in which she examined all time accrued and all time used, including sick time usage that was only recorded manually in a book, prior to the Town's moving to computerized tracking in 2008.

Using those audit figures as a starting point, the new administrative assistant, under the new Police Chief, provided all police department employees with an updated sick time balance and asked each employee to verify its accuracy. Remarkably, Lt. Lewandowski, who had never questioned the conclusions of the prior audit, went back and conducted an audit of his own time from his date of hire, *failing to deduct any sick time usage between 2005 and 2008 that was entered manually* prior to the process being computerized. Whether this falsely inflated his sick time by 160 or 274 hours is irrelevant. Lt. Lewandowski knew the inflated number could not be correct as it did not account for any of his sick time usage between the relevant time periods between 2005 and 2008.

The upward adjustment to his sick time balance by the Town was based solely on Lt. Lewandowski's misrepresentation.

As this appeal can be decided based on the above, I need not address whether Lt. Lewandowski misrepresented what former Chief Pervier explicitly told him about his benefits as opposed to what Lt. Lewandowski inferred from that discussion. Nor do I need to address whether Lt. Lewandowski should have noticed that six vacation days he took over six different weeks were not deducted from his accrued time.

There is a disconnect between the person who appeared before me throughout the three days of hearing and the proven charges of untruthfulness here. The Appellant is someone who has worked hard his entire life, including obtaining two masters' degrees. He has dedicated himself to public service in his community; is proud of his family; and clearly enjoyed his job as second-in-command of the Town's Police Department. In that context, what happened here is tragic.

Rather than acknowledging that he received a second \$200 longevity payment in error, Lt. Lewandowski inexplicably opted for obfuscation over candor. He then made matters (much) worse for himself by knowingly using the same erroneous information that partly caused the overpayment to increase his vacation accrual from four to five weeks before such credit was due to him. When expressly asked by the Town's Police Chief if he had been with the Charlton Police Department for fifteen years, he said "yes." The truthful answer was "no." Then, he did an audit of his own sick time and knowingly inflated his sick time balance by failing to deduct sick time usage that was recorded manually between 2005 and 2008.

The Appellant couldn't offer a credible explanation for his actions. Perhaps the Appellant was trying to bolster his vacation and sick time balances because he was no longer eligible for a series of administrative days granted to him by the former Chief. Perhaps his actions were simply a brief error in judgment for a person whose personal and professional life appears to have been conducted in an otherwise exemplary manner. Had that error in judgment been limited to one instance, such as the \$200 longevity payment, my conclusion would have been far different here. However, as referenced above, the Appellant was untruthful regarding multiple matters, including the above-referenced effort to increase his accrued vacation time and the erroneous inflation of his sick time balances. Taken together, those multiple instances of proven untruthfulness constitute substantial misconduct adverse to the public interest that provide just cause for the Town's decision to discipline him.

Having determined that Lt. Lewandowski did engage in the alleged misconduct, I must determine whether the level of discipline (termination) was warranted.

As stated by the SJC in *Falmouth v. Civ. Serv. Comm'n*, 447 Mass. 814, 823-825 (2006):

"After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authori-

ty, a role to which the statute speaks directly. G.L. c. [31], s. § 43 ('The commission may also modify any penalty imposed by the appointing authority.') Here the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether '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.'" *Id. citing Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

"Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the 'equitable treatment of similarly situated individuals.' citing *Police Comm'r of Boston v. Civ. Serv. Comm'n*, 39 Mass. App. Ct. 594, 600 (1996). However, in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system—"to guard against political considerations, favoritism and bias in governmental employment decisions." *Id.* (citations omitted).

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"Unless the commission's findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation." *Id.* at 572. (citations omitted).

My findings do not differ significantly from the Town as I have found that the Appellant was untruthful on multiple occasions. As discussed above, I do not believe the investigation here was a pretext to bring about the Appellant's termination. Further, I don't believe the final decision to terminate the Appellant was based on any personal or political bias. Finally, although there is evidence that the Town treated other similarly situated individuals differently from the Appellant regarding receipt of the longevity payment, the record does not show that those other employees engaged in multiple instances of untruthfulness, thus distinguishing them from the Appellant.

For all of the above reasons, the Appellant's appeal under Docket No. D1-18-196 is hereby **denied** and the Town's decision to terminate his employment is affirmed.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 9, 2020.

Notice to:

Dale R. Kiley, Esq.
BourgeoisWhite, LLP
One West Boylston Street
Suite 307
Worcester, MA 01506

Leo J. Peloquin, Esq.
Norris, Murray & Peloquin, LLC
315 Norwood Park South
Norwood, MA 02062

* * * * *

In Re: REQUEST BY: MICHAEL MCCARTHY for the Civil Service Commission (Commission) to Investigate Whether the State's Human Resources Division (HRD) and/or the Department of Correction (DOC) Should Be Ordered to Conduct Examinations for the Industrial Instructor and Recreation Officer Series

Tracking Number: I-20-038

April 9, 2020

Christopher C. Bowman, Chairman

Investigation by Commission-Failure to Conduct of Examinations for Industrial Instructor and Recreation Officer Series at the Department of Correction—The Commission declined to investigate whether it should order the Department of Correction to conduct examinations for the Industrial Instructor and Recreational Officer series, having recently denied an identical request after discovering that a majority of the impacted members opposed going forward with scheduling examinations. The scheduling of examinations would mean that any provisional employees whose names did not appear on an eligible list and certification could not continue being employed in those titles.

RESPONSE TO REQUEST FOR INVESTIGATION

On March 3, 2020, Michael McCarthy (Mr. McCarthy), a provisional Industrial Instructor II at the Department of Correction (DOC), pursuant to G.L. c. 31, § 2(a), filed a request for investigation with the Civil Service Commission (Commission), asking the Commission to open an investigation regarding whether the state's Human Resources Division (HRD) and/or the Department of Correction (DOC) should be ordered to conduct examinations for the Industrial Instructor and Recreation Officer series.

2. On March 24, 2020, I held a show cause conference via video conference which was attended by Mr. McCarthy, counsel for HRD, counsel for DOC and another DOC representative.

3. The Commission recently addressed an identical request in *Investigation Request Re: James Hunt & Seven Others* (I-19-90) [33 MCSR 159] (2020).

4. In the *Hunt* matter, the Commission conducted a show cause conference and a status conference. The status conference was attended by multiple DOC employees and representatives from the Massachusetts Correction Officers Federated Union (MCOFU).

5. Subsequent to this status conference, MCOFU sent correspondence to all MCOFU members who could be impacted by a decision to conduct an examination for these titles. Specifically, at the Commission's request, MCOFU notified those members that, pursuant to G.L. c. 31, s. 14, paragraph 3, no provisional employ-

ment in those positions would be authorized or continued after the establishment of an eligible list and Certification. Thus, those provisional employees whose names did not appear on the eligible list created from the examination (i.e. - they either did not take the examination or did not pass the examination), could not continue being employed in those titles.

6. A majority of impacted members who responded to a MCOFU poll opposed going forward with scheduling examinations at this time. Mr. McCarthy was among the minority, voting to support going forward with examinations in these titles.

7. The Petitioners in *Hunt* withdrew their request for investigation and the matter was closed by the Commission on March 12, 2020. Mr. McCarthy, through this Petition, is effectively asking the Commission to re-open the matter.

APPLICABLE CIVIL SERVICE LAW AND RULES & FINAL RESPONSE

G.L. c. 31, § 2(a) allows the Commission to conduct investigations. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See *Boston Police Patrolmen's Association et al v. Civ. Serv. Comm'n*, No. 2006-4617, Suffolk Superior Court (2007). See also *Erickson v. Civ. Serv. Comm'n & others*, No. 2013-00639-D, Suffolk Superior Court (2014). The Commission exercises this discretion, however, "sparingly," See *Richards v. Department of Transitional Assistance*, 24 MCSR 315 (2011).

I carefully reviewed and considered Mr. McCarthy's Petition, including his written submission and his statements at the Show Cause Conference. He has not presented any information which would cause the Commission to effectively re-open the matters already addressed in *Hunt*.

For these reasons, an investigation is not warranted and the Commission has opted not to exercise its discretion to initiate such an investigation under G.L. c. 31, § 2(a).

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) April 9, 2020.

Notice to:

Michael McCarthy
[Address redacted]

Norman Chalupka, Esq.
Department of Correction
P.O. Box 946
Norfolk, MA 02056

Melissa Thomson, Esq.
Human Resources Division
100 Cambridge Street, Ste. 600
Boston, MA 02204

* * * * *

DANIEL WHORISKEY

v.

HUMAN RESOURCES DIVISION

B2-20-028

April 9, 2020

Christopher C. Bowman, Chairman

Examination Appeal-E&E Credits-Promotional Exam for Fire Lieutenant—The Commission dismissed the appeal from a Dedham firefighter who claimed to have been wrongly denied E&E credits on a lieutenant promotional exam where he presented no evidence to show that he had ever submitted the online application for these credits.

ORDER OF DISMISSAL

On February 19, 2020, the Appellant, Daniel Whoriskey (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to deny him credit for his Education and Experience (E&E) exam component, resulting in his receipt of a failing score on the 2019 Fire Lieutenant examination and exclusion from the eligible list.

On March 10, 2020, I held a pre-hearing conference at the offices of the Commission which was attended by the Appellant and counsel for HRD.

The following is either undisputed or, where noted, based on statements made by the Appellant which, solely for the purposes of this dismissal, I have accepted as true:

1. The Appellant is presently employed as a firefighter in the Town of Dedham.
2. The fire lieutenant examination consisted of two (2) components: a written exam component, administered on November 16, 2019, and the Education and Experience (E&E) component. The passing score for the exam is a 70.
3. When the Appellant applied to take the examination, he was informed that he would receive an email with instructions on how to file the E&E Claim.
4. The Appellant sat for the written exam component on November 16, 2019. He received a score of 75.
5. The deadline for submitting the E&E claim was November 23, 2019.
6. HRD notified the Appellant of instructions for submitting the E&E claim online and that the deadline for submitting the E&E claim online was November 23rd.
7. The correspondence from HRD states, "[p]lease note that the E&E is an examination component, and therefore, you must

complete the Online E&E Claim yourself... Please read the instructions carefully." The correspondence from HRD also tells the Appellant that, once completed, he will receive a confirmation email confirming that the E&E component was completed.

8. HRD has no record that the Appellant went online and completed the E&E component.

9. The Appellant has no record of receiving a confirmation email.

10. On February 3, 2020, HRD notified the Appellant that, based on receiving a "0" for his E&E component, his final score was a 60. The passing score was 70.

11. The Appellant filed a timely appeal with HRD which was denied.

12. This timely appeal with the Commission followed.

13. On March 4, 2020, HRD established an eligible list for Dedham Fire Lieutenant. There are eight (8) candidates on that eligible list.

LEGAL STANDARD

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons aggrieved by "... any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations" It provides, *inter alia*,

"No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record."

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: "conduct[ing] examinations for purposes of establishing eligible lists."

G.L. c. 31, § 22 states in relevant part: "In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held."

G.L. c. 31, § 24 allows for review by the Commission of exam appeals. Pursuant to § 24, "...[t]he commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator."

In *Cataldo v. Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that "... under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as 'credit for such training and experience as of the time designated by HRD.' G.L. c. 31, § 22(1)."

Analysis

It is undisputed that the Appellant, and all applicants who took this most recent fire lieutenant examination, had until November 23,

2019 to file an E&E Claim with HRD. With the exception of supporting documentation, all applicants must complete the E&E application online. There is no evidence to show that the Appellant submitted the E&E claim on or before November 23rd. Since the Appellant cannot show that he followed HRD's instructions regarding E&E component, he cannot show that he has been harmed through no fault of his own. Thus, he is not an aggrieved person. For this reason, his appeal under Docket No. B2-20-082 is hereby dismissed.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 9, 2020.

Notice to:

Daniel Whoriskey
[Address redacted]

Emily Sabo, Esq.
Human Resources Division
100 Cambridge Street: Ste. 600
Boston, MA 02204

* * * * *

In Re: REQUEST FOR INVESTIGATION BY JAMES HUNT
and Seven Others Re: Department of Correction and Human
Resources Division

Tracking No. I-19-190

March 12, 2020
Christopher C. Bowman, Chairman

Investigation by Commission-Withdrawal of Request to Investigate the Conduct of Examinations for Industrial Instructor and Recreation Officer Series at the Department of Correction—Correctional officers withdrew their request to have the Commission investigate DOC's failure to conduct examinations for the Industrial and Recreational Officer series.

NOTICE: INVESTIGATION CLOSED

The Petitioners have withdrawn their request for investigation. Therefore, the investigation is closed.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 12, 2020.

Notice to:

James Lamond, Esq.
McDonald Lamond Canzoneri
352 Turnpike Road, Suite 210
Southborough, MA 01772-1756

Melinda Willis, Esq.
Human Resources Division
100 Cambridge Street: Ste. 600
Boston, MA 02204

Earl Wilson, Esq.
Department of Correction
P.O. Box 946
Norfolk, MA 02056

* * * * *

MICHAEL COLEMAN

v.

HUMAN RESOURCES DIVISION

B2-20-040

April 23, 2020

Christopher C. Bowman, Chairman

Examination Appeal—Fair Test Appeal—Questions Not Referenced in the Reading List—Commission Chairman Christopher C. Bowman granted HRD’s motion to dismiss an appeal from a promotional exam for fire lieutenant where the questions on the exam that related to materials not on the reading list were effectively removed for purposes of grading. As such, the Appellant was unable to show that this exam, consisting of 80 questions, was not a fair test of his abilities

DECISION ON HRD’S MOTION TO DISMISS

On March 6, 2020, the Appellant, Michael Coleman (Mr. Coleman) filed a “fair test” appeal with the Civil Service Commission (Commission) regarding the November 16, 2019 promotional examination for Fire Lieutenant.

2. On March 24, 2020, I held a pre-hearing conference via video-conference which was attended by Mr. Coleman and counsel for the state’s Human Resources Division (HRD).

3. As part of the pre-hearing conference, the parties stipulated to the following:

- A. On November 16, 2019, Mr. Coleman took the promotional examination for fire lieutenant.
- B. On November 21, 2019, Mr. Coleman filed a fair test appeal with HRD
- C. On February 3, 2020, Mr. Coleman received his score.
- D. On March 3, 2020, HRD denied Mr. Coleman’s fair test appeal.
- E. On March 4, 2020, HRD established an eligible list for Fire Lieutenant.
- F. On March 6, 2020, the Appellant filed his timely appeal with the Commission.

4. As part of the Appellant’s appeal with HRD, he provided a list of 11 questions that he alleged had not been taken from the reading list. Further, he listed additional questions for which he believed more than one correct answer was possible.¹

5. At the pre-hearing, counsel for HRD indicated that, after receiving Mr. Coleman’s appeal (and others), HRD did a careful and thorough review of the examination and determined that some questions on the examination did not correspond with the reading

material. Those questions were removed from the examination and were not counted in the score. For reasons attributed to confidentiality and the integrity of the testing process, HRD has opted not to indicate how many such questions were removed.

6. Further, after the above-referenced review, HRD identified additional questions in which more than one answer would be considered correct. Those questions remained in the score with candidates being given credit for a correct answer if they responded with one of the multiple correct answers. As part of prior appeals heard by the Commission, it was established that 4 questions fell into this category.

7. At the time of the pre-hearing conference, two other similar appeals were pending before the Commission. On March 26, 2020, the Commission issued decisions dismissing those appeals. (*See Kelley v. HRD & Barrasso v. HRD* [33 MCSR 129 (2020)] which I forwarded to the Appellant.

8. As part of decisions in *Kelley* and *Barrasso*, the Commission concluded in part, that:

“[T]he Commission squarely addressed this issue in *O’Neill v. Lowell and Human Resources Division*, 21 MCSR 683 (2008). Although the appeal was dismissed based on timeliness, the Commission did still address the issue of certain questions being faulty and/or effectively removed from the examination. In *O’Neill*, 20% of the examination questions were determined to be faulty. The Commission concluded that the “defect rate” of 20% did not, standing alone, rise to the level of proof necessary to deem the test unfair. The underlying facts here are not distinguishable from *O’Neill*, nor should the result be.”

9. After reviewing the above-referenced decisions, Mr. Coleman indicated that he still wished to move forward with his appeal. I established a briefing schedule. HRD submitted a motion to dismiss and Mr. Coleman submitted an opposition.

PARTIES’ ARGUMENTS

HRD makes the same argument here that it did in *Kelley* and *Barrasso*, arguing that, even if, after review, 13 of the 80 test questions were effectively removed from the examination because those questions were not referenced in the reading list, the Appellant cannot show that this promotional examination was not a fair test of his abilities to perform the duties of a Fire Lieutenant. Further, HRD argues that the circumstances here are no different than the circumstances before the Commission when it decided *O’Neill*.

Mr. Coleman, in his brief, argued that the circumstances here are distinguishable from *O’Neill*, arguing in part that: 1) “O’Neill was already an officer and had taken promotional exams previously,” demonstrating that he was familiar with the process, “whereas a firefighter going for a promotional exam does not have that background”; and that the 2) the police examination in *O’Neill* purportedly consisted in part of essay questions, diminishing the impact

1. On March 24, 2020, I conducted pre-hearing conferences in separate appeals involving the same issue presented here. As part of those pre-hearing conferences,

HRD indicated that the total number of questions removed entirely was “less than 13.”

of the faulty multiple choice questions. Mr. Coleman also takes HRD to task for purportedly not heeding the Commission's guidance in *O'Neill* to ensure that the percentage of faulty questions be minimized in future examinations.

In regard to the appropriate relief, Mr. Coleman asks that HRD, given the number of faulty questions on this examination, waive his application fee for the next promotional examination.

APPLICABLE LAW

G.L. c. 31, s. 2(b) states in part:

"No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."

G.L. c. 31, s. 22 states in part:

"An applicant may request the administrator to conduct a review of whether an examination taken by such applicant was a fair test of the applicant's fitness actually to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination."

G.L. c. 31, s. 24 states in part:

An applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three relative to (a) the marking of the applicant's answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination taken by such applicant was a fair test of the applicant's fitness to actually perform the primary or dominant duties of the position for which the examination was held."

ANALYSIS

I carefully reviewed Mr. Coleman's arguments, including his argument that the circumstances here are distinguishable from *O'Neill*. While, literally, there are indeed distinctions, there are no substantive distinctions that warrant a different conclusion by the Commission. HRD's removal of faulty questions, whether it be 11, 12 or 13 questions, does not rise to the level of determining that the examination was not a "fair test."

I am not unsympathetic to Mr. Coleman's argument that, more than a decade after *O'Neill*, examination applicants are, once again, faced with an examination in which a troubling percentage of examination questions were faulty. The Commission believes that the quality and integrity of the promotional exam process calls for HRD to take a thorough and pro-active approach in the design of future examinations to assure that the troubling problem presented in these recent cases does not repeat itself in the future. Should the problem occur in the future, the Commission will consider whether or not further review is appropriate, including but not limited to, a more formal review of the examination design process.

Finally, in regard to whether HRD should waive the application fee for the next examination, that relief, even if warranted, would have serious unintended consequences. These examinations are, in large part, funded by the examination fees. Granting such a waiver, which, if done fairly, would need to apply to all exam applicants, would seriously undercut HRD's ability to conduct a future Fire Lieutenant examination, let alone take the steps necessary to ensure that questions are properly validated.

For all of the above reasons, HRD's Motion to Dismiss is allowed and Mr. Coleman's appeal under Docket No. B2-20-040 is hereby *denied*.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 23, 2020.

Notice to:

Michael Coleman
[Address redacted]

Melinda Willis, Esq.
Human Resources Division
100 Cambridge Street: Suite 600
Boston, MA 02114

* * * * *

CHRISTOPHER CORWIN

v.

BOSTON FIRE DEPARTMENT

D-20-012

April 23, 2020

Christopher C. Bowman, Chairman

Commission Practice and Procedure-Filing Fees-Disciplinary Appeal—The Commission dismissed an appeal from a Boston Fire Lieutenant of a two-tour suspension where he failed to include the \$50 filing fee with his original appeal and only paid the \$50 fee after more than ten days had passed following Boston's disciplinary action.

DECISION ON REPONDENT'S MOTION TO DISMISS

On **January 6, 2020**, the Appellant, Christopher Corwin (Lt. Corwin), a Fire Lieutenant in the Boston Fire Department (BFD), received notice from the BFD that his appeal of his two-tour suspension was denied.

2. G.L. c. 31, s. 42 states in part:

"Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements

3. G.L. c. 31, s. 43 states in part:

"If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission."

4. Since 2003, the Commission has required a \$50.00 filing fee for disciplinary appeals. (812 CMR 4.00; <http://www.mass.gov/anf/hearings-and-appeals/oversight-agencies/csc/appeal-filing-fees.html>). On August 17, 2006, the Commission issued a "Clarification of Commission Policies," stating that appeals received without a filing fee would be returned to the Appellant or the attorney who submitted it. (<http://www.mass.gov/anf/hearings-and-appeals/civil-service-appeals-process/filing-your-appeal/clarification-of-commission-policies.html>). See also *Flynn v. Attleboro*, 23 MCSR 279 (2010) and *McKeon v. City of Quincy*, 24 MCSR 395 (2011). Further, the Commission's appeal form also explicitly states that a filing fee is required.

5. On January 17, 2020, the Commission received a letter from Lt. Corwin, seeking to file a Section 42 (procedural) appeal and a Section 43 (just cause) appeal with the Commission. No filing fee

was included nor was there any phone number or email address provided.

6. That same day, on January 17, 2020, the Commission stamped the letter as being an incomplete appeal that required a filing fee and returned it to the Appellant via mail, the only contact information that was available to the Commission.

7. On January 23, 2020, the Commission received an appeal form with a \$50 filing fee from Lt. Corwin which was postmarked **January 22, 2020** - 11 business days after January 6, 2020.

8. On March 10, 2020, I held a pre-hearing conference at the offices of the Commission which was attended by Lt. Corwin and counsel for the BFD.

9. Consistent with an established briefing schedule, BFD filed a motion to dismiss and the Appellant filed a reply.

ANALYSIS / CONCLUSION

The BFD argues that, since the Appellant did not file an appeal with the required filing fee until January 22, 2020, one day outside the statutory filing deadline under both Section 42 and Section 43, his appeal should be dismissed.

In his reply, the Appellant, for the first time, without any supporting evidence, suggests that the Commission returned his incomplete appeal form to the wrong address, preventing him from mailing the filing fee to the Commission in a timely manner. Even if this unsupported argument is true, it would not change the outcome here. There is ample notice, on the appeal form, and on the Commission's website, stating that the Commission will not consider an appeal to have been received unless it is accompanied by the required filing fee. As a courtesy, the Commission, upon receiving an appeal without the required filing fee, takes immediate steps to remind the Appellant of this requirement, using any and all contact information provided by the Appellant. Here, the only contact information provided by the Appellant was a mailing address (i.e. - no phone number, no email address, etc.) which the Commission used to provide the Appellant with a written reminder regarding the need to include a filing fee.

I also considered the other arguments raised in the Appellant's brief, none of which change the fact that his appeal, with the appropriate filing fee, was not received by the Commission within the statutorily-required ten days from receiving notice from the BFD of its decision to uphold his two-day suspension.

For all of the above reasons, and for all the reasons cited in the BFD's Motion to Dismiss, the Appellant's appeal under Docket No. D-20-012 is hereby **dismissed**.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 23, 2020.

Notice to:

Christopher Corwin
[Address redacted]

Kate M. Kleimola, Esq.
City of Boston
Officer of Labor Relations
Boston City Hall, Room 624
Boston, MA 02201

* * * * *

NICKLAS W. HAAG

v.

CITY OF WORCESTER

Case No. G1-20-037

April 23, 2020

Paul M. Stein, Commissioner

B*ypass Appeal-Original Appointment as a Worcester Firefighter-Lack of Bypass*—This appeal was dismissed for lack of jurisdiction where no candidates scoring lower than the Appellant were selected.

DECISION ON RESPONDENT’S MOTION TO DISMISS

The Appellant, Nicklas W. Haag, appealed to the Civil Service Commission (Commission), purporting to act pursuant to G.L. c.31, §2(b) & §27, to contest his non-selection by the Respondent, City of Worcester (Worcester) for appointment to the position of Firefighter with the Worcester Fire Department (WFD). Pursuant to the Procedural Order issued after the pre-hearing conference (held via Webex Video Conference) before the Commission on March 24, 2020, Worcester filed a Motion to Dismiss the appeal for lack of jurisdiction on the grounds that the Appellant’s non-selection was not a bypass.

FINDINGS OF FACT

Based on the submissions of the parties, I find the following material facts are not disputed:

1. The Appellant, Nicklas Haag, took and passed the civil service examination for firefighter administered on March 24, 2018 by the Massachusetts Human Resources Division (HRD). His name was placed on the eligible list established on December 1, 2018. (Administrative Notice [HRD Letter on File]; Stipulated Facts)

2. On July 19, 2019, HRD issued Certification #06487 to Worcester for appointment of new WFD Firefighters. Mr. Nicklas’s name was listed on the Certification in the 22rd tie group. Eventually, Worcester made 27 appointments from the Certification, including candidates whose names appeared in the 22nd tie group. No candidates ranked below the 22nd tie group were appointed. (Administrative Notice [HRD Letter on File]; Stipulated Facts)

3. By letter dated February 4, 2020, sent by certified mail, Worcester informed Mr. Haag that he had been “bypassed”. (Claim of Appeal; Stipulated Facts)

4. On March 5, 2020, Mr. Haag filed this appeal. (Claim of Appeal)

APPLICABLE LEGAL STANDARD

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., “viewing the evidence in the light most favorable to the non-moving party,” the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case.” See, e.g., *Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School v. Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005)

ANALYSIS

The undisputed facts, viewed in a light most favorable to Mr. Haag, establish that Worcester’s letter dated February 4, 2020 erroneously stated that he was “bypassed” for appointment, when, in fact, he was not bypassed within the meaning of G.L. c.31, §2(b) & G.L. c.31, §27. In particular, a non-selected candidate may appeal to the Commission only when his or her name appears “high[e]r” than one or more candidates who were appointed and, in this regard, appointment of a candidate in one tie group is not the appointment of a higher ranked candidate. See, e.g., *Damas v. Boston Police Dep’t*, 29 MCSR 550 (2016); *Servello v. Department of Correction*, 28 MCSR 252 (2015). See also, Personnel Administration Rules, PAR.02. Thus, as no candidates ranked below him on the certification were selected, Mr. Haag’s appeal must be dismissed for lack of jurisdiction.

CONCLUSION

In sum, for the reasons stated herein, the Motion to Dismiss is hereby **granted** and the appeal of the Appellant, Nicklas W. Haag, CSC No. G1-20-037, is **dismissed**.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 23, 2020.

Notice to:

Nicklas Haag
[Address redacted]

William R. Bagley, Jr., Esq.
City of Worcester
455 Main Street - Room 109
Worcester, MA 01608

* * * * *

AMY HALL

v.

TOWN OF BROOKLINE

D-19-209

April 23, 2020

Christopher C. Bowman, Chairman

Disciplinary Action-Five Day Suspension of Brookline Police Officer-Bias and Personal Animus-Neglect of Duty-Untruthful Report-Engaging in Personal Business on Duty—The Commission reduced a five-day suspension of a female Brookline police officer to a written warning after finding that charges of untruthfulness and engagement in personal business while on duty were false and arose from personal bias and animosity against her by superior officers. Finding the conduct of two Brookline police lieutenants to be “deeply troubling,” Chairman Christopher C. Bowman’s decision suggests that the animosity and bullying directed at the Appellant arose after she had filed an MCAD complaint against the Department charging harassment. The Commission did find that the Appellant had not responded in a timely fashion to a call from dispatch to meet a citizen in the lobby of the station to take her complaint but for that she only merited a written warning.

DECISION

On October 7, 2019, the Appellant, Amy Hall (Appellant), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Brookline (Town) to suspend her for a period of five days from her position as a police officer in the Town’s Police Department (Department).¹ The appeal was timely filed with the Commission. A pre-hearing conference was held on October 29, 2019 at the offices of the Commission.² Two days of hearing were held at the same location on December 12, 2019 and January 29, 2020.³ The hearing was digitally recorded and copies were provided to both parties.⁴ The hearing was made public at the request of the Appellant. Witnesses were sequestered with the exception of the Appellant and the Respondent’s representative Lieutenant Paul Campbell. The parties submitted proposed decisions on April 3, 2020.

1. On the same day, Chief Lipson required the Appellant to serve an additional 10 days of suspension which had been issued in April 2019 but held in abeyance pursuant to a settlement agreement.

2. On November 5, 2019, the Respondent filed a motion to dismiss based on lack of jurisdiction. The Commission denied the Respondent’s motion on November 15, 2019.

FINDINGS OF FACT

Thirty-nine exhibits (Resp. Exs. 1-13; App. Exs. 1-16; Jt. Exs. 1-9; PH Ex. 1) were entered into evidence, as well as a chalk of the Brookline Police Station, 1st floor. Giving appropriate weight to the evidence and the testimony of:

Called by the Town:

- Patrick Elwood, Patrol Officer, Brookline Police Department;
- Carol Mann, Dispatcher, Brookline Police Department;
- Thomas Ferris, Sergeant, Brookline Police Department;
- Kevin Mealy, Lieutenant, Brookline Police Department;
- Paul Campbell, Lieutenant, Brookline Police Department;
- Andrew Lipson, Chief, Brookline Police Department;

Called by the Appellant:

- Scott Wilder, Police Officer in charge of technology and communications, Brookline Police Department;
- Neil Harrington, Manager of Records, Brookline Police Department;
- David Hill, Sergeant, Brookline Police Department;
- Amy Hall, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, policies, and reasonable inferences from the evidence, a preponderance of credible evidence establishes the following facts:

1. Brookline is a community located four miles from downtown Boston with a population of approximately 59,000. (<https://www.brooklinema.gov/1539/About-Brookline>)
2. The Town’s Police Department is comprised of 127 uniformed officers. The Department is divided into four divisions: Patrol Division, Detective Division, Community Service Division and Traffic Division. There is a Superintendent who reports to the Police Chief. Each division is run by a Deputy Superintendent and comprised of various number of officers of the rank of patrol officer, sergeant and lieutenant. (Testimony of Chief Lipson)
3. The Department also employs various civilian employees which, relevant to this appeal, include dispatchers and a “Manager of Records” who, among other things, responds to public record requests. (Testimony of Chief Lipson)

3. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00 *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

4. The Appellant subsequently used the recording to have a transcription prepared. The Respondent has objected to the transcript being considered an official record of the proceedings, citing purported typographical errors. I encourage the parties to mutually resolve that issue to avoid unnecessary expenditures by either party going forward.

4. The Appellant has been a Brookline Police Officer for nineteen years. At all times relevant to this appeal, the Appellant was assigned to the day shift (7:20 AM - 3:30 PM). She is married with three children. Many years ago, the Appellant's uncle was the Town's Acting Police Chief; her brother is a Brookline firefighter; and many other family members of the Appellant have worked for the Town over the years. (Testimony of Appellant)

5. Prior to 2019, the Appellant had never been disciplined. (Testimony of Appellant)

6. On February 17, 2019, the Appellant made a complaint that she was being bullied and harassed by another police officer. (Testimony of Appellant)

7. As part of her complaint, the Appellant alleged that this other officer, during defensive tactics training, made a comment while practicing striking, that the object she was striking (a punching bag) with padded mitts was the Appellant's face. The Appellant told her superior officers that she had not heard the comments first-hand, but, rather, that other officers had told her of the alleged comments. (Jt. Ex. 1)

8. During a five-week period in February and March 2019, superior officers met with the Appellant and, as part of their investigation into her complaint, ordered the Appellant to disclose the names of the officers who told her about the alleged comment. The Appellant refused. (Jt. Ex. 1)

9. Approximately five weeks after the Appellant first made her complaint to superior officers, the investigation was turned over to Lt. Paul Campbell, who oversees matters related to internal affairs for the Department. (App. Ex. 1)

10. On April 9, 2019, Lt. Campbell finalized a 49-page, single-spaced report regarding his findings and recommendations. That report indicates that a police officer, who was a percipient witness and who Lt. Campbell found to be credible, told Lt. Campbell that he did indeed hear the police officer, in reference to a punching bag, state words to the effect: "If this was Amy's face." (App. Ex. 1)

11. As part of his findings and conclusions, however, Lt. Campbell found that the Appellant had engaged in misconduct, both during the investigation (i.e. - insubordination, untruthfulness) and at times during the prior year vis-à-vis the officer that the Appellant had lodged a complaint against (i.e. - making threatening statements to the officer). (App. Ex. 1)

12. In April 2019, the Town and the Appellant reached a settlement agreement in which the Appellant agreed to a 15-day suspension, with 10 days to be held in abeyance. (Resp. Ex. 4C)

13. In May 2019, the Department received notice that the Appellant had filed a complaint against the Department with the

Massachusetts Commission Against Discrimination (MCAD). (Testimony of Chief Lipson)

14. In July 2019, the Appellant received a written reprimand for violating the chain of command. (Resp. Ex. 5)

15. On August 13, 2019, the Appellant discovered a highlighted page from the union contract in her Department mailbox. The highlighted portion related to the contractual requirement that discipline notices be posted in the station for a period of seven days. The Appellant reported it to her supervisors, claiming the paper had been placed in her mailbox to harass and retaliate against her. She requested that the Department investigate who placed the paper in her mailbox. (Resp. Ex. 7; App. Ex. 14; Testimony of Lt. Mealy, Lt. Campbell, Chief Lipson, Appellant)

16. The Appellant was told by Lt. Mealy that Lt. Campbell would conduct an investigation. (Testimony of Appellant)

17. The Town of Brookline's "Policy Against Discrimination, Sexual Harassment and Retaliation" (Town Policy) states in part that: "All investigations will be conducted by the Human Resources Office or its designee. The Human Resources Office for the Town of Brookline shall record the complaint using the policy's Complaint Intake Form, when possible, and shall promptly investigate all allegations of discrimination, sexual harassment or retaliation in a fair and thorough manner." (PH Ex. 1)

18. Lt. Campbell had no communication with the Town's HR Department regarding his investigation of the Appellant's complaint. (Testimony of Lt. Campbell)

19. There is no evidence that the Town's HR Department ever delegated responsibility to the Police Department to investigate the Appellant's complaint.⁵

20. The Appellant was told by Lt. Mealy that she was not permitted to talk directly to Lt. Campbell about her complaint. (Testimony of Appellant)

21. The Town's Policy states in relevant part that investigations "... will include, as appropriate, private interviews with the person filing the complaint, the person alleged to have committed the discrimination, sexual harassment and/or retaliation and relevant witnesses." (PH Ex. 1)

22. Lt. Campbell did not interview the Appellant. Asked to explain why he did not interview the Appellant, Lt. Campbell stated in part:

"... I got a report from her outlining what she knew about the—the document being placed in her box. It was my preference at the time to conduct things through documents, rather than oral conversations. There's been ... a significant number of questions of people having conversations with Officer Hall with the conclusion of the conversation, uh, there were allegations of dishonesty. My preference was if this could be done through

5. I listened carefully to the Police Chief's testimony regarding the communication that he (the Police Chief) had with HR regarding the Appellant. Based on his testimony, I conclude that the primary purpose of that communication was to discuss

disciplinary action against the Appellant, as opposed to how the Appellant's complaint should be investigated and/or the merits of her complaint.

documents, that's what I wanted to do. Based on my conversation with Lt. Mealy, she didn't have any information about the document, except for the fact that she had found it, and what the timeline was." (Testimony of Lt. Campbell)

23. The Department was unable to determine who placed the highlighted contract page in the Appellant's mailbox. On August 29, 2019, Chief Lipson sent the Appellant a memo informing her of the outcome of the investigation. The memo includes a summary of the Department's investigative efforts as well as its conclusions as to the source of the paper. (Resp. Ex. 7)

24. The Appellant wanted to understand what investigation actually went on and she asked Lt. Mealy for a copy of the full investigative report (report) that had been completed by Lt. Campbell. (Testimony of Appellant)

25. Among the four "general aims" of the Town's Policy Against Discrimination, Sexual Harassment is: "to empower and strongly encourage those who reasonably believe that they have been victims of discrimination, sexual harassment or retaliation to report any incidents of such behavior and to obtain relief, as appropriate under the circumstances, through a simple, yet comprehensive complaint procedure." (emphasis added) (PH Ex. 1)

26. On either September 3rd or 4th, 2019, Lt. Mealy told the Appellant that she would need to make a public records request to obtain a copy of the report. He told the Appellant that he would ask Lt. Campbell how the Appellant could go about making such a request. (Testimony of Appellant)

27. On September 4, 2019 at 3:18 P.M., Lt. Mealy penned the following email to the Appellant: "Amy, [a]ll requests for Public Records have to go through the Records Division. There is no standard form. There is a sample form on the Mass. Public Records Website. You just put what you want in writing and submit it through Records, either Neal or Amanda, and they will forward it." (Resp. Ex. 3)

28. The Appellant did not check her work email at or after 3:18 P.M. so she had not seen Lt. Mealy's email when she reported for work the next morning on September 5th. (Testimony of Appellant)

The events of September 5, 2019

29. On September 5, 2019, the Appellant reported for duty at 7:20 A.M. Following roll call, she left the police station for her assigned sector. At approximately 8:35 AM, the Appellant requested a return to the station. She proceeded directly to Lt. Mealy's office. (Testimony of Appellant and Lt. Mealy)

30. During parts of the next 65 minutes (from 8:35 A.M. to 9:40 A.M.), the following two sequence of events were at times occurring simultaneously: 1) the Appellant was speaking to Lt. Mealy

and taking actions to secure the report; and 2) a private citizen arrived at the police department seeking to file a police report.

31. The Appellant asked Lt. Mealy if he had spoken to Lt. Campbell yet. In response, Lt. Mealy referenced his 3:18 P.M. email from the previous day which the Appellant still had not read. (Testimony of Appellant)

32. At or around the same time (8:50 A.M.), a private citizen came into the lobby of the police station wanting to file a police report, alleging that a neighbor was sneaking into her house and accessing her computer. Officer Patrick Elwood was working the front desk at the time; he was skeptical of the citizen's allegation and suspected that the citizen may have some mental health issues. (Testimony of Officer Elwood)

33. At 8:52 A.M., Officer Elwood called dispatch to ask them to send an officer to the front desk and take a report. Asked by the dispatcher if he (Elwood) could take the report, Officer Elwood stated that the allegations were complicated and that he had a line at the front desk. (Testimony of Officer Elwood)

34. As referenced below, the dispatcher did not dispatch any police officer to take the citizen's report until 18 minutes later, at 9:09 A.M. Thus, the Appellant was unaware, during that time period (8:52 A.M. - 9:09 A.M.) that a citizen was waiting in the lobby.

35. After accessing and reading Lt. Mealy's email, the Appellant returned to Lt. Mealy's office and stated to him: "So, now I have to speak to Neal Harrington to ask for this?" Lt. Mealy said "Yes." (Testimony of Appellant)⁶

36. The Appellant then walked to the nearby office of Neal Harrington, who serves as the Manager of Records for the Department, and asked him how to obtain a copy of an internal investigation report. Mr. Harrington said he had no idea and suggested that the Appellant contact Lt. Campbell. When the Appellant said she was not allowed to speak to Lt. Campbell, Mr. Harrington suggested that the Appellant send him (Harrington) an email and Mr. Harrington would then forward the email to Lt. Campbell. (Testimony of Appellant)

37. The Town's Policy also states: "The Town will protect the confidentiality of allegations and of the investigation and resolution to the extent possible. Such information will only be shared with those who may reasonably be expected to need such information to investigate and respond to the complaint or report and to process any appeal, take any necessary corrective action and respond to or conduct any legal and/or administrative proceeding arising out of the discrimination, sexual harassment or retaliation report." (PH Ex. 1)

6. There is a factual dispute regarding whether the Appellant then said to Lt. Mealy: "Do I have your authorization to go see Neal Harrington? The Appellant has a vivid recollection of posing that question to Lt. Mealy and hearing Lt. Mealy say "sure" in response. Lt. Mealy testified that the word "authorization" was never spoken. Ultimately, I have concluded that, whether or not the word authorization

was used is not pivotal to this case as I have concluded, after listening to all the testimony, that Lt. Mealy understood, at the time, that the Appellant's next stop after leaving his office was likely Neal Harrington's office and he did not voice any objection.

38. At 9:17 A.M. on September 5th, the Appellant sent the following email to Mr. Harrington (who had no role in the investigation), which was copied to Lt. Mealy:

“I am formally requesting the report done by Lt. Campbell describing the investigation regarding the harassment letter on August 13, 2019. I am also requesting the paper that I submitted that shows this harassment be returned to me ASAP. I am only writing this email because Lt. Mealy sent me to records. While in records, I spoke to Neil Harrington who stated he knows nothing about a form and just send him an email and he will send it to Lt. Campbell.

In my opinion this is an attempt once again to obstruct and delay me at every turn of events. I have spoken to Lt. Mealy for 2 days but instead I am required to go see a civilian clerk in records who informed he will send the request up to Lt. Campbell. Again, there is no reason that I can see other than (sic) delayed (sic) and obstruction that I couldn't see or email Lt. Campbell directly that everyone does daily including a civilian in the records division this morning 9/5/2019 who has access to Lt. Campbell directly in spite of this so called Chain of Command. I expect (sic) an answer and report and paper requested without delay. The fact that I am the only officer known to me that is banned for (sic) speaking to Lt. Campbell is telling.

Respectfully submitted,

PO Amy Hall” (Jt. Ex. 2)

39. While the Appellant was writing the above-referenced email, at 9:09 A.M., approximately twenty minutes after the private citizen had approached the front desk, and 18 minutes after Officer Elwood placed the call to dispatch, the dispatcher dispatched the Appellant to the front desk to take the citizen's report. The dispatcher directed the Appellant to see the person in the lobby before she cleared the station, meaning before she left the station to return to patrol duty. (Resp. Ex. 2(b); Testimony of Carol Mann, Officer Elwood, Appellant)

40. The dispatch can be heard over the radio. Lt. Mealy had a radio. (Testimony of Appellant)⁷

41. The Appellant acknowledged the dispatcher's call, but did not immediately report to the lobby to take the citizen's report. Rather, she continued to write the above-referenced email, which was completed and sent at 9:17 A.M. (Testimony of Appellant)

42. After sending the email to Mr. Harrington and Lt. Mealy, the Appellant went back to Lt. Mealy's office to confirm that he (Lt. Mealy) had received the email and that it would be forwarded to Lt. Campbell. Lt. Mealy said that he had not checked his email and that Lt. Campbell was going to be on vacation for a week. (Testimony of Appellant)

43. The Appellant told Lt. Mealy that she felt that she was getting the runaround and was being unfairly obstructed from obtaining Lt. Campbell's report. (Testimony of Appellant)

44. The Appellant left Lt. Mealy's office, returned to the Department computer and sent the following email to Lt. Mealy at 9:37 A.M.:

“I just been (sic) informed by Lt. Mealy on 9/5/2019 at 9:20 A.M. that Lt. Campbell is now on Vacation and will not be able to act on this until he returns. It should be noted that my first request to Lt. Mealy to contact Lt. Campbell was on 09/04/2019 in the Morning (sic). At that time Lt. Mealy thought Lt. Campbell would be going on vacation the following day. I asked specifically if he could contact Lt. Campbell ASAP on 9/4/2019 so there would not be a delay. The formal ban of me speaking to an Office of Professional Responsibility is only creating more stress to me and causing important two way information to be delayed, obstructed and unprofessional.

Respectfully submitted,

PO Amy Hall []” (App. Ex. 16)

45. At 9:40 A.M., the citizen left the police station without speaking with the Appellant or filing a report. Officer Elwood informed dispatch of the citizen's departure and dispatch then notified the Appellant to disregard the call. After dispatch canceled the call, the Appellant made her way to the station lobby and asked Officer Elwood what the resident wanted to report. The Appellant cleared the station and returned to her patrol duties. (Resp. Ex. 2b; Testimony of Carol Mann, Officer Elwood, Appellant)

46. Sgt. Thomas Ferris was the shift supervisor that morning. He heard the front desk call go out and he heard the dispatcher cancel the call. He did not take any action against the Appellant until he was prompted later that day by Lt. Mealy, as discussed below. (Testimony of Sgt. Ferris)

47. Around noontime, Lt. Mealy passed through the lobby of the police station and asked Officer Elwood (the front desk officer who first made the call to dispatch) about the resident who had come to file the police report. Officer Elwood informed Lt. Mealy that the Appellant never reported to the lobby and the resident eventually left the station without being serviced. (Testimony of Lt. Mealy and Officer Elwood)

48. Lt. Mealy reviewed the call records and met with Sgt. Ferris. (Testimony of Lt. Mealy, Sgt. Ferris)

49. Sgt. Ferris met with the Appellant and handed her a written directive which began:

“Officer Hall, It has come to my attention⁸ that you did not respond to call today, September 5, 2019, at the front desk.” Sgt. Ferris's directive requested that the Appellant submit a report answering the following questions:

1. Why you did not assist the citizen at the front desk.
2. Where were you when dispatch called you to service the call
3. What were you doing that you could not service the call.

(Jt. Ex. 3)

7. Lt. Mealy testified that he did not hear the 9:09 A.M. dispatch on his radio.

8. As previously referenced, Sgt. Ferris had already been aware that the Appellant had not responded to the call before it was canceled.

50. The Appellant submitted a written report the same day. Since the Appellant's report is a critical part of deciding the instant appeal, I cite it in its entirety:

"I was on authorized returned (sic) to the station in order to speak with Lt. Mealy. During this time, Lt. Mealy gave me certain instructions. Lt Mealy gave me an assignment to complete. At some point dispatched (sic) stated when you clear, there is someone at the front desk. This statement by dispatched (sic) clearly shows that not only was I on an authorized return by Lt. Mealy and Sgt. Ferris knew I was still in the station and would respond when I was clear. If at any time Lt. Mealy and or Sgt. Ferris wanted me to end my assignment and immediately respond when they would have said so. I responded by saying roger. When I cleared, I went to front desk and Officer Elwood said she just left.

Sgt. Ferris refuses to tell me who asked for this report. Instead he handed me a computer written statement that was obviously not written by him. I am only to assume because of his refusal to tell me who ordered this report that it was neither from him nor from Lt. Mealy who authorized my assignment in the station. Therefore, it is easy to conclude that this request for report did not come from Sgt. Ferris and Lt. Mealy but had to come from a higher supervisor. That can only be Deputy Superintendent Ward or Chief Lipson. Both of whom are named in my complaint with MCAD.

This entrapment is more than obvious. Lt Mealy was well aware I was in the station and if he wanted me to clear this assignment he would have done so. It is common policy that if an officer is in the station on assignment not cancelled by a supervisor those other officers on the street would take a non-emergency call. This however is not the case with me. I still responded I would take the call and clearly dispatched, Lt. Mealy and Sgt. Ferris new (sic) I was in the station on assignment.

Also, just last week a male officer was called for 15 minutes on the radio, had all patrol and detective division looking for him, no reports, no investigation took place but instead the incident was trivialized the next morning by the three supervisors, Lt. Mealy, Sgt. Hill and Sgt. Disario by making jokes about how the officer was asleep or should listen to this radio in front of the entire first platoon roll call that I was present for.

Once again it is no surprise that I have been asked to do a report after I was in the station with Lt. Mealy expressing my dissatisfaction in trying to obtain a copy of the investigation into my latest retaliation complaint. This report is just a pretext to harass me for exercising my rights to obtain a copy of Lt. Campbell (sic) investigation and to have the intimidating note left in my mailbox on 08/13/2019 returned to me.

Presently at this moment I am in the station on an assignment writing this report. If a non-emergency call came in from dispatched (sic) and they asked me to respond when I was clear I would do exactly the same that I did this morning unless otherwise asked to respond immediately. An example is that I had a traffic post at 2:20pm but someone else took it on authorization by Sgt. Ferris while I was on this assignment in the station. There is absolutely no difference from now or earlier this morning." (Jt. Ex. 4)

51. After reviewing the Appellant's response, Lt Mealy sent a 3 ½ page memo to Deputy Superintendent Ward on September 6, 2019 which begins with: "This report is in response to a report generated by P.O. Hall on 9-5-19, at the order of Sgt. Ferris. The report by P.O. Hall demands a response and rebuttal." On page 2

of the memo, Lt. Mealy writes in part "This report from P.O. Hall contains inaccuracies and outright lies." (Jt. Ex. 2)

52. In his memo, Lt. Mealy disputes various statements made by the Appellant including: 1) the Appellant's statement that he (Lt Mealy) gave the Appellant an assignment to complete; 2) the Appellant's statement that she asked Sgt. Ferris who asked for the report and/or that Sgt. Ferris failed to answer; 3) the Appellant's statement that he (Lt. Mealy) authorized her assignment in the station. (Jt. Ex. 5)

53. The final paragraph in Lt. Mealy's 9/6/19 statement reads:

"This report [by the Appellant] is the latest in a series of reports and emails from P.O. Hall that are false, inaccurate, insubordinate, disrespectful, and contain straight out lies. I have never in my experience as a supervisor been witness or recipient to reports such as the ones that P.O. Hall is generating either in response to an order or in an attempt to garner information. At this time I am in agreement with all of my day shift Sergeants that there is an impasse in our ability to successful (sic) supervise P.O. Hall in the current state that she is in. We are concerned about her mental health status as well as her ability to function as a police officer under our supervision."

(Jt. Ex. 2)

54. Lt. Mealy's report did not make any reference to the fact that: a) he did not hear the radio dispatch at 9:09 A.M.; b) he had met with and spoken with the Appellant at least once between 9:09 A.M. and 9:40 A.M. and discussed how she could go about obtaining the report she was requesting; and c) he had received two emails from the Appellant during this time period referencing what she was doing. (Jt. Ex. 2)

55. In his own written report, Sgt. Ferris disputed the Appellant's claim that he refused to tell her who had asked for the special report. According to Sgt. Ferris, the Appellant never asked him the question during the short meeting where he directed her to submit a special report. Sgt. Ferris also disputed the Appellant's claim that he was aware of what she was doing at the time and that he should have ordered her to stop working on an "assignment" in order to service the resident at the front desk. (Jt. Ex. 6; Testimony of Sgt. Ferris)

56. On September 12, 2019, Chief Lipson issued Personnel Order 2019-166, suspending the Appellant for five tours of duty for violating the Department's rules and regulations governing truthfulness, neglect of duty, and personal business on duty time based on her actions on September 5, 2019 and the statements she made in her special report to Sgt. Ferris. (Jt. Ex. 1; Testimony of Chief Lipson)

57. The Appellant filed an appeal and the Town's Board of Selectmen designated a hearing officer to hear the Appellant's appeal. (Resp. Ex. 1)

58. On October 1, 2019, the hearing officer found that the Appellant violated Department rules and regulations by: 1) conducting personal business (seeking the investigative report) while on duty; 2) failing to respond to the dispatch call to come to the

lobby and meet with the citizen in order to take her report; and 3) being untruthful in her written report by stating that Lt. Mealy had given her an assignment to complete during the time period in question. (Resp. Ex. 1)

59. On October 2, 2019, the Town's Board of Selectmen adopted the hearing officer's report. (Resp. Ex. 1)

As a result of this 5-day suspension, the Appellant was required to serve the ten-day suspension that had been held in abeyance regarding the prior discipline.

APPLICABLE LAW

G.L. c. 31, § 43 provides:

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against [a tenured civil service employee] ... it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of the evidence establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." *Commissioners of Civil Service v. Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971). See also *Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *School Comm. v. Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488 (1997). See also *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." *Tucker v. Pearlstein*, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited. However, "[t]he commission's task . . . is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the ap-

pointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision' *Id.*, quoting internally from *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. "Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to perform their official responsibilities." *Police Commissioner of Boston v. Civil Service Commission*, 22 Mass. App. Ct. 364, 371 (1986).

ANALYSIS

The three primary charges against the Appellant here are that: 1) the Appellant neglected her duties when she failed to meet the citizen in the police department lobby and assist her with filing a report; 2) the Appellant was untruthful in her report when she stated that Lt. Mealy had given her an "assignment" to obtain an investigative report related to the Appellant's prior complaint; and 3) the Appellant violated the rules and regulations of the Department by engaging in personal business while on duty. The preponderance of the evidence only supports one of these charges.

It is undisputed that, at 9:09 A.M. on September 5th, the Appellant received and acknowledged a dispatch to meet a citizen in the lobby who wanted to file a police report. For the next 31 minutes, the Appellant, instead of meeting with the citizen, spent her time focused on obtaining the investigative report related to her own internal complaint. Importantly, the Appellant never told dispatch that she would be delayed nor did she take a few short steps into the lobby to tell the citizen there would be a delay. By failing to respond to the dispatch, the Appellant neglected her duties and violated the rules and regulations of the Department.

In regard to the charge of "untruthfulness," the Commission has long held that, when a police officer engages in untruthfulness, that misconduct warrants, if not requires, discipline, up to and including termination. Here, as discussed in more detail below, the context in which the written statement in question was made is important. In her written report, the Appellant accurately writes that she "... was in the station with Lt. Mealy expressing my dissatisfaction in trying to obtain a copy of the investigation into my latest retaliation complaint." She also accurately writes that "... Lt. Mealy gave me certain instructions ..." referring to the instructions she received from Lt. Mealy in regard to how to obtain the investigative report. The Town, however, seizes on that portion of the Appellant's written statement in which she wrote that "... Lt. Mealy gave me an assignment to complete." The Town argues that the references to "an assignment" constitute "untruthfulness" that warrants discipline. While I have concluded that the Appellant's written statements regarding an assignment were inaccurate and that those words were used to paint herself, and her actions, in a better light, I do not believe that the references to an assignment constitute untruthfulness that warrants a suspension. In reaching that conclusion, I considered many of the factors refer-

enced in more detail below, including my conclusion that both the Appellant and the person who initiated the need for the Appellant to write the report (Lt. Mealy) both knew what the Appellant was doing for the approximately thirty minutes after the dispatch to see the citizen in the lobby was made. Further, although it is not required to support a finding of untruthfulness, I did consider that: 1) the reference to an “assignment” did not result in any benefit to the Appellant (in fact, she was suspended for it); and 2) the reference to an “assignment” did not result in an unjustified arrest or prosecution, or in a deprivation of liberty or denial of civil rights. (See *City of Pittsfield v. Local 447 International Brotherhood of Police Officers*, 480 Mass. 634 (2018) (upholding an arbitrator’s decision to reinstate a police officer after the arbitrator found that three words in a police officer’s written report were “intentionally misleading” but “less than intentionally false.”).

The Town has also not proven, by a preponderance of the evidence, that the Appellant engaged in personal business while on duty. Even the Town’s hearing officer acknowledges that officers may be permitted to engage in actions while on duty that may constitute “personal business.” For example, an officer filing a request for vacation time, or talking with a co-worker about the Patriots or Red Sox could, if construed literally, be considered to be engaging in “personal business.” Importantly, the Town candidly acknowledges that they deemed the Appellant’s efforts to obtain the investigative report as personal business primarily because the Town surmised that the Appellant may ultimately use that document to support her MCAD complaint against the Town. The Town’s determination in this regard was arbitrary and, as discussed in more detail below, indicative of the Town’s bias against her.

Having determined that the Appellant did engage in misconduct, I must determine whether the level of discipline (a 5-day suspension) was warranted.

As stated by the SJC in *Falmouth v. Civ. Serv. Comm’n*, 447 Mass. 814, 823-825 (2006):

“After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], § 43 (‘The commission may also modify any penalty imposed by the appointing authority.’) Here the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘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.’ *Id.* citing *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

“Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the ‘equitable treatment of similarly situated individuals.’ citing *Police Comm’n of Boston v. Civ. Serv. Comm’n*, 39 Mass. App. Ct. 594, 600 (1996). However, in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system—‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ *Falmouth*, *supra*. (citations omitted).

“Unless the commission’s findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation.” *Id.* at 572. (citations omitted).

My findings do differ significantly from the Town as I have found that the Appellant’s written report was not untruthful and I have found that the Appellant did not engage in personal business while on duty that warranted discipline.

That turns to the other reason that could justify a modification of the penalty here: alleged bias against the Appellant. For the reasons discussed below, the preponderance of the evidence supports the allegation that the Town’s decision to discipline the Appellant was based on a bias against her.

While it is not the Commission’s role to re-litigate whether there was just cause for the prior discipline meted out against the Appellant in April 2019, the underlying issues in that matter are inexorably tied to the instant appeal and whether the Town has developed a bias against the Appellant.

As noted in the findings, the Appellant first went to her superiors in February 2019 to complain about alleged bullying in the workplace. Part of the Appellant’s complaint was very specific. The Appellant had been told by colleagues that a fellow police officer joked about the Appellant, likening the punching bag she was hitting to the Appellant’s face. Tucked into the Department’s 49-page report on this matter is a statement from a fellow police officer, who Lt. Campbell found credible, that the police officer in question did indeed make a statement equating a punching bag she was hitting to “Amy’s face.” Lt. Campbell’s report states that: “If I was guessing on this issue, my gut instinct is that the statement was probably made by [the police officer].” He went on to write in his report, however that his “gut instinct” was not enough to prove that the police officer made the statement. Lt. Campbell did, however, find that the Appellant had engaged in misconduct prior to and during the investigation. A full reading of that investigative report, and how the investigation was conducted, show the beginnings of bias against the Appellant.

First, it took five weeks before the Appellant’s complaint of alleged bullying ever made it to Lt. Campbell, who was in charge of internal affairs. As referenced in that report, the superior officers who the Appellant brought her concerns to immediately ordered her to disclose the names of the police officers who had shared this information with her. Remarkably, the Appellant, who declined to identify those officers, was charged with insubordination. While I have not ignored the other examples of alleged insubordination that formed the basis of this charge, it appears that the Department had turned the Appellant’s complaint upside-down. Instead of “empowering and strongly encouraging those who reasonably believe that they been the victims of ... harassment ... to report any such incidents of such behavior,” as the Town’s anti-harassment policy requires, it is clear from that April 2019 investigative report

that the discussions with the Appellant were more of an interrogation aimed at questioning the veracity of her allegations.

That investigation was noteworthy for another reason. While the Town's Policy clearly states that complainants can go outside the chain of command and even bring their complaint directly to the Town's Human Resources Director, the Appellant was actually admonished for going outside the chain of command. Page 44 of Lt. Campbell's 49-page report reads in part: "In Officer Hall's April 1st report, she wrote that Chief Lipson said the matter of Officer Hall's complaint of bullying and harassment would be handled by Human Resources. Chief Lipson informed me that he never said this. He told Officer Hall that the matter would be handled by her supervisors, and she was told to communicate with them any specifics that she wanted addressed. She was told to complete a report with the specifics that she wanted addressed, and that this should be handled by the Sergeants through the chain of command." To me, that portion of the report, and relevant witness testimony during the hearing, showed the beginning of bias against the Appellant. Put another way, although the Town's own policy allows for, if not encourages, harassment complaints to be filed with the Human Resources Director directly, the Department was developing a misplaced irritation (and bias) against the Appellant for not working within the "chain of command" regarding her harassment complaint.

That leads to the Appellant's second complaint of alleged harassment in August 2019. Lt. Campbell's own testimony vividly shows the bias that had developed against the Appellant. The Town's own Policy states that the investigation of any harassment complaint will include an interview with the complainant, an obvious first step in any such investigation. Here, however, Lt. Campbell, who completed the investigation, not only opted not to interview the Appellant, but he also notified Lt. Mealy that the Appellant was prohibited from speaking with him (Lt. Campbell) about the investigation. Asked to explain this perplexing decision, Lt. Mealy candidly acknowledged that his decision was based, in part, on his conclusion that he did not trust the Appellant. The obvious course of action at this point was to refer the matter to the Town's Human Resources Director for investigation, as clearly anticipated by the Town's policy. That didn't happen.

What occurred next is deeply troubling and, most importantly, illustrative of the staunch bias, if not personal animus, that had developed against the Appellant as of September 5, 2019. After Lt. Campbell concluded that he could not determine who left a highlighted excerpt of the CBA in the Appellant's mailbox and/or whether this was done to harass the Appellant, the Appellant wanted a copy of the underlying investigative report. Setting aside whether the Appellant was entitled to receive a copy of the investigative report, it is overwhelmingly clear that the Department decided to send the Appellant on a cruel, proverbial wild goose chase. First, as referenced above, the Appellant, in seeking this report, was prohibited from making the request directly to Lt.

Campbell, who is in charge of matters related to internal affairs and completed the report. Second, the Appellant was then told that she would need to file a "public records request" with a civilian employee who had no role in the investigation, requiring her to disclose otherwise confidential information to this civilian employee, which the Town's Policy seeks to prevent. Third, when she approached Mr. Harrington, she was told that he had no idea what she was talking about and that she should send him an email request which he would forward to ---- Lt. Campbell! Fourth, when the Appellant submitted this email, she was informed by Lt. Mealy that Lt. Campbell was on vacation for the next several days. This was not an inadvertent comedy of errors by the Department. Rather, after carefully listening to all of the testimony, I conclude that it was a purposeful attempt to frustrate an employee who had filed an MCAD complaint against the Department. To me, this shows that the Department had developed a bias against the Appellant.

It is in that context that I must consider what occurred on September 5th. In the midst of this Department-orchestrated wild goose chase, the Appellant received the dispatch at 9:09 A.M. to go to the lobby and meet a citizen who wanted to file a police report. As stated above, the Appellant violated the rules and regulations of the Department by failing to respond to that dispatch in a timely manner and by inaccurately stating in her report that she had been given an "assignment" by Lt. Mealy to go see Mr. Harrington about obtaining the investigative report.

Importantly, the shift supervisor that day, Sgt. Ferris, who heard the radio transmissions and was aware that the call was canceled before the Appellant went to the lobby to see the citizen, saw no need to investigate this matter. Rather, it was the lieutenant who was part of the Department's attempt to frustrate the Appellant's efforts to obtain the investigative report, who was the impetus for investigating this matter. Despite being aware of what the Appellant was doing from 9:09 A.M. to 9:40 A.M., Lt. Mealy directed⁹ Sgt. Ferris to have the Appellant write a report answering three questions: 1. Why you did not assist the citizen at the front desk. 2. Where were you when dispatch called you to service the call; and 3. What were you doing that you could not service the call. Further, the Department's witnesses failed to provide convincing testimony to explain why they never investigated why the citizen was required to wait an initial 18 minutes due to the dispatcher's failure to dispatch the call. The dispatcher candidly testified before the Commission that she could not recall there being any calls in the queue that prevented her from making the dispatch in a more timely manner. The point here is not that the dispatcher engaged in any misconduct, but, rather that the Town did not adequately explain why it did not even *consider* the fact that the citizen was required to wait approximately 50 minutes, *18 minutes of which was attributable to the delayed dispatch*.

Finally, I considered the content of Lt. Mealy's "rebuttal" to the Appellant's report in regard to whether there was evidence of bias

9. I don't credit the testimony that Sgt. Ferris, on his own, developed the questions to be posed to the Appellant.

against the Appellant. The tone and tenor of that rebuttal is harsh, calling into question the mental stability of the Appellant. The rebuttal also fails to include certain relevant points that may have painted a different picture, including the fact that the Appellant had met with him at least once during the time period in question and that he had been sent two emails from the Appellant during that same time period, something that Lt. Mealy was indeed aware of when he wrote his rebuttal the next day on September 6th. To me, it was further evidence of bias and personal animus against the Appellant.

Taken together, all of the above incidents show, by a preponderance of the evidence, that bias and personal animus against the Appellant was a factor that contributed to the Department's decision to investigate and ultimately discipline the Appellant, which is contrary to the core of the civil service system, adherence to basic merit principles, which includes assuring fair treatment of all employees in all aspects of personnel administration and assuring that all employees are protected from arbitrary and capricious actions.

For all of the above reasons, the Appellant's appeal under Docket No. D-19-209 is hereby *allowed in part*. The discipline imposed shall be modified from a five-day suspension to a written warning.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 23, 2020.

Notice to:

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* * * * *

MICHAEL PELLIZZARO

v.

HUMAN RESOURCES DIVISION

B2-20-034

April 23, 2020

Christopher C. Bowman, Chairman

Examination Appeal-Fair Test Appeal-Timeliness—Another appeal challenging a fire lieutenant promotional exam was dismissed after the Commission found it was filed more than 17 days after HRD sent the Appellant its decision. The decision also notes that the appeal would have been dismissed anyway because HRD had withdrawn those questions that were based on materials not included in the reading list and gave credit for correct answers on those questions that had more than one possible correct answer.

DECISION ON HRD'S MOTION TO DISMISS

On February 26, 2020, the Appellant, Michael Pellizzarro (Mr. Pellizzarro) filed a "fair test" appeal with the Civil Service Commission (Commission) regarding the November 16, 2019 promotional examination for Fire Lieutenant.

2. On March 24, 2020, I held a pre-hearing conference via video-conference which was attended by Mr. Pellizzarro and counsel for the state's Human Resources Division (HRD).

3. As part of the pre-hearing conference, the parties stipulated to the following, unless otherwise noted:

- A. On November 16, 2019, Mr. Pellizzarro took the promotional examination for fire lieutenant.
- B. On November 21, 2019, Mr. Pellizzarro filed what is effectively a fair test appeal with HRD.
- C. On January 17, 2020, HRD denied Mr. Pellizzarro's fair test appeal.
- D. On February 3, 2020, Mr. Pellizzarro received his score notice.
- E. On February 26, 2020, Mr. Pellizzarro filed the instant appeal with the Commission.
- F. On March 4, 2020, HRD established an eligible list for Fire Lieutenant.

4. As part of the Appellant's appeal with HRD, he provided a list of 11 questions that he alleged had not been taken from the reading list. Further, he listed additional questions for which he believed more than one correct answer was possible.¹

5. At the pre-hearing, counsel for HRD indicated that, after receiving Mr. Pellizzarro's appeal (and others), HRD did a careful and thorough review of the examination and determined that some

1. On March 24, 2020, I conducted pre-hearing conferences in separate appeals involving the same issue presented here. As part of those pre-hearing conferences,

HRD indicated that the total number of questions removed entirely was "less than 13."

questions on the examination did not correspond with the reading material. Those questions were removed from the examination and were not counted in the score. For reasons attributed to confidentiality and the integrity of the testing process, HRD has opted not to indicate how many such questions were removed.

6. Further, after the above-referenced review, HRD identified additional questions in which more than one answer would be considered correct. Those questions remained in the score with candidates being given credit for a correct answer if they responded with one of the multiple correct answers. As part of prior appeals heard by the Commission, it was established that 4 questions fell into this category.

7. At the time of the pre-hearing conference, two other similar appeals were pending before the Commission. On March 26, 2020, the Commission issued decisions dismissing those appeals. (*See Kelley v. HRD* [33 MCSR 129] & *Barrasso v. HRD* [33 MCSR 127]) which I forwarded to the Appellant.

8. As part of decisions in *Kelley* and *Barrasso*, the Commission concluded in part, that:

“[T]he Commission squarely addressed this issue in *O’Neill v. Lowell and Human Resources Division*, 21 MCSR 683 (2008). Although the appeal was dismissed based on timeliness, the Commission did still address the issue of certain questions being faulty and/or effectively removed from the examination. In *O’Neill*, 20% of the examination questions were determined to be faulty. The Commission concluded that the “defect rate” of 20% did not, standing alone, rise to the level of proof necessary to deem the test unfair. The underlying facts here are not distinguishable from *O’Neill*, nor should the result be.”

9. After reviewing the above-referenced decisions, Mr. Pellizzarro indicated that he still wished to move forward with his appeal. I established a briefing schedule. HRD submitted a motion to dismiss and Mr. Pellizzarro submitted an opposition.

PARTIES’ ARGUMENTS

First, HRD argues that the Appellant’s appeal with the Commission is not timely, as it was filed with the Commission more than 17 days after HRD sent him its decision. Even if the starting date for timeliness purposes was the date that the Appellant received his score notice (2/3/20), his appeal to the Commission, which was received on 2/26/20, would still be beyond the 17-day statutory filing deadline.

Even if the appeal were timely, HRD makes the same argument here that it did in *Kelley* and *Barrasso*, arguing that, even if, after review, 13 of the 80 test questions were effectively removed from the examination because those questions were not referenced in the reading list, the Appellant cannot show that this promotional examination was not a fair test of his abilities to perform the duties of a Fire Lieutenant. Further, HRD argues that the circumstances here are no different than the circumstances before the Commission when it decided *O’Neill*.

Mr. Pellizzarro, in his brief, expresses frustration that, many years after the Commission’s decision in *O’Neill*, HRD has adminis-

tered another examination with a high rate of faulty questions. He also argues that he has received inconsistent communication from HRD and, generally, that exam applicants have a right to expect a better process, particularly in light of the cost of examination fees and reading materials, in addition to the considerable time and effort spent on studying for the examination.

In regard to the appropriate relief, Mr. Pellizzarro asks that HRD re-grade his examination and include those questions that were removed because they were not in the reading material.

APPLICABLE LAW

G.L. c. 31, s. 2(b) states in part:

“No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person’s rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person’s employment status.”

G.L. c. 31, s. 22 states in part:

“An applicant may request the administrator to conduct a review of whether an examination taken by such applicant was a fair test of the applicant’s fitness actually to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination.”

G.L. c. 31, s. 24 states in part:

An applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three relative to (a) the marking of the applicant’s answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination taken by such applicant was a fair test of the applicant’s fitness to actually perform the primary or dominant duties of the position for which the examination was held. Such appeal shall be filed no later than seventeen days after the date of mailing of the decision of the administrator.

ANALYSIS

As a threshold matter, this appeal was filed with the Commission outside the 17-day statutory filing deadline referenced above in Section 24. Thus, the Commission lacks jurisdiction to hear this appeal.

That notwithstanding, I did, however, carefully review all of Mr. Pellizzarro’s arguments, including his overarching concern that a number of questions were effectively removed from the examination because they were not referenced in the reading material.

I am not unsympathetic to Mr. Pellizzarro’s argument that, more than a decade after *O’Neill*, examination applicants are, once again, faced with an examination in which a troubling percentage of examination questions were faulty. The Commission believes that the quality and integrity of the promotional exam process calls for HRD to take a thorough and pro-active approach in the

design of future examinations to assure that the troubling problem presented in these recent cases does not repeat itself in the future. Should the problem occur in the future, the Commission will consider whether or not further review is appropriate, including but not limited to, a more formal review of the examination design process.

Finally, the relief requested by Mr. Pellizzarro would have the unintended consequence of treating certain exam applicants differently and bringing about a result that is contrary to his own fair test appeal with HRD, in which he stated that including questions on the examination that were not referenced in the reading material resulted in an “unfair” test.

For all of the above reasons, HRD’s Motion to Dismiss is allowed and Mr. Pellizzarro’s appeal under Docket No. B2-20-034 is hereby *denied*.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 23, 2020.

Notice to:

Michael Pellizzarro
[Address redacted]

Melinda Willis, Esq.
Human Resources Division
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* * * * *

EDWARD SLOCUM

v.

TOWN OF WHITMAN

D-18-076

April 23, 2020

Paul M. Stein, Commissioner

Disciplinary Action-Suspension-Demotion-Neglect of Duty-Community Caretaking-Disparate Treatment—In a disciplinary appeal from a demoted and suspended police sergeant, Hearing Commissioner Paul M. Stein found the Town of Whitman had no just cause for imposing such severe discipline for neglect of duty and failure to engage sufficiently in community caretaking. The Appellant had found a citizen sleeping in his locked car and was charged with neglect of duty in deciding to exercise restraint and not force his removal from the vehicle. The evidence established that the sergeant had acted well within his discretion and his harsh treatment contrasted starkly with that meted out to another officer recently promoted to sergeant after he received very minor discipline for a blatant dereliction of duty.

DECISION

The Appellant, Edward Slocum, acting pursuant to G.L. c.31, §43, appealed to the Civil Service Commission (Commission) from the decision of the Respondent, the Town of Whitman (Whitman), suspending him for forty-five (45) days from his tenured position of Police Sergeant, in the Whitman Police Department (WPD) and demoting him from that position to Patrolman.¹

The Commission held a pre-hearing conference in Boston on June 5, 2018, and held a full hearing, which was digitally recorded,² on July 26 & 27, 2018 and August 24, 2018 at the UMass School of Law in Dartmouth. The full hearing was declared private, with witnesses sequestered. Forty (40) exhibits were received in evidence at the hearing (*Exhs. A; B.1 through B.19; C through L; N through W*).³

The Commission received Proposed Decisions on November 5, 2018. For the reasons stated below, the Appellant’s appeal is allowed.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Town of Whitman:

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

2. CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing

to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

3. One proffered exhibit was excluded on the objection of the Respondent (*Exh. Y-ID*). Two exhibits were marked for Identification (ID), with objections taken under advisement. After considering the objections and the relevant evidence in the record, I now admit those two documents in evidence for what they may be worth. (*Exh.M & Exh.X*)

- WPD Officer Patrick Burt-Henderson
- WPD Officer William Balonis, Jr.
- WPD Officer Kevin Harrington
- WPD Officer Robert Stokinger
- WPD Lieutenant Christine May-Stafford
- WPD Detective Eric Campbell
- Raymond A. Scichilone, Municipal Police Training Committee
- WPD Deputy Chief Timothy Hanlon
- WPD Chief Scott Benton
- Whitman Town Administrator, Francis J. Lynam

Called by the Appellant:

- Mr. B, Whitman resident
- WPD Officer Edward Slocum, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Edward Slocum, is a tenured full-time permanent sworn police officer with approximately thirty (30) years of service with the WPD. He was promoted to Police Sergeant in 1994 and served in that position until his demotion to Patrolman as a result of the incident that gave rise to this appeal. He also served as Acting Police Chief for about a year after the retirement of a former chief in 2006 and selection of (then Sergeant, now Lieutenant) May-Stafford as the next permanent Chief in 2007. (*Testimony of Appellant & May-Stafford*)⁴

2. Officer Slocum is a certified first-responder trained to render emergency medical care, including CPR, first-aid, and recognizing signs of a wide range of common medical issues, which he had regularly encountered during hundreds of medical emergencies in the line of duty, including drug overdoses, heart attacks and strokes. (*Exh. Q; Testimony of Appellant*)⁵

3. Officer Slocum is re-certified bi-annually as a first responder and receives annual in-service training through the Massachusetts Municipal Police Training Committee (MPTC), which includes, among other things, legal updates on such issues as arrests and searches with and without warrants. He received a copy of the 400-plus page 2016 edition of “Hanrahan’s Police Officer’s Law Manual” (Hanrahan Manual) distributed to all WPD officers. The

Hanrahan’s Manual is updated annually and updates distributed to WPD personnel via e-mail. (*Exhs. B.14, M, O through S & U; Testimony of Appellant, Benton, Burt-Henderson, Balonis & Scichilone*)⁶

4. WPD officers are also required to comply with the “Rules and Regulations for the Government of the Police Department of Town of Whitman” (WPD Rules and Regulations), and all policies issued by the WPD, which include, in particular, a “Towing Policy” (WPD Towing Policy). (*Exhs. B.15 & T; Testimony of Appellant*)

5. Prior to the incident that gave rise to this appeal, Officer (then Sgt.) Slocum was disciplined on two occasions:

- A three-day suspension for sleeping on duty, reduced to a two-day suspension, after grievance, by agreement in November 2017. (*Exhs. C through F*)
- A written reprimand in January 2017 for issuing two firearms licenses with hunting and target restrictions, contrary to Chief Benton’s orders to issue the licenses “without restrictions.” (*Exhs. G & H*)

6. Also, in or about 2017, the WPD started to provide Sgt. Slocum with accommodations for a long-standing disability, primarily, to better enable him to perform his administrative tasks, such as preparing reports. (*Testimony of Appellant & Benton*)

The November 29, 2017 Incident

7. On November 29, 2017, Sgt. Slocum was the Patrol Supervisor on the overnight shift (12 AM to 8 AM), assigned to Cruiser 305. Also on patrol duty was Officer Balonis, assigned to Cruiser 306, and Officer Burt-Henderson, assigned as the WPD Dispatcher.⁷

(*Exhs. B.2 & B.13; Testimony of Appellant*)

8. At approximately 2:00 AM, an individual later identified as Mr. B, then a Scituate resident, arrived in his pickup truck at the home of a female friend in a residential neighborhood of Whitman. He was a carpet installer who kept tools and materials in the bed of his truck. He had been drinking heavily. After spending two or three hours with his friend, she told him to leave, as she didn’t want her children to see him. (*Exh. B; Testimony of Mr. B*)

9. Mr. B realized that he was then in no condition to drive. He backed his truck out of his friend’s driveway and parked it on the opposite side of the street, about 30 feet from her home. He took the keys out of the ignition and placed them, along with his license, in plain view on the console of the truck. He then lay back in his seat and went to sleep. His intention was to sleep until he was sober enough to drive to work later in the day. (*Testimony of Mr. B*)

4. Chief May-Stafford served in that position until 2012, when she voluntarily returned to her current position of Lieutenant. Chief Benton has been the WPD Chief since 2012. (*Testimony of May-Stafford & Benton*)

5. Whitman reported approximately 40 to 50 drug overdoses (approximately 5 to 10 fatal) annually from 2015 through 2018. (*Exh. V*)

6. Exh. U contains selected pages from the Hanrahan Manual concerning warrantless searches and, in particular, information about the Protective Custody Law, G.L. c.111B, §1 et seq, as well as the so-called community caretaker function, a

judicially-created exception to the constitutional requirement to obtain a warrant for police searches in certain circumstances that will be addressed in further detail elsewhere in this Decision..

7. The overnight shift was normally staffed with three officers in cruisers but, on this occasion, one of the regularly scheduled officers had taken a “comp day” and was not replaced, leaving the shift short one officer. (*Exh.B2*)

10. At 6:57 AM, Officer Burt-Henderson received a call for service on the “non-emergency” line from a resident who reported a truck was parked in front of his house with a party sleeping in it. The caller said he was on his way to work but his wife and kids were home and he thought it was “weird” to see the truck there. Officer Burt-Henderson asked the caller to provide the license plate which he did. He ran a check on the commercial license plate he was provided, which identified the registered owner as Mr. B. The dispatch officer logged the call as “Suspicious Activity”. As Officer Balonis was then occupied with a traffic stop, Sgt. Slocum was dispatched to the scene, provided the name of the registered owner and told the occupant appeared to be asleep in his truck. (*Exhs. B.2, B.3, B.8, B.10, B.12 & B.17; Testimony of Appellant, Burt-Henderson & Balonis*)

11. Sgt. Slocum arrived on scene at approximately 7:01 AM. He located the truck (a 2002 Chevrolet pickup in poor condition) legally parked in front of the caller’s residence. The vehicle was not running and he noticed the tools and carpet material in the bed of the truck. He saw the male occupant (Mr. B) in the driver’s seat with his feet on the dashboard to the left of the steering wheel and a “hoodie” sweatshirt with the hood over his head. (*Exhs. B, B.2, B.3, B.7, B.8 & B.17; Testimony of Appellant*)

12. Sgt. Slocum looked closely at Mr. B and, applying his first-responder training, made a visual check of Mr. B’s “A,B,Cs” (Airway, Breathing, Circulation). He could see that Mr. B’s airway was open by the way his head was positioned (not slumped over), he was breathing normally and his skin color was normal. He looked for other signs of impairment or medical distress, such as urinating, vomiting, frothing around the mouth, or other evidence of drugs or alcohol use, and saw none. (*Exh. B.8; Testimony of Appellant*)

13. Sgt. Slocum attempted to wake up Mr. B by knocking on the driver side window (which was fully closed) and banging with his flashlight, shining the flashlight⁸, and shaking the truck. Mr. B was “responsive” to the knocking and “began to move and wiggle in his seat”. He “squinted” when the flashlight was shined at him, but never opened his eyes or further acknowledged that he knew of Sgt. Slocum’s presence. Sgt. Slocum tried to open the driver’s side door, but found it was locked. He walked around to the passenger side and found that door also locked. (*Exhs. B.8 & B.18; Testimony of Appellant*)

14. At 7:08 AM, Officer Balonis cleared the motor vehicle stop and radioed the dispatcher and asked: “What’s going on at [address]?” The dispatch officer responded: “homeowner reported truck in front of his house with gentleman sleeping in it.” (*Exh. B17*)

15. Sgt. Slocum radioed: “I’m with the party now, trying to wake him up. He’s moving in there but not waking up.” (*Exh. B.8 & Exh. B17*)

16. Officer Balonis radioed: “Sarge, you need help there?” and Sgt. Slocum replied: “Seems like he will be alright. He’s moving. Just trying to get him going here.” (*Exh. B17*)

17. At 7:09 Sgt. Slocum confirmed with the dispatch officer that the party in the truck (Mr. B) was the registered owner. (*Exhs. B.8 & B.17*)

18. At 7:14, Sgt. Slocum radioed the dispatch officer to ask: “Who called on this?” and “Would he be at the residence?” The dispatch officer replied with the address and stated: “I would guess he left for work He said he noticed him on his way out. Not sure if he was going to wait for your response or not.” No mention was made about other household members who the caller had told the dispatcher were also at the residence. (*Exh. B.17*)

19. Seeing carpet and tools in the bed of the truck, Sgt. Slocum thought Mr. B could be a contractor working for the homeowner. He started to walk to the caller’s residence but stopped after the dispatcher said he didn’t think anyone was home, which ruled out the hypothesis that Mr. B had business with the homeowner. Due to the early hour, he chose not to disturb anyone or canvass the rest of the neighborhood. (*Exh. B.8 & B.17; Testimony of Appellant*)

20. After approximately 20 minutes on scene, Sgt. Slocum decided that Mr. B was simply in a deep sleep and was not in need of any immediate medical attention. He reported: “Unable to get him awake. Moving around in there. Keys out of the ignition. No Threat. Looks fine at this point.” At 7:17 AM, Sgt. Slocum cleared the call and said he would “let the next shift know and they will come by and check on him.” (*Exhs. B.2, B.3, B.8 & B.17; Testimony of Appellant*)

21. Meanwhile, Officer Balonis decided on his own initiative to back-up Sgt. Slocum. He did not notice the parked truck as he drove past, as he was looking only for Sgt. Slocum’s cruiser who had just cleared. He caught up with Sgt. Slocum and they talked briefly after which Officer Balonis resumed patrol and Sgt. Slocum headed back to the station to attend to administrative duties. (*Exh. B.10; Testimony of Appellant & Balonis*)

22. Mr. B. was “happy” to be left alone. Knowing he was still too drunk to drive, he decided to stay put and went back to sleep. (*Testimony of Mr. B*)

23. At the 8:00 AM change-of-shift roll call, Sgt. Slocum spoke to the day shift commander, Lt. May-Stafford. He advised her about Mr. B, whom he described as asleep in his truck, moving around, with no signs of drug or alcohol use, but he could not get him to unlock the door to the vehicle. (*Exhs. B.2, B.8 & B.9; Testimony of Appellant & May-Stafford*)

24. At approximately 8:30 AM, after being briefed and reviewing the incident log, Lt. May-Stafford and Patrolman Stokinger proceeded to the scene. Officer Stokinger followed the same procedures to attempt to wake up Mr. B, banging on the door and shak-

8. Sunrise in Whitman on November 29, 2017 occurred at 7:49 AM. (*Administrative Notice* [<http://www.timebie.com/sun/whitmanma.php>])

ing the truck, with similar lack of success. (*Exh. B, B2, B.\$B.9 & B.17; Testimony of May-Stafford & Stokinger*)

25. At 8:31 AM, Lt. May-Stafford called for a Whitman Fire Department ambulance which carries special tools to access a locked vehicle. These tools are designed to minimize damage caused by a forced entry but they can cause damage that requires replacement of scratched body parts and bent door frames. (*Exhs. B.2 & B.17; Testimony of Appellant, Benton, May-Stafford, Burtt-Henderson, Balonis & Stokinger*)⁹

26. At approximately 8:32 AM, after further knocking on the window, Mr. B “woke up” and opened the truck door, revealing a strong odor of alcohol. He could not say where he was or where he had been that night. A field sobriety test was not performed. The call for a fire department response was cancelled. (*Exhs. B.2 & B.17; Testimony of May-Stafford, Balonis & Stokinger*)

27. At 8:38 A.M., Officer Stokinger radioed that a towing company had been called to remove and store the truck. The rationale for that decision was a concern of the officers on scene that it would not be safe to leave the truck on the street with tools in the bed and cab. (*Exh. B.2, B4, B.7, B.9 & B.17; Testimony of May-Stafford & Stokinger*)

28. Mr. B’s identity was confirmed. He was taken into protective custody and placed in Officer Stokinger’s cruiser for transport to the police station. The call was cleared at 8:50 AM. (*Exh. B.2 through B4, B.9 & B.17; Testimony of May-Stafford & Stokinger*)

29. At the police station, a PBT breathalyzer test showed a 0.162 level of intoxication. Mr. B. also admitted to using marijuana the day before. A suicide evaluation showed no risk of harm to himself or others. (*Exhs. B.4 through B.6; Testimony of Stokinger*)

30. At 4:25 PM on November 29, 2017, Mr. B. was released to a female acquaintance (the woman he had been visiting) who picked him up at the police station. (*Exhs. B, B.3 & B.4*)

31. The incident caused an immediate buzz within the WPD. Several officers questioned Sgt. Slocum’s decision to clear the call, assuming he had left an “unresponsive” individual who presumably may be overdosing or in medical distress. Officer Burtt-Henderson exchanged texts with Officer Balonis (suggesting he was glad Balonis wasn’t asked to respond as it gave him cover if the situation turned out badly), and with Officer Harrington (who called Sgt. Slocum “just lazy”). (*Exhs. B, B10 through B12; Testimony of Burtt-Henderson, Balonis & Harrington*)

The Internal Investigation

32. As was his practice upon arriving for duty each morning, on November 29, 2017, WPD Deputy Chief Hanlon reviewed the overnight shift log, and noted that Sgt. Slocum had responded to a call about a “truck parked in front of [the caller’s] house with a party sleeping in it” which Sgt. Slocum had cleared at 7:19 AM after he determined that the occupant was “breathing” but could not

be roused and the doors of the truck were locked. A few minutes later, Deputy Hanlon heard the radio transmission requesting the fire department assistance to gain access to the same vehicle and the subsequent transmission that the occupant had been placed in protective custody. This prompted Deputy Chief Hanlon to inform WPD Chief Benton that the initial call may have been mishandled. (*Exh. B; Testimony of Benton & Hanlon*)

33. After Deputy Chief Hanlon later learned that Mr. B had failed a breathalyzer test with a reading of 0.162, Deputy Chief Hanlon called Sgt. Slocum and ordered him to report to his office the next day with union representation. (*Exh. B; Testimony of Hanlon*)

34. After consulting with the Whitman Town Administrator, Chief Benton prepared a letter, immediately placing Sgt. Slocum on administrative leave, ordered him to stay away from the department and refrain from contact with other WPD staff. Chief Benton handed the letter to Deputy Chief Hanlon, to be delivered to Sgt. Slocum the next day. (*Exh. B, Exh. B1; Testimony of Benton, Hanlon & Lynam*)

35. As ordered, Sgt. Slocum reported to Deputy Chief Hanlon at 8:00 AM on November 30, 2017, accompanied by a union representative. Deputy Chief Hanlon handed each of them a copy of Chief Benton’s letter and ordered Sargent Slocum to prepare a report about the incident that “included any reasons he had for clearing the call without getting the occupant of the vehicle to become alert.” (*Exh. B; Testimony of Appellant & Hanlon*)

36. While waiting for Sgt. Slocum’s report, Deputy Chief Hanlon called the female party who had picked up Mr. B from protective custody. She informed him that Mr. B had called and texted her early in the morning on November 29, 2017 and showed up “obliterated” at her home. When he drove off at her request, she assumed he left the area. She next heard from him when he called her from the WPD police station. (*Exh. B; Testimony of Hanlon*)

37. Deputy Chief Hanlon also called the homeowner who initiated the incident. The homeowner saw Sgt. Slocum arrive. He and his wife watched from a window as Sgt. Slocum tapped on the truck windows, shined his flashlight, and shook the truck with his foot. The homeowner was concerned that his 8-year old needed to walk past the truck to get a school bus, something he had not told the dispatcher. No one left the house to speak to Sgt. Slocum. (*Exh. B*)

38. Sgt. Slocum submitted his report at 2:30 PM. He wrote that his “only alternatives were to start yelling or use the siren on my car. Because of the hour of the morning, I didn’t think that was appropriate. . . . [Mr. B] had not broken any laws and was not a threat to himself or others . . . [and] was not in any medical distress. I saw no exigency that would justify damaging his personal property or violating his civil rights.” (*Exhs. B & B.8; Testimony of Appellant & Hanlon*)

9. The WPD no longer breaks-into vehicles but relies on the fire department to do so when necessary. (*Testimony of Benton & Hanlon*)

39. Sgt. Slocum's report largely tracked the incident log and radio transmissions but did include one statement not corroborated by other evidence: "After clearing the call at 7:18 AM it was my intention to follow-up and check back with [Mr. B] before the end of my shift. At 7:32 AM I was sent to an alarm call and not able to respond back." (*Exhs. B2 through B.4 & B.8*)¹⁰

40. Later in the afternoon of November 30, 2017, Mr. B returned a call from Deputy Chief Hanlon, who told Mr. B that he was not in any trouble and there were no criminal charges taken out against him. Mr. B did hear Sgt. Slocum but didn't acknowledge him or give any "thumbs up" or any indication he was "OK". He just wanted the officer to leave him alone. After the officer (Sgt. Slocum) left, Mr. B thought about driving away but decided to go back to sleep. Deputy Chief Hanlon "commended [Mr. B] for not driving any further [than a 'few houses' down]." Mr. B tried to ignore the other officers who arrived later but they were "having none of that," so he opened his eyes and eventually opened the door. (*Exh. B; Testimony of Mr. B*)

41. Deputy Chief Hanlon thereafter requested and received written reports from Lt. Mau-Stafford and Officers Balonis, Harrington and Burtt-Henderson. (*Exhs. B & B.9 thorough 12*)

42. On December 13, 2017, Sgt. Slocum reported to Deputy Chief Hanlon, with union representation, for a recorded investigative interview. Deputy Chief Hanlon, confronted Sgt. Slocum with the concern that, by leaving the scene without rousing Mr. B or otherwise gaining access to the truck, Sgt. Slocum had failed his duty under the community caretaker "doctrine". Sgt. Slocum repeated his position that, having concluded that Mr. B was asleep, "wriggling" with his feet up, breathing, and with no visible signs of medical distress or cause to believe Mr. B had committed any crime, he would be violating Mr. B's civil rights by "assuming the worst" and forcibly entering the vehicle to make physical contact, and that the fire department would have no greater right to break into the truck than he did. He had never before "walked away from somebody that I felt needed medical attention," noting that, in his entire career, he had to break into a vehicle only once, and that was to extricate a disoriented motorist stuck on railroad tracks who wouldn't heed his request to unlock her door. (*Exhs. B & B18; Testimony of Appellant*)

43. Sgt. Slocum acknowledged that Lt. May-Stafford and Officer Stokinger were able to arouse Mr. B and eventually gained access to the truck, causing him to be placed into protective custody. Deputy Chief Hanlon pressed Sgt. Slocum with a series of "What if's," such as what if he were having a "diabetic reaction," "the next shift could [not] arouse him," or "he comes to and puts the keys in the ignition and he gets down the street and kills a bunch of people." Sgt. Slocum repeated that Mr. B did not request or

require medical attention and stated: "You're questioning my discretion on this and I don't understand it." (*Exhs. B & B.18*)

44. Deputy Chief Hanlon also conducted recorded interviews with Lt. May-Stafford, Officers Balonis, Harrington Stokinger and Burtt-Henderson, as well as Detective Eric Campbell (another officer on the 8AM to 4PM shift), who professed varying levels of concern with the way Sgt. Slocum had handled the call involving Mr. B. Excerpts from those interviews follow:

- Officer Balonis assumed from the radio calls that the occupant overdosed on heroin or was intoxicated and, either way, Sgt. Slocum would want him for "grunt work," i.e. physical transport for protective custody or "something else". He was not satisfied with the way the call was cleared, but Sargent Slocum was both his supervisor and investigating officer and he "assumed he knew what he was doing." He confirmed that Officer Burtt-Henderson texted him questioning Sgt. Slocum's handling of the call and not requesting back-up.
- Officer Harrington is assigned as the WPD school officer. He did not respond to the call but monitored it. He said he did not question how the call was handled as Sgt. Slocum was an experienced supervisor and "there may have been some information that Sgt. Slocum had gathered at the scene that wasn't transmitted over the radio."
- Detective Campbell arrived late in the midst of roll call on November 29, 2017. He heard part of the report involving Mr. B and the follow-up assigned to Officer Stokinger. He was not asked to report to the scene but, when he heard the radio request for Fire Department response he "assumed the worst" (injury or overdose which would call for a detective) and started to get up to respond, but stopped when he heard the request was cancelled. When asked if he had any questions about how the call was handled, Det. Campbell said he didn't "want to Monday morning quarterback someone" and without the facts "it's hard sitting in this position," but "it does raise a concern, I guess".
- Officer Burtt-Henderson (a relatively junior officer then at the top of the list for the next Sargeant position) thought that the calling party had told him he was leaving for work but also knew that the wife and children were home. He confirmed that his log entries were probably not "verbatim" what Sgt. Slocum reported but "in the nature of what Sgt. Slocum relayed" put into his own words. He closed the call with "services rendered," as he didn't think it should be called anything else, although he knew that Sgt. Slocum had requested follow-up by the next shift. He "expressed disbelief" as to how the call was handled in a text to Officer Balonis while they were still on duty.
- When Officer Stokinger went to check on Mr. B, he found him sitting in the truck, still asleep. Officer Stokinger spotted two empty containers of alcoholic beverages on the floor.¹¹ Although Mr. B was breathing and moving in his seat, Officer Stokinger was concerned that the inability to get an acknowledgement of his presence or a response to knocks and pounding was an issue. He was about to get something to break the window, but Lt. May-Stafford suggested calling the fire department instead. He thought that the female who came to pick up Mr. B was someone "known to our department."
- Lt. May-Stafford questioned Sgt. Slocum's handling of the call. Mr. B wasn't "turning blue" but she would not have left him asleep at the scene. She thought she had been told by Det. Campbell that Mr.

10. The burglar alarm was reported at 7:25 AM and cancelled at 7:32 AM, after the WPD dispatch received a call back from the alarm company that the "homeowner was all set." (*Exh. B17; Testimony of Appellant*)

11. Mr. B did not consume the contents of those containers that night. They had been in the truck for some time and Sgt. Slocum did not see them during his inspection. I infer that they were dislodged during the second round of shaking the truck by Officer Stokinger (a man of considerably larger stature than Sgt. Slocum). (*Testimony of Appellant, Stokinger, May-Stafford & Mr. B*)

B was a witness to a stabbing at a local bar and that may have been where Mr. B was drinking that night. (Actually it was Mr. B who was the witness).

(*Exhs. B.19 & C; Testimony of Hanlon, Balonis, Harrington, Stokinger, Burt-Henderson, May-Stafford & Campbell*)

45. On January 8, 2018, Deputy Chief Hanlon submitted a report of his Internal Investigation into Sgt. Slocum's conduct relative to the November 29, 2017 incident. The report concluded that Sgt. Slocum "failed to act in the performance of his duties as a Whitman Police Officer, as a Superior Officer and as a "community caretaker," by failing to take required action to appropriately determine Mr. B's well-being in his initial response and in his failure to follow-up prior to the end of his shift. The report found that this alleged misconduct violated the WPD's Rules and Regulations, 1.F.9 (Required Conduct - Attention to Duty; 1.F.19 (Devotion to Duty); 1.G.10.c (Prohibited Conduct - Incompetence; and 1.G.16 (Neglect of Duty). (*Exh. B & B.15*)

46. By letter dated January 24, 2018, Sgt. Slocum was provided with a copy of Deputy Chief Hanlon's report and informed that a disciplinary hearing on his alleged misconduct as stated in the report would be held before a Hearing Officer (a former Fall River Police Chief), selected by the Whitman Town Administrator upon direction of the Whitman Board of Selectmen (the Appointing Authority) on February 8, 2018. (*Exh. A; Testimony of Lynam*)

47. On April 17, following two days of hearing, the Hearing Officer submitted his report to the Whitman Board of Selectmen. The report found that Sgt. Slocum violated his duty under the "well-established" community caretaking "doctrine," in that (1) he failed to perform "Required Conduct," i.e., to take appropriate action to ascertain the well-being of Mr. B and, "mitigate or remove a potentially imminent dangerous matter of public concern," which, among other things, included failing to gain access to the truck before leaving the scene, to call for back-up, to speak to neighbors and missing evidence of alcohol consumption; (2) he engaged in "Incompetence," by failing to conform to work standards established for his rank and position, i.e., not being "adequately versed" in, and failing to perform the community caretaking function as understood by all of the other WPD officers who testified; by his "unwarranted concern" for Mr. B's civil rights and his "adamant stance on the issue" in the face of potential danger to others; and (3) engaged in "Neglect of Duty" by failing to take suitable action when an "incident requires police attention or service" by not conducting "an adequate medical evaluation of the unresponsive truck occupant," speaking to neighbors, failing to remove an "imminent threat" from the community and "leaving an unresponsive and unsafe individual" for more than an hour. (*Exh. J*)

48. The Hearing Officer's report noted that the "matter has been a topic of widespread conversation among the rank and file of the Whitman Police Department" where the "consensus is that Sgt. Slocum did not respond appropriately." The report found Sgt. Slocum's persistence that he did act appropriately and assertion that Mr. B's constitutional rights prevented him from breaking into the truck, even after having time to "to reflect or research" the

issues, to be an "unconscionable" disparagement of Sgt. Slocum's fellow officers. The Hearing Officer recommended the following discipline:

A. For the violation of the WPD Rules and Regulations - 45 day suspension

B. For the violation of the WPD Rules and Regulations and "clear and convincing evidence of a loss of confidence in the Sgt. that permeates the Whitman Police Department" - reduction in rank from Sgt. to Police Officer;

C. For the lack of working knowledge of the Community Care (sic) Doctrine - retraining as determined by the WPD Chief of Police.

(*Exh. J*)

49. By letter dated April 26, 2018, Sgt. Slocum was officially informed that the Whitman Board of Selectmen, after due notice of an executive session at which Sgt. Slocum was present, unanimously voted to adopt the Hearing Officer's report and imposed the discipline recommended in that report. (*Exhs. K & L; Testimony of Lynam*)

50. Until Sgt. Slocum's demotion, no WPD superior officer had been disciplined by a demotion at any time during the tenure of Chief May-Stafford or Chief Benton. (*Testimony of May-Stafford & Benton*)

51. In 2011, then Chief May-Stafford imposed a one-day suspension on another officer who had failed to appear at a scheduled court hearing so that he could take his daughter to an amusement park and, then, lied to superior officers about the reason for his absence. This officer was later promoted to Sergeant by Chief Benton. (*Exh. X; Testimony of May-Stafford & Benton*)

The Community Caretaker Dispute

52. Chief Benton, Deputy Chief Hanlon, most of the other WPD witnesses held the substantially same opinion of what Sgt. Slocum was obligated to do as a community caretaker upon coming upon a motor vehicle in which an "unresponsive" individual was found. Each witness held the opinion that it was unreasonable for Sgt. Slocum to conclude that Mr. B was sleeping, rather than overdosing or in immediate need of medical attention from an evaluation through the window of the truck and without breaking into the vehicle to verify that Mr. B was merely sleeping. They each believed that, as a community caretaker, Sgt. Slocum was obligated to use force to enter a locked vehicle to ascertain whether or not an "unresponsive" occupant needed such medical assistance. None of the witnesses could point to any specific training, written policy or other authority that expressly enunciated those conclusions or describe a directly comparable occasion in which they had invoked the "community caretaker" function to break into a locked vehicle (*Testimony of Burt-Henderson, Balonis, May-Stafford, Stokinger, Hanlon & Benton*)¹²

12. [See next page.]

53. Officer Slocum held a different view. From his perspective, his duty as a community caretaker was to come to the aid of a citizen who was demonstrably in medical distress, and must be tempered with an appreciation for the civil rights of the citizen. Based on the assessment he made of Mr. B, he was not an overdose victim and showed no signs of any need for immediate medical assistance. In the exercise of his discretion, and based on his training and experience, he had already determined that, it was reasonable to leave Mr. B asleep in his truck, for the time being, and that, under the circumstances as he found them, whatever additional information that he could gain by breaking into the truck was outweighed by the risk that such action would be considered use of excessive force and a violation of the constitutional presumption that prohibits “unreasonable” searches and seizures. (*Testimony of Appellant*)

54. In his Commission testimony, Officer Slocum took responsibility for his decision, but continued to maintain that he had acted properly within the discretion he was allowed. He did not deny that many of his peers and superiors reported that they had lost confidence in him, but attributed that to “misinformation.” (*Exh. B; Testimony of Appellant*)

55. This Commissioner asked Officer Slocum what he learned during his mandated “retraining” ordered as part of his discipline. The retraining consisted of a five or six hour session with a private attorney experienced in law enforcement law on the first day he returned to duty as a patrol officer after serving his 45-day suspension. Officer Slocum asked many questions during the session. He found much of the information he learned was “consistent” with his prior understanding about the “community caretaker” function. In particular:

- Asked what right he had to ascertain if someone inside a vehicle was intoxicated, he was informed that “unless I have some reasonable suspicion that gets me into the vehicle . . . then I can’t.”
- Asked what right he had to interact with a person “in charge of,” but not operating, a vehicle, he was informed that he would “have the right to interact with them, but my interaction has to be reasonable. I can’t force interaction . . . because [that] could lead to an unjustifiable seizure. . . . I could easily converse with him as long as he was willing to converse. But if he refused to converse, then, at that point, my investigation’s over.”

(*Testimony of Appellant*)

APPLICABLE LEGAL STANDARD

G.L. c.31, §§41-45 requires that discipline of a tenured civil servant be imposed only for “just cause” after due notice, hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of decision

that states “fully and specifically the reasons therefore.” G.L. c.31, §41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L. c.31, §42 and/or §43 for de novo review by the Commission “for the purpose of finding the facts anew.” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited.

The Commission’s role 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 Comm’n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997). *See also Police Dep’t of Boston v. Collins*, 48 Mass. App. Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000); *McIsaac v. Civil Service Comm’n*, 38 Mass. App. Ct. 473, 477 (1995); *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331, *rev.den.*, 390 Mass. 1102 (1983).

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence,¹³ when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971); *City of Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928) *See also Mass. Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-65 (2001).

The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” *School Comm. v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488, *rev.den.*, 426 Mass. 1104 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983) The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of “merit principles” which govern civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c.31, §1.

G.L. c.31, Section 43 vests the Commission with “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. *See, e.g., Police Comm’r v. Civil Service Comm’n*, 39 Mass. App. Ct. 594, 600 (1996) (“The power accorded to the com-

12. The WPD also called a retired police officer who currently serves as a training instructor at the MPTC Academy which provides in-service training to the WPD. Although he was permitted to testify as an expert, his forte was in “first responder” training and was not responsible for teaching the legal component of the training. (*Exhs N; & Q; Testimony of Scichilone*)

13. It is within the hearing officer’s purview to determine the credibility of live testimony. *E.g., Leominster v. Stratton*, 58 Mass. App. Ct. 726, 729 (2003). *See Embers of Salisbury, Inc. v. 37 Alcoholic Beverages Control Comm’n*, 401 Mass. 526, 529 (1988); *Doherty v. Ret. Bd. of Medford*, 425 Mass. 130, 141 (1997). *See also Covell v. Dep’t of Social Services*, 439 Mass. 766, 787 (2003) (where witnesses gave conflicting testimony, assessment of their relative credibility cannot be made by someone not present at the hearing).

mission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”) *Id.*, (*emphasis added*). See also *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006), quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

The Commission also must take into account the special obligations the law imposes upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to adhere to the law, both on and off duty. “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel . . . they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” *Attorney General v. McHatton*, 428 Mass. 790, 793-74 (1999) and cases cited. See also *Falmouth v. Civil Service Comm’n*, 61 Mass. App. Ct. 796, 801-802 (2004); *Police Commissioner v. Civil Service Comm’n*, 39 Mass. App. Ct. 894, 601-602 (1996); *McIsaac v. Civil Service Comm’n*, 38 Mass. App. Ct. 473, 475-76 (1995); *Police Commissioner v. Civil Service Comm’n*, 22 Mass. App. Ct. 364, 371, *rev.den.* 398 Mass. 1103 (1986) See also *Spargo v. Civil Service Comm’n*, 50 Mass. App. Ct. 1106 (2000), *rev.den.*, 433 Mass. 1102 (2001).

ANALYSIS

Analysis of the merits of this appeal begins by addressing the role of police officers when acting in what has become generally known as a “community caretaker” function, as opposed to performing “law enforcement” duties to detect and gather evidence of criminal activity, and, in particular, the judicially-imposed distinctions regarding the rights of citizens and the restrictions placed on police officers to conduct warrantless searches and seizures of persons and property while fulfilling those different functions. The Commission need not decide (and does not decide) which view of the law is the correct one—that espoused by the Appellant or the very different view espoused by the Respondent. The decision that the Commission must make is whether or not the discipline imposed comports with “basic merit principles” of civil service law and is supported by “just cause.” As the survey of the jurisprudence below demonstrates, there is considerable uncertainty about the scope of a police officer’s duties and responsibilities as a community caretaker, and, under those circumstances, the severe

discipline meted out to Sgt. Slocum is not justified as a matter of civil service law and cannot stand.

Federal Constitutional Law

The only two cases to reach the U.S. Supreme Court involving the community caretaker function are 5-4 split decisions. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), after noting that “decisions of this Court dealing . . . warrantless searches. . . of vehicles. . . [are] something less than a seamless web,” the majority decided to make an exception for the routine inventory search of a disabled vehicle taken into custody as a public safety concern (as opposed to one lawfully parked), which was conducted pursuant to “standard procedure in [the] department.”¹⁴

“Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute Particularly in nonmetropolitan jurisdictions such as those involved here, the enforcement of traffic laws and supervision of vehicle traffic may be a large part of a police officer’s job. We believe that the Court of Appeals should have accepted, as did the state courts and the District Court, the findings with respect to Officer Weiss’ specific [non-investigatory] motivation and the fact that the procedure he followed was ‘standard’.”

Id., 413 U.S. at 439-42. In his dissent, Mr. Justice Stewart (joined by Justices Brennan, Douglas and Marshall) saw no reason to create another exception to the constitutional presumption that: “a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant”

“[T]he fact that the professed purpose of the contested search was to protect the public safety rather than gain incriminating evidence does not of itself eliminate the necessity for compliance with the warrant requirement. Although a valid public interest may establish probable cause to search. . . [the decisions of this Court] make clear that, absent exigent circumstances, the search must be conducted pursuant to a ‘suitably restricted search warrant.’ [Citations] . . . What the Court does today in the name of an investigative automobile search is in fact a serious departure from established Fourth Amendment principles . . . That departure is totally unjustified”

413 U.S. at 450-454 (Stewart, J., dissenting).

In *South Dakota v. Opperman*, 428 U.S. 364 (1976), the Supreme Court justified a routine inventory search, this time, of the unlocked glove compartment of a locked vehicle impounded for parking violations (which turned up illegal drugs). The majority stated that the “authority of police to seize and remove from the

14. Previously recognized exceptions include: (1) “exigency,” applied to law enforcement activity, where officers have probable cause to believe that a serious crime has been committed and delay in obtaining a warrant would risked destruction of evidence, enhanced likelihood of a suspect’s escape or would put officer or others in harms way, *e.g.*, *Michigan v. Tyler*, 436 U.S. 499 (1978) (entry to fight a fire of suspicious origin); but see *Minnesota v. Olsen*, 495 U.S. 91 (1990) (no exigency to enter premises to arrest the getaway driver in a murder investigation after weapon was recovered, killer apprehended and police had house surrounded); *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (exigency exception did not apply to entry and arrest to preserve blood-alcohol evidence of a non-criminal OUI first

offense); (2) an “emergency,” where an officer had “an objectively reasonable basis for believing that an occupant [was] seriously injured or imminently threatened with serious injury,” *e.g.*, *Michigan v. Fisher*, 558 U.S. 45 (2009) (officers entered home after finding evidence of damaged vehicle with bloody hood and clothes) and *Hill v. Walsh*, 884 F.3d 16 (1st Cir. 2018) (subject of civil commitment order with history of drug overdose justified entry to search for him), *citing*, *Brigham City v. Stuart*, 547 U.S. 398 (2006) (officers observed a bloody altercation in progress); (3) implied “consent,” *e.g.* *United States v. Donlan*, 909 F.2d 650 (1st Cir. 1990) (defendant, by opening door, effectively gave officers permission to enter). See generally, Hanrahan Manual, pp. 89-90.

streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge” and the routine practice of conducting a warrantless “caretaking search” of a lawfully impounded vehicle was reasonable. *Id.*, 428 U.S. at 365-376.

In his concurring opinion, Mr. Justice Powell, as the deciding vote, emphasized that, but for the existence of a “standard procedure,” he would not have joined in the plurality decision:

“[T]he unrestrained search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances [b]ut . . . the search here was limited to the contents of the unoccupied automobile and was conducted strictly in accord with the regulations of the Vermilion Police Department. . . . [I]f inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized, [t]here are thus no special facts for neutral magistrate to evaluate [in deciding whether a search warrant should be approved].” 428 U.S. at 376-84.

The four dissenting Justices (Marshall, Brennan, Stewart and White) took issue with the implied premise of the plurality, i.e., that “a person’s constitutional interest in protecting the integrity of closed compartments of his locked automobile may routinely be sacrificed to government interests requiring interference with that privacy” noting:

“ . . . [that has] never been the law. . . . [O]ur cases have consistently recognized that the nature and substantiality of interest required to justify a search of private areas of an automobile is no less than that necessary to justify an intrusion of similar scope into a home or office The Court’s result . . . elevates . . . mere possibilities [of the need to protect property] above the privacy and security interests protected by the Fourth Amendment. . . . On remand it should be clear that this Court’s holding does not preclude a [different] resolution of this case or others involving the same issues under any applicable state law.” 428 U.S. at 384-96.

In *MacDonald v. Town of Eastham*, 745 F.3d 8 (1st Cir. 2014), police entered a home after neighbors reported the door had been left wide open and discovered a marijuana-growing operation. The Massachusetts state court judge rejected the community caretaker defense and suppressed the evidence (as wrongfully seized in a warrantless search), charges against the homeowner were dropped, and the homeowner sued the town and its police officers for violation of his civil rights. The First Circuit did not question the state-court decision to suppress the evidence but dismissed the civil rights claim before it on a close call of qualified immunity:

“[T]he defendant officers seek shelter in the community caretaking exception. That exception . . . has become ‘a catchall for the wide range of responsibilities that police officers must discharge aside from their criminal enforcement activities.’ [Citation] . . .”

“The question is complicated because courts do not always draw fine lines between the community caretaking exception and other exceptions to the warrant requirement . . . decrying the ‘contradictory and sometimes conflicting’ way in which the community caretaking, emergency, and emergency aid doctrines have been applied. . . . [Citations]”

“The same sort of disarray is evident in the manner in which courts have attempted to define the interface between the exi-

gent circumstances exception to the warrant requirement and the community caretaking exception. . . .”

“Given the profusion of cases pointing in different directions, it is apparent that the scope and boundaries of the community caretaking exception are nebulous. The plaintiff appears to concede that this rampant uncertainty exists. Nevertheless, he strives to convince us that, whatever the parameters of the exception, the circumstances here fall outside of it. We are not persuaded.”

“[T]he defendant officers . . . conducted their ensuing search in an unremarkable manner. These actions were at least arguably within the scope of the officers’ community caretaking responsibilities and, given the parade of horrors that could easily be imagined had the officers simply turned tail, a plausible argument can be made that the officers’ actions were reasonable under the circumstances. . . .”

“ . . . Manifestly, there is no directly controlling authority. The question thus reduces to whether a consensus of persuasive judicial decisions exists. We think not. . . . The plaintiff places heavy reliance on . . . two small islands in a sea of confusing case law. . . . Even if the cases that run contrary to the plaintiff’s position were wrongly decided—a matter on which we take no view—they serve to inject a substantial measure of doubt as to whether the Fourth Amendment barred the officers’ entry in this case.”

“Let us be perfectly clear. We do not decide today . . . whether or not the circumstances that confronted the officers here come within the compass of the community caretaking exception. These questions are down-to-the-wire close—but the very closeness of the questions is telling. . . . [I]t is sufficient to hold—as we do in this opinion—that because these questions are not resolved by clearly established law, the officers . . . are entitled to the shield of qualified immunity. We need go no further.”

Id., 745 F.3d at 12-15. (*emphasis added*) See also, *Matalon v. Hynnes*, 806 F.3d 627 (1st Cir. 2015) (rejected qualified immunity and refused to apply the community caretaker defense; upholding jury verdict in civil rights lawsuit for unlawful search and use of excessive force brought by homeowner who was sleeping when Boston police officers broke into his residence in search of a thief reportedly headed there and, then, charged him for his unruly behavior for which he was later acquitted); *Hunsberger v. Wood*, 570 F.3d 546 (4th Cir. 2009), *cert.den.*, 589 U.S. 938 (2010) (police officer lawfully entered home under an “exigent circumstances” exception to investigate vandalism and a report that missing minor was present and in need of assistance but not the community caretaker exception, noting that “[w]hat community caretaking involves and what boundaries upon it exist have simply not been explained to an extent that would allow us to uphold this warrantless entry based on that justification. This is not to diminish the caretaking function . . . but only to say that it is in no sense an open-ended grant of discretion that will justify a warrantless search whenever an officer can point to some interest unrelated to the detection of crime.”); *United States v. Rodriguez-Morales*, 929 F.2d 780 (1st Cir. 1991) (community caretaker function has a “protean quality” that requires a “search for equipoise” between “the need to search or seize against the invasion the search or seizure entails” and “almost always involves the exercise of discretion” to “chose freely among the available options, so long as the option chosen is within the universe of reasonable choices.”);

United States v. Dunbar, 470 F.Supp. 704 (D.Conn.), *aff'd*, 610 F.2d 807 (2d Cir. 1979) (table) (although police officer's good faith concern that motorist was lost and might cause a disturbance by seeking directions was "arguable," officer's stopping the motorist did not fit the community caretaker function; officer simply should have "made his presence known" and left it up to the motorist as to whether to stop and seek directions.")

Massachusetts Law

Massachusetts has a well-developed body of case law relating mostly to warrantless searches of premises under the "emergency" and "exigent circumstance" exceptions to the warrant requirement. For example, in *Commonwealth v. DiGeronimo*, 38 Mass. App. Ct. 714 (1995), the Appeals Court overturned an OUI conviction based on an unjustified warrantless entry into the defendant's residence to ascertain his well-being after an automobile accident

"... [T]he so-called "emergency" doctrine ... authorizes warrantless entry when a police officer (or other public safety official) reasonably believes that a person within the dwelling is in need of immediate assistance because of an imminent threat of death or serious injury, or that prompt intervention is necessary to prevent a threatened explosion, or the destructive accident. [Citations]."

"Police action in such situations is to be viewed under a reasonableness standard in light of the circumstance in the field, not by "Monday morning quarterbacking" ... [W]e fail to find in this record the requisite compelling reasons, supported by specific and articulable facts [citation] that could have led [the officer] reasonably to believe that DiGeronimo was in dire, life-threatening distress and in need of immediate assistance".

"[The reporting party] did not tell [the officer] that DiGeronimo was injured, only that he appeared drunk. ... DiGeronimo's telephone call to police gave no hint that he was ailing, only profane and probably inebriated."

...

In sum, [the officer's] subjective good faith belief that DiGeronimo might be in need of assistance did not justify either the entry or the subsequent search and arrest. [Citations] The objective circumstances did not reasonably support a genuine concern on [the officer's] part that DiGeronimo might have been so severely injured in the accident as to be in a life-threatening situation requiring immediate, warrantless entry and assistance."¹⁵

Id., 38 Mass. App. Ct. at 722-75. *See Commonwealth v. Duncan*, 467 Mass. 746 (2014) (applying emergency exception to render emergency assistance to animals); *Commonwealth v. Peters*, 453 Mass. 818 (2009) (initial warrantless entry in search of source of gunshot justified but no "objectively reasonable basis" supported later search to double-check for additional victims); *Commonwealth v. Snell*, 428 Mass. 766 (1999) (emergency exception applied to warrantless search to ascertain well-being of spouse, whose husband was seen in early morning flight from residence the day he posted bail after being arrested for threaten-

ing to kill her); *Commonwealth v. Young*, 382 Mass. 448 (1981) (approved warrantless search of premises to find murder suspect and victims, noting "whether an exigency exists and whether the response of the police was reasonable and therefore lawful" are to be evaluated "in relations to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis"); *Commonwealth v. Bates*, 28 Mass. App. Ct. 217 (1990) (warrantless entry of apartment to search for missing woman not justified under "emergency" exception); *Commonwealth v. Colon*, 88 Mass. App. Ct. 579 (2015) (troopers not justified to enter and search home under emergency exception after defendant opened door and surrendered himself); *Commonwealth v. Lindsey*, 72 Mass. App. Ct. 485 (2008) (checking on elderly woman known to be frail properly based on "evidence known to the police at the time of the warrantless entry" and not inappropriate "20/20 hindsight"); *Commonwealth v. Kirschner*, 67 Mass. App. Ct. 836 (2006) (emergency exception requires that "[t]he injury sought to be avoided must be immediate and serious, and "mere existence of a potentially harmful circumstance is not sufficient"), *citing Commonwealth v. Allen*, 54 Mass. App. Ct. 719 (2002) (disabled man apparently left alone in front of television who did not respond to knocks and shouts did not justify warrantless entry). *See also Commonwealth v. McCarthy*, 71 Mass. App. Ct. 591 (2008) (justified warrantless search of handbag of unconscious woman in medical distress)

Commonwealth v. Townsend, 453 Mass. 413 (2009), is a rare case mentioning the "community caretaker" exception in the context of a dwelling search. The lower court judge applied the exception to deny a motion to suppress evidence obtained during a warrantless search which produced evidence used to convict the defendant of murder. The SJC held that the officer's entry fell within the "emergency" exception to the warrant requirement, not the community caretaker exception, but added that the "emergency" exception is "closely related to community caretaking function. Although *Townsend* does not involve a motor vehicle, I find it particularly significant because the decision: (1) illustrates how Massachusetts courts and commentators (the MPTC Legal Guide and Hanrahan Manual included, as noted below) sometimes seem to conflate the various exceptions to warrantless searches and incorporate, in effect, the same required "objective facts" that a citizen be in "immediate need of assistance" in order to justify more than an initial "non-coercive" inquiry and enable an officer to use force to make a warrantless entry, search and seizure of any person, property and/or a motor vehicle, 453 Mass. at 424-26; (2) reinforces the point that actions taken by the police must always be "evaluated in relation to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis," 453 Mass. at 425-26; and (3) in *Townsend*, despite numerous facts to suggest that defendant's wife may have been the victim of foul play, the police responded four times and left the scene without gaining access before a decision

15. The Appeals Court also held that the evidence of the officer's observations and alcohol breath test results that were fruits of the officer's unlawful warrantless entry could not be justified under exigent destruction of evidence exigent circum-

stances exception and their unopposed admission into evidence constituted ineffective assistance of counsel. 38 Mass. App. Ct. at 725-31.

was made to force entry, leading to discovery of the murder victim)

Commonwealth v. Leonard, 422 Mass. 504, cert.den., 519 U.S. 877 (1996) is the seminal Massachusetts appellate decision focusing on the community caretaker function as justification for a warrantless entry of a motor vehicle. The lower court suppressed evidence obtained by a State Trooper who approached a motor vehicle in the early morning hours at a breakdown area on Storrow Drive and, after getting no response from the driver after activating blue lights, using his PA megaphone and air horn, he opened the unlocked driver's door, at which point the driver began shouting obscenities, was arrested and convicted of OUI and disorderly conduct.

The lower court judge concluded that, since the trooper was not “acting in accordance with an official policy of the state police . . . and [no] specific facts and circumstances suggesting that the defendant was engaged in criminal activity or injured” and had “no right to open the vehicle,” relying on *Commonwealth v. Helme*, 399 Mass. 289 (1987), in which the SJC questioned an asserted “policy” of approaching a car just to determine “if everything is all right”. Without expressly referencing community caretaking, the SJC majority held that the trooper was justified to open the unlocked door because he was “doing his duty as he patrolled the highway,” the driver’s “stopping when and where she did suggested that she was in difficulty” and her repeated failure to respond “not with a gesture, a smile or a nod of the head” implied “she might be quite ill.” The majority held that the lower court “overreads” the *Helme* decision to mean that every minimally intrusive, reasonable action is permissible only when taken pursuant to “an explicit and perhaps even invariable policy,” as it would be impossible to fashion such rulebook that “sought to anticipate and instruct a trooper . . . just what to do in the circumstance of every such particular case.” *Id.*, 422 Mass. at 504-509.

Chief Justice Liacos dissented, stating, it is “clear from our state case law that opening the defendant’s door constituted a seizure of the defendant’s automobile” and every police intrusion must rest on “specific and articulable facts . . . that follow in light of the officer’s experience.”

“A mere hunch is not enough. The [lower court judge] was correct when he stated: ‘there must be a prior justification either in the form of . . . circumstances suggestive of criminal activity or circumstances suggesting a medical problem or [hazard] to safety or health.’ Although ‘our cases have not explicitly required an established written policy . . . what we have required is some constraint on the discretion of the law enforcer. [citing Cady v. Dombrowski] . . . Standard procedures are universally recog-

nized as a tool to determine the reasonableness of police conduct and to ensure police actions are not a pretext.’”

The Chief Justice also noted: “[I]n this Commonwealth . . . ordinarily, a citizen need not comply with a police request and is free to walk away.” *Id.*, 422 Mass. at 510-514.¹⁶

In *Commonwealth v. Murdough*, 428 Mass. 760 (1999), the SJC clarified the *Leonard* decision, holding that a police officer’s authority when performing the community caretaker function justifies an initial approach to make a “non-coercive” well-being check (there, a vehicle parked for an extended period with its brake lights on at a highway rest stop) only “so long as they do not implicitly or explicitly assert that the person inquired of is not free to ignore their inquiries. . . . It was only when the officer opened Leonard’s door that a justification for that action had to be offered”. As soon as the officers suspected he was under the influence of narcotics “they went beyond the caretaking function and were look for evidence of a narcotics violation.” 428 Mass. at 762-64.

Massachusetts appellate decisions have justified a warrantless inquiry of the operator of a motor vehicle under a community caretaker exception when there was reason for concern about the fitness or well-being of the operator, but none have directly decided how the community caretaker duty applies to a forcible entry of a parked, locked and occupied vehicle under the circumstances involved here. *See, e.g., Commonwealth v. Evans*, 436 Mass. 369 (2002) (initial “non-coercive” of motorist stopped in breakdown lane was justified but, when an officer “by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . . we conclude that a ‘seizure’ has occurred” citing *Leonard* and *Murdough*); *Commonwealth v. McDevitt*, 57 Mass. App. Ct. 733 (2003) (vehicle in breakdown lane at night with motor running, noting that community caretaker function covers “concern for a vehicle’s occupants” and “the safety of the public using the roadway,” citing *Murdough*); *Commonwealth v. Colburn*, 86 Mass. App. Ct. 1112, *rev.den.*, 470 Mass. 1101 (2014) (Rule 1:28) (vehicle parked late at night with engine running and totally non-responsive driver at the wheel, citing *Leonard*); *Commonwealth v. Fisher*, 86 Mass. App. Ct. 48, *rev.den.*, 469 Mass. 1109 (2014) (driver seated in vehicle with door open, slurred speech, eyes closing and head nodding are “objective facts that a person may be in need of medical assistance,” citing *Murdough*); (*Commonwealth v. McHugh*, 41 Mass. App. Ct. 906 (1996) (rescript) (officer asked driver of vehicle stopped in traffic lane of highway if he needed assistance, got “strange gaze” and “incoherent” reply)

16. Other states’ courts echo the concern that the community caretaker function become a source of unfettered discretion, which, as Chief Justice Liacos put it, would make “policing the police” difficult and, therefore, impose restrictions to keep it tethered to its “health and well-being” moorings. The Supreme Court of South Dakota found that community caretaking was often indistinguishable from the “emergency” and “emergency aid” functions and the same rules should apply to all three, namely, an “actual and immediate need” to protect persons from “serious” harm: “If the warrant requirement is to retain its viability, a merely officious concern that someone might conceivably need assistance to avoid some undefined peril should not justify police intrusion” *State v. Deneui*, 2009 SD 99, 775

N.W.2d 221 (2009). In *State v. Coffman*, 214 N.W.2d 240 (Iowa 2018), the Iowa Supreme Court questioned whether the community caretaking exception properly extends beyond emergency situations and inventory searches into the “amorphous category of police officers acting as public servants”. Concerned that such an exception “would swallow up constitutional restrictions on warrantless searches altogether,” the Court “tightly cabin[ed]” community caretaker “first party assistance” situations with a requirement that an officer coming upon a parked vehicle must demonstrate by “specific and particularized facts” that the occupants have *manifested a desire for needed assistance*, so as to limit the “potential for abuse” that would otherwise arise.

Some Massachusetts case law expressly questioned the applicability of the community caretaker exception. *See, e.g., Commonwealth v. Sanborn*, 477 Mass. 393 (2017) (community caretaker function does not justify a motor vehicle stop to serve a 209A abuse prevention restraining order on the operator); *Commonwealth v. Knowles*, 451 Mass. 91 (2008) (no objective basis to believe that the defendant's well-being or the safety of the public was in "immediate jeopardy" at the time the defendant was "seized" and his open trunk searched); *Commonwealth v. Eckert*, 431 Mass. 591 (2000) (after initial stop of motor vehicle and affirmative response by operator that he was "all set" his community caretaker function was accomplished and officer's further questioning driver's sobriety triggered the heightened constitutional requirement of "reasonable suspicion"); *Commonwealth v. Smigliano*, 427 Mass. 490 (1998) (motorist report that vehicle was "all over the road," coupled with officer's personal observations that supported conclusion that operator was in "immediate need of assistance" enough to justify stop under the "emergency" exception but not the "community caretaker" exception); *Commonwealth v. Lubiejewski*, 49 Mass. App. Ct. 212 (2000) (anonymous report of erratic driving without direct corroboration by officer did not support a stop under community caretaking exception); *Commonwealth v. Canavan*, 40 Mass. App. Ct. 642 (1996) (community caretaker exception did not authorize motor vehicle stop to assist operator that officer thought was lost). *See also Commonwealth v. Quezada*, 67 Mass. App. Ct. 693 (2006) (community caretaker function ended after citizen ran away from officer after being asked if he needed assistance, as his action constituted a "non-verbal response" that he declined assistance);

Finally, Massachusetts has enacted specific legislation that overrides the judicially-defined constitutional exceptions to warrantless searches and seizures when it comes to determining impairment of a motorist under the influence of alcohol for purposes of arrest and or protective custody decisions. G.L. c.111B, §8 authorizes a police officer to take a person who is "incapacitated" by alcohol into protective custody, to "use such force as necessary to carry out his authorized responsibilities" and to hold such person until no longer incapacitated, but not more than 12 hours. G.L. c.111B, §3 defines "incapacitated" as "the condition of an intoxicated person who, by reason of the consumption of intoxicating liquor is (1) unconscious, (2) in need of medical attention, (3) likely to suffer or cause physical harm or damage property, or (4) disorderly. In exercising the authority under the protective custody statute, the applicable standard requires "reasonable suspicion" that a person is incapacitated; the community caretaker exception does not apply. *See Commonwealth v. Eckert*, 431 Mass. 591, 596-97 (2000); *Commonwealth v. Quezada*, 67 Mass. App. Ct. 693, 695-97 (2006).

WPD Officer Training on Warrantless Searches

The training that WPD officers receive in the law of warrantless searches, in general, and the community caretaker function, in particular, do not explicitly address the issue that confronted Sgt. Slocum at the scene on November 29, 2017. Both the Hanrahan Manual (Exh. U) and the 2016-2017 MPTC Legal Issues Guide (Exh. P) conflate the community caretaker excep-

tion and the emergency exception as essentially equivalent. The Hanrahan Manual refers to "Warrantless Emergency Entry Under Community Caretaking (often called the Emergency Circumstances Exception)" and define the community caretaking exception as applicable when police "encounter a person in need of immediate care," citing mostly cases of "emergency" warrantless searches of residential property. Similarly, the MPTC Legal Issues Guide teaches that the community caretaking function "applies when the purpose of the police [intrusion] is not to gather evidence of criminal activity but rather because of an emergency, to respond to an immediate need for assistance for the protection of life or property" (*emphasis added*), citing *Commonwealth v. Bates* [a case in which the SJC held unconstitutional a warrantless search of a residence]. Neither training materials make any reference to the SJC's decision in *Leonard*.

The account of Officer Slocum's five-hour "remedial" retraining confirms the fine line between what may be a "reasonable exercise of discretion" and what a "dereliction of duty" when it comes to a warrantless search in furtherance of the community caretaker function. In fact, during that training, Officer Slocum was advised that: (1) by forcing an entry into Mr. B's locked vehicle to ascertain whether he needed immediate medical assistance, without any objective basis to conclude that he did, or "reasonable suspicion" of impairment, he risked committing an "unjustified seizure" and (2), he could not "force interaction" with Mr. B and, "if he refused to converse, then, at that point my investigation's over."

Sgt. Slocum's Handling of the Call

In assessing Sgt. Slocum's handling of his interaction with Mr. B, I give their testimony substantial weight, as the only percipient witnesses to what they actually saw, heard, knew or did. While I have considered all of the evidence, the testimony of others was based on less reliable hearsay information gleaned from recollection of the radio calls or after-the-fact and third-hand assumptions, including inferences and conclusions that fit the sort of "20/20 hindsight" and "Monday morning quarterbacking" that courts have strictly eschewed.

The preponderance of the evidence established that Sgt. Slocum acted within his discretion in his handling of the initial response to the call for service regarding a "suspicious" person sleeping in a vehicle parked in a residential neighborhood of Whitman. He promptly established that the vehicle was legally parked, the motor was not running, and nothing gave rise to reasonable suspicion or probable cause to believe that laws had been broken. He noted that Mr. B was sitting upright in his seat, not slumped down, had his head back and feet up and was breathing normally. His skin color was normal. There was no drug paraphernalia in the truck and no indicia that Mr. B had recently ingested drugs or consumed alcohol. Mr. B intentionally placed the keys and his driver's license so that they were in plain view for the express purpose of negating any inference that he had operated his truck while impaired (although I infer he most likely knew that he had done so to get to his girlfriend's house). He was asleep when Sgt. Slocum arrived and was awoken by Sgt. Slocum's efforts to make contact, squinting when Sgt. Slocum shined his flashlight at him.

He watched Mr. B for five minutes or more, noting that he had moved around several times.¹⁷ Sgt. Slocum tried to gain access to the truck but found the doors were locked. Sgt. Slocum was headed to get input from the homeowner who had initiated the call, but, when the dispatcher provided somewhat misleading and incomplete information that led Sgt. Slocum to conclude that no one was home, he considered it futile to do so.

Sgt. Slocum had reached a critical decision point. He was running an understaffed shift. By remaining on scene or calling Officer Balonis to join him would continue to leave no other officer available to cover the entire town for the remainder of the shift. Based on his training and experience as a first responder and career police officer, he had concluded, correctly, that there was nothing “suspicious” about Mr. B’s presence and that, in particular, he had no “reasonable suspicion” that Mr. B had or would be committing any crime or was impaired by alcohol within the meaning of the protective custody statute. There was absolutely no indicia of a drug overdose. Mr. B’s physical condition confirmed the “ABCs,” i.e., his airway was clear, he was breathing and his circulation was normal. Mr. B was not so “completely unresponsive” (as Whitman later assumed) that such further efforts to make physical contact were necessary to reasonably conclude that Mr. B did not require “immediate” emergency medical assistance.

Sgt. Slocum also acted appropriately, and consistent with the law, when he paused to take into account that further effort to interact with Mr. B required the use of force to break into the truck, and elected, instead to brief the next shift (starting within the hour) to follow up. His instincts were sound that there was a greater level of uncertainty associated with a decision to break into a locked vehicle to access a passenger inside than if he were able to gain access to Mr. B through an unlocked door. In exercising his judgment about what to do, and in the absence of “objective facts” that Mr. B. was in “immediate” jeopardy of serious injury and no “reasonable suspicion” of impairment or criminal behavior, he was entitled to consider that uncertainty. The case law involving motor vehicle (or property) “well-being” checks is mostly focused on entry via an unlocked door or an operator’s voluntary consent to a request to open the door or exit the vehicle. *See, e.g., Commonwealth v. Leonard*, 422 Mass. 504 (1996); *Commonwealth v. Fisher*, 86 Mass. App. Ct. 48, rev.den., 469 Mass. 1109 (2014); *Commonwealth v. Canavan*, 49 Mass. App. Ct. 642 (1996) The cases that justify forced entry rely on the fact that the entry was made pursuant to a routine inventory search or other well-established policy. *See, e.g., South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (Powell, J., concurring); *Cady v. Dombrowski*, 413 U.S. 433 (1933); *Commonwealth v. Leonard*, 422 Mass. 504

(1996) (Liacos, C.J., dissenting). Although *Commonwealth v. Townsend* is not on all fours (that case involved far more serious, and ultimately justified, concern about foul play), Sgt. Slocum’s judgment here tracks closely to how the police officers and their supervisor handled the response in that case, in which officers returned four times before deciding to force entry.

Loss of Confidence as a Supervisor

The speed within which the WPD command staff and its rank and file uniformly came to the consensus that Sgt. Slocum’s actions on November 29, 2017 showed that he could no longer be trusted to serve in a supervisory capacity raised my eyebrow. At no time during his tenure as a superior officer, had Sgt. Slocum’s supervisory ability ever been questioned. Upon careful consideration, I concur with Sgt. Slocum’s assessment that the conclusion was based, at least in substantial part on “misinformation” and “Monday morning quarterbacking,” both as to the facts presented at the scene (Mr. B was not “totally unresponsive” and displayed no indicia of “immediate need” for medical assistance) and the law (there was a rational basis for Sgt. Slocum to decide that prompt follow-up, rather than an immediate forced entry was the appropriate community caretaker response and to conclude that he then had no “reasonable suspicion” upon which to proceed under the protective custody law or any other criminal statute. In addition, I am unable to reconcile the decision to severely discipline and permanently demote Sgt. Slocum when Chief Benton had no issues promoting another officer to Sergeant soon after he had received (surprisingly minor) discipline for a blatant dereliction of duty (essentially AWOL) by taking his daughter to an amusement park when he was due to appear in court and then lying to his supervisors about it.¹⁸

Allowance of the Appeal

My de novo review of the facts that were known, or should have been known, to the WPD at the time, and the applicable law, demonstrate that the WPD was materially mistaken as to both. As a result, the WPD has failed to meet its burden to establish “just cause” for the discipline imposed on Sgt. Slocum. Even after giving the WPD the benefit of all doubt, the only justifiable criticism of Sgt. Slocum’s performance, perhaps, was his failure to take additional measures, such as using his blue lights, siren or other devices to get Mr. B to acknowledge his presence but not for electing to circle back rather than use immediate force.

I do not miss the point that constitutional law is not a matter that falls within the sphere of the Commission’s “expertise,” and that a police department has considerable discretion to hold its officers to a higher standard. Nor do I mean to suggest that, as a matter

17. Had Sergeant Slocum realized that Mr. B knew that he was trying to make contact but didn’t want to interact with the officer, that “non-verbal” expression that he didn’t want or need assistance, alone, could have justified, indeed, arguably mandated the end of a “community caretaking” function. *See, e.g., Commonwealth v. Murdough*, 428 Mass. 760 (1999); *Commonwealth v. Leonard*, 422 Mass. 504, 510 (1996) (Liacos, C.J., dissenting); *Commonwealth v. Quezada*, 67 Mass. App. Ct. 693 (2006). *See also, State v. Coffman*, 214 N.W.2d (Iowa 2018).

18. I have also considered the Appellant’s argument that witnesses were motivated by self-interest or bias: (1) Officer Burr-Henderson, who was in line to fill the next opening for Sergeant; may have realized that he had not been as clear as he could about the information he conveyed to Sgt. Slocum, and (2) Lt. May-Stafford’s order to have Mr. B.’s car towed could be questioned under the WPD Tow Policy (Exh.T) and the law. (*See Commonwealth v. Oliveira*, 473 Mass. 10 (2016) (inventory search of impounded vehicle that posed no public safety risk held invalid when police failed to let owner make his “one phone call” to arrange for a girlfriend to retrieve it). The Appellant’s contention may have some force, but I find that misinformation, rather than self-interest, played the major role here.

of law, Sergeant Slocum had no legal right to break into Mr. B's truck, but only that, because of the legitimate uncertainty in his mind about that issue and his otherwise reasonable assessment of the scene, his decision not to break into the truck was a fair exercise of his discretion at the time.

The Commission is vested with a duty to enforce "basic merit principles" of civil service law, which mandate that discipline must be remedial, not punitive, designed to "correct inadequate performance" and removing an employee from his or her position only when "inadequate performance cannot be corrected." In particular, Sgt. Slocum's discretionary, and honest judgment that his duty to protect the civil rights of an apparently innocent citizen outweighed the uncertainty of exceeding his authority by use of excessive force, especially when another plausible, albeit not perfect, alternative was available, is not that type of "substantial misconduct which adversely affects the public interest by impairing the efficiency of public service."

In sum, I find no just cause for the severe discipline imposed on Sgt. Slocum. Nothing in this decision is intended to preclude the WPD from, prospectively, clearly and expressly articulating and enforcing a policy (if that, indeed, is its policy) to use all available means to rouse a sleeping motorist, including the use of force to break into a vehicle, in any similar situation.

CONCLUSION

For the reasons set forth above, the appeal of the Appellant, Edward Slocum, Docket No. D-18-076 is hereby *allowed*. His discipline, including the 45-day suspension and demotion is vacated. He shall be restored to his position as Sergeant and receive all other pay and benefits to which he has been entitled.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 23, 2020.

Notice to:

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Reardon, Joyce & Akerson, P.C.
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Worcester, MA01609

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* * * * *

SHAWN SOUZA

v.

MASSACHUSETTS ENVIRONMENTAL POLICE

G1-19-207

April 23, 2020

Christopher C. Bowman, Chairman

Bypass Appeal-Appointment as Environmental Police Officer-Professional Qualifications-Municipal Police Officer—The bypass appeal of a Dartmouth municipal police officer seeking appointment as an environmental police officer was dismissed because the candidate failed to provide necessary documentation showing two years of relevant experience in wildlife management, fisheries management, or conservation law enforcement. Although this candidate listed the portion of his time as a Dartmouth police officer on fisheries management issues on his application, he never quantified this experience to show it amounted to the requisite two years.

ORDER OF DISMISSAL

On October 8, 2019, the Appellant, Shawn W. Souza (Mr. Souza), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Environmental Police (MEP) to bypass him for appointment for the position of Environmental Police Officer A/B (EPO A/B).

2. On October 29, 2019, I held a pre-hearing conference which was attended by Mr. Souza, counsel for MEP and counsel for the state's Human Resources Division (HRD).

3. As part of the pre-hearing conference, counsel for MEP confirmed that Mr. Souza was bypassed for appointment based on a determination that he did not meet the minimum entrance requirements (MEP) of the EPO A/B position.

4. The MERs state that you must have the equivalent to two (2) years of professional or para professional experience in the environmental or related field. Further, in addition to a high school diploma or equivalency, you must have at least two (2) years of full-time, or equivalent part-time, professional or para professional experience in wildlife management; fisheries management; forestry; or conservation law enforcement or related field.

5. The MERS also provide for one year of experience to be substituted through education which not does appear to pertain here.

6. As part of the pre-hearing conference, Mr. Souza listed various experience, which, according to him, taken together, would meet the experience requirement (i.e. - a portion of time spent in his current position of Dartmouth Police Officer on fisheries management issues).

7. Mr. Souza, however, has never quantified this varied experience to show that the experience, taken together, meets the two (2) year requirement.

8. For all of the above reasons, I issued a Procedural Order on October 31, 2019 allowing Mr. Souza thirty (30) days to provide the Commission and MEP with a summary, with accompany documentation, that quantifies all purported experience in a format that would allow MEP to determine whether the cumulative experience meets the MERs. MEP would have thirty (30) days thereafter to review the summary and documentation provided and determine whether the information provided met the MERs.

9. On March 30, 2020, having not received a summary with accompanying documentation from Mr. Souza, I sent him an email stating in part, “Prior to issuing an Order of Dismissal, I wanted to make sure that I did not overlook an email that you sent regarding this matter.” Mr. Souza did not reply to this email.

10. On April 6, 2020, the Appellant replied to my email stating in part: “I was unable to gather any further documentation since the appeal [pre] hearing in regards to further experiences other than what I originally provided during the interview process. I provided every document I was able to...”

ANALYSIS / CONCLUSION

During the hiring cycle, the Appellant did not provide MEP with sufficient information to determine whether he (the Appellant) met the MERs, nor has he done so as part of this appeal process.

In regard to whether time spent as a police officer, even if a portion of that time is spent on environmental related issue, the Commission has previously concluded that:

The MEP ... [is] reasonably justified to bypass [a candidate] for appointment as an EPO A/B on the grounds that he did not possess the minimum entrance requirements specified for the position as approved by HRD. These requirements call for education

and experience that is directly related to the subject of natural resource and environmental protection that are reasonably related to the requirements of the job and have been uniformly applied to all candidates (save for a brief, less than successful experiment that enabled a few candidates to be hired whose qualifications were limited to general police work). The Commission has made clear that, absent proof that job requirements are arbitrary or unequivocally irrelevant to the performance of the duties required of the position, it will defer to the interpretation given to those requirements by the appointing authority, who is best situated and informed on those matters. *See, e.g., Graham v. Department of Conservation & Recreation*, 31 MCSR 337 (2018) (DCRs definition of “major park” and other terms); *Trubiano v. Department of Conservation & Recreation*, 31 MCSR 298 (2018) ...

... [N]either [a] degree in Criminal Justice nor [] general law enforcement experience as a [municipal] Police Officer fit the type of education and experience that MEP deems necessary to meet the minimum entrance requirements.”

Harrell v. Mass. Env. Police, G1-19-065 [33 MCSR 30] (2020)

For all of the above reasons, the Appellant’s appeal under Docket No. G1-19-207 is hereby **dismissed**.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 23, 2020.

Notice to:

Shawn Souza
[Address redacted]

Julia O’Leary, Esq.
EOEEA
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* * * * *

JOSHUA BRUINS

v.

NEW BEDFORD FIRE DEPARTMENT

G1-19-206

May 7, 2020

Paul M. Stein, Commissioner

Bypass Appeal—Original Appointment as a New Bedford Firefighter—State OUI Charge—Pattern of Driving Record Not Shown—Disparate Treatment—The Commission unanimously reversed the bypass of a disabled marine veteran for original appointment to the New Bedford Department, finding that the City had failed to show any consistent pattern of driving offenses when relying, without further inquiry, on a criminal docket and the RMV Driver History Report. In this case, the candidate's only serious offense was an OUI almost 10 years previously and the more recent infractions were trivial matters. Moreover, two successful candidates had far from sterling driving records which suggested disparate treatment.

DECISION

The Appellant, Joshua Bruins, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b), from his bypass for appointment as a Firefighter with the City of New Bedford Fire Department (NBFD).¹ A pre-hearing conference was held at the UMass School of Law at Dartmouth, MA on October 25, 2019 and a full hearing was held at that location on January 10, 2020, which was digitally recorded.² Seven (7) exhibits (*Exhs. 1 through 4A-4J, 5 & 6*) were received in evidence. At the Commission's request the NBFD submitted a CD which I have marked in evidence (*PHExh.7*). Neither party submitted a Proposed Decision. For the reasons stated below, Mr. Bruins' appeal is allowed.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Paul N. Coderre, Jr., Chief, NBFD
- Scott Kruger, Deputy Chief, NBFD

Called by the Appellant:

- Joshua Bruins, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Joshua Bruins is a New Bedford resident in his mid-thirties. He holds a Bachelor's Degree in History and Political Science from UMass Dartmouth. (*Exhs. 3 & 13; Testimony of Appellant*).

2. Mr. Bruins enlisted in the United States Marine Corps and served honorably as an infantry officer and company commander from 2009 until 2013, including two overseas combat deployments. While deployed, he commanded a motorized infantry, which required management of over forty military vehicles from Humvees to tanks. He is a qualified disabled veteran for civil service purposes. (*HRD Submission (10/24/2019); Testimony of Appellant*)

3. While serving in the military, during his off-duty hours while stationed in North Carolina awaiting the processing of his discharge, Mr. Bruins joined a local fire department as a volunteer firefighter. He completed training and was certified as a North Carolina Level I & II Firefighter and EMT. He responded to more than a dozen calls, including one structural fire. After discharge from the Marine Corps, Mr. Bruins moved to Vermont to live temporarily with his father where he also volunteered with the local fire department. (*Testimony of Appellant*)

4. Since the summer of 2013, Mr. Bruins has held the position of vineyard manager at the Westport Rivers Winery in Westport, MA. (*Testimony of Appellant*)

5. Mr. Bruins took and passed the civil service examination for Firefighter administered by the Massachusetts Human Resources Division (HRD) on March 24, 2018 with a score of 99.³ He was ranked third (the highest scoring disabled veteran) on the eligible list established on November 18, 2018. (*Stipulated Facts; HRD Submission (10/24/2019); Testimony of Appellant*)

6. On March 18, 2019, HRD issued Certification No. 06166 to New Bedford for the appointment of six (6), later amended to ten (10), full-time permanent NBFD Firefighters. Mr. Bruins' name appeared in a tie group in the 3rd position on the certification. (*Stipulated Facts; HRD Submission (10/24/2019)*)

7. On or about September 1, 2019, New Bedford appointed a total of ten candidates from Certification No. 06166, all of whom were ranked below Mr. Bruins, who was bypassed. (*Stipulated Facts; Exh.1: Testimony of Deputy Chief Kruger; Chief Coderre*)

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of

the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

3. Mr. Bruins also took the 2016 Firefighter examination but, due to a mistake regarding his status as a New Bedford resident, he was not appointed during the life of that eligible list. (*Exh. 1; Testimony of Appellant*)

8. By letter dated September 16, 2019, NBFD Chief Coderre informed Mr. Bruins that he had not be selected for employment as an NBFD Firefighter, stating the following reason:

“A review of your driving record shows a consistent pattern of offenses. Including, but not limited to an OUI charge and driving an unregistered vehicle with a suspended license as well as a more recent offense (2018) of distracted driving. Respect for the law is an essential qualification to be a member of the New Bedford Fire Department and you chose to disregard it, when compared with other applicants, this reflects poorly.”

(*Exh. 1*)⁴

9. The sole information NBFD relied upon to disqualify Mr. Bruins was a “10-year lookback” of: (his RMV Driver History Report dated May 2, 2019; and (2) a criminal docket concerning 2015 charges (discovered through a routine check for court records in jurisdictions where the candidate resides or has resided). (*Exhs. 2 & 3; Testimony of Deputy Chief Kruger*)

10. The RMV Driver History Report contained the following entries within the past ten years that New Bedford found problematic (Five Incidents):

NDR Violation 0-043-189-584 Sanction	NDR VIOLATION - Reported Date: 03-Aug-2009 Disposition: R Jurisdiction Code: NC NDR VIOLATION Suspended: 02-Sep-2009 to 02-Mar-2011 Reinstated: 02-Mar-2011 Jurisdiction Code: NC Source Violation Id: 0-043-189-584
Out of State Conviction 0-043-189-579 Sanction	DUI OF ALCOHOL OR DRUGS - NC Posted Date: 01-Mar-2011 Violation Date: 07-July-2009 Finding Date: 02-Oct 2009 Disposition: G SDIP Points 5 OPERATING UNDER INFLUENCE (OUI) Suspended: 24-Nov-2019 to 02-Mar-2011 Reinstated: 02-Mar-2011 Jurisdiction Code: NC Source Violation Id: 0-043-189-579
NDR Violation 0-043-189-585 Sanction	NDR VIOLATION - Reported Date: 25-Jan-2012 Disposition: R Jurisdiction Code: NC NDR VIOLATION Pending Period: 25-Jan-2012 to 10-Feb-2012 Cleared: 10-Feb-2012 Jurisdiction Code: NC Source Violation Id: 0-043-189-585
Violation 0-43-168-575	90/7/D - EQUIPMENT VIOLATION, MISCELLANEOUS MV *C90§7 Posted Date: 21-Aug-2015 Violation Date: 12-Aug-2015 Finding Date: 17-Sept-2015 Disposition: R Location: New Bedford Citation No: R6609709

Violation	90/20/B - INSPECTION STICKER, NO *C90§20 Posted Date: 21-Aug-2015 Violation Date: 12-Aug-2015 Finding Date: 17-Sept-2015 Disposition: NP Location: New Bedford Citation No: R6609709
Sanction	PAYMENT DEFAULT Suspended: 27-Oct-2015 to 16-Nov-2015 Reinstated: 16-Nov-2015 Source Violation Id: 0-043-189-575 Citation No. R6609709
Violation	90/9B - UNREGISTGERED MOTOR VEHICLE *C90§9 Posted Date: 30-Nov-2015 Violation Date: 13-Nov-2015 Finding Date: 29-Jan-2016 Disposition: NR Location: New Bedford Citation No: R6614336
Violation	90/23/D - LICENSE SUSPENDED, OP MV WITH *C90§23 Posted Date: 30-Nov-2015 Violation Date: 13-Nov-2015 Finding Date: 20-Jan-2016 Disposition: DISM Location: New Bedford Citation No: R6614336
Warning	90/13B ELECTRONIC MESSAGE, OPERATOR SEND/ READ *C9 Event Date: 9/3/2018

(*Exh. 2; Testimony of Deputy Chief Kruger & Chief Coderre*)

11. The criminal docket disclosed that Mr. Bruins was charged on 11/24/2015 with two offenses allegedly occurring on November 13, 2015 which were the same subject of the Citation No. R6614336 referred to in the RMV Driver History Report above: (1) Operating a Motor Vehicle with License Suspended, which was dismissed on January 29, 2016; and (2) Unregistered Motor Vehicle, for which he was found Not Responsible. (*Exh. 3*)

12. Two other candidates, who ranked below Mr. Bruins and were appointed from Certification No. 06166 had the following infractions on the RMV Driver History Report during the “10-year look-back” period:

Candidate G (Three Incidents)	SURCHARGEABLE ACCIDENT - PROPERTY DAMAGE LIABILITY Posted Date:02-Nov-2009 Incident Date:18- Jul-2009 Finding Date:29-Oct-2009 Disposition:R SDIP Points:3
Accident	SURCHARGEABLE ACCIDENT - COLLISION Posted Date:30-Aug-2012 Incident Date:18- Aug-2012 Finding Date:23-Aug-2012 Disposition:R SDIP Points:4
Accident	

4. An additional reason for the bypass, allegedly falsely claiming to be a New Bedford resident, was not pressed at the full hearing after the Appellant provided satisfactory proof of his residency in New Bedford at the pre-hearing conference.

Accident	SURCHARGEABLE ACCIDENT - COLLISION Posted Date:01-May-2013 Incident Date:16-Dec-2012 Finding Date:26-Apr-2013 Disposition:R SDIP Points:4
	<u>Candidate J (Three Incidents)</u>
Violation	90/17/A - SPEEDING *C90§17 Posted Date:13-Sep-2013 Violation Date:30 Aug 2012 Finding Date:18 Sep-2012 Disposition: R Location: Fall River SDIP Points: 2 Citation Number: R1053347
	90/17/A - SPEEDING *C90§17 Posted Date:05-Jun-2014 Violation Date:23-May-2014 Finding Date:30-Jun-2014 Disposition: NP Location: Fall River Citation Number: R4565192
Violation 0-073-604-221	90/20/B- INSPECTION STICKER, NO *C90§20 Posted Date:05-Jun-2014 Violation Date:23-May-2014 Finding Date:30-Jun-2014 Disposition:NP Location:Fall River SDIP Points:2 Citation Number:R4565192
Sanction	PAYMENT DEFAULT Pending Period: 30 June-2014 to 29-Jul-2014 Cleared:29-Jul-2014 Source Violation Id:0-073-604-221 Citation Number:R4565192
	90/17/A - SPEEDING *C90§17 Posted Date:17-Nov-2016 Violation Date:8-Nov-2016 Finding Date:29-Nov-2016 Disposition R Location:Westport SDIP Points:2 Citation Number: R7561269

(Exhs. 4G & 4J)

13. Mr. Bruins brought up his OUI when he was interviewed by the NBFD and it was discussed thoroughly. The NBFD did not ask him any questions about any other of his driving infractions. (*Testimony of Appellant*)

14. At the Commission hearing, Mr. Bruins provided the following information about the incidents reflected on his RMV Driver History Record:

- He acknowledged that the OUI was a very serious offense. He pointed out that the incident had occurred nearly ten years ago (actually just over ten years ago, measured from the date of bypass) and that he has maintained a clean driving record since then, with his only violation being an “equipment violation” explained below, and no SDIP Points assessed on his record since the OUI.
- He has no recollection of any infraction while in North Carolina and had no knowledge of what the 2012 “NDR Violation” could have been.
- The August 2015 Inspection Sticker violation and the Equipment Violation involved a burned out license plate illumination bulb that he had not fixed before his inspection sticker expired. He rectified the

deficiency, took responsibility for the equipment violation and the inspection sticker violation was dropped.

- The November 13, 2015 charge of operating an Unregistered Vehicle arose when Mr. Bruins was driving a relative’s vehicle without knowing the registration had expired. The criminal charges were dropped, the matter was handled as a civil infraction and he was found Not Responsible for that infraction.
- Mr. Bruins was also charged on November 13, 2015 with Operating with a Suspended License, which had recently been suspended due to non-payment of over-due parking tickets (hence, the Non-Payment Default issued on October 27, 2015). Mr. Bruins did not realize his license had been suspended until he was stopped on November 13, 2015. He immediately cleared up the over-due tickets, his license was reinstated on November 16, 2015, and the criminal charges were dismissed.
- The 2018 Warning for Sending/Receiving Electronic Messages (“what the NBFD bypass letter refers to as “Distracted Driving”, resulted after Mr. Bruins had checked his cell phone while stopped at a traffic light and, when the light turned green, the motorist behind him beeped at him for not starting up right away. The incident was observed by a police officer who pulled Mr. Bruins over and explained that the cell-phone law now prohibited any use of the device, even when stopped at a traffic light.

(Exhs. 2 & 3; *Testimony of Appellant*)

15. As the NBFD had no information about any of Mr. Bruins’ driver history other than the RMV Driver History Report and the Criminal Docket, and asked him no questions about it during the background investigation, neither NBFD witness offered any testimony about the specific facts and circumstances of the criminal charges or entries on the driving record. In particular, the witnesses could shed no light on the 2012 North Carolina entry about which Mr. Bruins had no recollection. (*Testimony of Deputy Chief Kruger & Chief Coderre*)

16. At the Commission hearing, the NBFD witnesses distinguished Mr. Bruins’ driver history from Candidate G and Candidate J on several grounds. Candidate G’s surchargeable accident record was not sufficient to create an unreasonable risk that he may be unsuitable to operate NBFD fire apparatus⁵ because his last accident occurred in 2012, and he had “cleaned up his act” since then. Candidate J’s history of speeding violations was similarly not considered as risky behavior or as “dangerous” as an OUI. (*Testimony of Deputy Chief Kruger & Chief Coderre*)

17. The NBFD witnesses did acknowledge that driving with a broken license plate illumination light (the one offense for which Mr. Bruins was held responsible since 2009) was not a “dangerous” act. The NBFD witnesses also acknowledged that Mr. Bruins’ OUI, alone, would not have necessarily led to the decision to bypass him, but that it was that old offence, together with the “totality” of the continued “pattern” of his driver history that resulted in the bypass decision. (*Testimony of Deputy Chief Kruger & Chief Coderre*)

5. In addition to operating fire apparatus, NBFD firefighters are also called upon to drive the New Bedford EMS ambulance apparatus when both EMS paramedics

are required to remain with a seriously ill or injured patient in route to the hospital. (*Testimony of Deputy Chief Kruger & Chief Coderre*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, §1. *See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); *MacHenry v. Civil Serv. Comm’n*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den.*, 423 Mass.1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L. c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L. c. 31, §2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. *Boston Police Dep’t v. Civil Service Comm’n*, 483 Mass. 474-78 (2019); *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Service Comm’n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’” *Brackett v. Civil Service Comm’n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211,214 (1971) and cases cited. *See also Mayor of Revere v. Civil Service Comm’n*, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”)

Appointing authorities are vested with discretion in selecting public employees of skill and integrity. The commission “cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority” but, when there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy,” then

the occasion is appropriate for intervention by the commission.” *City of Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 428 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L. c. 31, §2(b), also gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority’s action”; it is not necessary for the Commission to find that the appointing authority acted “arbitrarily and capriciously.” *Id.*

ANALYSIS

New Bedford has failed to establish reasonable justification to bypass Mr. Bruins after a thorough and impartial review of his qualifications for appointment to the position of an NBFD Firefighter for the single reason asserted in this appeal, namely, that his driving record “shows a consistent pattern of offenses” and a “disregard” for the law.

First and foremost, I see no basis upon which to conclude that Mr. Bruins’ record reflected a “pattern” of offenses that is disqualifying, especially when the record of Candidate G (with three surchargeable incidents and 11 SDIP points accumulated over the most recent ten year period) is not similarly treated as a “pattern” of offenses. The preponderance of the evidence established that Mr. Bruins committed only one “offense” (an OUI in 2009) and that, save for a civil infraction for operating without an illuminated license plate and a warning for checking his mobile phone while stopped at a traffic light, his driving record has been free of criminal offenses, civil infractions or motor vehicle accidents, and no SDIP points assessed.

Thus, the single criminal “offense” for which Mr. Bruins was ever held responsible occurred in July 2009. The 2018 “offense” mentioned in the bypass letter was not an offense at all, but a warning, and neither were other incidents mentioned in the bypass letter for which he was not held responsible, “offenses” he committed.⁶ The driving an unregistered vehicle charge was dropped, treated as a civil infraction, for which Mr. Bruins was held not responsible and the driving with a suspended license charge was dismissed.

Second, Mr. Bruins does not shy from responsibility for his OUI but notes that this offense occurred in 2009 and that, since then, his criminal record is clean and his driving record, save for a minor citation and a warning, is also clean. (His only surchargeable accident occurred in 2007, well beyond the look-back period applied by New Bedford.)⁷ Mr. Bruins presented himself at the Commission hearing as an honest and sincere individual, as well as an articulate, respectful and effective advocate. He made a very persuasive and convincing case that he took full responsibility for his criminal record and I believe his testimony that he has learned from his OUI. I am convinced that he is not now, and probably never has been, a person who shows a “pattern” of intentional “disregard” for the law.

6. I do not minimize the importance of the public policy underlying the distracted driving law but only that a warning does not trigger any penalty and is not appealable.

7. I note that Candidate G was charged with Reckless Driving in 2008, which New Bedford also did not consider as it fell outside the look-back period. (*Exh.4G*)

I do not suggest that a “10-year look-back” window is, per se, unreasonable. As recently summarized in *Dorn v. Boston Police Department*, 31 MCSR 375 (2018), the Commission, in regard to bypass appeals based on driving histories, generally limits the review to the Appellant’s driving history within the past ten (10) years, but gives greater weight to the most recent five (5) years. Further, the Commission gives more weight to those infractions related to at-fault accidents and other moving violations where the Appellant has been found responsible. Less weight is given to those entries which may be attributable to socioeconomic factors such as expired registrations, no inspection sticker, etc. which may have no bearing on whether the Appellant can effectively serve in a public safety position. The Commission also attempts to put an Appellant’s driving history in the proper context, considering such issues as whether he/she is required to drive more for personal or business reasons. Finally, the Commission reviews the driving histories of other candidates to ensure fair and impartial treatment.

Finally, I note that the practice employed here to rely solely on the information contained in an RMV Driver History Report and a Criminal Docket can be problematic. *See, e.g., Wine v. City of Holyoke*, 31 MCSR 19 (2018); *Teixeira v. Department of Correction*, 27 MCSR 471 (2014); *Gallagher v. City of Leominster*, 22 MCSR 118 (2009) The preferred practice often calls for further inquiry and review, such as accessing the relevant incident reports to identify the specific misconduct, especially, when it is the misconduct, and not a conviction that underlies a bypass decision. While the decision in this appeal does not turn on this point, it might bear notice to consider in future hiring decision.

In sum, in the circumstances of this particular case, considering how close this one offense was to the “look-back” window, combined with the record of law-abiding behavior since that one offense, the record does not support a conclusion that Mr. Bruins presents a sufficiently risky “pattern” of behavior that disqualifies him as the NBFD asserted. Even the NBFD witnesses relied on the “totality” of the evidence, and acknowledged that the OUI, alone, probably did not justify the bypass.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Joshua Bruins is **allowed**.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/or the City of New Bedford in its delegated capacity take the following action:

- Place the name of Joshua Bruins at the top of any current or future Certification for the position of Firefighter with the New Bedford Fire Department (WFD) until he is appointed or bypassed after consideration consistent with this Decision.
- If Mr. Bruins is appointed as an NBFD Firefighter, he shall receive a retroactive civil service seniority date which is the same date as the first candidate ranked below him appointed from Certification No. 06166. This retroactive civil service seniority date is not intended to provide Mr. McManus with any additional pay or benefits including, without limitation, creditable service toward retirement.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 7, 2020.

Notice to:

Joshua Bruins
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* * * * *

MICHAEL GOLDEN

v.

DEPARTMENT OF CORRECTION

G1-19-198

May 7, 2020

Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointment as a Correction Officer I-Criminal Record-Guilty Pleading to Assault and Battery-Sealed Criminal Record-Staleness—In what they considered to be a very close call, three other Commissioners adopted Chairman Christopher C. Bowman’s decision affirming the bypass of a candidate for appointment as a Correction Officer I based on a 19-year-old misdemeanor for assault and battery. The candidate had an otherwise stellar record since that time that included military service, stable family history, and solid employment references. Hoping that DOC would reconsider the bypass, the decision is held in abeyance for 60 days, giving the agency time to review candidate’s application again should it chose to do so. Commissioner Paul M. Stein dissented, arguing that the candidate deserved a chance and his stellar record was a better indication of his potential with DOC than a misdemeanor from long ago.

DECISION

On September 19, 2019, the Appellant, Michael L. Golden (Appellant or Mr. Golden), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Department of Correction (DOC) to bypass him for original appointment as a permanent, full-time Correction Officer I (CO I). I held a pre-hearing conference on October 15, 2019 at the offices of the Commission and I held a full hearing at the same location on December 9, 2019.¹ The hearing was digitally recorded.² The parties submitted proposed decisions on January 9, 2019 (Appellant) and January 10, 2019 (DOC).

FINDINGS OF FACT

Ten (10) exhibits were entered into evidence at the hearing. Exhibit 7 (the Appellant’s sealed criminal record) was entered de bene and the parties were given the opportunity to address its admissibility in their post-hearing briefs. For the reasons discussed in the analysis, those records are admissible. Based on the exhibits, the stipulated facts, the testimony of:

Called by DOC:

- Eugene T. Jalette, Supervising Identification Agent, DOC ;

Called by the Appellant:

- Michael Golden, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant is forty-eight (48) years old. He has lived in Pembroke since 2007, where he currently resides with his wife and two (2) children. (Testimony of Appellant; Exhibit 10)
2. His neighbor, who has been employed by DOC since 2012 and has known the Appellant for five (5) years, describes him as a “dependable, outgoing, personable, stand-up guy.” (Exhibit 9)
3. The Appellant has been a member of the Army National Guard since 1997. He served tours of duty in Iraq (2005) and Afghanistan (2010). (Testimony of Appellant; Exhibit 10)
4. A fellow member of the Army National Guard, who served with the Appellant in Iraq and Afghanistan, describes him as an “extremely dependable” person who handles stressful situations well. He told the DOC background investigator that: “If 10 applicants for a job all walked into an interview at the same time, the [Appellant] would beat all ten out due to his professionalism. (Exhibit 9)
5. The Appellant has been employed since 2016 by a private company where he works at a local transfer station running the scale weighing trucks, working approximately 40-50 hours per week. (Testimony of Appellant and Exhibit 10)
6. For the five years prior to 2016, the Appellant worked for a collection agency. His supervisor at the time told the DOC background investigator that the Appellant “had good relationships with all coworkers and was considered a very mature family man.” She noted that the Appellant was one of her top collectors, was always on time for work and never abused sick time. (Exhibit 9)
7. On October 20, 2018, the Appellant took and passed the civil service examination for CO I. (Stipulated Fact)
8. On February 6, 2019, the Appellant’s name appeared tied for 11th on Certification No. 06084, from which DOC ultimately appointed 147 candidates. 145 of those appointed candidates were ranked below the Appellant. (Stipulated Facts)
9. The bypass letter sent to the Appellant by DOC stated that the Appellant was being bypassed due to: “Failed Background due to your Massachusetts Board of Probation sealed and not sealed cases that includes a 2000 guilty plea for Assault and Battery and supporting police reports.” (Exhibit 2)
10. Eugene T. Jalette, Supervising Identification Agent for DOC, testified that the “biggest issue” for DOC was the above-refer-

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

enced 2000 assault and battery conviction. (Testimony of Mr. Jalette)

DOC's Review of the Appellant's Background

11. On March 15, 2019, the Appellant completed an “Application for Employment.” (Exhibit 10)

12. DOC accessed and obtained Criminal Offender Record Information (CORI) regarding the Appellant from the state’s Criminal Justice Information Services (CJIS). This information is accessed online by CJIS-authorized DOC employees. (Testimony of Jalette and Exhibits 3, 5, 6 and 7)

13. In response to the CJIS inquiry regarding the Appellant, DOC received two documents that are relevant to this appeal: 1) a document titled “MA Criminal History (BOP)”³; and 2) the Appellant’s sealed criminal record. (Exhibits 6; Exhibit 7 and Testimony of Mr. Jalette)

14. On April 15, 2019, as part of the background investigation, a DOC background investigator met with the Appellant at his home. During that background interview, the Appellant was asked to address the various entries on his sealed and unsealed CORI records. (Testimony of Appellant)

15. In regard to the one entry on his unsealed record, the Appellant told the investigator that, in 1996, his now ex-wife and he had a verbal argument that escalated; they “came to blows”; she hit the Appellant; the Appellant grabbed his ex-wife’s arm. The Appellant went to his mother’s house. A restraining order was issued and dismissed a few weeks later. (Testimony of Appellant)

16. During that same home interview on April 15, 2019, the Appellant, in response to questions regarding the sealed criminal records that DOC had obtained, provided the DOC background investigator with the information contained in the findings that follow. (Testimony of Appellant and Exhibit 9)³

17. In 1996, the Appellant was charged with assault and battery in relation to the events that resulted in the restraining order. The criminal charge was dismissed the same day as the restraining order. (Testimony of Appellant and Exhibit 9)

18. The Appellant was found not guilty of breaking and entering after a jury trial in 2001. The Appellant denied any involvement in the alleged crime. (Exhibit 9 and Testimony of Appellant)

19. In 2000, the Appellant was 29 years old. He was driving a car on Route 9; his mother was a passenger in that car. The Appellant’s vehicle was “rear-ended” by the driver of another vehicle, who the Appellant came to believe was a drunk driver. The Appellant exited his vehicle and approached the vehicle that had just rear-ended him; and opened the driver’s side door of that vehicle. The driver of the vehicle swung at the Appellant two or three times and missed. The Appellant proceeded to punch the driver of that vehicle multiple times until he was asked to stop by a witness who

told the Appellant that he (the witness) had already called police. The State Police arrived. The State Police issued the Appellant a summons but he never received it. A default warrant was issued and the Appellant was subsequently arrested. The Appellant pled guilty to assault and battery (a misdemeanor); he was sentenced to six months’ probation and ordered to perform 50 hours of community service. (Testimony of Appellant)

20. The background investigator’s report indicates that, on April 18, 2019, the investigator contacted the police department in the Town of Pembroke where the Appellant has resided since 2007, and “no negative findings” were reported to him. (Exhibit 9)

21. The background investigator’s report also indicates, on April 18, 2019, the investigator contacted the Marshfield Police Department and there were “multiple reports” and that “all reports added to the applicant’s file”. The only Marshfield Police Department report submitted as evidence by DOC was a May 20, 2000 police report regarding the assault and battery charge for which the Appellant was eventually found not guilty. (Exhibits 8 and 9)

22. The background investigator’s summary of the “police reports” is consistent with the information provided by the Appellant. (Testimony of Appellant and Exhibit 9)

23. In regard to the assault and battery charge and the underling incident on Route 9, the background investigator’s report states that he was told by the State Police that “due to the fact that the applicant[’]s records were sealed, they would have to forward their request to their legal department. This investigator was then told if they were allowed to release the report, it would be forwarded to DOC HRD. (Exhibit 9) No report from the State Police was submitted by DOC as part of these proceedings.

24. Under “positive employment aspects”, the background investigator wrote: “Active National Guard with Two Deployments; Strong References.” Under “negative employment aspects”, the investigator wrote: “Guilty plea on Assault and Battery Charge; History of Negative Interactions with Marshfield Police Department.” (Exhibit 9)

25. The DOC Commissioner, who is the appointing authority, was personally involved in the decision-making process here and was provided with the Appellant’s entire package, including his application, his CORI records and the investigator’s report. The Commissioner concluded that the assault and battery conviction was the most problematic issue and decided to bypass the Appellant for appointment. (Testimony of Mr. Jalette)

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on “[b]asic merit principles.”

3. I have not included references to other minor and stale (i.e. - charges related to graffiti) matters that occurred well over 20 years ago.

Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, citing *Cambridge v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300, 304 (1997). “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, section 1. 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* at 304.

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 *Commissioners of Civil Service v. Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975); and *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. *City of Beverly v. Civil Service Comm’n*, 78 Mass. App. Ct. 182, 189, 190-191 (2010) citing *Falmouth v. Civil Serv. Comm’n*, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. *Beverly* citing *Cambridge* at 305, and cases cited. “It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree.” *Town of Burlington and another v. McCarthy*, 60 Mass. App. Ct. 914, 915 (2004).

Disputed facts regarding alleged prior misconduct of an applicant must be considered under the “preponderance of the evidence” standard of review as set forth in the SJC’s recent decision in *Boston Police Dep’t v. Civil Service Comm’n*, 483 Mass. 461 (2019), which upheld the Commission’s decision to overturn the bypass of a police candidate, expressly rejecting the lower standard espoused by the police department. *Id.*, 483 Mass. at 333-36.

ANALYSIS

The bypass letter sent to the Appellant states that the reasons for bypass were: “Failed background due to your Massachusetts Board of Probation sealed and not sealed cases that includes a 2000 guilty plea for Assault and Battery and supporting police reports.” To ensure clarity, the list of “unsealed” entries on the CJIS reports provided to DOC totals 1—the ex parte temporary restraining order that was issued on 10/24/96 and dismissed on 11/21/96. Although the background investigator’s report indicates that he talked to Marshfield Police about a related (sealed) charge, DOC had no further information about this restraining order at the time of bypass other than what the Appellant self-reported to the investigator during the background interview. The Appellant offered

detailed testimony about the underlying incident that occurred 23 years ago with his ex-wife. While the Commission has long held that evidence of domestic violence is a valid reason to bypass a candidate for appointment, particularly in regard to public safety appointments, the facts, as shown here, including that the event occurred more than 2 decades ago and that the ex-parte restraining order and criminal charges were dismissed a few weeks later, do not provide a valid reason for bypassing the Appellant in 2019.

That turns to the other reason for bypass: “not sealed cases that includes a 2000 guilty plea for Assault and Battery and supporting police reports.” Critical to deciding this case are the following questions:

1. Was DOC permitted to rely on the Appellant’s sealed criminal records and/or the underlying incident related to those records to justify its decision to bypass him?
2. Should DOC be permitted to enter those sealed criminal records as an exhibit before the Commission?
3. Assuming that DOC can rely on the sealed criminal records and/or the underlying incidents, do they justify DOC’s to bypass the Appellant for appointment?

As referenced in the findings, DOC accessed and obtained the sealed Criminal Offender Record Information (CORI) regarding the Appellant from the state’s Criminal Justice Information Services (CJIS). Nothing on that sealed report constituted a statutory disqualifier from serving as a correction officer, nor was the Appellant, as part of his DOC employment application, required to answer any questions related to information on that sealed report. The background investigator, after receiving the sealed report, met with the Appellant and asked him to address entries on that report. In response, the Appellant provided detailed responses, including the details related to the 2000 assault and battery charge, to which he pled guilty and was sentenced to probation and community service.

The Commission, in *Kodhimaj v. DOC*, 32 MCSR 377 (2019), previously concluded that DOC, as a criminal justice agency, may rely on criminal records not available to non-criminal justice employers, stating in part:

“DOC’s ability to receive all of the Appellant’s CORI information from CJIS appears to be derived from that section of the state’s CORI Law (G.L. c. 6, § 172) which states in relevant part:

‘ ... Criminal justice agencies may obtain all criminal offender record information, including sealed records, for the actual performance of their criminal justice duties ... ’

Among the criminal justice duties that DOC must perform is the appointment of suitable candidates, such as CO Is, to provide for the care and custody of criminal offenders. In that context, it is appropriate for DOC to conduct a thorough review of a candidate’s background, including the review of a candidate’s entire criminal offender record information. This is consistent with years of Commission decisions involving the bypass of criminal justice candidates based on their entire criminal record.”

Since none of the criminal records in *Kodhimaj* were sealed, the Commission did not need to address whether DOC could rely on sealed criminal records to justify a bypass and admit those records into evidence before the Commission.

G.L. c. 276, Section 100A, provides, in pertinent part, as follows:

“... sealed records shall not operate to disqualify a person in any examination, appointment or application for public service in the service of the commonwealth or of any political subdivision thereof; nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any board or commissions...”

G.L. c. 276, Section 100D, provides as follows:

“Notwithstanding any provision of section 100A, 100B or 100C of this chapter, criminal justice agencies as defined in section 167 of chapter 6 shall have immediate access to, and be permitted to use as necessary for the performance of their criminal justice duties, any sealed criminal offender record information as defined in section 167 of chapter 6 and any sealed information concerning criminal offenses or acts of delinquency committed by any person before he attend the age of 17.” (emphasis added)

The Appellant argues that, regardless of whether DOC had the ability to obtain the Appellant’s sealed records, the entries contained within that sealed record should not have been used as a basis to bypass the Appellant for employment as that is directly in contradiction with G.L. c. 276, § 100A. Further, even assuming, without conceding, that DOC properly used the Appellant’s sealed record as a basis for the bypass decision, in accordance with the provisions of G.L. c. 276, § 100A, the Appellant argues that the sealed records should not be admitted into evidence by the Commission and should not be considered by the Commission in making its decision on this appeal citing that portion of Section 100A which states: “nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any board or commissions....”

The Appellant argues that, unlike G.L. c. 276, § 100D, which enables law enforcement agencies to immediately obtain sealed records for their “criminal justice duties”, there is no similar exception in § 100A for the admissibility of sealed records in the context of “...hearings before any board or commissions.”

In addition to relying on the Commission’s decision in *Kodhimaj*, DOC argues that, whether the Appellant’s records are sealed or not becomes less important since the Appellant admitted, both to DOC and the Commission, that he committed the misdemeanor, which carries a potential sentence of up to 2 ½ years in a house of correction.

The legislature has explicitly provided criminal justice agencies with the ability to: “obtain” and “use as necessary” sealed criminal records for the “actual performance of their criminal justice duties.” (G.L. c. 6, s. 172 & G.L. c. 276, s. 100D). First, DOC is a “criminal justice agency”. Second, as stated in *Kodhimaj*, the appointment of suitable candidates, such as CO Is, to provide for the care and custody of criminal offenders, is among the criminal justice duties that DOC must perform. In that context, it is

appropriate for DOC to conduct a thorough review of a candidate’s background, including the review of a candidate’s entire criminal offender record information, including sealed criminal records. Third, based on the above, it would be nonsensical and inconsistent with the above referenced statutes to prohibit DOC from entering the sealed criminal record into evidence before the Commission.

As discussed in *Kodhimaj*, however, DOC cannot rely solely on entries on a (sealed or non-sealed) criminal history record if the entry does not constitute an automatic statutory disqualifier. Rather, DOC must give the Appellant a chance to address the criminal record, in regard to both its accuracy and relevance to the job. Here, the background investigator informed the Appellant at the outset about the CORI-related information he had obtained and then offered the Appellant the opportunity to address the information. DOC’s process is consistent with the intent of the statute: be transparent, let the Appellant know what additional CORI-related information you have obtained; and then allow him/her to provide an explanation about the alleged or actual misconduct. Put another way, DOC cannot rely solely on the CJIS records themselves to bypass the Appellant. Rather, only after speaking with the Appellant and gathering any other relevant information (i.e. - police reports, etc.) regarding the accuracy and relevance of the underlying misconduct, can DOC consider the underlying misconduct as a possible reason for bypass.

That turns to whether the Appellant’s criminal conduct is a valid reason for bypass. DOC acknowledges that the assault and battery charge from 19 years ago, for which the Appellant pled guilty, was the major reason for the decision to bypass him for appointment. DOC argues that the Appellant used poor judgment in handling an interaction with the driver who rear-ended his car. Opening the door of the driver’s car and repeatedly punching the individual, according to DOC, demonstrates a lack of self-control; a quality that is necessary for a Correction Officer as inmates frequently throw bodily fluids at COs, and are often violent. DOC argues that handling situations like those described requires patience and self-control, qualities that, according to DOC, appear to be lacking in the Appellant. Thus, DOC argues, there was a sufficient nexus between the candidate’s prior misconduct and his potential ability to perform the duties of a Correction Officer.

The Appellant argues that it is manifestly unjust to bypass him for appointment, given that the bypass was based upon a Guilty plea for an Assault and Battery from 2000; approximately nineteen (19) years have passed since that Guilty plea; he has had no further legal difficulties in the intervening years, during which time he has sought and maintained gainful employment with positive reports from his employer; served two deployments with the National Guard; re-married, become a homeowner and is raising two children. Preventing him from employment with the DOC, based primarily upon an approximately nineteen (19) year old Guilty plea for a misdemeanor offense when all other factors are highly favorable certainly, argues the Appellant, amounts to an arbitrary and capricious action on the part of DOC.

This is a (very) close call. In its recent decision in *Boston Police v. Civ. Serv. Comm'n and Gannon*, the SJC confirmed that an Appointing Authority must prove, by a preponderance of the evidence, *that the Appellant actually engaged in the alleged misconduct used as a reason for bypass*. However, the Court also *reaffirmed* that, once that burden of proof *regarding the prior misconduct* has been satisfied, it is for the appointing authority, not the commission, to determine whether the appointing authority is willing to risk hiring the applicant. Specifically, the SJC stated in relevant part:

“a police department should have the discretion to determine whether it is willing to risk hiring an applicant who has engaged in prior misconduct ... However, where, as here, the alleged misconduct is disputed, an appointing authority is entitled to such discretion only if it demonstrates that the misconduct occurred by a preponderance of the evidence. *See Cambridge*, 43 Mass. App. Ct. at 305; G. L. c. 31 § 2 (b).

In *Cambridge*, *supra* at 305, the Appeals Court held that where an applicant has engaged in past misconduct, it is for the appointing authority, not the commission, to determine whether the appointing authority is willing to risk hiring the applicant. However, the misconduct in *Cambridge* was undisputed by the applicant. Here, in contrast, the question whether Gannon engaged in past misconduct was the single issue brought before the commission. Because the failed drug test was the department's proof that Gannon ingested cocaine and was the sole reason for the bypass, it was the department's burden to prove by a preponderance of the evidence that the test reliably demonstrated that Gannon had ingested cocaine. To the extent that the dissent suggests that there are occasions when an appointing authority need not demonstrate reasonable justification by a preponderance of the evidence as required by G. L. c. 31, § 2 (b), we disagree.

In *Beverly*, 78 Mass. App. Ct. at 190, the Appeals Court concluded that the commission erred as a matter of law when it required the city to prove that the candidate committed the misconduct for which he was fired from a previous job. In so doing, the Appeals Court articulated a different standard of proof to be applied in cases where an applicant's misconduct is in dispute, i.e., an appointing authority need only demonstrate “a sufficient quantum of evidence to substantiate its legitimate concerns.” *Id.* at 188. See G. L. c. 31, § 2 (b).[30] It is error to apply any standard other than a preponderance of the evidence in this context. *See Anthony's Pier Four Inc. v. HBC Assocs.*, 411 Mass. 451, 465 (1991), quoting *Commonwealth v. Hawkesworth*, 405 Mass. 664, 669 n.5 (1989) (“an appellate court ‘carefully scrutinizes the record, but does not change the standard of review’”).

Citing to *Cambridge*, 43 Mass. App. Ct. at 305, the court in *Beverly*, 78 Mass. App. Ct. at 190, further suggested that to require an appointing authority to prove a candidate's alleged misconduct “would force the city to bear undue risks.” However, the “risk” discussed in *Cambridge* pertained to risk that the candidate might engage in future misconduct, not risk that the candidate engaged in past misconduct.

For these reasons, the department may not rely on demonstrating a “sufficient quantum of evidence” to substantiate its “legitimate concerns” about the risk of a candidate's misconduct. *Beverly*, 78 Mass. App. Ct. at 188. Instead, it must, as required by G. L. c. 31, § 2 (b), demonstrate reasonable justification for the bypass by a preponderance of the evidence.”

Applied here, it is undisputed that the Appellant engaged in criminal behavior 19 years ago. DOC effectively argues that, as part of a thorough review in which the Appellant was given the opportunity to address the underlying misconduct, they exercised their discretion not to assume the risk of hiring the Appellant based on that prior misconduct. The Appellant argues that, rather than being a valid exercise of discretion, DOC's decision here was arbitrary and capricious.

I can't conclude that DOC's decision here was necessarily “arbitrary and capricious” as it did not “lack any rational explanation that reasonable persons might support.” *Cambridge v. Civil Serv. Commn.*, 43 Mass. App. Ct. 300, 303 (1997).

In regard to the broader issue of whether the Appellant's behavior from 19 years ago provides DOC with reasonable justification to bypass the Appellant, there are strong public policy arguments suggesting it is not. Leaders across the political spectrum in Massachusetts have stressed the need to avoid looking at a snapshot of who a candidate was many years ago, but, rather, to look at who that candidate is today, as defined primarily by the intervening years since the misconduct occurred.

Here, the Appellant has a 19-year record of being a good citizen, serving two tours of active military duty in Iraq and Afghanistan, raising a family, maintaining steady employment and, importantly, no evidence of any criminal misconduct during that time period. That 19-year record would appear to be a better predictor of whether the Appellant has the patience and self-control needed to serve as a correction officer.

The Commission reached a somewhat similar conclusion in *Laguerre v. Springfield Fire Department*, 25 MCSR 549 (2012). In *Laguerre*, the Appellant had pled “no contest” to a charge of assault and battery with a dangerous weapon (a felony) 15 years prior to seeking appointment as a firefighter. The Commission questioned the reasonableness and legitimacy of relying on this criminal misconduct, particularly given that Mr. Laguerre, similar to Mr. Golden, had been a model citizen for the intervening 15 years, including serving two tours of duty in Iraq. In *Laguerre*, however, the Springfield Fire Department failed to even *consider* the intervening 15 years, discontinuing the review process after learning of Laguerre's criminal record.

Here, as referenced above, DOC *did* consider the 19 intervening years since Mr. Golden engaged in criminal behavior and DOC *did* give Mr. Golden the opportunity to address his criminal history. After what appears to be careful review and consideration, the DOC Commissioner, after weighing all factors, concluded that it would be too great of a risk to appoint Mr. Golden to the stressful position of CO I. To me, that conclusion stretches the bounds of reasonableness, commonsense and equity. However, given that the criminal misconduct is undisputed; given that DOC did the type of thorough review required, which included a consideration of the Appellant's entire history; and given that DOC has articulated specific, rational reasons supporting their conclusion that the Appellant's appointment could, arguably, create too high of a risk,

I see no basis upon which the Commission can overturn DOC's discretionary decision here.

However, for the reasons stated above, including the compelling public policy arguments in favor of giving more weight to the Appellant's now two decades of being a model citizen, the Commission is making this decision effective sixty days from the date of issue. To ensure clarity, we encourage DOC to use this sixty-day period to reconsider their decision to bypass the Appellant for appointment. Should DOC ultimately decide that the Appellant, at a minimum, deserves a second look in a subsequent hiring cycle, the Commission would grant the appropriate relief to facilitate that reconsideration.

CONCLUSION

The Appellant's appeal under Docket No. G1-19-198 is hereby *denied*, with a future effective date of July 7, 2020

OPINION OF COMMISSIONER STEIN

I respectfully dissent. I agree with the majority that the record here presents a very close call and, because it is such a close call, I would require a heightened scrutiny and more clearly articulated explanation for the DOC's conclusion that the Appellant's 19-year-old misdemeanor conviction serves as a rational justification to trump an otherwise stellar personal and professional record which gives every indication of the Appellant's present suitability to serve as a DOC Correction Officer. The majority is correct that the Commission should not be substituting its judgment for the rational exercise of discretion afforded to an appointing authority, but that discretion is not unfettered.

Massachusetts law has defined those offenses and misconduct that are, indeed, sufficiently problematic as a matter of law, that they may bar a candidate "forever" from appointment to the DOC, such as a felony conviction or prior incarceration. The Appellant's misconduct, here, as inexcusable as it was, is not in that category. Thus, when an appointing authority relies on a discretionary decision that is as close a call as even the majority describes, I do not believe that the Commission is required to give rote deference to the decision but must require, in the unusual and rare circumstances presented, more than the DOC has done here to persuade the Commission that there is a demonstrable, not hypothetical, nexus between the single instance of proved misconduct involved and a candidate's present "ability, knowledge and skills", which is the standard of suitability required by basic merit principles.

I would allow this appeal and provide the Appellant with one additional opportunity to prove his qualification for appointment as a DOC Correction Officer under the heightened standard of scrutiny that I believe his record entitles him.

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, and Tivnan, Commissioners—Yes; Stein, Commissioner—No) on May 7, 2020.

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* * * * *

MICHAEL LYNCH

v.

TOWN OF ARLINGTON

G2-19-171

May 7, 2020

Christopher C. Bowman, Chairman

Bypass Appeal-Provisional Promotion-Promotion to Arlington Parks Supervisor—The Commission dismissed the appeal from a candidate for a promotional appointment to Arlington Parks Supervisor, finding that the Town followed all the necessary steps for making a provisional promotion where both candidates were tenured in civil service, both were serving in the next lower title, and the relevant departmental unit was properly the Department of Public Works. No examination has been given for Parks Supervisor statewide for decades.

DECISION

On August 16, 2019, the Appellant, Michael Lynch (Mr. Lynch), filed an appeal with the Civil Service Commission (Commission), contesting his non-selection by the Town of Arlington (Town) for the position of Parks Supervisor.

2. On September 10, 2019, I held a pre-hearing conference at the offices of the Commission, which was attended by Mr. Lynch, the vice president of the local union, counsel for the Town and representatives from the Town's Human Resources Department and DPW.

3. At the pre-hearing conference, the parties agreed that Mr. Lynch is a permanent, tenured civil service employee in the labor service position of Working Foreman - Laborer. He has been employed by the Town for over thirty (30) years. The person selected is also a permanent, tenured civil employee, previously holding the labor service position of Working Foreman - Water and Sewer.

4. According to the Appellant, he has previously served as "Acting Parks Supervisor" when the former incumbent(s) has/have been out for an extended period of time.

5. At the pre-hearing conference, the Town submitted a Motion to Dismiss, arguing that: a) the position of Parks Supervisor is an of-

ficial service position; b) the vacancy was filled via a provisional appointment; and, therefore, c) there was no bypass.

6. At the pre-hearing, the City was unable to provide documentation to verify that the position of Parks Supervisor is an official service position in Arlington. Also, the posting did not specifically state that the position was filled through a provisional “appointment”. As both of these issues would impact the outcome of this appeal and/or how the appeal would be processed, I asked the Town to provide the Commission with additional information / verification on both issues.

7. On September 30, 2019, I received information from the Town which, according to the Town, verified that the position of Parks Supervisor was an official service position and that the Town made a provisional appointment to that position, as opposed to a provisional promotion.

8. On October 16, 2019, the Appellant submitted a reply, arguing that: 1) the Town had not shown that Parks Supervisor was an official service position; and 2) the Town made a provisional promotion (not a provisional appointment).

9. On October 29, 2019, I asked the state’s Human Resources Division (HRD) to provide me with any information regarding whether the Parks Supervisor position was an official service or labor service position. I received the requested information from HRD on January 10, 2020.

10. Based on a careful review of the record as of that point, including the information provided by HRD, the preponderance of evidence showed that the position of Parks Supervisor in Arlington was/is an official service position. Further, the preponderance of the evidence did not support the Town’s argument that the position was filled as a provisional appointment (i.e. - the posting was limited to internal applicants; there was nothing stated on the posting that it was a provisional appointment, etc.) Rather, the preponderance of the evidence shows that the position was filled as a provisional *promotion*.

11. Based on those findings, I provided the Town with the opportunity to submit an additional brief addressing whether the Town followed the provisions of G.L. c. 31, s. 15 regarding provisional promotions.

12. On February 28, 2020, the Town submitted a supplemental brief. While the Town continued to argue that the position was filled as a provisional appointment, it argued that, even if deemed a provisional promotion by the Commission, the Town’s actions here conformed with Section 15 of the civil service law.

13. On April 10, 2020, the Appellant submitted a rebuttal. Among the arguments raised by the Appellant was that the reference to the “departmental unit” in Section 15 should be considered the Parks Department, as opposed to the Town’s argument that the “departmental unit” should be considered the Department of Public Works. Both the Appellant and the selected candidate work within

the Department of Public Works, with the Appellant falling under Parks and the selected candidate under Water and Sewer.

14. On April 20, 2020, the Town, in partial response to my request, provided me with excerpts of those Acts related to the creation of a DPW in Arlington.

APPLICABLE LAW / ANALYSIS

The position of Parks Supervisor is an official service position. All of the relevant records, including those provided by HRD, firmly establish this and the Appellant cannot provide any evidence to the contrary.

Since this involves an official service position, there was no permanent, “promotional appointment” as, pursuant to G.L. c. 31, §§ 7 & 8, permanent, promotional appointments to an official service position require taking an examination. As no examinations for Parks Supervisor have been given statewide for decades, appointing authorities must fill vacancies for this, and almost all other non-public safety positions, through a provisional appointment or provisional promotion. This is commonly referred to as the “plight of the provisionals” in Massachusetts.

For the purposes of deciding this matter, and because the evidence supports it, I have accepted the Appellant’s argument that the Town made a provisional *promotion* here, as opposed to a provisional *appointment*. Specifically, the Town did not post this vacancy as a provisional appointment and considered only internal candidates. Thus, the question turns to whether the Town followed those provisions of the civil service law regarding provisional promotions.

In a series of decisions, the Commission has addressed the statutory requirements when making provisional appointments or promotions. *See Kasprzak v. Department of Revenue*, 18 MCSR 68 (2005), on reconsideration, 19 MCSR 34 (2006), on further reconsideration, 20 MCSR 628 (2007); *Glazer v. Department of Revenue*, 21 MCSR 51 (2007); *Asiaf v. Department of Conservation and Recreation*, 21 MCSR 23 (2008); *Pollock and Medeiros v. Department of Mental Retardation*, 22 MCSR 276 (2009); *Pease v. Department of Revenue*, 22 MCSR 284 (2009) & 22 MCSR 754 (2009); *Poe v. Department of Revenue*, 22 MCSR 287 (2009); *Garfunkel v. Department of Revenue*, 22 MCSR 291 (2009); *Foster v. Department of Transitional Assistance*, 23 MCSR 528; *Heath v. Department of Transitional Assistance*, 23 MCSR 548.

These decisions provide the following framework regarding provisional promotions that is relevant to this appeal: G.L. c. 31, §15 permits a provisional promotion of a permanent civil service employee from the next lower title within the departmental unit of an agency, with the approval of the Personnel Administrator (HRD).

First, there is no dispute that both the Appellant and the promoted candidate were permanent civil service employees prior to this provisional promotion.

Second, the Town has established that both the Appellant and the promoted candidate were serving in a position in the next lower title. In fact, if the selected candidate cannot be considered to have been serving in the next lower title at the time of the promotion, the same would apply to the Appellant, potentially undermining his appeal on other grounds.

Third, the applicable Special Acts of the Legislature explicitly state that the Town's Board of Selectmen may establish a "Department Public Works" managed by a "Superintendent of Public Works" under which there are "divisions". This, along with the supporting documentation regarding guidance provided to the Town regarding prior layoffs, establish that the applicable "departmental unit" here is the Department of Public Works, as opposed to the *divisions* that fall under the DPW. (See *Moran v. City of Brockton*, 29 MCSR 102 (2016) citing *Herlihy v. Civ. Serv. Comm'n*, 44 Mass. App. Ct. 835, 840, rev. den., 428 Mass. 1104 (1998)). Both the promoted candidate and the Appellant served in the DPW at the time of the promotion.

In regard to whether the Town was required to obtain HRD's approval before making this promotion, HRD, since 2009, has delegated the vast amount of decision-making authority regarding *permanent* appointments and promotions to cities and towns. Under that delegation, for example, cities and towns are no longer required to submit bypass reasons to HRD for approval regarding permanent appointments and promotions. Further, as referenced above, the vast majority of non-public safety civil service appointments and promotions have been done provisionally across Massachusetts for decades with no objection from HRD. In this context, the approval referenced here in regard to *provisional* promotions, even if not explicitly listed in the delegation agreements, has truly become a ministerial function.

For all of the above reasons, the Town has complied with those parts of the civil service law and rules regarding provisional promotions. Thus, the Appellant's appeal under Docket No. G2-19-171 is hereby *dismissed*.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and

Tivnan, Commissioners) on May 7, 2020.

Notice to:

Michael Lynch
[Address redacted]

Nicholas Dominello, Esq.
Valerio Dominello & Hillman
One University Avenue Suite 300B
Westwood, MA 02090

* * * * *

CRAIG ERICKSON

v.

ROCKLAND FIRE DEPARTMENT

D1-17-218

May 21, 2020

Cynthia A. Ittleman, Commissioner

Disciplinary Action-Discharge of Rockland Fire Lieutenant-Sick Leave Abuse-Insubordination-Conduct Unbecoming-False Statements-Failure to Report for Duty-Modification of Penalty-Bias-Disparate Treatment—The Commission reduced the discharge of a Rockland Fire Lieutenant to a demotion and 90-day suspension after first finding that the Department had proven the Appellant had engaged in physical outside employment while on sick leave and repeatedly failed to provide the Department with information necessary to evaluate his medical leave and unauthorized absences from work. However, the discipline of this Appellant was flawed by the Department's failure to prove some of the other charges and by bias and disparate treatment since it was clear he had been targeted by the hierarchy since 2013 when he objected to the promotion to Captain of a better-connected competitor. Moreover, this Appellant had previously won a disciplinary appeal before the Commission in 2018 when it found that he had been victimized by nepotism and cronyism.

DECISION

On October 19, 2017, the Appellant, (Mr. Erickson or Appellant), pursuant to G.L. c. 31, s. 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Rockland (Town or Respondent) to terminate his employment. A pre-hearing conference was held on November 14, 2017 at the Commission's offices in Boston. The hearing was held on January 16, 2018 at the same location.¹ Witnesses (not including the Appellant) were sequestered. As a discipline case, the hearing was closed as the Commission did not receive a written request from either party to open the hearing to the public, pursuant to G.L. c. 31, s. 43. The hearing was digitally recorded and both parties were provided with a CD of the hearing, from which the Appellant obtained a written transcription of the full hearing, copies of which were provided to the Commission and the Respondent. This transcription constitutes the official record of the hearing.² The parties filed post-hearing briefs. Thereafter, the Commission informed the parties that it may take administrative notice in this appeal of the Commission's decision in an appeal previously filed by the Appellant regarding a thirty (30)-day suspension by the Respondent, which prior appeal the Commission allowed. See *Erickson v. Rockland*, D-17-092 [31 MCSR 127 (2018)]; *aff'd Rockland v. Civil Service Commission*

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

and *Erickson*, Plymouth Superior Court C.A. No. 1883CV00466 (J. Pasquale)(April 3, 2019).³ The Appellant filed a memorandum in support of taking such administrative notice. The Respondent filed a memorandum in opposition thereto but argued that if the Commission takes administrative notice here of its decision in the thirty (30)-day suspension appeal, the Commission should also take administrative notice of the administrative record of the thirty (30)-day suspension case. As noted below, the Commission takes administrative notice of our decision, and the record therein, regarding the Appellant's prior appeal of the thirty (30)-day suspension issued by the RFD. For the reasons stated herein, the appeal is allowed in part.

FINDINGS OF FACT

The Appellant's exhibits (A.Exs.) 1 through 9 and the Respondent's exhibits (R.Exs.) 1 through 48 were entered into evidence. Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Scott Duffey, Fire Chief, Rockland Fire Department (RFD)

Called by the Appellant:

- Craig Erickson, Appellant;
- Dr. Robert Downes, M.D.

and taking administrative notice of all matters filed in the case, as well as the Commission's decision in *Erickson v. Rockland*, D-17-092 and the administrative record therein; and pertinent statutes, case law, regulations, rules, policies; testimony that I find credible; and reasonable inferences from the evidence; a preponderance of evidence establishes the following facts:

Background

1. The Appellant was hired as a full-time firefighter in the RFD in 1986. The Appellant is an African American male, the only African American member of the Department, and the longest serving member of the RFD. In 1994, the Appellant was promoted to temporary Lieutenant in 1994 and permanent Lieutenant in 1996. While the Appellant was working one day in 1996, he was attacked by a former Selectman who was ultimately convicted of assault and battery.⁴ (Testimony of Appellant)

2. In addition to his position as Lieutenant at the RFD, the Appellant occasionally engaged in outside employment at a private company providing public safety-related services, such as high angle or confined space rescues, which can be intense work. (R.Ex. 14; R.Ex. 27 (June 6, 2017 investigative interview of Appellant); Testimony of Appellant)⁵

3. Since approximately 2004, the Appellant also occasionally engaged in outside employment for a federal government pro-

gram that trains first responders and deploys them to disaster areas. (Testimony of Appellant; R.Ex. 14) At the pertinent time, the Appellant was a Chief of Logistics for Massachusetts Team 1 in the federal government program. (R.Ex. 14)

4. In June 2010, Chief Scott Duffey became the Fire Chief of the RFD. (Testimony of Chief Duffey) The Rockland Fire Chief is the Fire Department's appointing authority. (R.Ex. 1) Before Chief Duffey worked at the RFD, he was employed by the Norwell Fire Department, where he worked with Thomas Heaney, who also became employed by the RFD. (Testimony of Duffey)

5. Chief Duffey developed and implemented the Rules and Regulations for the RFD, which were implemented on January 1, 2011 and were in effect at all pertinent times. Every member of the Department received these Rules and Regulations and was required to return a signed acknowledgment sheet to Chief Duffey. (Testimony of Duffey; R.Ex. 3)

6. The RFD implemented a Standard Operating Guideline (SOG) for sick leave on September 14, 2015. It provides, in part,

1. The policy "further defines the use of sick leave as established in the [CBA]. It is not the intent of this SOG to restrict sick leave use or deny members of the benefits received through the collective bargaining process.

2. Sick leave is a benefit that is specifically intended to be used in the event of personal sickness or non-service connected injury of the employee. Sick leave shall not be utilized for any other reasons.

2.1. Exception: Sick leave used as defined in Article 11.9 of the [CBA].

3. Sick leave is not a benefit provided to be used as a substitute for vacation or personal leave, nor does it provide the opportunity to work at outside employment.

3.1. If you are sick, it is expected you will stay home, except for a trip to the doctor's office, medical appointments or the pharmacy.

Exception: For some sick situations it may be permissible to resume non-fire department related activities even though you are unable to work. It is understood that **non-physical, non-fire department related activities and employment may be performed during convalescence. These situations shall be clearly communicated through the Fire Chief. These activities shall not be unreasonably denied by the Chief.**

4. Sick Leave abuse will be defined as follows:

4.1 Utilizing sick leave for purposes other than those outlined in Sections 2 and 3 of this SOG, or

4.2 Repeated pattern of taking sick leave in conjunction with weekends, holidays, and other paid leave, or

3. I note that on judicial review of the Appellant's prior appeal, the Superior Court solely addressed the Respondent's allegation that the appeal was untimely. The Respondent has appealed the Superior Court's decision to the Appeals Court but the Commission is unaware of the Appeals Court docket number or the current status of the further appeal.

4. It is alleged that the assault and battery was motivated by racism but there is insufficient evidence in the record to make a determination in that regard.

5. The record does not appear to indicate when the Appellant began outside employment with the private rescue company.

4.3 Use of more than 12 sick shifts in any 12 month period, unless the employee submits a medical certificate from a physician verifying the illness and inability to work, or

4.4 Submitting false or inaccurate information concerning the reason the employee needed to use sick leave.

5. Sick leave misuse and abuse will not be tolerated. Employees failing to follow this SOG will face disciplinary action as outlined in the Rules and Regulations of the [RFD] (dated January 1, 2011). ...”

(R.Ex. 4)(emphasis added)

7. Firefighters MD and MM were allowed to engage in outside employment while out on sick leave or injured on-duty leave under the 2015 sick leave policy. Firefighter MD engaged in outside employment as a Security Gate Attendant while out on injured on duty leave. Firefighter MM, while out on sick leave, also engaged in outside employment but as an account specialist for a trash company, which involved clerical/administrative work. Firefighters MD and MM did not engage in outside employment on a day that they received sick pay from the RFD. (Testimony of Duffey)

8. Prior to the 2015 sick leave policy, members of the RFD were allowed to engage in outside employment while out on sick leave or injured on-duty leave. (Testimony of Duffey)

9. In 2012, when the Appellant was a provisional Fire Captain in the RFD, he filed a request for investigation at the Commission pursuant to G.L. c. 31, s. 2(a) asserting that Thomas Heaney, a member of the Department, did not qualify for promotion to Captain because he did not reside within ten (10) miles from the town limits of Rockland in violation of G.L. c. 31, s. 58. The Commission ordered the Town to investigate and ultimately concluded that Mr. Heaney, after the Appellant filed his request for investigation with the Commission, had moved to within ten (10) miles of the Town in satisfaction of the statute. The RFD then promoted Mr. Heaney.⁶ (*Erickson v. Rockland Fire Department*, CSC Tracking No. I-12-100 [26 MCSR 29 (2013)] (2012; 2013))

10. The Appellant has filed grievances at the RFD alleging that he was subjected to race discrimination at the RFD, receiving disparate treatment by the Department regarding his outside employment, use of sick leave and in disciplinary matters. (R.Ex 36 - 39, 42 - 44 and 46) By letter dated June 21, 2016, Chief Duffey responded to then-pending grievances stating, in part,

You have presented to me numerous grievances since October 29, 2015. Each of these grievances conveyed allegations of racial discrimination ... Prior to answering these so called grievances, the Town of Rockland conducted an investigation into the multiple claims of racial discrimination. ... Now that the investigation is closed and no evidence of racial discrimination exist (sic), the matters being grieved can be dealt with

(R.Ex. 45)⁷

The letter went on to deny the Appellant’s race discrimination grievances. (*Id.*)

Incidents Involving Appellant’s Termination

11. In or about 2014, the Appellant was treating with Dr. Richard Goldbaum, psychiatrist, for Post-Traumatic Stress Disorder (PTSD). (Testimony of Appellant, R.Ex. 27)⁸

12. On February 21, 2017, Dr. Goldbaum faxed a letter to the RFD stating that the Appellant had suffered a relapse of PTSD and that the Appellant should not return to work until he was reevaluated and cleared by Dr. Goldbaum. The reevaluation of the Appellant would occur within two (2) weeks. (R.Ex. 5)⁹

13. On March 9, 2017, Dr. Goldbaum faxed a letter to Chief Duffey stating that he had reevaluated the Appellant and recommended that the Appellant be granted medical leave under the Family Medical Leave Act (FMLA). Included in the fax to Chief Duffey were the Appellant’s deployment orders from the federal government program for training April 3 through 7, 2017. (Testimony of Duffey; R.Ex. 6)¹⁰

14. When Chief Duffey received the Appellant’s deployment orders, he was concerned that the Appellant would deploy for the federal government program training while out on sick leave. (Testimony of Duffey)

15. On March 10, 2017, the Appellant was out on sick leave for his entire twenty-four (24) hour shift. On that date, there were no other firefighters working overtime to cover the Appellant’s shift. (Testimony of Duffey; R.Ex. 7) RFD members’ work schedules remain the same so that they know when they worked in the past and when they will work in the future. Therefore, the Appellant was aware that on March 10, 2017 he was scheduled to work at RFD. (Testimony of Duffey)

6. Thereafter, the Legislature amended G.L. c. 31, s. 58 allowing municipalities to collectively bargain this matter with the appropriate unions.

7. The June 21, 2016 letter states that the investigation report concerning the Appellant’s race discrimination allegations is attached to the letter but it was not included with the letter produced by the Respondent in response to my request at the hearing. (Ex. 45)

8. There is no indication in the record if the Appellant was treated for PTSD prior to 2014.

9. There is no indication in the record of the events that lead to the Appellant’s relapse.

10. The federal government program notice adds, in part, “Section 2812(d)(3) of the [Public Health Service] Act provides that service as an [federal government program] employee during activations and authorized training activities is consid-

ered ‘service in the uniformed services.’ As such, when the [federal government program] is activated to respond to a public health emergency or to be present at locations at risk of a public health emergency (which may include activation in response to a disaster, major emergency, or special event), or when [federal government program] employees are activated to participate in a Federal exercise or other official training, [federal government program] personnel are covered by the employment and reemployment rights provisions of chapter 43, title 38 of the U.S. Code (Uniformed Services Employment and Reemployment Rights Act)(USERRA). However, when [federal government program] employees are assigned to carry out ongoing activities necessary to prepare for the provision of health or other services when the [federal government program] is activated, employees are not considered to be providing ‘service in the uniformed services’ when engaged in such ongoing activities and will not be covered by USERRA for such activities.” (R.Ex. 6)

16. On March 13, 2017, Chief Duffey wrote to the Appellant about Dr. Goldbaum's March 9 letter. Chief Duffey also notified the Appellant that in order to qualify for leave under the FMLA, he must fill out the required FMLA application. In the same letter to the Appellant, Chief Duffey specifically reminded the Appellant that he had no personal leave or vacation leave left, that he had three (3) shifts of holiday leave left ("if used as leave in lieu of pay"), and that he had twelve (12) 24-hour shifts, plus three (3) hours, of sick leave left. In the same letter, Chief Duffey also advised the Appellant that if he was still on medical leave from the RFD, he was not to deploy to the April 3 - 7, 2017 federal government program training and that doing so "will be viewed as an abuse of sick leave and you will face further discipline." (R.Ex. 8)

17. On March 16, 2017, the Appellant was out on sick leave for his entire twenty-four (24) hour shift. On that date, Lieutenant Daniel DelPrete and Captain Thomas Heaney covered both of the Appellant's shifts. (R.Ex. 9) The Appellant was aware that on March 16, 2017 he was scheduled to work at RFD. (Testimony of Duffy)

18. On March 23, 2017, Dr. Goldbaum faxed to Chief Duffey the Certification of Health Care Provider for Employee's Serious Health Condition pursuant to the FMLA. Included in Dr. Goldbaum's fax were his American with Disabilities Act (ADA) Recommendations for the Appellant: end "confrontational communications" with the Appellant, end co-workers' harassment of the Appellant, change the Appellant's night shift to a day shift, and implement sensitivity training. (R.Ex. 10)

19. On March 27, 2017, Chief Duffey sent a letter to Dr. Goldbaum addressing his request for ADA accommodations on behalf of the Appellant. Chief Duffey disputed Dr. Goldbaum's statements, writing, "[a]t various times in recent years, Lt. Erickson has made vague an (sic) unsubstantiated claims of harassment or improper treatment by other employees. Each time these claims were made, the Town attempted to investigate the claims. In each instance, the claims could not be substantiated because Lt. Erickson refused to provide details regarding names, dates or specific facts supporting the claims." (R.Ex. 11) Chief Duffey added that the Town had conducted sensitivity training with an outside consultant for four (4) days in 2014 in view of the Appellant's allegations, that he would consider possible assignment of the Appellant to the day shift under the appropriate circumstances and that the Town of Rockland would consider any accommodations which would not be unduly burdensome. (R.Ex. 11)

20. On April 3, 2017, Chief Duffey received a letter dated March 30 via fax from Dr. Goldbaum stating that the Appellant was "completely fit to return to his duties." (R.Ex. 12) The duties referenced were the Massachusetts Essential Tasks for fire department Lieutenants attached to the faxed letter. (*Id.*)

21. Sometime after March 30, 2017, but prior to the beginning of his April 3, 2017 shift with the Rockland Fire Department, Lt. Erickson became aware that he had been cleared for duty by Dr. Goldbaum. (Testimony of Appellant)

22. The Appellant deployed for his federal government program training late on the evening of April 2, 2017 or early in the morning on April 3, 2017, and returned April 7, 2017. He did not notify the Department that he had been medically cleared to return to duty prior to deploying for the federal government program training. (Testimony of the Appellant)

23. During his deployment, the Appellant did not communicate with the Department or Chief Duffey to tell them that he had been medically cleared to return to his duties, that he had deployed for his scheduled federal government program training on April 3, 2017 using sick leave, and that the sick leave designation for April 3, 2017 should be changed to some other paid leave since he was no longer medically unable to work. (R.Ex. 27; Testimony of Appellant). Also, *see* Fact 11.

24. On April 3, 2017, the Appellant was scheduled to work an entire twenty-four (24) hour shift but was carried on sick leave for which he was paid. On that date, Captain Heaney and Lieutenant DelPrete covered both of the Appellant's shifts. (R.Exs. 9 and 27)

25. On April 11, 2017, Chief Duffey initiated an investigation regarding the Appellant's use of sick leave. As part of that investigation, the Appellant was required to complete an investigatory questionnaire relating to his extended sick leave use and outside employment. (R.Ex. 14)

26. The Appellant submitted his written responses to the investigatory questionnaire on April 11, 2017. (*Id.*)

27. On May 15, 2017, Chief Duffey notified the Appellant in writing that many of the answers he provided on the investigative questionnaire were incomplete or relatively vague. Chief Duffey further ordered the Appellant to provide all payroll records for any outside employment he had engaged in while out on extended sick leave from February 20, 2017 through April 3, 2017, including all work performed for the federal government program and the private rescue company. (R.Ex. 15)

28. Citing a 2013 decision of the Department of Labor Relations (DLR) that found that the RFD could not require the union to provide outside employment payroll records, the union expressed concerns about Chief Duffey's request that the Appellant produce such records. (Testimony of Duffey; A.Ex. 6) The DLR's 2013 decision stated, in part,

During the [DLR] investigation, the Town [of Rockland] did not dispute that the only way for the Union to retrieve the requested [outside employment payroll information, including recent W-2s and/or 1099s] information was through its bargaining unit members. An employee organization does not violate the Law by failing to provide information it does not possess and is under no obligation to retrieve. In this case, the Union did not possess or control the information requested by the Town. The requested information was in the possession of the bargaining unit members. The Union asked its members for the requested information; however, they were unwilling to provide it and the Union cannot compel its members to provide such information. Accordingly, [the DLR investigator does] not find probable cause to believe the Union has violated the Law in the manner alleged and [the

DLR investigator dismissed] the Town's charge in its entirety." (A.Ex. 6)

29. The union and Chief Duffey subsequently agreed that Chief Duffey could ask the Appellant to produce a list of dates of when the Appellant engaged in outside employment. (Testimony of Duffey)

30. Chief Duffey scheduled a recorded investigative interview with the Appellant to take place on June 6, 2017. At the interview, the Appellant stated that he requested a union representative but, "based on the facts" (R.Ex. 27 (statement of Appellant)), which facts the Appellant did not describe, he was "forced to decline". (*Id.*) Asked if he wanted anyone else in the RFD to be with him during this interview, the Appellant also declined. (*Id.*)

31. The purpose of the June 6 interview was to ask the Appellant about the answers he provided on the investigative form on April 11, 2017. The Chief also wanted to ask the Appellant why he failed to timely advise the RFD that Dr. Goldbaum had cleared him to return to duty. (Testimony of Duffey) The Appellant asserted that he did not tell the RFD he was cleared for duty because he was under doctor's orders not to communicate with the Department. (R.Ex. 27) However, neither Dr. Downes nor Dr. Goldbaum told the Appellant not to communicate with the RFD. (Testimony of Downes)

32. During the June 6, 2017 investigative interview, the Appellant gave Chief Duffey a list of dates that he had engaged in outside employment while out on extended sick leave, as the Chief had ordered. Chief Duffey determined that the Appellant had engaged in outside employment in violation of SOG 15-03 (R.Ex. 3), he ordered the Appellant, by a date certain, to provide payroll records for the dates that the Appellant had engaged in outside employment to confirm the dates that the Appellant had written. (Testimony of Duffey; R.Ex. 19)

33. The list of dates provided by the Appellant indicated that the Appellant had engaged in outside employment at the private rescue company on March 10, 2017 and March 16, 2017 and at the federal government program on April 3, 2017. On those dates, the Appellant was scheduled to work for the RFD and received paid sick leave. (R.Exs. 7, 9, and 13)

34. Chief Duffey scheduled a second investigative interview with the Appellant to be held on June 12, 2017. As with the June 6, 2017 interview, the Appellant did not bring a union representative or other member of the RFD with him. Also at the June 12 interview, the Appellant stated that the reason he did not contact the RFD himself to report that he had been cleared for work and to ask the RFD to change his reported time for the period April 3 through 7, 2017 from sick leave to another form of leave was that he was under doctors' orders not to communicate with the RFD. That statement is untrue. (R.Ex. 27; Testimony of Dr. Downes) Further, at the June 12 meeting the Appellant accused Chief Duffey of or-

dering the Appellant to return from his deployment although there is no evidence in the record to support this allegation. (R.Ex. 27)

35. At the June 12 interview, the Chief again ordered the Appellant, by a date certain, to produce payroll records to confirm the dates that the Appellant engaged in outside employment. He also ordered the Appellant to produce the dates and times he had met with Dr. Goldbaum in the pertinent time period. (R.Ex. 27) At the interview, the Appellant repeatedly referred to the need to change his use of paid sick leave time for the deployment to another form of leave as "bookkeeping" rather than as adherence to the RFD sick leave policy. (R.Ex. 27)

36. At or around the time of these events, Dr. Goldbaum retired. On June 18, 2017, Dr. Downes, the Appellant's new treating physician, told the RFD that the Appellant had suffered a recurrence of PTSD and that he would be out of work on extended sick leave. (R.Ex. 18) Dr. Downes is not a psychiatrist. He was trained as a pediatrician then worked in insurance for years. He has been in private practice since then, he has worked with patients in psychiatric hospitals and with patients with addiction. He has approximately five (5) patients with PTSD and has "lived it" himself. (Testimony of Downes)¹¹

37. In a letter from Chief Duffey to the Appellant dated June 19, 2017, the Chief wrote:

On June 12, 2017 you were ordered to provide payroll records for your [federal government program] deployment and other employment, as well as information from Dr. Goldbaum to me within 48 hours. You have knowingly violated that order and may be subject to discipline for insubordination as you have not provided me the records. I ordered you to provide those records as part of the investigation into your use of sick leave while getting paid by other employers. I am restating my original order to provide those records to me immediately, and your continued refusal to comply with this order will be considered in any disciplinary process that takes place as part of this investigation." (R.Ex. 19)

38. The Appellant did not respond to Chief Duffey's June 19, 2017 letter. (Testimony of Duffey)

39. On June 28, 2017, the Appellant was scheduled to work an entire twenty-four (24) hour shift but he did not work that shift. (Testimony of Duffey)

40. When RFD members are going to be out on sick leave, they must call the Officer on duty to notify him that they will be out. A member of the RFD may also complete a slip when they are going to be out for an extended period of time. (Testimony of Duffey)

41. The Appellant did not follow the procedure for informing the RFD when he did not appear for his scheduled shift on June 28, 2017. (Testimony of Duffey and Appellant)

42. On June 29, 2017, Chief Duffey sent the Appellant a letter regarding his absence on June 28, 2017 stating, in part,

11. No curriculum vitae was provided for Dr. Downes.

You were also reminded that on June 12, 2017 you were ordered to provide payroll records for your [federal government program outside employment] and other [outside] employment as well as information from Dr. Goldbaum within 48 hours. In a letter dated June 19, 2017, you were given further orders to immediately provide the documentation requested during the June 12, 2017 meeting. You continue to knowingly violate these orders and may be subject to discipline for insubordination as you have not provided me the records. I ordered you to provide those records as part of the investigation into your use of sick leave while getting paid by other employers. I am restating my original ORDERS to provide those records to me no later than 14:00 Hours on July 6, 2017, and your continued refusal to comply with this order will be considered in any disciplinary process that takes place as part of this investigation. (R.Ex. 22)(emphasis in original)

43. Thereafter (but on an unknown date), the Appellant provided the RFD with contact information for his supervisors at his two (2) outside employers. The supervisors reported the dates that the Appellant worked for his outside employers between February 24, 2017 and March 29, 2017, which information RFD had not been previously provided. Based on this information, the RFD learned that the Appellant was paid by the private rescue company for work he performed for it on thirteen (13) shifts while he was out on sick leave from the RFD. The RFD records show that on two (2) of those dates (March 10 and March 16, 2017) the Appellant was scheduled to work at the RFD but was still on paid sick leave. (Testimony of Chief Duffey, R.Ex. 1) The Appellant did not provide the information ordered pertaining to Dr. Goldman. (Testimony of Duffey)

44. On June 30, 2017, Dr. Downes, via fax, informed Chief Duffey that the Appellant had suffered a recurrence of PTSD and that the Appellant should be placed on an extended medical leave of absence. Dr. Downes also inquired about the status of the ADA accommodations that Dr. Goldbaum had requested prior to clearing the Appellant to work. (R.Ex. 23)

45. On July 6, 2017, Chief Duffey responded to Dr. Downes' June 30, 2017 letter, asking whether Dr. Downes had instructed the Appellant not to communicate with the Chief or any other representative of the Department. (R.Ex. 24)

46. On July 8, 2017, Dr. Downes notified Chief Duffey that he had not restricted the Appellant's communication with anyone in the Rockland Fire Department. (R.Ex. 25)

47. On July 20, 2017, Chief Duffey issued a Notice of Contemplated Termination to the Appellant, scheduling a hearing for August 8, 2017. The reasons for the Notice and hearing were that the Appellant:

engaged in outside employment on March 10 and 16, 2017 while he was on paid sick leave without obtaining permission from the Fire Chief, in violation of the RFD sick leave SOG;

was cleared to work on or about April 2, 2017 by his physician but failed to notify the RFD and received sick pay for his scheduled shift on April 3, 2017;

was issued an order on March 13, 2017 to not deploy for [the federal government program] training while on sick leave and

was advised that it would constitute abuse of sick leave and yet he deployed on April 2 while on sick leave;

after the June 12, 2017 investigative interview, was ordered to provide documents indicating when he was cleared for duty by his physician and payroll records from outside employment to verify the dates of his outside employment. Having failed to produce these documents at that time, he was ordered to do so again on June 19 and June 26, 2017 and yet he failed to produce the documents; and

failed to report for duty or call in sick on June 28, 2017.

This written Notice (attaching copies of G.L. c. 31, ss. 41-45) stated that these actions violated RFD Rules and Regulations:

1.1 Disobeying general orders

1.2 Insubordination

1.4 Conduct unbecoming an officer

1.5 Making false statements regarding illness

1.12 Absent without leave

3.1 Failure to report for duty

2.10 Falsifying information and/or misrepresenting himself on RFD reports and/or paperwork

SOG 15.03 Sick leave policy

(R.Ex. 2)

48. The hearing was held on August 21, 2017 and was conducted by Attorney James Lampke, who was appointed by Chief Duffey to be the hearing officer. Chief Duffey and Dr. Downes testified at the hearing. The RFD was represented by Attorney Clifford, who represented the Respondent at the Commission hearing. The Appellant was represented by counsel at the local hearing (not the attorney who represented the Appellant at the Commission). The Appellant did not testify at the local hearing and was advised that an adverse inference may be drawn from his refusal to testify. (R.Ex. 1)

49. In a forty-two (42)-page decision dated October 9, 2017, the hearing officer concluded that the Appellant had taken the actions stated in the Notice of Contemplated Termination, in violation of the rules, regulations and policies cited therein. (R.Ex. 1)

50. The hearing officer's report considered the Appellant's discipline record, all of which arose *after* the Appellant asked the Commission to conduct an investigation into the residency of a member of the RFD in 2012:

March 5, 2013: Verbal reprimand for failing to complete 39 departmental incident reports;

March 29, 2013: Written reprimand for failing to provide the Town of Abington with a mutual aid ambulance;

February 11, 2014: Written reprimand for excessive absenteeism thus jeopardizing the Department's ability to maintain appropriate levels of staffing.

February 28, 2014: Written reprimand for safety violations that placed others on scene at risk including freelancing on the fire

ground without orders from the Incident Command and failing to wear the appropriate safety apparatus.

February 25, 2015: Written reprimand for conduct unbecoming a superior officer for failing to properly direct his group on the fire ground at a mutual aid call. Specifically, Lieutenant Erickson was unable to execute a clear order from Chief John Nuttall of the Abington Fire Department with regard to venting a roof resulting in an order from Chief Nuttall that Lieutenant Erickson not respond to any emergencies in Abington until completing basic safety training.

March 15, 2016: Written reprimand for failing to obey orders with regard to the completion and proper documentation of a written investigation form for Chief Duffey.

March 15, 2016: Written reprimand for conduct unbecoming an officer for failing to properly file incident reports; and

December 28, 2016: Forty-eight (48)-hour unpaid suspension for failure to properly supervise firefighters under his command.

(R.Ex. 2)

51. The Appellant grieved five (5) of these eight (8) disciplines he received; specifically, he appealed the disciplines dated Feb. 11, 2014, Feb. 28, 2014, Feb. 25, 2015, March 15, 2016 and Dec. 28, 2016. Chief Duffey denied the grievances. (R.Exs. 35 - 47)

52. The hearing officer's report did not rely on a thirty (30)-day suspension issued to the Appellant by the Respondent on or about April 27, 2017 because the Respondent indicated that it did not consider the thirty (30)-day suspension in its decision to terminate the Appellant's employment since the Appellant had appealed the suspension to the Commission and the Commission had not yet issued a decision on that appeal (*Erickson v. Rockland*, D-17-092).

(R.Ex. 2)

53. By letter dated October 13, 2017, the RFD terminated the Appellant's employment at the RFD effective October 14, 2017. (R.Ex. 1)

54. The Appellant timely filed the instant appeal at the Commission. (Administrative Notice)

55. After the Respondent terminated the Appellant's employment, the Commission issued a decision in the Appellant's appeal of the (30)-day suspension, allowing that appeal. Specifically, the Commission found, in part, that RFD's allegation that the Appellant had lied when he stated that he had ordered members of the Department to timely respond to a mutual aid call was untrue. The Commission further found that although the RFD suspended the Appellant for thirty (30) days for allegedly lying in this regard, other members of the Department who are connected to current or previous Department leadership or Town officials were not disciplined at all, indicating that the Appellant had been the subject of disparate treatment. Moreover, the decision in that appeal further found that the Fire Chief's actions exhibited a clear bias against the Appellant. *Erickson v. Rockland*, D-17-092 [31 MCSR 127 (2018)]; *aff'd Rockland v. Civil Service Commission and Erickson*, Plymouth Superior Court C.A. No. 1883CV00466 (J. Pasquale)(April 3, 2019).

APPLICABLE LAW

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and **bias** in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256 (2001), citing *Cambridge v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 1. 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* at 304.

A tenured civil service employee may be discharged for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L. c. 31, s. 41. A person aggrieved by a decision of an appointing authority may appeal to the Commission under G.L. c.31, s. 43.

Under section 43, the Commission makes a de novo review "for the purpose of finding the facts anew." *Town of Falmouth v. Civil Service Comm'n.*, 447 Mass. 814, 823 (2006) and cases cited. The role of the 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 Comm'n.*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997). *See also City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728, *rev.den.*, 440 Mass. 1108 (2003); *Police Dep't of Boston v. Collins*, 48 Mass. App. Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000); *McIsaac v. Civil Service Comm'n.*, 38 Mass. App. Ct. 473, 477 (1995); *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331, *rev.den.*, 390 Mass. 1102 (1983).

An action is justified if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971); *City of Cambridge v. Civil Service Comm'n.*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *School Comm. v. Civil Service Comm'n.*, 43 Mass. App. Ct. 486, 488, *rev.den.*, 426 Mass. 1104 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983). The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" *Town of Falmouth v. Civil Service Comm'n.*, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of

“merit principles” which govern civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c. 31, § 1.

G.L. c. 31, section 43 also vests the Commission with some discretion to affirm, vacate or modify the discipline imposed by an appointing authority, although that discretion is “not without bounds” and requires sound and reasoned explanation for doing so. *See Police Comm’r v. Civil Service Comm’n*, 39 Mass. App. Ct. 594, 600 (1996) and cases cited. (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority”). “[T]he power to modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’ [citations omitted]” *Id. See also Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006), quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

The Commission may draw an adverse inference against an appellant who fails to testify at an appointing authority hearing. *Town of Falmouth v Civil Service Comm’n*, 447 Mass. 814 (2006).

The Commission may also take administrative notice of certain matters. In *Boston Police Department v. Kavaleski*, 463 Mass. 680 (2012), a case involving the bypass of a police officer candidate based on her reported failure of a psychological evaluation, the Commission relied, in part, on findings concerning expert testimony in *Roberts v. Boston Police Department*, G1-06-321 [21 MCSR 536] (2008), another case involving the bypass of a police officer candidate based on his reported failure of a psychological evaluation. The Boston Police Department sought judicial review of the Commission’s decision in *Kavaleski* arguing, in part, that it was improper for the Commission to rely on findings made in the *Roberts* case. The Kavaleski Court held, in part,

... G. L. c. 30A, § 11 (5), authorizes agencies to ‘take notice of any fact which may be judicially noticed by the courts,’ as well as any ‘general, technical or scientific facts within their specialized knowledge.’ However, ‘[p]arties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.’ *Id. See Assessors of Boston v. Ogden Suffolk Downs, Inc.*, 398 Mass. 604 , 605-606 (1986).

The critical component of these statutory provisions is that parties be afforded notice of and an opportunity to respond to the evidence on which an agency relies in rendering a decision. (citations omitted) ... Thus, our concern with the commission’s decision is not that the commission considered testimony from a different commission proceeding, which it permissibly may do. *See Doherty v. Retirement Bd. of Medford*, 425 Mass. 130 , 140 (1997)(upholding State agency’s reliance on transcripts from Federal criminal proceedings where transcripts bore “reasonable indicia of reliability”)(fn 20 omitted). *Contrast Assessors of Boston v. Ogden Suffolk Downs, Inc.*, *supra* at 606 (agency could

not permissibly rely on determination of property values made in prior proceeding involving same party where prior decision was not supported by contemporaneous findings). Rather, the commission erred in failing to alert the department that it would be looking to [expert testimony] in *Roberts*, and considering it as evidence in the present case, thus depriving the department (and Kavaleski) of an opportunity to contest and respond to that evidence. *Contrast Doherty v. Retirement Bd. of Medford, supra* (agency introduced portions of transcript of prior criminal trial during hearing; defense counsel permitted to respond and to introduce other portions of transcript to question witness’s credibility).

Although we conclude that the commission erred by considering testimony from *Roberts* without notice to the parties and an opportunity to respond, that does not end our inquiry. Pursuant to G.L. c. 30A, s. 14(7), we also determine whether, as a result of that error, ‘the substantial rights of any party may have been prejudiced.’

We are satisfied that the department was not prejudiced by the commission’s reliance on expert testimony from *Roberts*... [T]he commission did not decide Kavaleski’s appeal on that basis alone, and there was other substantial and reliable evidence in the record, independent of the testimony from *Roberts*, to support the commission’s decision. (*Id.* at 690-92)(fn omitted).

As a result, the Commission may take administrative notice of findings made in another decision as long as the parties have been afforded notice and an opportunity to comment thereon.

ANALYSIS

The RFD has proved by a preponderance of the evidence that it had just cause to discipline the Appellant. Specifically, a preponderance of the evidence establishes that the Appellant engaged in outside employment on days he was scheduled to work for the Department while on paid sick leave on March 10, 2017 and March 16, 2017 in that he performed work for an outside employer (the private rescue company) whose work was physical and fire department-related employment in violation of the 2015 sick leave policy, he repeatedly failed to produce the dates on which he met with Dr. Goldbaum as ordered, he failed to timely inform the RFD (directly or through his doctor) that he was fit to work April 3 - 7, 2017 until he left for training for an outside employer (the federal government employer), and he failed to report for work on June 28, 2017 and report any illness as reason therefor, as required. The Appellant’s actions and/or inactions in these regards constitute violations of RFD Rules and Regulations section 1.1 (disobeying general orders), 1.2 (insubordination), 1.4 (conduct unbecoming an officer), 1.5 (making false statements regarding illness, 3.1 (failure to report for duty), 3.10 (misrepresenting himself on department paperwork) and the RFD sick leave policy. The RFD did not have information about the Appellant’s outside employment for the private rescue company for the two dates in March, 2017. The Appellant’s misconduct clearly constitutes substantial misconduct which adversely affects the public interest by impairing the efficiency of public service, thereby warranting discipline.

The Department has not established that it had just cause to discipline the Appellant for other reasons it cited. Specifically, I do

not find that the Appellant's deployment to the federal government program violated the RFD sick leave policy because it was for training and not physical work similar to the work performed by the RFD. Further, the Department sick leave policy does not explicitly require prior notice and approval of the Chief of such outside employment during sick leave, although, as a practical matter, it certainly would be important information for the RFD to know in a timely manner so that it can address any necessary staffing issues. In addition, the Respondent has not established that the Appellant lacked sufficient unpaid holiday leave time for the period April 3 through April 7, 2017 when the Appellant deployed to the federal government program. Lastly, the Respondent has not established that the Appellant did not produce the payroll information for the work he performed for the private rescue company on March 10 and 16, 2017 since he produced it after multiple orders, albeit after the deadlines established in the orders he was given.

I draw an adverse inference against the Appellant for failing to testify at the Respondent's hearing. In addition, I found the Appellant's credibility limited because his testimony at the Commission hearing was, at times, vague and/or evasive, such that I had to ask him to directly respond to questions posed to him. The Appellant was also vague and/or evasive in responding to Chief Duffey's questions during the investigative interviews of the Appellant. R.Ex. 27. Further, the Appellant's credibility was undermined by his untruthful assertion in his testimony and in his recorded investigative interview that the reason he did not contact the RFD himself to report that he had been cleared for work in April 2017 and to ask the RFD to change his reported time for the period April 3 through 7, 2017 from sick leave to another form of leave until he was notified of the investigative interview was that he was under doctors' orders not to communicate with the RFD.

The Appellant's arguments that he did not violate the cited RFD rules and sick leave policy are unavailing. For example, as noted above, the Appellant did not timely notify the RFD that he was cleared to work, permitting him to be deployed to the federal government program on April 3, 2017, because he said that he was under doctor's orders not to communicate with the RFD. Dr. Downes testified that there were no such orders from him or Dr. Goldbaum. The RFD only found out that Dr. Goldbaum had cleared the Appellant to work when Dr. Goldbaum faxed a letter to Chief Duffey in that regard on April 3, although the letter was dated March 30. Incredibly, the Appellant stated that he did not know he would be cleared to work until Dr. Goldbaum told him the night before by phone. The Appellant is proud of the outside employment that he performs and indicated that he enjoys it, so much that he apparently told Dr. Goldbaum that he was ready to return to work (although, only a couple of weeks earlier, Dr. Goldbaum had written to Chief Duffey to ask him for specific reasonable accommodations to enable the Appellant to return to work at the RFD) just in time to deploy for the federal government program April 3 to 7, 2017 and for Dr. Goldbaum to send written notice to Chief Duffey Sunday night when the Chief was not in,

only hours before the Appellant boarded a flight to California for the deployment.

The Appellant also argued that for years the RFD had approved his outside employment. While that may have been the practice years ago, the RFD had changed its practice in 2015 because of historical abuse by some members of the Department. Specifically, the 2015 sick leave policy provides that employees may engage in outside employment while out sick but the work must be "non-physical, non-fire department related" and such outside employment must be clearly communicated through the Fire Chief, while such activities "shall not be unreasonably denied by the Chief." R.Ex. 4. The wording of the sick leave policy does not explicitly require the Chief's prior notice and approval of outside employment. Therefore, it has not been established that the Appellant violated that aspect of the sick leave policy. However, at his June 12, 2017 investigative interview with Chief Duffey, the Appellant attempted to undermine the sick leave policy by referring to the assignation of the type of leave time to be used in connection with outside employment while on sick leave as "book-keeping". A personnel policy established to avoid sick leave abuse and double-dipping is not merely bookkeeping.

Further concerning the RFD sick leave policy, the Appellant argues that he was treated differently because other members of the RFD were allowed to work their outside jobs while they were on sick leave on days they would be scheduled to work. However, Chief Duffey testified that two (2) members of the RFD had been permitted to perform outside work on while out on sick leave because the outside work that one of them performed was office work and the work the other member performed involved monitoring a security gate, not the work of the RFD. By comparison, the rescue work that the Appellant performed for the private company providing public safety-related services in March 2017 is similar to the work of the RFD and, therefore, is not permitted by the RFD sick leave policy.

Having established just cause to discipline the Appellant, the RFD avers that termination of the Appellant's employment is appropriate based on his actions in 2017 but also based on his pertinent discipline record.¹² As noted above, until the Appellant's termination he was the most senior member of the RFD and the only African American member of the RFD. I note also that from 1983 to 2013 (twenty-seven (27) years) the Appellant had no discipline record at all. Beginning in 2013, the Appellant suddenly incurred a number of disciplines; in 2013, he received two (2) reprimands (one verbal, one written); in 2014, he incurred two more reprimands (written); in 2015, he incurred a written reprimand; and in 2016 he incurred three disciplines (two (2) written reprimands and a forty-eight (48) hour unpaid suspension. Chief Duffey acknowledged that some of the disciplines were for minor matters. For example, certain reprimands were for the Appellant's failure to file certain reports but, on one occasion, the Appellant was disciplined for having thirty-nine incident reports outstanding. On another occa-

12. As noted above, the RFD did not include in its consideration here the 30-day suspension previously issued to the Appellant for other alleged misconduct. The

Appellant appealed the 30-day suspension and the Commission allowed the appeal.

sion involving the Appellant, the Abington Fire Department called for mutual aid, needing the RFD's ambulance. The RFD ambulance was reportedly hidden by renovations being performed on the fire station and the Appellant reported to Abington that the ambulance was either not there or unavailable. When he discovered shortly thereafter, that the ambulance was available, the Appellant attempted, but failed to reach Abington to report that it was available.

One of the logical questions here is why, after twenty-seven (27) years free of discipline at the RFD, did the Appellant incur eight (8) disciplines in three (3) years? In addition, why did the RFD discipline the Appellant all but one (1) of the eight (8) times with a written or verbal reprimand, then one (1) forty-eight (48) hour suspension and then termination? Unfortunately, and although Chief Duffey denied it at the Commission hearing, the sudden number of disciplinary actions did not occur until the Appellant requested that the Commission investigate the residency status of certain members of the RFD, including now-Capt. Thomas Heaney, whom Chief Duffey has known since they worked together in the Norwell Fire Department. As noted above, in 2012 the Appellant was a provisional Fire Captain in the RFD and Thomas Heaney was a candidate for promotion to Captain. The Appellant alleged that Mr. Heaney did not qualify for the promotion because he did not reside within in ten (10) miles of the town limits of Rockland in violation of G.L. c. 31, s. 58. Mr. Heaney intervened in the investigation and, ultimately, moved his residence to be in compliance with the statute and was promoted. There can be little question that this left at least some members of the relatively small Department with hard feelings.

In the present appeal, the recorded investigative interview of the Appellant by Chief Duffey relating to the instant appeal, Chief Duffey, responding to a statement by the Appellant, stated words to the effect 'let's not start throwing bombs you're not ready to throw'. R.Ex. 27. Intended or otherwise, the statement indicates that the disciplinary process here was inappropriately affected by animus toward the Appellant that resulted in his termination. Having taken administrative notice of the Commission's decision and hearing record in the prior thirty (30)-day suspension appeal, after the parties were given notice and an opportunity to be heard in that regard, it is clear that the Department's animus in that case continued in this appeal.

The prior Commission decision laid bare the bias that the Fire Chief has developed against the Appellant. Specifically, that decision concluded that:

"... the Fire Chief initiated a second investigation of Lt. Erickson which resulted in the thirty (30)-day suspension that is the subject of this appeal. In his testimony before the Commission, the Town's Fire Chief stated that the second investigation was initiated after two individual firefighters approached him and accused Lt. Erickson of lying during his testimony at the local hearing related to the forty-eight (48)-hour suspension. Both of those firefighters, who were sequestered, testified before the Commission and offered testimony which directly contradicts the Fire Chief."

The Commissioner in that prior Commission decision also concluded that:

"To me, this case is a stark and troubling example of disparate treatment. A firefighter whose son sits on the Board of Selectmen and served with the Fire Chief on the Fire Station Building Committee faced no formal discipline for: a) engaging in insubordination; and b) providing what appear to be less than credible responses during an internal investigation."

Finally, the Commission in that prior decision stated that:

"To ensure uniformity, the Town must also now decide how to respond to the starkly conflicting testimony before the Commission between the Fire Chief and two (2) firefighters regarding whether, as stated by the Fire Chief, they accused Lt. Erickson of being untruthful during the local hearing."

Under the circumstances, but in view of the findings here that some, but not all of the Appellant's conduct involved in the instant appeal violated the cited RFD rules and sick leave policy, modification of the discipline issued to the Appellant is warranted, while ensuring that the message is clear—that proven violations of RFD rules and its sick leave policy are unacceptable, especially when committed by a superior officer.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. D1-17-218 is hereby ***allowed in part*** such that the Appellant shall be demoted to firefighter and be suspended for ninety (90) days.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 21, 2020.

Notice to:

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* * * * *

RICHARD ST. GERMAIN

v.

CITY OF BROCKTON

G1-19-053

June 4, 2020

Paul M. Stein, Commissioner

By *bypass Appeal-Original Appointment as a Brockton Police Officer-Residency-Driving Record-Criminal History-Suitability to Carry Firearm-Employment History-False Statements on Application*—A 3-2 majority of the Commission voted to grant the appeal of a candidate for original appointment to the Brockton Police Department, finding unpersuasive the reasons cited that included a poor driving record, criminal history related to domestic violence, and lying on the application. Also cited were the candidate's less than stellar employment history and potential inability to obtain a license to carry. Chairman Christopher C. Bowman and Commissioner Cynthia Ittleman vigorously dissented, finding probative the domestic violence incidents and the Appellant's provision of conflicting information on his applications to different law enforcement agencies relating to having been subject to a temporary restraining order. The minority also found that he had failed to provide the City with the necessary information at the time of his application to verify residency.

DECISION

The Appellant, Richard St. Germain, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b), from his bypass by the City of Brockton (Brockton) for appointment as a police officer in the Brockton Police Department (BPD).¹ The Commission held a pre-hearing conference on April 12, 2019 and heard cross-motions by the parties for summary decision on June 14, 2019, which were denied. A full hearing was held on September 18, November 20 and December 11, 2019, which was digitally recorded.² Witnesses were sequestered. Twenty-four Exhibits (*Exhs. 1 through 16 & 18 through 25*) were received in evidence³ and administrative notice was taken of documents pertaining to the Appellant's sealed criminal and juvenile records. Each party filed a Proposed Decision. For the reasons stated below, Mr. St. Germain's appeal is allowed.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- BPD Police Officer Alfred Gazerro.

Called by the Appellant:

- Richard St. Germain Appellant
- Ms. C, former domestic partner
- Ms. V, current domestic partner

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

The Appellant's Background

1. The Appellant, Richard St. Germain, is an African-American male in his early thirties. He currently shares joint legal and physical custody of three children resulting from a long-term prior relationship with Ms. C and also supports a fourth child that Ms. C. had through another relationship, remaining active in their lives, attending school events, coaching sports and volunteering at school. (*Exhs. 8 & 20; Testimony of Appellant & Ms. C*)

2. Mr. St. Germain was born in Boston, removed from his parents at an early age, and grew up in foster care, group homes and residential programs. He obtained a high school diploma through the Boston Community Leadership Academy (2003), received a scholarship to attend a transitional college program at Brandeis University (2003-2004), and completed a one-year technical training program at Cambridge College (2007) sponsored by Year Up, Inc. He attended Bunker Hill Community College off and on from 2004 through 2014, but did not obtain a degree. (*Exhs. 8, 10, 11 & 25; Testimony of Appellant*)

3. Mr. St. Germain became employed in January 2016 with the Suffolk County Sheriff's Office and currently holds the position of Deputy Sheriff, which grants him full police powers. He serves on the rapid response unit, operates cruisers (sometimes at high speed over Boston streets to convey prisoners to hospitals), performs police details, and performs other duties incident to the care and custody of prisoners. He participates in the Suffolk Sheriff's community outreach program, coaching inner-city youth. (*Exhs. 8, 10, 11 & 25; Testimony of Appellant*)

4. Mr. St. Germain's employment history from 2006 to 2016 includes:

- 2006-2008: Fidelity Investments. Intern, Jr. Systems Engineer, Regional Support Technician. Laid off in reduction in force due to recession.
- 2008-2010: Unemployed
- 2010-2011: Toys R Us. Bicycle Dep't Manager. Assembled and repaired bicycles and provided customer service. Resigned to take job with Middlesex Sheriff's Office.
- 2011-2013: Middlesex Sheriff's Office, Correction Officer. Terminated (conditional offer withdrawn) during probationary period.

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing

to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

3. Brockton's proposed Exhibit 17 (related to certain parts of Mr. St. Germain's juvenile records) was withdrawn.

od when 2013 criminal charges were filed against him, as described further below.

- 2013-2014: Unemployed
- 2014-2016: Beth Israel Deaconess Hospital, Public Safety Officer. Per diem position. After becoming a full-time Deputy Sheriff, he stopped working the minimum number of hours and was terminated for “job abandonment”.
- 2014-2016: Apollo International. Security Officer, Supervisor, Account Manager. Resigned after taking position with Suffolk County Sheriff’s Office.

(Exhs. 8, 10, 11 & 25; *Testimony of Appellant*)

5. Mr. St. Germain’s driver’s history includes the following citations:

09/03/2005	Surchargeable Accident
11/18/2005	Speeding (NA); Number Plate Violation (NR)
05/22/2007	Speeding (NR); Registration Not In Possession (NA)
08/01/2007	Speeding (R)
09/13/2007	Failure to Obey Sign (R)
01/05/2008	Speeding (R); Failure to Wear Seat Belt (R)
09/17/2008	Passing Violation (NP); Failure to Wear Seat Belt (R)
12/16/2008	Miscellaneous Equipment Violation (R)
01/30/2009	Speeding (R); Registration Not In Possession (NR)
08/07/2009	No Inspection Sticker (R)
10/08/2009	No Inspection Sticker (NR); Number Plate Violation (NR)
06/11/2011	Surchargeable Accident
02/02/2012	Failure to Stop (NR)
04/25/2014	Speeding (NR)
02/23/2018	Speeding (INC) [later NR] ⁴

(Exhs. 8 & 23; *Testimony of Appellant*)

6. Mr. St. Germain currently holds two Licenses to Carry Firearms (LTCs): (1) an Unrestricted Class A Large Capacity License to Carry issued by the Medford Police Department and most recently renewed by the Woburn Police Department in August 2017 (to expire August 2023) and (2) a Utah Concealed Carry License, most recently renewed in 2016 (to expire in 2021). Mr. St. Germain has been in good standing with both LTCs, save for a one year period in 2013, when those licenses were suspended following the crimi-

nal charges against him discussed further below. He owns several firearms. (Exhs. 8, 18 & 22; *Testimony of Appellant*)

7. Mr. St. Germain’s Criminal History includes:

- Two (2) adult records (sealed in 2014) concerning disputes in May 2007 and May 2013 with Ms. C, then Mr. St. Germain’s domestic partner, the details of which are described further below. (Exhs. 8 & 23; *Testimony of Appellant* & Ms. C; *Administrative Notice* [<https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Ascscs%3AUS%3Af8e8f509-2db3-4de0-bc20-7bfc98a84cc7>])
- Four (4) juvenile cases (sealed in 2019) alleging assault & battery involving residents and staff at the juvenile facilities and group homes where he lived when he was 14 and 15 years of age, which were filed or dismissed without adjudication. (Exhs. 6, 8 & 23; *Testimony of Appellant*; *Administrative Notice* [<https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Ascscs%3AUS%3Af8e8f509-2db3-4de0-bc20-7bfc98a84cc7>])⁵

Mr. St. Germain’s Law Enforcement Applications

8. On March 25, 2017, Mr. St. Germain took and passed the civil service examination for Municipal Police Officer (and Massachusetts State Police [MSP] Trooper) administered by the Massachusetts Human Resources Division (HRD) and his name was placed on the eligible list established in November 2017. (*Stipulated Facts*; Exhs. 1 & 2)

9. In April 2017, from a prior eligible list, Mr. St. Germain applied for appointment as a MSP Trooper. He completed the application process, including a background investigation and psychological examination, but he was not selected for appointment. He reapplied in 2018 and, again, was not selected. (Exhs. 2, 8, 11, 12 & 16)

10. In 2018, Mr. St. Germain applied for appointment as a MBTA Transit Police Officer and, after an initial background investigation; he was bypassed in April 2019. (Exh. 8 & 16)⁶

11. On September 27, 2018, HRD issued Certification #05819 to Brockton for the appointment of additional permanent, full-time BPD Police Officers. Mr. St. Germain’s name appeared in a tie group with one other candidate in the 23rd position on the certification. He signed the certification as willing to accept employment and was provided a copy of the BPD’s “Recruit Officer Candidate Application Packet” which he was required to complete and return to the BPD. (*Stipulated Facts*; Exh. 1; *Testimony of Appellant* & Gazerro)

12. On November 3, 2018, Mr. St. Germain appeared, along with other candidates, intending to submit his completed “Recruit Officer Candidate Application Packet” along with certain documentation in support of his application for appointment to the BPD and review the application with the BPD background inves-

4. This citation was adjudicated Not Responsible after the BPD pulled the RMV Driver’s History. (Exh. 23; *Testimony of Appellant*)

5. At the Commission hearing, Brockton withdrew the proposed exhibit containing police reports concerning juvenile charges against Mr. St. Germain and did not press his juvenile record as a basis to justify his bypass, making only passing reference during the Commission hearing to his juvenile behavior. (*Proposed Exhibit*

17 [withdrawn]; *Colloquy with Counsel* [*Hearing Day I and Hearing Day III*]; *Testimony of Gazerro*)

6. Mr. St. Germain’s bypass by the MBTA is the subject of a related appeal which the Commission also decides today. *St. Germain v. Massachusetts Bay Transp. Auth.*, CSC No. G1-19-128 [33 MCSR 222 (2020)].

tigator, Officer Gazerro. (*Exhs. 7 through 10 & 24; Testimony of Appellant & Gazerro*)

13. Prior to November 3, 2018, Officer Gazerro had begun to research Mr. St. Germain's background, accessing and obtaining Criminal Offender Record Information (CORI) through the Massachusetts Criminal Justice Information Services (CJIS). This information included a listing of Mr. St. Germain's complete driving history, as well as his criminal history, the latter which identified all adult arraignments, including the two sealed records, and all juvenile appearances. (*Exh. 23; Testimony of Gazerro*)

14. Officer Gazerro obtained copies of the police reports regarding Mr. St. Germain on file with the Medford Police Department, which had responded to the 2007 and 2013 incidents involved in the two sealed criminal matters. (*Exh. 18*)

15. Officer Gazerro secured a report from COPLINK, a private third-party company that provides law enforcement agencies with detailed information about subjects, including CORI, extracts from police incident reports and other data. He also procured reports from the Insurance Services Office (ISO) which identified all insurance claims for which Mr. St. Germain's name was associated, as well as two reports from Thompson Reuters, which searched for information about Mr. St. Germain's residences, utility services, phone numbers, motor vehicles and possible relatives and neighbors. (*Exhs. 4 through 6; Testimony of Gazerro*)

16. Officer Gazerro also obtained a copy of Mr. St. Germain's 2018 application to the MBTA Transit Police and spoke to an MSP Trooper who permitted Officer Gazerro to review Mr. St. Germain's application papers on file with the MSP (and take notes but no copies). Officer Gazerro is not certain when he received this information but his initial contact with the MSP occurred on or about November 13, 2018. His review of the MSP application file occurred after Brockton had sent out its bypass letter to Mr. St. Germain and was motivated by the anticipation of an appeal. (*Exhs 11, 12 & 16; Testimony of Gazerro*)

17. Mr. St. Germain appeared at the BPD on November 3, 2018. Prior to processing him with the other candidates, Officer Gazerro called him aside. Officer Gazerro told Mr. St. Germain that "it appears he would be bypassed and that he had the option to withdraw and avoid the bypass." He said that "the reason we were going to look into bypassing him is because of his prior criminal record." He was told "it was his decision" but "by withdrawing he would remain available on the State Civil Service list" and if the BPD bypassed him other departments "will use our bypass as a reason not to hire him." (*Exh. 7; Testimony of Gazerro*)

18. After listening to Officer Gazerro, Mr. St. Germain declined to withdraw. He was taken in to join the other candidates for the next step in the process, which was an interview with Officer

Gazerro to review their application packets. (*Exh. 7; Testimony of Appellant & Gazerro*)

19. When his turn came to be interviewed, Mr. St. Germain met with Officer Gazerro privately for approximately an hour or two. He presented his application and all additional required documentation which they reviewed in detail. The interview was not recorded, but Officer Gazerro took notes which he later transcribed.⁷ (*Exh. 11; Testimony of Appellant & Gazerro*)

20. Officer Gazerro did not contact Mr. St. Germain's employers, references, neighbors or landlords. He did not follow-up with Mr. St. Germain about any of the information he received during his November 13, 2018 conversation with the MSP Trooper. At the Commission hearing, Officer Gazerro explained that, after what he had learned about Mr. St. Germain's residency, criminal and driving records he "already had enough" to recommend a bypass. (*Testimony of Gazerro*)

21. On November 15, 2018, Officer Gazerro submitted a report to his superior officer, Capt. LaFrance, containing his conclusion that "I would recommend the bypassing of Richard St. Germain." His report states:

"Mr. St. Germain lied in his applications, brings with him a criminal record that shows a propensity toward violence to resolve issues, domestic violence arrest in 2013 that included A&B and Intimidation, a lack of character and maturity by denying and deflecting responsibility for the issues that have arisen in his life, an unequivocal poor past employment history, excessive motor vehicle violations to include suspension of his driving license and not in compliance with residency."

"Many of these issues bring into question the suitability of his being issued or reissued an LTC which is a requirement to be hired. He does have an LTC issued by Woburn PD but . . . [a]fter conversation with our licensing officer, this candidate would typically be denied an LTC in the City of Brockton as unsuitable. The candidate had an LTC issued by the State of Utah that has since been revoked."

"[H]e lied about ever being listed as a runaway or missing person and . . . had prior knowledge that he had in fact been reported as a runaway to the Boston Police . . ."

"His criminal record (juvenile and adult) includes multiple A&B's and a Domestic A&B as recently as 2013. The victim is the mother of his children . . . [W]hen asked if there was a court order for support [Mr. St. Germain] stated there was not and that he and the children's mother came to an amicable agreement that did not require court intervention which contradicts the children's mothers statement."

"The candidate is claiming residence but utility and credit card records indicate he was not a city resident during the times required to claim residency."

"[T]he candidate lied, intentionally omitted or failed to follow instructions regarding the answer to the question . . . where it asked to list those currently living with you. [He] marked this

7. The interview notes contain abbreviated summaries of subjects that Officer Gazerro covered during the interview, interspersed with information from other materials he had collected, as well as notes of his November 13, 2018 conversation with the MSP, clearly prepared after the interview. Neither the notes nor Officer

Gazerro's testimony provide a sufficiently reliable basis to know which information represents the interview conversation and which represents Officer Gazerro's thoughts about the information he had collected from other sources, either before or after the interview. (*Exh. 11; Testimony of Gazerro*)

question; “N/A”; however his current girlfriend and brother currently live with him.”

“... [H]e has either quit or been fired from most of his previous jobs which indicates an unequivocal poor past work history.”

“There is an extended period of time from 2011 to 2013 that the candidate omitted /failed to report ... whether he was even employed or not.”

(*Exh. 13*)

22. By letter dated January 23, 2019, BPD Chief Crowley informed Mr. St. Germain that he had been bypassed for the reasons stated in Officer Gazerro’s November 15, 2018 report. (*Exh. 13*)

23. Brockton eventually hired seventeen (17) candidates from Certification #05819, of which eight (8) were ranked below Mr. St. Germain, all of whom were Brockton residents. (*Stipulated Facts; Exhs. 1 & 13; Testimony of Gazerro*)

24. This appeal duly ensued. (*Claim of Appeal*)

Residency

25. On the residency issue, Brockton relies entirely on entries in third-party reports, mainly, the Thomson Reuters report, that show a “Utility Service Connect Date” for “CONVENIENCE” Utility Service(s) of 2/24/2017 at the Woburn address that he listed as the next place he lived after Brockton. Officer Gazerro was not personally familiar with the source of that entry, how it was collected, or how it could be interpreted or reconciled with different dates listed elsewhere in the report as the period(s) of his residence at the Woburn address. (*Exhs. 4 & 8; Testimony of Gazerro*)

26. At the Commission hearing, Mr. St. Germain provided copies of the leases for both the Brockton and Woburn apartments. (*Exhs. 14 & 15*)

27. Officer Gazerro did not visit or contact the manager of the apartment in Brockton or any other residences listed in Mr. St. Germain’s application. (*Exh. 8; Testimony of Gazerro*)

28. The Brockton lease, in the name of Mr. St. Germain and his current domestic partner, Ms. V, was a renewal of the tenancy at that address where he had lived since 2014, and ran from January 1, 2016 through March 26, 2017. The unusual term of 14 months and 26 days was specifically selected in advance because Mr. St. Germain knew he would be taking the municipal police exam in March 2017 with the intent of applying to become a Brockton Police Officer, and made it his intention to maintain his residency in Brockton through the date of the exam so that he would be entitled to claim Brockton residency at the time of the exam. (*Exhs. 3 through 5, 8 & 14; Testimony of Appellant and Ms. V*)

29. The Woburn lease, in the name of Mr. St. Germain and Mr. B (his brother, who was going to move in with Mr. St. Germain), was executed on or about February 3, 2017, to commence March 16, 2017 and run through March 14, 2018. Mr. St. Germain continued to live in Brockton with Ms. V until after he took the civil service examination, when he and Ms. V moved his belongings from Brockton to Woburn. The “Move-Out Statement” from the

Brockton landlord confirms that notice had been given to the landlord on January 21, 2017 that Mr. St. Germain would be moving on March 26, 2017 and that his rent for March 2017 was prorated through that date. He moved his furniture, including his bed, and spent the night in Woburn for the first time on March 26-27, 2018. (*Exh. 14; Testimony of Appellant and Ms. V*)

Criminal Record

30. On May 15, 2007, at approximately 10PM, the Medford Police responded to a report of a domestic disturbance. Upon arriving on scene, Ms. C (then pregnant with their first of three children) met the officers outside the residence and stated that her boyfriend (Mr. St. Germain) was inside. The officers went to speak with him. The report does not indicate what interaction occurred with Mr. St. Germain. The report states that Ms. C had his belongings packed up and, when he came home, she told him to move out but he began to unpack his stuff and started putting it back into a dresser drawer. Ms. C reached to take his belongings out of the drawer. Mr. St. Germain grabbed her arm as he closed the drawer, causing her to catch her fingers in the drawer. She said that he also hit her with a stuffed animal. She was advised of her rights to seek a restraining order but declined. Based on her report, Mr. St. Germain was arrested and booked on a charge of domestic assault & battery. The charges were dismissed in December 2007 and the criminal record sealed. (*Exhs. 8, 18 & 23*)

31. Mr. St. Germain does not deny that the incident occurred and resulted in his arrest. He agrees that the account contained in the police report is largely accurate but not complete. He vigorously denied that he threatened or assaulted Ms. C or engaged in any other form of criminal misconduct. (*Exh.3; Testimony of Appellant (Exh.8; Testimony of Appellant)*)

32. At the Commission hearing, Ms. C largely stood by what she had told the police, but she did agree that, although Mr. St. Germain was “upset” with her, he was not out of control, and added that she did not believe Mr. St. Germain intentionally tried to slam the drawer on her finger and that she was never in fear that he would harm her in any way. (*Testimony of Ms. C*)

33. Brockton also obtained a Medford Police “CAD Incident Report” concerning a 6/30/2010 response to a “Domestic” incident, but there is no substantive information in the documents provided to Brockton about the call, except the time the two Medford Police Officers were dispatched (10:28 AM) and the time the call was cleared (10:35 AM). (*Exh. 18*)

34. On May 6, 2013, at approximately 10:30 PM, the Medford Police responded to a 911 call received from a friend of Ms. C. According to the police report, at approximately 10:15 PM, Mr. St. Germain had dropped off their three children and left, but returned about fifteen minutes later and started banging on the front door. Mr. St. Germain told Ms. C. that he had learned something that he said warranted giving his daughters a “time out”. Ms. C said the children were already asleep and he should come back in the morning. According to the police report, Ms. C said Mr. St. Germain tried to pry open a front window and, then, before she could call 911, Mr. St. Germain was inside. She thought he

came through a rear window.. She said that an argument then ensued, during which Mr. St. Germain grabbed her, she spun around and he took Ms. C's cell phone and left. She then contacted the Medford Police. (*Exh. 18; Testimony of Ms. C*)

35. Mr. St. Germain was tracked down by Randolph Police at the residence where he was staying and taken into custody by Medford Police officers. According to the police report, en route to the police station, Mr. St. Germain stated that he had been with his daughters the entire day. After he dropped them off, his current girlfriend told him she had seen something "troubling" about his daughters. He turned back to Ms. C's home. He tried to contact Ms. C but she did not return his messages or texts or answer her cell phone. He knocked on the front door and Ms. C came to the door and told him to go away. He could see his daughters in the background and could see Ms. C yelling at them. He returned to his vehicle and retrieved the house key to the back door (not a window) which he used to enter the home. He met Ms. C in the dining/kitchen area. They argued, but it never got physical, and Ms. C ran out the front door. He initially denied knowing about Ms. C's cell phone, but when asked again, he admitted that he "was right" and had "got rid of the cell phone by throwing it out the car window." (*Exh. 18*)

36. Based on the foregoing information received from both Ms. C and Mr. St. Germain, Medford Police placed him under arrest with the intent to charge him with domestic assault and battery, breaking and entering with intent to commit a felony, and intimidation of a witness. The Medford Police also notified the Department of Families and Children (DCF), filed a "51A" Report of Child Abuse), and confiscated his Massachusetts LTC and his Middlesex Sheriff's Department issued firearm. Medford Police later learned that Mr. St. Germain also held Utah LTC and notified that state's authorities of Mr. St. Germain's arrest. (*Exh. 18*)

37. Mr. St. Germain was charged with Assault & Battery, Witness Intimidation and Breaking and Entering with Intent to Commit a Felony. On August 8, 2013, after filing of a Nolle Prosequi, all charges were dismissed. The record was later sealed. (*Exh. 23*)

38. Mr. St. Germain agrees that the May 2013 incident occurred and that the charges resulted in his arrest, a one-year (negotiated) suspension of his LTCs and loss of his job at the Middlesex Sheriff's Office. He disputes parts of the police report and the DCF 51A and denies any criminal behavior or intent to commit any crime. He specifically denies that he ever "threatened" Ms. C or physically assaulted her. (*Exhs. 8 & 18; Testimony of Appellant*)⁸

39. As the police report indicated, Mr. St. Germain told Ms. C they needed to talk about some "troubling" behavior by their children but, for some reason, Ms. C was visibly angry with Mr. St. Germain and, refused to talk with him. At the Commission hearing, Ms. C confirmed that the reason she was angry with Mr. St. Germain and did not then want to talk to him was because she had seen that he had been out with Ms. V and that the children had met

"Daddy's new friend" before she did. (*Testimony of Appellant & Ms. C*)

40. During her Commission testimony, Ms. C admitted that she depended on Mr. St. Germain to support their children and that her interest in Mr. St. Germain's financial support was in her mind when the criminal cases against him were under consideration. She also admitted that both she and Mr. St. Germain could get "emotional" at times but he was not a "violent person", he was never abusive to her and she was "never physically afraid" of him. (*Testimony of Ms. C*)

41. Ms. C did not make the comments about Mr. St. Germain that Officer Gazarro attributed to her, allegedly disparaging him about his suitability to become a police officer. In particular, she called her prior relationship with Mr. St. Germain, although it included "lots of arguments", typical of any couple. Both she and Mr. St. Germain called their current "working relationship" good overall. She especially praised him for how well she saw him get along with their children and how "really, really good" he is handling difficult and stressful situations involving them and others. Mr. St. Germain and Ms. C had multiple discussions about his intention to become a police officer and how to plan for how to handle the relationship with their children while he was attending the academy. (*Testimony of Appellant & Ms. C*)

Driver History

42. In concluding that Mr. St. Germain's driving record reflected "excessive motor vehicle violations including suspension of his driving license", Officer Gazarro considered all of the entries on Mr. St. Germain's Driver History going back to 2005, including those for which he was found "Not Responsible." (*Exhs. 6, 8, 19 & 23; Testimony of Gazarro*)

43. Brockton also relies on what it describes as a 60-day suspension of Mr. St. Germain's driving license in 2008 for failure to pay fines and costs, but Officer Gazarro was unable to correlate that assertion to specific entries on the RMV driving record. Mr. St. Germain disclosed on his application that his driver's license was suspended once "due to 7 surchargeable events". (*Exhs. 6, 8, 13, 19 & 23; Testimony of Appellant & Gazarro*)

License to Carry (LTC)

44. Officer Gazarro's conclusion that Mr. St. Germain was not suitable to be licensed to carry a firearm is based solely on a conversation with another BPD officer who did not testify before the Commission but who purportedly opined that Mr. St. Germain's criminal history would preclude him from recommending issuing him an LTC. (*Testimony of Gazarro*)

45. The undisputed evidence in this record indicates that Mr. St. Germain has held, and currently does hold, two personal LTCs, an unrestricted Class A license issued by the Woburn PD and another concealed carry license issued by the State of Utah. He also car-

8. There was no evidence to indicate what action, if any, resulted from the "51A". (*Exh. 18*)

ries a duty firearm issue by the Suffolk Sheriff. (*Exhs. 22 & 25; Testimony of Appellant*)

46. Although both of Mr. St. Germain's personal LTC's were suspended for a period of one year after the 2013 domestic dispute incident, the statement in Officer Gazerro's November 15, 2018 letter that the Utah license was "since revoked" is contradicted by the evidence in the record. (*Exhs. 6, 8, 18 & 23; Testimony of Appellant & Gazerro*)

Employment History

47. Officer Gazerro's November 15, 2018 letter states that Mr. St. Germain has "quit or been fired" from most of his jobs and "omitted/failed to disclose . . . whether he was even employed or not" from 2011 to 2013. His Commission testimony did not corroborate this statement. (*Exh. 13; Testimony of Gazerro*)⁹

48. As to the reasons for leaving his prior jobs, Mr. St. Germain admitted that he was discharged involuntarily from the Middlesex County Sheriff's Office while serving as a probationary employee. He was not "fired" from any other jobs. He was "laid off" by Fidelity due to the 2008 recession, left Apollo Investments and stopped his per diem job at Beth Israel Deaconess Hospital to take his current job with the Suffolk County Sheriff, and, similarly, left Toys R US to take the job with the Middlesex County Sheriff. (*Exh. 8; Testimony of Appellant*)

49. As far as his employment between 2011 and 2013 is concerned, Mr. St. Germain did disclose on his application that he was employed with Toys R Us from 10/2010 to 02/2011 and was employed with the Middlesex Sheriff from 2/2011 to 6/2013. He also listed his period of unemployment between his lay-off from Fidelity in 2008 and his employment at Toys R Us, although he stated the time frame as "11/2008 to 10/2018", an obvious typo of the last digit. (*Exh. 8*)

False Statements

50. Officer Gazerro's November 15, 2018 letter recommending that Mr. St. Germain be bypassed also concluded that Mr. St. Germain had been untruthful during the application process: (1) he lied on his application about not ever being listed as a runaway or missing person; (2) his statement about the absence of court-ordered arrangements between Ms. C and himself for support of their children "contradicts" Ms. C's statements; and (3) he "lied, intentionally omitted or failed to follow instructions" on the application when asked to "list those currently living with you." (*Exh. 13; Testimony of Gazerro*)

51. The evidence established the following facts regarding these conclusions.

- Mr. St. Germain answered NO to a question in the Criminal Record portion of the BPD application: "Have you ever been reported to a law enforcement agency as a missing person or runaway?" In fact, when he was a group home resident, on several occasions in 2002 and

2003, the group home staff called in a "missing person" report to the police when he had not returned home by the 4:00 pm curfew, which was the required protocol. Mr. St. Germain later returned home and the incident was filed without further action. Mr. St. Germain was not aware of these reports until they were brought to his attention, first during his initial MSP application and then during his interview with Officer Gazerro. He left the home to go to work and did not consider that his tardy return was equivalent to being a "missing person". His omission was not intentional. (*Exhs. 6, 8 & 11; Testimony of Appellant & Gazerro*)

- In January 2014, pursuant to an agreement for judgment filed with the Essex Probate Court, Mr. St. Germain and Ms. C agreed to terminate his child support obligation and entered into a joint support agreement by which they shared joint legal and physical custody under mutually acceptable terms. The agreement was modified to adjust the parenting schedule in 2016. Both parties were represented by counsel. These arrangements have been implemented without acrimony and there has been no court intervention since these agreements went into effect. (*Exhs. 6, 20 & 23; Testimony of Mr. St. Germain & Ms. C*)
- In the block provided in the BPD application for "CURRENT SPOUSE/ SIGNIFICANT OTHER", Mr. St. Germain listed Ms. V, and provided the required personal details, including her current residence in Woburn (same as Mr. St. Germain). In the block provided for "RELATIVES", Mr. St. Germain listed, among others, his brother who also lived with him, again providing the required personal details and residential address in Woburn (same as Mr. St. Germain). In the block that follows these two sections of the application, which asks for the "NAME(S) OF ALL OTHERS RESIDING WITH YOU", Mr. St. Germain wrote "N/A". (*Exh. 8*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, §1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); *MacHenry v. Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den.*, 423 Mass.1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a "certification" of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L. c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4)

9. Officer Gazerro agreed that, as a result of his review of Mr. St. Germain's MSP application after the bypass decision had been issued, he learned that Mr. St. Germain had nine employment references from Middlesex and Suffolk Sheriff

Departments' officers (including the Suffolk Sheriff Deputy Superintendent, all of which were positive. (*Exh.1; Testimony of Gazerro*)

A person may appeal a bypass decision under G.L. c. 31, §2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't v. Civil Service Comm'n*, 483 Mass. 474-78 (2019); *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

"Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett v. Civil Service Comm'n*, 447 Mass. 233, 243 (2006); *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere v. Civil Service Comm'n*, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient")

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The commission ". . . cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority" but, when there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy", then the occasion is appropriate for intervention by the commission." *City of Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 428 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L. c. 31, §2(b), gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary for the Commission to find that the appointing authority acted "arbitrarily and capriciously." *Id.*

ANALYSIS

The preponderance of the evidence does not establish reasonable justification to bypass Mr. St. Germain for appointment to the position of a Brockton police officer based on the reasons it proffered to disqualify him. He did reside in Brockton for the one year period prior to taking the civil service examination and was entitled to claim residency preference in Brockton. Although Brockton was entitled to access and consider Mr. St. Germain's employment, criminal and driver history, the conclusions it made about them were not based on a reasonably thorough review and are not supported by the preponderance of the evidence. Similarly, Brockton's conclusions that Mr. St. Germain lied on his application are not supported by the preponderance of the evidence.

Residency

There was no dispute that Mr. St. Germain began residing in Brockton in 2014 and continued his residency there until he moved to Woburn in 2017. The only factual dispute is the specific date on which Mr. St. Germain changed his legal residence by leaving Brockton and establishing residence in Woburn. The

preponderance of the evidence established that he did so on March 26, 2017, and, therefore, maintained his residency in Brockton for more than one year before taking the civil service examination. He moved his belongings to Woburn and spent the night there for the first time on March 26, 2017. His Brockton lease and the "Move-Out" documentation from his landlord confirms these facts. Mr. St. Germain (and Ms. V) provided very specific and credible recollection of when he moved his furniture, including his bed, and began sleeping in Woburn. The only evidence proffered by Brockton to the contrary was third-hand circumstantial evidence in the Thompson Reuters reports about utility turn-ons and turn-offs. Officer Gazerro did not know how that information was collected or by whom or exactly what it meant, and I give it very little weight.

Brockton contends that Mr. St. Germain did not provide the evidence that confirmed his Brockton residency during the application process. He was not put on notice that his residency was an issue until it was raised in the November 3, 2018 interview with Officer Gazerro, which had occurred right after he had been pulled aside and told that he was going to be bypassed based on his criminal record. He did tell Officer Gazerro that he had apartment leases to prove his residency, but Officer Gazerro did not contact the apartment management or otherwise pursue the residency issue before conferring with "command staff" and writing the November 15, 2018 recommendation to bypass Mr. St. Germain. It would certainly have been of value had Mr. St. Germain provided Brockton the evidence that was introduced at the Commission hearing that established his residency claim. However, I find it unlikely that, even if he had submitted the information, it would have changed the recommendation that Officer Gazerro already had made to bypass Mr. St. Germain based on the allegedly contrary "utility and credit" information, an opinion that he continued to assert at the Commission hearing.

Driving Record

Brockton claims that Mr. St. Germain has a record of "excessive motor vehicle violations" that justifies his bypass. I do not agree.

Mr. St. Germain acknowledges that his driver's history is not unblemished. He disclosed that his license was suspended in 2009 after accumulating seven surchargeable events, including one at-fault accident (2005), a "sign" violation not otherwise identified (2007), three speeding citations (2007 & 2008) and two seat-belt violations (2008). In the past ten years since then, he was cited for failing to have his registration in his possession (Not Responsible, 2009); failing to have a current inspection sticker (Responsible, 2009), a number plate violation (Not Responsible, 2009); one at-fault accident (2011), a failure to yield (Not Responsible, 2012), and three speeding citations (Responsible, 2009; Not Responsible, 2014 & 2018).

As recently summarized in *Dorn v. Boston Police Department*, 31 MCSR 375 (2018), the Commission, in regard to bypass appeals based on driving histories, generally limits the review to the Appellant's driving history within the past ten (10) years, but gives greater weight to the most recent five (5) years. Further, the

Commission gives more weight to those infractions related to at-fault accidents and other moving violations where the Appellant has been found responsible. Less weight is given to those entries which may be attributable to socioeconomic factors such as expired registrations, no inspection sticker, etc. which may have no bearing on whether the Appellant can effectively serve in a public safety position. The Commission also attempts to put an Appellant's driving history in the proper context, considering such issues as whether he/she is required to drive more for personal or business reasons. Finally, when relevant, the Commission reviews the driving histories of other candidates to ensure fair and impartial treatment. *See also, Bruins v. City of New Bedford*, CSC No. G1-19-206, 33 MCSR 189 (2020)

In sum, for seven years immediately preceding his application to become a Brockton Police Officer, Mr. St. Germain maintained a clean driving record. Following his suspension ten years earlier, he has had one at-fault accident, one speeding ticket and an inspection sticker infraction. Thus, the preponderance of the evidence, indeed, the undisputed evidence of Mr. St. Germain's most relevant recent driving record, is not fairly characterized as comprising "excessive motor vehicle violations" that justify a bypass for appointment.

Criminal History

Mr. St. Germain argues that Brockton is precluded from obtaining and considering any information about either of his adult criminal cases, as those records have been sealed pursuant to G.L. c. 276, §100A. The Commission recently considered this issue in *Golden v. Department of Correction*, CSC No. G1-19-198, 33 MCSR 194 (2020) and *Kodhimaj v. Department of Correction*, 32 MCSR 377 (2019). The Commission concluded that a "criminal justice agency" as defined in G.L. c. 276, §100D (which includes the BPD), is expressly authorized to access independently, or through third parties, all forms of criminal history information about a candidate for employment as a law enforcement officer as part of the required "reasonably thorough review of a candidate's background", and that expressly includes sealed judicial records or other information (including police incident reports) concerning such sealed cases. *Id.*¹⁰

The Commission also concluded that criminal justice agencies were not exempt from the requirements of Massachusetts Discrimination Law, G.L. c. 151B, §4(9) & §4(9½), which precludes any employer (including public law enforcement agencies) from asking a candidate to disclose certain prior criminal history, including cases that did not involve a conviction, misdemeanor convictions that occurred more than three years ago, and "a criminal record, or anything related to a criminal record, that has been sealed or expunged pursuant to chapter 276." *Id.*¹¹ Moreover, all

employers must comply with G.L. c. 6, § 171A, which states, in part:

"In connection with any decision regarding employment, volunteer opportunities, housing or professional licensing, a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source prior to questioning the applicant about his criminal history. If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source. . . ."

...

"Failure to provide such criminal history information to an applicant pursuant to this section may subject the offending person to investigation, hearing and sanctions by the board. Nothing in this section shall be construed to prohibit . . . an adverse decision on the basis of an individual's criminal history or to provide or permit a claim of an unlawful practice under Chapter 151B or an independent cause of action . . . for a claim arising out of an adverse decision based on criminal history except as otherwise provided under Chapter 151B."

Thus, insofar as Brockton's application process inquired of Mr. St. Germain about information concerning his criminal history, including but not limited to sealed records and juvenile history, which Chapter 151B prohibits it from asking him about, he correctly asserts that those disclosures cannot be used against him and, in particular, any errors or omissions in his disclosures cannot form the basis to disqualify him on the grounds of untruthfulness. *Id.* *See also* G.L. c. 151B, §9, ¶2 ("No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.")

Moreover, by answering improper questions solicited by Brockton about his criminal history that are prohibited by G.L. c. 151B, Mr. St. Germain does not waive his rights to object to consideration of the truthfulness of his responses. *See Kodhimaj v. Department of Correction*, 32 MCSR 377 (2019) *citing Kraft v. Police Comm'r of Boston*, 410 Mass. 155 (1991) *See also*, G.L. c. 151B, §4(5) (prohibiting "interference" with the exercise of c.151B rights); *Lysek v. Seiler Corp.*, 415 Mass. 625 (1993) ("Any result other than the one reached in *Kraft* at best would have ignored the employer's unlawful inquiries, and at worst would have rewarded the employer for them. In either event, employers in the future would have been encouraged to violate the law")

10. An order to seal a criminal record is distinguished from an order to "expunge" the record, now applicable to most juvenile records and certain other matters (e.g., cases of mistaken identity and offenses that are no longer criminal) which mandates "the permanent erasure or destruction" of judicial and all other related records as well, including police logs, "so that the record is no longer accessible to, or maintained by, the court, any criminal justice agencies or any other state agency, municipal agency or county agency. If the record contains information on a person

other than the petitioner, it may be maintained with all identifying information of the petitioner permanently obliterated or erased." *See* G.L. c. 276, §100E et. seq., added by St. 2018 c. 69, §195, eff. Oct. 13, 2018.

11. Massachusetts Civil Service Law also limits the information that may be required from a candidate when applying to take a civil service examination. *See* G.L. c. 31, §20.

In sum, in the present case, none of Mr. St. Germain's criminal history fell within the categories that Brockton could lawfully ask him about in his application, and charging him with untruthfulness in his responses cannot be used as a reason to bypass him. Similarly, although Brockton was lawfully entitled to access his criminal history, including the adult sealed records, although no convictions were entered, Brockton was required to provide Mr. St. Germain with copies of all information it had obtained (and allow him to directly and fully respond to it). Officer Gazerro's interview notes and Commission testimony did not establish that this was done. For these two reasons, alone, Brockton's bypass of Mr. St. Germain on the basis of his criminal record did not comply with Massachusetts law and was not reasonably justified.

Finally, these two fatal flaws aside, I also conclude that the information about Mr. St. Germain's criminal history would not provide a reasonable justification to bypass him on that basis. The fact that Mr. St. Germain's adult records were sealed does not preclude their consideration by Brockton, but the weight they deserve ought to take into account that, in order to be sealed, a judicial determination had to be made that the sealing was in the public interest, after weighing all relevant factors, including, among other things "evidence of rehabilitation . . . [and] the passage of time since the offense and since the dismissal or nolle prosequi. . . ." *Commonwealth v. Pon*, 469 Mass. 296, 316-19 (2014). See also Executive Order No. 495 "Regarding the Use and Dissemination of Criminal Offender Record Information by the Executive Department (Jan. 11, 2008):

"[T]he existence of a criminal record should not be an automatic and permanent disqualification for employment, and as the largest single employer in the Commonwealth, state government should lead by example in being thoughtful about its use of CORI in employment decisions . . .

...

It shall be the policy of the Executive Department with respect to employment decisions that . . . [t]he employer should consider the nature and circumstances of any past criminal conviction; the date of the offense; . . . the individual's conduct and experience or professional certifications obtained since the time of the offense or other evidence of rehabilitation; and the relevance of the conviction to the duties and qualifications of the position in question. Charges that did not result in a conviction will be considered only in circumstances in which the nature of the charge relates to sexual or domestic violence against adults or children . . . or otherwise indicates that the matter has relevance to the duties and responsibilities of the position in question."

(Emphasis added)

Giving consideration to applicable law and public policies set forth above, I conclude that the preponderance of the evidence fails to establish that Mr. St. Germain's prior criminal history provides a reasonable justification to disqualify him for appointment to the position of an BPD Police Officer. He has never been

convicted of any crime or adjudicated a delinquent.. All charges against him were dismissed. I also take note that, while not excusing his juvenile behavior, that period was a particularly difficult time in Mr. St. Germain's life (having been separated from his siblings and bullied by other older and bigger kids at the juvenile residences and group homes where he lived). The preponderance of the evidence at the Commission hearing, most of which Brockton failed to discover or was led to misconstrue during its less than thorough review, established that the adult 2007 and 2013 incidents involved legitimate verbal arguments that, without a more thorough review than appears in this record, cannot reasonably be characterized as a pattern of domestic abuse or violence. The credible testimony of Mr. St. Germain and Ms. C established that both incidents were isolated instances in a long-term relationship with Ms. C and their three children, that is, and has been, on good terms, without need even for a court order of support since 2014. I take note that Ms. C did not deny her potential bias due to her financial interest in Mr. St. Germain's employment future, but I credit her testimony for its candor and honesty.¹²

Mr. St. German's adult history shows many indicia of his maturity, none of which Brockton considered, as the background investigator "already had enough" reason to bypass him, and never took a serious look at his adult professional and person life beyond the paper record of his criminal history. For example, in addition to his stable family life, he has become a successful mentor to other young people. He holds two personal LTCs, both in good standing. He has a satisfactory employment record as a Suffolk Deputy Sheriff, which, among other things, includes responsibility to carry a department-issued firearm, operate cruisers and handle the many stressors of a job dealing with the care and custody of prisoners. He proudly and credibly presented the evidence of these current, positive traits, in testimony that showed a demeanor that was calm and reserved, even under tough cross-examination.

In sum, because of the absence of a thorough review of Mr. St. Germain's background and after consideration of the preponderance of the evidence that failed to establish that Mr. St. Germain ever committed any domestic physical or verbal abuse of anyone in his entire life, I conclude that Brockton has not met its burden to establish the claim that Mr. St. Germain's has a criminal record that "shows a propensity toward violence to resolve issues, domestic violence . . . A&B and Intimidation [and] a lack of character and maturity".

Suitability to Carry A Firearm

Pursuant to G..L.c.41, §98, a BPD Police Officer is authorized to carry such firearms as may be determined by the BPD Police Chief. Brockton argues that, based on Mr. St. Germain's criminal history, he would be found unsuitable to carry a BPD department-issued firearm and, therefore, could not perform the essential functions of a BPD Police Officer. The record does not support this argument.

12. The dispute reported in the sketchy Medford 2010 incident report was not considered worthy of pursuit by the police or Ms. C or Mr. St. Germain (the incident had slipped his mind until the MBTA bypass letter refreshed his recollection). The

2005 Boston incident was a case of mistaken identity. I give no weight to either incident.

Mr. St. Germain is not classified as a “prohibited person” within the meaning of the Massachusetts Firearms Licensing Law, G.L. c.140, §140. Nor does he fit the description of a person who could be found “unsuitable” in the reasonable exercise of discretion of the licensing authority.¹³ No less than three law enforcement agencies (Woburn Police, Medford Police and the State of Utah) have deemed Mr. St. Germain suitable to hold a personal LTC and to possess, carry and conceal Large Capacity Firearms. The Suffolk Sheriff has authorized Mr. St. Germain to carry, and he does carry a department-issued firearm.

Brockton relies on a 1987 Opinion issued by Attorney General Bellotti, in response to a question posed by the Norfolk District Attorney, regarding the authority of a police chief to issue an LTC to a member of the department who resides in another community. The Opinion states:

“In effect, G.L.c.41, §98, exempts police officers from compliance with the licensing requirement of G.L. c.140, §131(d) [which then authorized a chief of police to issue licenses only to persons “residing or having a place of business” with his jurisdiction] . . . because G.L. c.41, §98 entitles them to carry “within the commonwealth” any weapons deemed appropriate by their chiefs of police.”

I do not read this Opinion to mean that a chief of police has absolute discretion to determine the type and to whom a duty firearm may be issued. I also note that G.L. c.140, §131(d) was amended in 2008 and now includes the words “or any law enforcement officer employed by the licensing authority” within the ambit of persons to whom a chief of police has not been authorized to issue an LTC under the standards prescribed by that statute. St. 2008, c.224.

In addition, Brockton’s assertion that Mr. St. Germain would not be found suitable to be issued a BPD firearm is premised entirely on hearsay information conveyed to Officer Gazerro after a conversation with a fellow officer. The record does not reflect the specific information, if any, Officer Gazerro conveyed about Mr. St. Germain’s criminal record or any other “reliable and credible information”, positive or negative, about his suitability, including, for example, his stable family life, current employment with the Suffolk Sheriff and LTC renewals, all of which post-dated the criminal incidents. I am not suggesting that the Commission can substitute its judgment about “suitability” to carry a firearm, but, the Commission must, in the application of basic merit principles of civil service law, ensure that bypass decisions are not arbitrary and capricious and are based on a fair and thorough review of all relevant facts bearing on an applicant’s present “ability, knowledge and skills”.. That was not the case with the superficial treatment of the LTC issue here.

Employment History

Brockton claims, without ever having contacted any of Mr. St. Germain’s employers, that he “has either quit or been fired from

most of his previous jobs which indicates an unequivocal poor past work history.” I address briefly this unsubstantiated claim. Of the five jobs Mr. St. Germain has held since 2006, he was “fired” only once, when the Middlesex Sheriff’s Office withdrew his conditional offer of employment during his probationary period (based on the 2013 criminal charges filed against him that were eventually dismissed). His layoff from Fidelity in a reduction in force due to the recession is not fairly characterized as being “fired”, nor is his termination from his per diem job with Beth Israel Hospital after he became a full time Suffolk Deputy Sheriff. He “quit” his other jobs only to accept better employment, leaving Toy’s R Us for the Middlesex Sheriff’s Office and, later, leaving Apollo International (where he had been promoted twice during his tenure) for the Suffolk Sheriff’s Office.

False Statements on Application

Brockton claims that Mr. St. Germain “lied” about four matters during his application process: (1) he denied that he had ever been listed as a runaway or missing person; (2) he lied about his support obligations with Ms. C; (3) he lied or failed to follow instructions about who lived with him; and (4) he omitted/failed to report his employment status from 2011 to 2013. None of these claims were proved by a preponderance of the evidence.

An appointing authority is entitled to bypass a candidate who has “purposefully” fudged the truth as part of the application process. *See, e.g., Minoie v. Town of Braintree*, 27 MCSR 216 (2014). However, providing incorrect or incomplete information on an employment application does not always equate to untruthfulness. “[L]abeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and [informed] review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety.” *Kerr v. Boston Police Dep’t*, 31 MCSR 25 (2018), citing *Morley v. Boston Police Department*, 29 MCSR 456 (2016) Moreover, a bypass letter is available for public inspection upon request, so the consequences to an applicant of charging him or her with untruthfulness can extend beyond the application process initially involved. *See G.L. c. 31, §27, ¶2*.

The corollary to the serious consequences that flow from a finding that a law enforcement officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. *See, e.g., Boyd v. City of New Bedford*, 29 MCSR 471 (2016) (honest mistakes in answering ambiguous questions on NBPD Personal History Questionnaire); *Morley v. Boston Police Dep’t*, CSC No. G1-16-096, 29 MCSR 456 (2016) (candidate unlawfully bypassed on misunderstanding appellant’s responses about his “combat” experience); *Lucas v. Boston Police Dep’t*, 25 MCSR 520 (2012) (mistake about appellant’s characterization of past medical history)

13. Under G.L. c. 140, §131, discretionary denial of an LTC on the grounds of “unsuitability” must be based on “reliable and credible information” that the applicant is a “risk to public safety.” An applicant denied an LTC on this basis is entitled to a

written explanation of the specific reasons for the determination, which is subject to judicial review.

Here, none of the errors and omissions cited by Brockton were the result of what it cited as an intent to deceive as opposed to honest mistakes or misunderstanding the question. Mr. St. Germain explained that he believed that he gave a truthful negative response to the question about being “listed” as a “runaway or missing person”. Although there were times that he returned to his group home a few hours after curfew, there was no evidence that the staff did not know he had gone out or that his departure was unauthorized. He did not consider that his brief delayed return from an authorized absence was equivalent to “running away” from home or being a “missing person”. Similarly, he was completely accurate to explain that there was no court support order, which had been vacated, and his obligations to Ms. C and their children were based on a mutually acceptable negotiated plan they worked out themselves. He also acted in good faith when he did not list Ms. V or his brother as an “other” person who lived with him because he had already disclosed that they lived with him in answer to preceding questions. Finally, Brockton simply overlooked that he did duly report his unemployment between jobs from 2010 to 2013 on the supplementary page of the application, although he inadvertently wrote “2010 to 2018” as dates of unemployment, an obvious typo, but not an intentional deception.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Richard St. Germain, is allowed.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/or the City of Brockton in its delegated capacity take the following action:

- Place the name of Richard St. Germain at the top of any current or future Certification for the position of BPD Police Officer until he is appointed or bypassed after consideration consistent with this Decision.
- If Mr. St. Germain is appointed as a BPD Police Officer, he shall receive a retroactive civil service seniority date which is the same date as the first candidate ranked below Mr. ST. Germain who was appointed from Certification No. 05819. This retroactive civil service seniority date is not intended to provide Mr. St. Germain with any additional pay or benefits including, without limitation, creditable service toward retirement.

OPINION OF CHRISTOPHER BOWMAN AND CYNTHIA ITTLEMAN

The City of Brockton has provided valid reasons to bypass the Appellant.

First, the Appellant, based on his own testimony, was involved in two (2) domestic violence-related incidents, including an incident in 2013 where he entered a home without permission, grabbed the mother of his children, spun her around and stole her cell phone. Aware that police had been called, the Appellant fled the scene and threw the cell phone out a car window, destroying the cell phone. This type of disturbing conduct, standing alone, is a valid reason for bypass.

Second, the Appellant provided conflicting information on his application, including answering “no” to whether he had ever been the subject of a temporary restraining order, when he indicated on his application to the MBTA Transit Police Department that he believed that he had been subject to two (2) orders against him, including one (1) related to the incident referenced above.

Third, the Appellant failed to provide the City with the necessary information to verify that he resided in Brockton continuously from March 25, 2016 to March 25, 2017, the applicable window for showing that he met the residency preference requirement in Brockton. Providing a lease at the Commission hearing, which, coincidentally, had an end date of March 26, 2017, does not change the fact that he failed to prove his residence *at the time* that he was being considered for appointment by the City of Brockton.

Years of prior Commission decisions have established that any one of these reasons, let alone all of them taken together, justify an appointing authority’s decision to bypass a candidate for appointment to a public safety position.

The appeal should be denied.

[signed]

Christopher C. Bowman, Chairman

I concur with the above dissent. Further, I note that well-established law and policy in Massachusetts are designed to prevent and address domestic violence. This decision should not be interpreted to mean that domestic violence is acceptable. Domestic violence must be condemned in the strongest possible terms.

[signed]

Cynthia Ittleman, Commissioner

* * *

By 3-2 vote of the Civil Service Commission (Bowman [NO], Chairman; Camuso [AYE], Ittleman [NO], Stein [AYE] and Tivnan [AYE], Commissioners) on June 4, 2020.

Notice to:

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* * * * *

RICHARD ST. GERMAIN

v.

MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY TRANSIT POLICE DEPARTMENT

G1-19-128

June 4, 2020

Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment to the MBTA Transit Police-Criminal Record-Domestic Violence-Driving Record-False and Misleading Statements on Application—A Commission majority of 3-2 found that a candidate for original appointment to the MBTA Transit Police was wrongly bypassed based on a criminal record that included domestic violence, a poor driving record, false and misleading statements on his application, as well as numerous unintentional mistakes on the application. The Civil Service Commission voted on the same day to also reverse this same candidate's bypass by the Brockton Police Department. Commissioner Chairman Christopher C. Bowman and Commissioner Cynthia A. Ittleman dissented, finding that the domestic violence issues standing alone were enough to warrant this candidate's bypass. They also cited the Applicant's incomplete and misleading application.

DECISION

The Appellant, Richard St. Germain, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b), to contest his bypass by the Massachusetts Bay Transportation Authority (MBTA) for appointment as police officer with the MBTA Transit Police Department).¹

The Commission held a pre-hearing conference on July 2, 2019 and a full hearing on August 30, September 18 and October 2, 2019, which was digitally recorded.² Witnesses were sequestered. Twenty-eight (28) exhibits were received in evidence and administrative notice was taken of documentation regarding the sealing of the Appellant's criminal and juvenile court records. Proposed Decisions were filed on July 8, 2019. For the reasons stated below, Mr. St. Germain's appeal is allowed.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- MBTA Transit Police Detective. Matthew Haney
- MBTA Transit Police Detective Paul Mabee
- MBTA Transit Police Sergeant John Cutting

Called by the Appellant:

- Richard St. Germain, Appellant
- Ms. C, former domestic partner

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Richard St. Germain, is an African-American male in his early thirties. He currently shares joint legal and physical custody of three children resulting from a long-term prior relationship with Ms. C and also supports a fourth child that Ms. C had through another relationship, remaining active in their lives, attending school events, coaching sports and volunteering at school. (*Exh. 26; Testimony of Appellant & Ms. C*)

2. Mr. St. Germain was born in Boston, removed from his parents at an early age, and grew up in foster care, group homes and residential programs. He obtained a high school diploma through the Boston Community Leadership Academy (2003), received a scholarship to attend a transitional college program at Brandeis University (2003-2004), and completed a one-year technical training program at Cambridge College (2007) sponsored by Year Up, Inc. He attended Bunker Hill Community College off and on from 2004 through 2014, but did not obtain a degree. (*Exhs. 3, 24 & 28; Testimony of Appellant*)

3. Mr. St. Germain became employed in January 2016 with the Suffolk County Sheriff's Office and currently holds the position of Deputy Sheriff, which grants him full police powers. He serves on the rapid response unit, operates cruisers (sometimes at high speed over Boston streets to convey prisoners to hospitals), performs police details, and performs other duties incident to the care and custody of prisoners. He participates in the Suffolk Sheriff's community outreach program, coaching inner-city youth. (*Exhs. 3, 24 & 28; Testimony of Appellant*)

4. Mr. St. Germain's employment from 2006 to 2016 includes:

- 2006-2008: Fidelity Investments, Intern; Jr. Systems Engineer; Regional Support Technician. Laid off in reduction in force due to recession.
- 2008-2010: Unemployed
- 2010-2011: Toys R Us, Bicycle Dep't Manager. Assembled and repaired bicycles and provided customer service. Resigned to take job with Middlesex Sheriff's Office.
- 2011-2013: Middlesex Sheriff's Office, Correction Officer. Terminated (conditional offer withdrawn) during probationary period when 2013 criminal charges were filed against him, as described further below.
- 2013-2014: Unemployed

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. .

- 2014-2016: Beth Israel Deaconess Hospital, Public Safety Officer. Per diem position. After becoming a full-time Deputy Sheriff, he stopped working the minimum number of hours and was terminated for “job abandonment”.
- 2014-2016: Apollo International, Security Officer; Supervisor; Account Manager. Resigned after taking position with Suffolk County Sheriff’s Office.

(Exhs. 3, 24, 25 & 28; *Testimony of Appellant*)

5. Mr. St. Germain’s driver’s history includes the following citations:

09/03/2005	Surchargeable Accident
11/18/2005	Speeding (NA); Number Plate Violation (NR)
05/22/2007	Speeding (NR); Registration Not In Possession (NA)
08/01/2007	Speeding (R)
09/13/2007	Failure to Obey Sign (R)
01/05/2008	Speeding (R); Failure to Wear Seat Belt (R)
09/17/2008	Passing Violation (NP); Failure to Wear Seat Belt (R)
12/16/2008	Miscellaneous Equipment Violation (R)
01/30/2009	Speeding (R); Registration Not In Possession (NR)
08/07/2009	No Inspection Sticker (R)
10/08/2009	No Inspection Sticker (NR); Number Plate Violation (NR)
06/11/2011	Surchargeable Accident
02/02/2012	Failure to Stop (NR)
04/25/2014	Speeding (NR)
02/23/2018	Speeding (INC) [later NR] ³

(Exhs. 3 & 15; *Testimony of Appellant*)

6. Mr. St. Germain currently holds two Licenses to Carry Firearms (LTC): (1) an Unrestricted Class A Large Capacity License to Carry issued by the Medford Police Department and most recently renewed by the Woburn Police Department in August 2017 (to expire August 2023) and (2) a Utah Concealed Carry License, most recently renewed in 2016 (to expire in 2021). Mr. St. Germain has been in good standing with both LTCs, save for a one year period in 2013, when those licenses were suspended following the criminal charges filed against him discussed further below. He owns several firearms. (Exhs. 2 & 3; *Testimony of Appellant*)

7. Mr. St. Germain’s Criminal History includes:

- Two (2) adult records (sealed in 2014) concerning disputes in May 2007 and May 2013 with Ms. C, then Mr. St. Germain’s domestic partner, the details of which are described further below. (Exhs. 3, 12 & 13; *Testimony of Appellant & Ms. C*; *Administrative Notice* [<https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Ascds%3AUS%3Af8e8f509-2db3-4de0-bc20-7bfc98a84cc7>])⁴
- Four (4) juvenile cases (sealed in 2019) alleging assault & battery concerning residents and staff at the juvenile facilities and group homes where he then lived, filed or dismissed without a delinquency adjudication: (1) age 14 - telephone allegedly thrown at resident; (2) age 15 - allegedly chased and threatened staff and residents with hockey stick; (3) age 15 - telephone allegedly used in unknown manner; (4) age 15 - resident allegedly hit with broken antenna and shampoo bottle. (Exhs. 2 & 12; *Testimony of Appellant*; *Administrative Notice* [<https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Ascds%3AUS%3Af8e8f509-2db3-4de0-bc20-7bfc98a84cc7>])⁴

Mr. St. Germain’s Law Enforcement Applications

8. On March 25, 2017, Mr. St. Germain took and passed the civil service examination for Municipal Police Officer (and Massachusetts State Police [MSP] Trooper) administered by the Massachusetts Human Resources Division (HRD) and his name was placed on the Municipal Police eligible list established in November 2017. (*Stipulated Facts*)

9. In April 2017, from a prior eligible list, Mr. St. Germain applied for appointment as a MSP Trooper. He completed the application process, including a background investigation and psychological examination, but was not selected for appointment. He reapplied in 2018 and, again, was not selected. (Exhs. 2, 3 & 22)

10. In 2018, Mr. St. Germain applied for a position as a Brockton Police Officer and, after an initial background investigation, in November 2018, was recommended for bypass. (Exh. 21)⁵

11. On September 4, 2018, HRD issued Certification #05777 to the MBTA for the appointment of twenty (20) entry-level MBTA Transit Police Officers from the 2017 Municipal Police eligible list. Mr. St. Germain’s name appeared in a tie group in the 62nd position on the certification. He signed the certification as willing to accept employment and was provided, via e-mail, a copy of the MBTA’s “Recruit Officer Candidate Application Packet” which he was required to complete electronically and return to the MBTA within seven (7) days. (*Stipulated Facts*; Exhs. 1 through 11; *Testimony of Haney, Mabee & Cutting*)

12. The application packet included twenty-eight (28) pages containing 99 separate questions, many of which required use of an “Additional Response Form” to provide all the information needed to respond to the question. (Exh. 3)

13. In the week following receipt of the application form, Mr. St. Germain was assigned extra overtime hours at the Suffolk Sheriff’s Department. He did not begin working on his applica-

3. This citation was adjudicated Not Responsible after the BPD pulled the RMV Driver’s History. (Exhs. 3 & 15; *Testimony of Appellant*)

4. Mr. St. Germain described the period of his youth from approximately 1997 to 2001 as the most difficult time of his life. He had been separated from his siblings, who were sent to different foster homes and, all but one, eventually adopted, and he wound up in residential programs and group homes where he was “fending off bullies” much older and bigger than he was. (*Testimony of Appellant*).

tion until the night before it was due. To save time, he tried to copy information from prior applications, but had trouble entering all of the information correctly and “clearly made mistakes.” (*Testimony of Appellant*)

14. On September 7, 2018, as required, Mr. St. Germain reported to the MBTA with his application packet. When it came time to meet with Sgt. Det. Cutting, he explained his difficulty completing and printing the on-line application form. (*Testimony of Appellant & Cutting*)

15. Candidates commonly encounter technical issues with the application and are allowed to fix errors and, if necessary, submit hand-written responses. (*Testimony of Mabee and Cutting*)

16. Sgt. Det. Cutting provided Mr. St. Germain a computer terminal and allowed him time to finish and submit his application, which included responses to all 99 questions, plus nineteen (19) Additional Response Form pages. Due to problems downloading some of the pages, he wound up having to fix typos and insert some of the information by hand. (*Exh. 3; Testimony of Appellant & Cutting*)

17. Mr. St. Germain included most of the required documentation with the application, but did not provide his college transcripts and three years of tax returns. (*Exhs. 4 through 11 & 28*)

18. It is not unusual for applicants to need more time to submit documentation. Mr. St. Germain was allowed additional time to provide his college transcripts and tax returns. He had not yet obtained all of those additional documents when he received notice that he would be bypassed and, therefore, never submitted them. (*Testimony of Appellant, Mabee & Cutting*)

19. Mr. St. Germain’s application was assigned to MBTA Transit Police Detective Mabee to begin the background investigation. Det. Mabee reviewed the Criminal Offender Record Information (CORI) obtained by the MBTA through the Massachusetts Criminal Justice Information Services (CJIS), which contains a record of Mr. St. Germain’s driving history, as well as the history of all adult criminal arraignments, including the two sealed records, and all juvenile appearances. (*Exhs. 12 through 15; Testimony of Mabee*)

20. The rest of Det. Mabee’s investigation consisted of collecting and reviewing (a) police reports on file with the Medford, New Bedford and Boston Police; (b) personnel records from the Middlesex Sheriff and the Suffolk Sheriff; (c) Mr. St. Germain’s charge of discrimination filed with the Massachusetts Commission Against Discrimination (MCAD) alleging racially disparate treatment by the Middlesex Sheriff along with the MCAD’s finding

of lack of probable cause; and (d) Mr. St. Germain’s MSP and Brockton application packets. (*Exh. 18*)

21. Det. Mabee never met Mr. St. Germain. His employment and personal references were not checked.⁶ He was not granted an “oral board” interview. No written investigation report was generated. (*Testimony of Appellant & Mabee*)

22. In early 2019, Sgt. Det. Cutting and Det. Mabee contacted Mr. St. Germain by telephone and informed him that, after verbal discussion with “command staff”, the MBTA was not moving forward with his application. (*Testimony of Appellant, Cutting & Mabee*)

23. By letter dated April 10, 2019, MBTA Superintendent Richard Sullivan informed Mr. St. Germain that he had been bypassed. The letter, authored by Det. Mabee, summarized the reasons for his bypass as follows:

“[Y]ou failed to truthfully and accurately answer numerous questions listed in your MBTA Transit Police Recruit Application Package. Your horrendous driving record, accompanied by your inability to pay attention to detail makes you a burden for any law enforcement agency. Your aggressive, hostile, and confrontational actions exhibited through the information cited by numerous Police Officers and their interactions with you makes you a liability (sic) therefor, appointing you as a Police Officer would be an injustice to the Commonwealth of Massachusetts. Your blatant disregard to follow Massachusetts General Law makes it impossible to empower you to enforce the same . . . laws . . . you violate. You failed to follow the directions completing the MBTA Transit Police Recruit Application and . . . every question was not answered truthfully and to the best of your knowledge. Therefore, hiring you, as a Police Officer, would not only be detrimental to the MBTA Transit Police Department but all citizens of the Commonwealth of Massachusetts and your name should be by-passed for employment.”

(*Exh. 2; Testimony of Mabee*)

24. The MBTA bypass letter enumerated twelve (12) “discrepancies and/or omissions” found in Mr. St. Germain’s application and background documentation:

1. Question #17 on the application asked: “Have you ever received a written or verbal warning from a police officer in any state?” Mr. St. Germain responded: “Yes, there have been a few times that I was pulled over by a Police Officer and let go with a warning date and reasons I do not remember.” The MBTA found this answer “minimal” without providing the required “Who, What, When, Where and Why”.

2. Question #18 asked; “Have you ever received a citation from a police officer in any state?” Although Mr. St. Germain disclosed twelve (12) motor vehicle citations, he did not mention a Febru-

5. Mr. St. Germain’s bypass by the City of Brockton is the subject of a related appeal which the Commission also decides today. *St. Germain v. City of Brockton*, CSC No. G1-19-053 [33 MCSR 211 (2020)].

6. The personnel file obtained by the MBTA from the Middlesex Sheriff’s Office included a performance review made two months before Mr. St. Germain was dismissed, which noted that, except for improvement in gaining knowledge of policies and procedures, his performance was acceptable or superior in all cate-

gories, with his supervisor specifically calling out his “professional” manner and respect for all. (*Exh. 25*) The MSP application packet contains extensive details of the MSP’s background investigation, including, among other things, two positive references from his direct supervisors at the Middlesex Sheriff’s Office and the Suffolk Sheriff’s Office, who vouched for him as a man of “superb moral character”, a “fair yet firm officer” who “follows the chain of command” and performs with “professionalism and strict attention to detail.” (*Exh. 22*)

ary 23, 2018 speeding ticket [that he was appealing and resulted in a finding of Not Responsible].

3. Question #19 asked: “Have you ever been involved in an automobile accident in any state?” Mr. St. Germain provided an “Additional Response Form which disclosed both of his surchargeable accidents [a 2005 one-operator motorcycle accident and a 2011 accident “while driving in a rainstorm, a car with no tail lights stopped short” and he failed to brake in time to avoid the collision]. He also disclosed a 2016 accident that did not appear on his driver history [being rear-ended in Boston for which he was not responsible] Again, the MBTA found these responses “vague” and lacking in “details”.

4. Question #25 asked: “Has your license to operate a motor vehicle in any state been suspended, revoked, or slated for suspension or revocation?” Mr. St. Germain’s handwritten Additional Response Form listed a suspension from 9/14/2009 to 12/14/2009 for seven surchargeable events but did not disclose that his license was “slated for suspension” in 2008 due to non-payment of fines and costs; and did not disclose that he currently owed an unpaid parking ticket that would prevent renewal of his license when it came up. The MBTA described this driving record as a “direct reflection of your inability to safely operate a motor vehicle” and failing to accept “responsibilities for your own actions by promptly paying the citations issued in order to maintain your privilege to operate a motor vehicle.”

5. Question #27 asked: “List chronologically ALL employment, including summer, part-time employment and volunteer employment. If unemployed for a period of time indicate, setting forth the dates of unemployment.” The MBTA found the following discrepancies in Mr. St. Germain’s list of employment history: (a) he listed his employment at Fidelity Investments on the application form as one employment, but his resume and his MSP application showed three different jobs within Fidelity during that timeframe; (b) he failed to provide a telephone number or contact information for Fidelity Investments; (c) the employment dates for Fidelity on the application form were different from his resume and his MSP application; (d) his Suffolk Sheriff’s Office personnel file showed notice of outside employment as a “bar-back” [bartender’s assistant] omitted from his application or resume; and (e) he did not account for two years of unemployment from 11/2008 and 10/2010 [after he was laid off from Fidelity] and his next job for [Toys R Us] which left “unclear what your source of income was” for those two years.

6. Question #28(f) asked (sic): “Have you ever (or ever been accused of) . . . (f) Had an accident while working?” Mr. St. Germain answered “NO”, but the MBTA noted that, his Brockton application stated: “I slammed my finger in a cell door while closing the door” at the Suffolk Sheriff’s Department. The MBTA found this discrepancy to be evidence of untruthfulness and a “direct reflection of your personal character and integrity.”

7. Question #30 asked: “Have you ever received any reprimands, suspensions or counseling’s (sic) from any employment or volunteer position you’ve held.” Mr. St. Germain answered “NO”. The MBTA letter noted that, in his MSP application, however, he said he once received a “written reprimand” for misplacing handcuff keys and had called the withdrawal of his probationary employment a “suspension”.

8. Question #34 asks: “Have you ever been terminated or resigned in lieu of termination?” Mr. St. Germain answered “YES” and disclosed his layoff by Fidelity and the rescission of his conditional offer by the Middlesex Sheriff’s Department “due to the previously disclosed matter which I was arrested”

9. Question #45 asked: “Have you ever been arrested for a violation of a criminal offense?”; Question #37 asked “Have you ever been tried for a criminal offense but were not convicted?”; Question #52 asked “Have you ever been detained by any law enforcement officer for investigation purposes or have you ever been the subject or a suspect in any criminal investigation?” Mr. St. Germain answered “YES” to these questions, disclosed his 2000 juvenile arrests and the two adult sealed criminal cases. The MBTA found that these disclosures “differed” from his CORI and the police incident reports they collected, and found that his disclosures were “vague” and that his “inability to provide a full recollection of each incident leading to your arrest and arraignment” was misleading and “reiterates your lack of integrity and displays a repeated pattern of untruthful actions.”

10. Question #59 asked: “Have you ever used or possessed the following prescription drugs without a prescription?” Mr. St. Germain answered “YES” to this question and provided an Additional Response Form that stated he was given Valium in the emergency room after a slip and fall in 2018 and was prescribed a cough syrup containing Codeine in 2017. The MBTA found this answer left it “unclear” whether Mr. St. Germain had an “inability to follow directions” or whether he “used these prescribed drugs another time in your life and failed to disclose this information.”

11. Question #66 asked: “Have you ever signed the civil service list for, or submitted an application to any other Fire Department, Police Department, Sheriff’s Department or Law Enforcement agency?” Question #67 asks: “Have you ever been rejected for any Police, Fire, Corrections, Sheriff’s or Law Enforcement position.” Mr. St. Germain answered “YES” to both questions and listed applications to the Middlesex Sheriff’s Department in 2010, 2013 & 2015; Suffolk County Sheriff’s Department in 2013 & 2015; TSA in 2013; MSP in 2016 & 2017; and Transit Police in 2018. The MBTA letter notes that Mr. St. Germain did not update his application to disclose that he also applied to the Brockton Police Department (after submitting his MBTA application) and quotes at length from Brockton’s November 2018 bypass recommendation which listed “lying”, a criminal record with a “propensity toward violence”, a domestic violence arrest in 2013, lack of character and maturity, unequivocal poor past employment history, excessive motor vehicle violations, and not being in compliance with residency. The MBTA also notes that he did not mention that he had also been rejected by the MSP again in 2018, citing his admission that he had “mixed up the dates” and missed a scheduled psychological exam.⁷

12. Question #94 asked: “Have you ever been issued any type of firearms license?” Mr. St. Germain answered “YES” and provided the details about his Massachusetts LTC, but did not disclose that he also held an LTC issued by the State of Utah.

(Exh. 2)⁸

7. Mr. St. Germain did complete the MSP’s psychological screening in 2017. The MSP examining psychiatrist’s final report contains a detailed account of Mr. St. Germain’s struggles as a youth, taken from his parents at four years of age to live with relatives and later group homes, where he became “embroiled in fighting to defend himself from bullies”. The psychiatrist noted that this “challenging life his-

tory and his response to it are key concerns” but Mr. St. Germain “did not present as exhibiting a mood disturbance or cognitive impairment” and denied “consciously experiencing anger, and was more focused on continuing self-improvement and overcoming obstacles.” (Exh. 22)

8. [See next page.]

25. The MBTA eventually hired thirteen (13) candidates from Certification #05777, of which three (3) were ranked below Mr. St. Germain. (*Stipulated Facts; Exhs. 1 & 2*)

Driver History (Bypass Reasons 1 through 4)

26. In concluding that Mr. St. Germain's driving record was "horrendous", the MBTA considered all entries on Mr. St. Germain's Driver History going back to 2005, including those for which he was found "Not Responsible." (*Exhs. 3 & 15; Testimony of Appellant & Mabee*)

27. The MBTA also cited Mr. St. Germain's failure to disclose that his driver's license was "slated for suspension" for failure to pay fines and costs, failed to disclose his attendance at a remedial driver's training, and noted that he had an unpaid parking ticket that had flagged his driver's license for future non-renewal. Mr. St. Germain stated on his application that his driver's license was suspended for 60 days in 2009 "due to 7 surchargeable events". Save for the unpaid parking ticket, the MBTA witnesses were not able to identify which entries on the RMV Driver's History actually showed the alleged remedial training or what resulted from any of the "slated" suspensions. Mr. St. Germain paid the outstanding parking ticket as soon as it was brought to his attention by the MBTA bypass letter. (*Exhs. 3 & 15; Testimony of Appellant & Mabee*)

Criminal Record (Bypass Reason 9)

28. In addition to his driving record, the MBTA relies on Medford Police reports and Ms. C's testimony concerning the 2007 and 2013 sealed records cases and one other non-criminal incident report, as well as a Boston Police report regarding a 2005 incident, to support its conclusion that Mr. St. Germain's "aggressive, hostile, and confrontational actions" reported to, and observed by, numerous police officers showed a "blatant disregard" for Massachusetts law that made him a "liability" whom it was "impossible" to appoint as a police officer. (*Exhs. 16 through 19; Testimony of Ms. C*)

29. In the early morning hours of February 20, 2005, Boston Police officers responded to a report of a fight at a residential apartment in the Mission Hill area. Upon arriving on scene, the officers observed a black "non-Hispanic" male standing in the street in front of the residence with a cut on his chin and asked him if he had been in a fight, to which he responded "No" but would not say how he got cut. The officers spoke to the residents of the apartment who reported that the male, whom they had not previously met but identified as Richard St. Germain, had come to visit with other friends of theirs. An argument ensued over a food bill, the male began "freaking out", punched two women and they threw

him out about 20 minutes before the police arrived. As he left, he smashed his hand into the door, causing a "spider-web" crack in the glass. The police noted this crack in the incident report as well as noting that the male also appeared to have a small cut on his hand. The officers concluded that there was no probable cause to arrest the male suspect and allowed him to leave after telling him that the BPD detective division would be issuing him a summons on a complaint of malicious destruction of property. The incident report identifies the male as Richard St. Germain, a "Wentworth Student", of Apt. 108 [# redacted] Huntington Avenue, Boston. The report listed a Boston telephone number and reported his SSN as "000-00-0000". (*Exh. 20*)

30. Mr. St. Germain claims the incident is a case of mistaken identity. He was never a student at Wentworth and submitted a letter from the school attesting to that fact. He never resided at the Huntington Avenue address. He never received a summons or criminal complaint regarding the incident. (*Exhs. 3, 21 & 22; Testimony of Appellant*)⁹

31. On May 15, 2007, at approximately 10PM, the Medford Police responded to a report of a domestic disturbance. Ms. C (then pregnant with their first of her three children with Mr. St. Germain) met the officers outside the residence and stated that her boyfriend (Mr. St. Germain) was inside. The officers went to speak with him. The report does not indicate what interaction occurred with Mr. St. Germain. The report states that Ms. C had his belongings packed up and, when he came home, she told him to move out but he began to unpack his stuff and started putting it back into a dresser drawer. Ms. C reached to take his belongings out of the drawer. Mr. St. Germain grabbed her arm as he closed the drawer, causing her to catch her fingers in the drawer. She said that he also hit her with a stuffed animal. She was advised of her rights to seek a restraining order but declined. Based on her report, Mr. St. Germain was arrested and booked on a charge of domestic assault & battery. The charges were dismissed in December 2007 and the criminal record sealed. (*Exhs. 3, 13 & 19*)

32. Mr. St. Germain does not deny that the incident occurred and resulted in his arrest. He agrees that the account in the police report is largely accurate but not complete. He vigorously denied that he threatened or assaulted Ms. C or engaged in any other form of criminal misconduct. (*Exh. 3; Testimony of Appellant*)

33. At the Commission hearing, Mr. St. Germain confirmed that he arrived home after work on the night in question to find his laptop and other belongings piled up outside. Ms. C wanted him out of the house and he agreed. He arranged for his sister to pick him up and come back for his belongings. He tried to talk with

8. At the Commission hearing, the MBTA raised additional concerns, including: (a) answering "NO" to Question #64 which asked if he had ever sued or been sued, although a claim was pending from his 2016 motor vehicle accident and he filed a charge of discrimination with the MCAD after discharge by the Middlesex Sheriff's Department; and (2) failing to sign the next certification for appointment to the Transit Police, that taken together with other information that came to the MBTA's attention, raised doubt that Mr. St. Germain truly wanted a job with the MBTA or was more interested in a position with the Brockton Police. (*Exhs. 3, 22 & 23; Testimony of Appellant*) As these concerns were based on information that

came to the MBTA's attention after the decision had been made to bypass him and were first presented at the Commission hearing, they are not properly before the Commission as reasons for bypass. I give them no weight, and I do not address them further. See G.L. c. 31, §27; PAR.08(4).

9. When asked about the exculpatory evidence at the Commission hearing, Det. Mabee discounted the absence of any record that Mr. St. Germain's ever lived on Huntington Avenue or attended Wentworth as more examples of "discrepancies" in his application. (*Testimony of Mabee*).

Ms. C but she would not listen to him, so he began to bring his belongings inside and started to stow them away in a drawer and, as he did so, Ms. C began taking them out of the drawer. He does not specifically remember Ms. C catching her finger in the drawer but does not deny that it happened. He does remember that he threw a teddy bear at her as stated in the police report. (*Testimony of Appellant*)

34. At the Commission hearing, Ms. C largely stood by what she had told the police, but she did agree that, although Mr. St. Germain was “upset” with her, he was not out of control, and added that she did not believe Mr. St. Germain intentionally tried to slam the drawer on her finger and that she was never in fear that he would harm her in any way. (*Testimony of Ms. C*)

35. The MBTA also obtained a Medford Police “CAD Incident Report” concerning a 6/30/2010 response to a “Domestic” incident and an associated “Investigative Report” form. The CAD Incident Report contains no substantive information about the call, except the time the two Medford Police Officers were dispatched (10:28 AM) and the time the call was cleared (10:35 AM). The handwritten “Investigative Report” states that Ms. C was the “victim” of an “argument” with Mr. St. Germain “over money and no job” and got “verbally abusive with [Ms. C] about his feeling the financial stress of being laid off and UE [unemployment] benefits have stopped.” The parties were “advised” and the report filed without any further action. (*Exh. 18*)

36. Until it was brought to his attention in the bypass letter, Mr. St. Germain had forgotten about this incident, but did recall it. At the Commission hearing, he described it as a “disagreement”, not an “altercation”. He does not remember the police coming to the house and neither he nor Ms. C were sure how it was that they were called. This incident occurred about a year and half after Mr. St. Germain was laid off by Fidelity Investments and had not found another job. Both he and Ms. C were short of money. He was still covering her rent and other bills as well as paying for a place of his own. Ms. C’s mother had recently passed away. He and Ms. C both recalled the incident as verbal argument over money issues. At the Commission hearing, both he and Ms. C stressed that the encounter never became physical. (*Testimony of Appellant & Ms. C*)

37. On May 6, 2013, at approximately 10:30 PM, the Medford Police responded to a 911 call received from a friend of Ms. C. According to the police report, at approximately 10:15 PM, Mr. St. Germain had dropped off their three children and left, but returned about fifteen minutes later and started banging on the front door. Mr. St. Germain told Ms. C. that he had learned something that he said warranted giving his daughters a “time out”. Ms. C said the children were already asleep and he should come back in the morning. According to the police report, Ms. C said Mr. St. Germain tried to pry open a front window and, then, before she could call 911, Mr. St. Germain was inside. She thought he

came through a rear window. She said that an argument then ensued, during which Mr. St. Germain grabbed her, she spun around and he took Ms. C’s cell phone and left. She then contacted the Medford Police. (*Exh. 18; Testimony of Ms. C*)

38. Mr. St. Germain was tracked down by Randolph Police at the residence where he was staying and taken into custody by Medford Police officers. According to the police report, en route to the police station, Mr. St. Germain stated that he had been with his daughters the entire day. After he dropped them off, his current girlfriend told him she had seen something “troubling” about his daughters. He turned back to Ms. C’s home. He tried to contact Ms. C but she did not return his messages or texts or answer her cell phone. He knocked on the front door and Ms. C came to the door and told him to go away. He could see his daughters in the background and could see Ms. C yelling at them. He returned to his vehicle and retrieved the house key to the back door which he used to enter the home. He met Ms. C in the dining/kitchen area. They argued, but it never got physical, and Ms. C ran out the front door. He initially denied knowing about Ms. C’s cell phone, but when asked again, he admitted to the officer that he “was right” and had “got rid of the cell phone by throwing it out the car window.” (*Exh. 16*)

39. Based on the foregoing information received from both Ms. C and Mr. St. Germain, Medford Police placed him under arrest with the intent to charge him with domestic assault and battery, breaking and entering with intent to commit a felony, and intimidation of a witness. The Medford Police also notified the Department of Families and Children (DCF), filed a “51A” Report of Child Abuse), and confiscated his Massachusetts LTC and his Middlesex Sheriff’s Department issued firearm. Medford Police later learned that Mr. St. Germain also held Utah LTC and notified that state’s authorities of Mr. St. Germain’s arrest. (*Exhs. 16 & 17*)

40. Mr. St. Germain was charged with Assault & Battery, Witness Intimidation and Breaking and Entering with Intent to Commit a Felony. On August 8, 2013, after filing of a Nolle Prosequi, all charges were dismissed. The record was later sealed. (*Exh. 13*)¹⁰

41. Mr. St. Germain agrees that the May 2013 incident occurred and that the charges resulted in his arrest, a one-year (negotiated) suspension of his LTCs and loss of his job at the Middlesex Sheriff’s Office. He disputes parts of the police report and the DCF 51A and denies any criminal misconduct. (*Exhs. 3 & 16; Testimony of Appellant*)

42. At the Commission hearing, Mr. St. Germain’s account of the May 2013 incident was largely consistent with what he told the police that night, but he provided additional details that corroborated his claim that he “had nothing to hide” about what happened. (*Exh. 13; Testimony of Appellant*)

43. As the police report indicated, Mr. St. Germain left Ms. C’s residence after dropping off their three children without incident

10. There was no evidence to indicate what action, if any, resulted from the “51A”. (*Exh. 17*)

and then returned about 15 to 20 minutes later. The three girls had spent the day with him and Ms. V, who is still Mr. St. Germain's current girlfriend. They all went to the movie theater and, before leaving, Ms. V observed something she thought was wrong, but did not immediately tell Mr. St. Germain. On the way home, after they were alone, Ms. V described to Mr. St. Germain in detail what she said happened. This alarmed Mr. St. Germain for good reason, which he credibly explained during his testimony. Upon hearing what Ms. V told him, he turned the car around and returned to Ms. C's residence with the intention to discuss the subject with Ms. C and the children and get to the bottom of what had happened. As he told the police, en route he tried to reach Ms. C by phone, but she didn't answer. (*Testimony of Appellant*)

44. As the police report indicated, Mr. St. Germain told Ms. C they needed to talk about some "troubling" behavior by their children. Ms. C was visibly angry with Mr. St. Germain for reasons he couldn't pin down, but suspected it had something to do with the fact that Ms. C saw he had been out with Ms. V and that the children had met "Daddy's new friend" before she did. At the Commission hearing, Ms. C confirmed that is precisely why she was angry and did not then want to talk with Mr. St. Germain. (*Testimony of Appellant & Ms. C*)

45. As he had told the police, Ms. C would not open the door. He used his house key to the back door (he did not have key to the front door) to gain entry into the residence. He never attempted to enter the residence through a window. He met Ms. C in the kitchen area and tried to talk to her about his concerns, but she laughed at him and told him she would call the police or something to that effect. She took out her phone, which he grabbed from her hand as he continued to "plead with her" to "please listen to me." Ms. C then ran out the door. Mr. St. Germain went to talk to his children and then sent them back to bed. He went outside where he saw Ms. C at the door of a neighbor's house, tried one more time to engage her in conversation, to no avail, and then drove off. After he left, Ms. C made contact with the police. (*Testimony of Appellant & Ms. C*)

46. While driving home the second time, Mr. St. Germain realized that he had put Ms. C's cell phone in his back pocket. By this time, he was stewing over the fact that Ms. C would not take seriously what he thought was an important issue involving their children, as well as the fact that his children would not give him straight answers about what happened at the movie theater. He admits that, at this point, his anger did boil over and he threw Ms. C's phone out the car window. He provided Ms. C with a new phone following week. (*Testimony of Appellant*)

47. During her Commission testimony, Ms. C admitted that she depended on Mr. St. Germain to support their children and that her interest in Mr. St. Germain's financial support was in her mind when the criminal cases against him were under consideration. She also admitted that both she and Mr. St. Germain could get "emotional" at times but he was not a "violent person", he was never abusive to her and she was "never physically afraid" of him. (*Testimony of Ms. C*)

48. Ms. C did not make the comments about Mr. St. Germain by "numerous Police Officers" that the MBTA attributed to her, allegedly disparaging him about his suitability to become a police officer. In particular, she called her prior relationship with Mr. St. Germain, although it included "lots of arguments" but no more than "typical of any couple". Both she and Mr. St. Germain called their current "working relationship" good overall. She especially praised him for how well she saw him get along with their children and volunteered how "really, really good" he is handling difficult and stressful situations involving them and others. (*Testimony of Appellant & Ms. C*)

False Statements (Bypass Reasons 6, 7 & 12)

49. At the Commission hearing, the MBTA provided no specific evidence to support its contention (Bypass Reason 6) that Mr. St. Germain "intentionally" concealed his accident at the Suffolk Sheriff's Department on his MBTA application, other than he did mention it in response to a similar question on Brockton's application filed two month later. He was never out of work due to the accident. (*Exhs. 2,3 & 21; Testimony of Appellant, Mabee & Cutting*)

50. Mr. St. Germain admits that he provided inconsistent responses to very similar questions on the MBTA application and the MSP application regarding whether he was ever "suspended" from a job or "reprimanded" (Bypass Reason 7), but the substantive disclosures about his employment history, and specifically, his termination from the Middlesex Sheriff's Department are substantially identical, save that he mentioned the "written reprimand" for his part (along with other Suffolk Sheriff correction officers) in misplacing handcuff keys only on his 2017 MSP application. Mr. St. Germain attributed the discrepancies to the logistical problems and tight deadlines he faced to complete his MBTA application. In particular, he copied his responses from prior applications and the questions on those application did not exactly match up to the questions as they appeared on the MBTA application. (*Exhs. 3 & 22; Testimony of Appellant*)

51. Mr. St. Germain also admitted his failure to disclose that he held an LTC issued by the State of Utah, in addition to his Massachusetts LTC, both of which were suspended due to the 2013 criminal matter (Bypass Reason 12). He did disclose the suspension of the Massachusetts license and had disclosed the Utah license on other applications. He also attributed the omission to the same logistical problems and tight deadlines he faced to complete the MBTA application noted above. (*Exhs. 3, 21 & 22; Testimony of Appellant*)

Other Errors and Omissions (Bypass Reasons 5, 8, 10 & 11)

52. The other errors and omissions found by the MBTA in the employment section of Mr. St. Germain's application (Bypass Reasons 5 & 8) were not cited as intentionally untruthful, but relied upon to show what the MBTA concluded was Mr. St. Germain's lack of attention to detail and failure to follow the instructions provided for completing his application properly and updating it as necessary. Mr. St. Germain admitted most of these mistakes, including his failure to mention his part-time job as a barback and

forgetting to list the period of unemployment between his jobs for Fidelity and Toys R Us. He attributed these omissions to honest oversight and the same logistical issues and time constrained he faced in completing the application noted above. (*Exhs. 2 & 3; Testimony of Appellant, Mabee & Cutting*)

53. In the case of the discrepancies regarding his Fidelity employment, Mr. St. Germain explained that he broke out that employment on his resume to show the three different assignments he had in different departments, but they were covered in a single block on the application because they were all part of the same employer, Fidelity Investments. The discrepancy in the overall employment dates on the application was a typo which Mr. St. Germain had corrected by hand (somewhat illegibly) when he was completing the form at the MBTA. The dates on the resume are correct. (*Exhs. 3 & 28; Testimony of Appellant*)

54. As to the discrepancy in his response about prescription drugs, at the Commission hearing, Mr. St. Germain agreed that he may have misinterpreted the question, taking it literally, and thought that he had not been “prescribed” a drug that was given to him in the hospital. The Additional Response Form he provided was completely accurate. (*Testimony of Appellant*)

55. The final discrepancy in Mr. St. Germain’s application mentioned in the bypass letter concerned failure to update the information. The application material provided by the MBTA to candidates requires that they update their applications to reflect any “interactions” and “encounters” with law enforcement “officials” or “agencies.” The MBTA also tells candidates verbally that they must update and supplement the application if any information has changed, such as incurring a speeding ticket or submitting an application to another law enforcement agency. The MBTA considered Mr. St. Germain’s failure to disclose his 2018 applications to the MSP and Brockton a violation of these instructions. (*Exhs. 3 & 5; Testimony of Haney*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, §1. *See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); *MacHenry v. Civil Serv. Comm’n*, 40 Mass App.Ct. 632, 635 (1995), *rev.den.*, 423 Mass. 1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L. c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that for-

mula, an appointing authority must provide specific, written reasons—positive or negative, or both—consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L. c. 31, §2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. *Boston Police Dep’t v. Civil Service Comm’n*, 483 Mass. 474-78 (2019); *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly v. Civil Service Comm’n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’” *Brckett v. Civil Service Comm’n*, 447 Mass. 233, 243 (2006); *Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere v. Civil Service Comm’n*, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”)

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The commission “. . . cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority” but, when there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy,” then the occasion is appropriate for intervention by the commission.” *City of Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 426 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L. c. 31, §2(b), gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority’s action” and it is not necessary for the Commission to find that the appointing authority acted “arbitrarily and capriciously.” *Id.*

ANALYSIS

Driving Record

Mr. St. Germain acknowledges that his driver’s history is not unblemished. He disclosed that his license was suspended in 2009 after accumulating seven surchargeable events, including one at-fault accident (2005), a sign violation, not otherwise identified (2007), three speeding citations (2007 & 2008) and two seat-belt violations (2008). In the past ten years since then, he was cited for failing to have his registration in his possession (Not Responsible, 2009); failing to have a current inspection sticker (Responsible, 2009), a number plate violation (Not Responsible, 2009); one at-fault accident (2011), a failure to yield (Not Responsible, 2012), and three speeding citations (Responsible, 2009; Not Responsible, 2014 & 2018)

As recently summarized in *Dorn v. Boston Police Department*, 31 MCSR 375 (2018), the Commission, in regard to bypass appeals based on driving histories, generally limits the review to the Appellant's driving history within the past ten (10) years, but gives greater weight to the most recent five (5) years. Further, the Commission gives more weight to those infractions related to at-fault accidents and other moving violations where the Appellant has been found responsible. Less weight is given to those entries which may be attributable to socioeconomic factors such as expired registrations, no inspection sticker, etc. which may have no bearing on whether the Appellant can effectively serve in a public safety position. The Commission also attempts to put an Appellant's driving history in the proper context, considering such issues as whether he/she is required to drive more for personal or business reasons. Finally, when relevant, the Commission reviews the driving histories of other candidates to ensure fair and impartial treatment. *See also, Bruins v. City of New Bedford*, CSC No. G1-19-206, 33 MCSR 189 (2020)

In sum, for seven years immediately preceding his application to become an MBTA Transit Police Officer, Mr. St. Germain maintained a clean driving record. Following his suspension more than ten years earlier, he has had one at-fault accident, one speeding ticket and an inspection sticker infraction. Thus, the preponderance of the evidence, indeed, the undisputed evidence of Mr. St. Germain's most relevant recent driving record, is not fairly characterized as comprising "excessive motor vehicle violations" that justify a bypass for appointment.

Criminal History

Mr. St. Germain argues that the MBTA is precluded from obtaining and considering any information about either of his adult criminal cases, as those records have been sealed pursuant to G.L. c. 276, §100A. The Commission recently considered this issue in *Golden v. Department of Correction*, CSC No. G1-19-198, 33 MCSR 194 (2020) and *Kodhimaj v. Department of Correction*, 32 MCSR 377 (2019). The Commission concluded that a "criminal justice agency" as defined in G.L. c. 276, §100D (which includes the MBTA Transit Policed Dep't), is expressly authorized to access independently, or through third parties, all forms of criminal history information about a candidate for employment as a law enforcement officer as part of the required "thorough review of a candidate's background", and that expressly includes sealed judicial records or other information (including police incident reports) concerning such sealed cases. *Id.*¹¹

The Commission also concluded that criminal justice agencies were not exempt from the requirements of Massachusetts Discrimination Law, G.L. c. 151B, §4(9) & §4(9½), which precludes any employer (including public law enforcement agencies)

from asking a candidate to disclose certain prior criminal history, including cases that did not involve a conviction, misdemeanor convictions that occurred more than three years ago, and "a criminal record, or anything related to a criminal record, that has been sealed or expunged pursuant to chapter 276." *Id.*¹² Moreover, all employers must comply with G.L. c. 6, § 171A, which states, in part:

"In connection with any decision regarding employment, volunteer opportunities, housing or professional licensing, a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source prior to questioning the applicant about his criminal history. If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source. . . ."

...

"Failure to provide such criminal history information to an applicant pursuant to this section may subject the offending person to investigation, hearing and sanctions by the board. Nothing in this section shall be construed to prohibit . . . an adverse decision on the basis of an individual's criminal history or to provide or permit a claim of an unlawful practice under Chapter 151B or an independent cause of action . . . for a claim arising out of an adverse decision based on criminal history except as otherwise provided under Chapter 151B."

Thus, insofar as the MBTA's application process inquired of Mr. St. Germain about information concerning his criminal history, including but not limited to sealed records and juvenile history, which Chapter 151B prohibits it from asking him about, he correctly asserts that those disclosures cannot be used against him and, in particular, any errors or omissions in his disclosures cannot form the basis to disqualify him on the grounds of untruthfulness. *Id.* *See also* G.L. c. 151B, §9, ¶2 ("No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.")

Moreover, by answering improper questions solicited by the MBTA about his criminal history that are prohibited by G.L. c. 151B, Mr. St. Germain does not waive his rights to object to consideration of the truthfulness of his responses. *See Kodhimaj v. Department of Correction*, 32 MCSR 377 (2019) *citing Kraft v. Police Comm'r of Boston*, 410 Mass. 155 (1991) *See also*, G.L. c. 151B, §4(5) (prohibiting "interference" with the exercise of c.151B rights); *Lysek v. Seiler Corp.*, 415 Mass. 625 (1993) ("Any result other than the one reached in *Kraft* at best would have ignored the employer's unlawful inquiries, and at worst would have

11. An order to seal a criminal record is distinguished from an order to "expunge" the record, now applicable to most juvenile records and certain other matters (e.g., cases of mistaken identity and offenses that are no longer criminal) which mandates "the permanent erasure or destruction" of judicial and all other related records as well, including police logs, "so that the record is no longer accessible to, or maintained by, the court, any criminal justice agencies or any other state agency, municipal agency or county agency. If the record contains information on a person

other than the petitioner, it may be maintained with all identifying information of the petitioner permanently obliterated or erased." *See* G.L. c. 276, §100E et. seq., added by St.2018 c 69, §195, eff. Oct. 13, 2018 .

12. Massachusetts Civil Service Law also limits the information that may be required from a candidate when applying to take a civil service examination. *See* G.L. c. 31, §20.

rewarded the employer for them. In either event, employers in the future would have been encouraged to violate the law”)

In sum, in the present case, none of Mr. St. Germain’s criminal history fell within the categories that the MBTA could lawfully ask him about in his application, and charging him with untruthfulness in his responses cannot be used as a reason to bypass him. Similarly, although the MBTA was lawfully entitled to access his criminal history, including the juvenile and sealed cases (which include no record of conviction or delinquency adjudication), the MBTA also was required to provide Mr. St. Germain with copies of all the information it had obtained (and allow him to directly and fully respond to it), before it used that information as a basis for bypass, which the MBTA did not do. For these two reasons, alone, the MBTA’s bypass of Mr. St. Germain on the basis of his criminal record did not comply with Massachusetts law and was not reasonably justified.

Finally, these two fatal flaws aside, I also conclude that the information about Mr. St. Germain’s criminal history would not provide a reasonable justification to bypass him on that basis. The fact that Mr. St. Germain’s adult records were sealed does not preclude their consideration by the MBTA, but the weight they deserve ought to take into account that, in order to be sealed, a judicial determination had to be made that the sealing was in the public interest, after weighing all relevant factors, including, among other things “evidence of rehabilitation . . . [and] the passage of time since the offense and since the dismissal or nolle prosequi. . . .” *Commonwealth v. Pon*, 469 Mass. 296, 316-19 (2014). *See also* Executive Order No. 495 “Regarding the Use and Dissemination of Criminal Offender Record Information by the Executive Department (Jan. 11, 2008):

“[T]he existence of a criminal record should not be an automatic and permanent disqualification for employment, and as the largest single employer in the Commonwealth, state government should lead by example in being thoughtful about its use of CORI in employment decisions . . .

...

It shall be the policy of the Executive Department with respect to employment decisions that . . . [t]he employer should consider the nature and circumstances of any past criminal conviction; the date of the offense; . . . the individual’s conduct and experience or professional certifications obtained since the time of the offense or other evidence of rehabilitation; and the relevance of the conviction to the duties and qualifications of the position in question. Charges that did not result in a conviction will be considered only in circumstances in which the nature of the charge relates to sexual or domestic violence against adults or children . . . or otherwise indicates that the matter has relevance to the duties and responsibilities of the position in question.”

(*Emphasis added*)

Giving consideration to applicable law and public policies set forth above, I conclude that the preponderance of the evidence fails to

establish that Mr. St. Germain’s prior criminal history provides a reasonable justification to disqualify him for appointment to the position of an MBTA police officer. He has never been convicted of any crime or adjudicated a delinquent. All charges against him were dismissed. I also take note that, while not excusing his juvenile behavior, that period was a particularly difficult time in Mr. St. Germain’s juvenile life (having been separated from his siblings and bullied by other older and bigger kids at the juvenile facilities and group homes where he lived). The preponderance of the evidence at the Commission hearing, most of which the MBTA failed to discover or was led to misconstrue during its less than reasonably thorough review, established that the adult 2007 and 2013 incidents involved legitimate verbal arguments that, without a more thorough review than appears in this record, cannot reasonably be characterized as a pattern of domestic abuse or violence.. The credible testimony of Mr. St. Germain and Ms. C established that both incidents were isolated instances in a long-term relationship with Ms. C and their three children, that is, and has been, on good terms, without need even for a court order of support since 2014. I take note that Ms. C did not deny her potential bias due to her financial interest in Mr. St. Germain’s employment future, but I credit her testimony for its candor and honesty.¹³

Mr. St. German’s adult history shows many indicia of his maturity, none of which the MBTA considered, as the background investigator never met him and never took a serious look at his adult professional and personal life beyond the paper record of his criminal history. No less than four law enforcement agencies (Suffolk Sheriff, Medford Police, Woburn Police and the State of Utah) have deemed him suitable to hold an LTC and carry a firearm. He has a satisfactory employment record as a Suffolk Deputy Sheriff, which, among other things, includes responsibility to operate cruisers and to handle the many stressors of a job dealing with the care and custody of prisoners. He proudly and credibly presented the evidence of these current, positive traits, in testimony that showed a demeanor that was calm and reserved, even under tough cross-examination.

In sum, because of the absence of a thorough review of Mr. St. Germain’s background and after consideration of the preponderance of the evidence that failed to establish that Mr. St. Germain ever committed any domestic physical or verbal abuse of anyone in his entire life, I conclude that the MBTA has not met its burden to establish that he has a “troubling history” of “domestic violence” and never outgrew the “pattern of aggressive, assaultive behavior, lack of impulse control and anger, dating from his time as a juvenile” that it claims to be the reason for this unwarranted bypass decision.

False Statements

The MBTA claims that Mr. St. Germain provided three knowingly false answers to questions on his application: (1) omitting disclosure of an on-the-job injury, (2) failing to disclose discipline re-

13. The dispute reported in the Medford 2010 incident report was not considered worthy of pursuit by the police or Ms. C or Mr. St. Germain (the incident had slipped his mind until the MBTA bypass letter refreshed his recollection). The

2005 Boston incident was a case of mistaken identity. I give no weight to either incident.

ceived at the Middlesex Sheriff and Suffolk Sheriff's departments, and (3) disclosing only one of his two LTCs, omitting his Utah Concealed Carry License. I accept Mr. St. Germain's testimony that none of those omissions were intentional but, rather, attributed to the formatting issues he had encountered in completing the MBTA application.

An appointing authority is entitled to bypass a candidate who has "purposefully" fudged the truth as part of the application process. *See, e.g., Minoie v. Town of Braintree*, 27 MCSR 216 (2014). However, providing incorrect or incomplete information on an employment application does not always equate to untruthfulness. "[L]abeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and [informed] review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety." *Kerr v. Boston Police Dep't*, 31 MCSR 25 (2018), citing *Morley v. Boston Police Department*, 29 MCSR 456 (2016). Moreover, as this case illustrates, a bypass letter is available for public inspection upon request, so the consequences to an applicant of charging him or her with untruthfulness can extend beyond the application process initially involved. *See G.L. c. 31, §27, ¶2*.

The corollary to the serious consequences that flow from a finding that a law enforcement officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. *See, e.g., Boyd v. City of New Bedford*, 29 MCSR 471 (2016) (honest mistakes in answering ambiguous questions on NBPD Personal History Questionnaire); *Morley v. Boston Police Dep't*, 29 MCSR 456 (2016) (candidate unlawfully bypassed on misunderstanding appellant's responses about his "combat" experience); *Lucas v. Boston Police Dep't*, 25 MCSR 520 (2012) (mistake about appellant's characterization of past medical history)

In sum, the preponderance of the evidence failed to establish the MBTA's attempt to characterize these errors and omissions as examples of untruthfulness.

Other Errors and Omissions

The MBTA also identifies what it calls unintentional mistakes committed by Mr. St. Germain in completing his application. In addition to the three examples just mentioned above, the MBTA cites five other alleged errors and omissions: (1) omitting his part-time outside employment as a barback while working at the Suffolk Sheriff's office; (2) leaving off his period of unemployment from 2010 to 2013 between jobs at Fidelity Investments and Toys R Us; (3) failing to list his three different assignments at Fidelity Investments as separate employments; (4) erroneously listing two drugs he was properly prescribed as having been taken "without a prescription"; and (5) failing to report his 2018 appli-

cations to the MSP and Brockton as required further disclosures of "encounters" or "interactions" with a law enforcement agency.

Mr. St. Germain does not concede that his use of a single block to report his employment at Fidelity was an error at all. He does concede, however, that he "clearly made [other] mistakes", including "misreading" the question on prescription drugs because he didn't understand that drugs administered in the hospital were "prescribed" to him, forgetting to list his period of unemployment from 2010 to 2013 and failing to disclose his part-time job as a barback and his on-the-job accident while working as a Suffolk Deputy Sheriff.

Finally, forgetting to update his application to report his 2018 Brockton application and his 2018 MSP application and rejection by the MSP is troubling, but it does not alter my conclusion that, although attention to detail is an important trait for a police officer, on all of the evidence, Mr. St. Germain's carelessness on his application, alone, does not rise above the level of isolated, honest mistakes and, without more, does not presents a legitimate reason to question his candor or overall attention to detail. *cf. Barboza v. City of New Bedford*, 29 MSCR 495 (2016) (application riddled with dozens of discrepancies and credibility issues about prior employment and involvement with a known felon).¹⁴

Mr. St. Germain's errors are not excused by the rushed circumstances of his own making that he faced to complete his application. However, the MBTA also had information in the form of employment references that expressly praised Mr. St. Germain for his "professionalism" and "strict attention to detail as a correction officer". Having made no effort to follow-up with any of those on-the-job references or employers, or even meet with Mr. St. Germain, I cannot credit the background investigator's professed concern that these inadvertent errors on his application justify his bypass recommendation.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Richard St. Germain, is allowed.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/or the City of Gloucester in its delegated capacity take the following action:

- Place the name of Richard St. Germain at the top of any current or future Certification for the position of MBTA Transit Police Officer until he is appointed or bypassed after consideration consistent with this Decision.
- If Mr. St. Germain is appointed as an MBTA Transits Police Officer, he shall receive a retroactive civil service seniority date which is the same date as the first candidate ranked below Mr. St. Germain who was appointed from Certification No. 05777. This retroactive civil service seniority date is not intended to provide Mr. St. Germain with

14. I also note that, insofar as the MBTA relied on the Brockton and MBTA rejections: (1) the MSP rejection was due, at least in significant part, to reports of statements allegedly made by Ms. C about Mr. St. Germain which I found were

misconstrued or not accurate, and (2), as set forth in the decision announced today in *St. Germain v. Brockton*, the Commission found that the reasons cited by the MBTA in the Brockton bypass letter were not reasonably justified.

any additional pay or benefits including, without limitation, creditable service toward retirement.

**OPINION OF CHRISTOPHER BOWMAN AND
CYNTHIA ITTLEMAN**

The MBTA Transit Police Department has provided valid reasons to bypass the Appellant.

First, the Appellant, based on his own testimony, was involved in two (2) domestic violence-related incidents, including an incident in 2013 where he entered a home without permission, grabbed the mother of his children, spun her around and stole her cell phone. Aware that police had been called, the Appellant fled the scene and threw the cell phone out a car window, destroying the cell phone. This type of disturbing conduct, standing alone, is a valid reason for bypass.

Second, the Appellant failed to disclose on his application that he held a license to carry (LTC) a firearm in the State of Utah, which had previously been suspended for one (1) year.

Third, even as of the date of the hearing before the Commission, the Appellant had failed to provide the MBTA Police Department with documents that all candidates were required to produce, including, but not limited to, copies of his tax returns.

Fourth, the Appellant failed to provide complete and/or thorough responses to various questions on the application.

Years of prior Commission decisions have established that any one of these reasons, let alone all of them taken together, justify an appointing authority's decision to bypass a candidate for appointment to a public safety position.

The appeal should be denied.

[signed]
Christopher C. Bowman, Chairman

Iconcur with the above dissent. Further, I note that well-established law and policy in Massachusetts are designed to prevent and address domestic violence. This decision should not be interpreted to mean that domestic violence is acceptable. Domestic violence must be condemned in the strongest possible terms.

[signed]
Cynthia A. Ittleman, Commissioner

* * *

By 3-2 vote of the Civil Service Commission (Bowman [NO], Chairman; Camuso [AYE], Ittleman [NO], Stein [AYE] and Tivnan [AYE], Commissioners) on June 4, 2020.

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* * * * *

ANTHONY BEDINELLI

v.

SPRINGFIELD POLICE DEPARTMENT

G2-19-110

June 18, 2020

Christopher C. Bowman, Chairman

Bypass Appeal-Promotion to Springfield Police Sergeant-Disciplinary History-Poor Judgment and Inability to Deescalate—
The Commission affirmed the promotional bypass of a long-serving Springfield police officer after finding that his actions and disciplinary record reflected an ongoing pattern of inability to deescalate adversarial encounters with civilians.

DECISION

On May 13, 2019, the Appellant, Anthony Bedinelli (Officer Bedinelli), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Springfield's Police Department (City, Department or SPD) to bypass him for promotion from the rank of police officer to sergeant. I held a pre-hearing conference at the Springfield State Office Building on June 26, 2019, followed by a full hearing at the Springfield City Hall on August 21, 2019.¹ The full hearing was digitally recorded and both parties received a CD of the proceeding.² The parties submitted proposed decisions on October 18th and 20th, 2019.

FINDINGS OF FACT

Twenty-one (21) Joint Exhibits (Jx-1 - Jx-21) and seventeen (17) Respondent Exhibits (Rx-1 - Rx-17) were entered into evidence³.

Called by the SPD:

- Lynn Vedovelli, Human Resources & Payroll Manager, SPD; and
- Cheryl C. Clapprood, Police Commissioner, SPD

Called by Officer Bedinelli:

- Anthony Bedinelli, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences therefrom, I find the following:

1. Located in Hampden County in Western Massachusetts, Springfield is the state's third largest city with a population of approximately 155,000.

2. Officer Bedinelli was born and raised in Springfield. After serving as a police cadet, he was appointed as a Springfield Police Officer in 1993. Officer Bedinelli has an Associate's degree in criminal justice from Springfield Technical Community College and has served in the Air National Guard. (Testimony of Officer Bedinelli)

3. On September 6, 2017, Officer Bedinelli took the civil service promotional examination for police sergeant and received a score of 78. His name was placed on an eligible list of candidates for Springfield Police Sergeant on February 1, 2018. (Stipulated Facts)

4. On March 29, 2018, the SPD created Certification No. SPRO 19-0006 from which five (5) candidates were ultimately promoted to police sergeant, four (4) of whom were ranked below Officer Bedinelli. (Stipulated Facts)

5. In a bypass letter dated March 25, 2019 regarding Officer Bedinelli, then-Acting Springfield Police Commissioner Cheryl Clapprood wrote in part:

"It is the department's position that the cumulative career of this candidate shows a pattern of blatant lack of respect to the citizens of Springfield and an appointment / promotion of this individual would be detrimental to the public interest. The department feels any promotion of this officer would create community outrage and be extremely detrimental to community relations and trust."

(Jx-8)

6. The March 25, 2019 letter referenced the following discipline regarding Officer Bedinelli: a) a 1997 six-month suspension for leaving his post without permission after learning that his dogs had attacked a child; b) a 2004 written reprimand regarding an off-duty verbal altercation with a citizen; c) a 2006 termination that was modified to a six-month suspension by an arbitrator regarding an alleged assault and alleged false statements on a police report; d) a 2015 requirement to attend training after an incident involving the issuance of a citation to a citizen; and e) a 2017 termination that was modified to a written reprimand by an arbitrator regarding an alleged altercation with a citizen during a road detail. (Jx-8)

7. Cheryl Clapprood became acting Police Commissioner for the City of Springfield on February 22, 2019. As acting Police Commissioner, Clapprood served as the decision-maker in regard to hiring, firing, promotion and discipline for the SPD. (Testimony of Clapprood)

1. The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evi-

dence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, these CDs should be used to transcribe the hearing.

3. Rx-16 is the 1/21/15 Amended Complaint & Release re: E.K. and Rx-17 is the 2018 Arbitration Award related to the Appellant.

8. When Commissioner Clapprod was appointed, she was told by the City's Mayor that her charge was to "turn the SPD around", "place the SPD in a better light in the public eye", "start to regain the trust of the public", "start to make the SPD more transparent", "hold people accountable", "let the public know that the SPD was holding people accountable" and "start changing the image of the SPD". (Testimony of Clapprod)

9. The SPD interviewed Officer Bedinelli on March 21, 2019. The interviews were conducted by acting Deputy Trent Duda, Deputy Chief William Cochrane and acting Commissioner Clapprod. (Testimony of Commissioner Clapprod)

10. Prior to the interviews, Commissioner Clapprod was of the opinion that Officer Bedinelli should not be promoted because of his disciplinary history; however, she was open to hearing from him at the interview. (Testimony of Clapprod) The Appellant's disciplinary history, however, was not discussed during the interview. (Testimony of Officer Bedinelli)

11. After the interviews, Commissioner Clapprod and the others weighed the dates of the disciplinary issues in question as well as the nature of the disciplinary issues because other candidates had disciplinary issues as well. (Testimony of Clapprod)

12. Commissioner Clapprod was concerned that Officer Bedinelli's "cumulative career" showed a "pattern of disciplinary problems" and that most, if not all, of these disciplinary problems dealt with Officer Bedinelli's interaction with the public and that his actions had generated media attention that reflected poorly on the SPD. (Testimony of Clapprod)

13. Before making her decision, Commissioner Clapprod reviewed the underlying events regarding all of the disciplinary actions against Officer Bedinelli. Although some of the discipline was overturned and/or modified by arbitrators, Commissioner Clapprod was still concerned about the underlying misconduct that was proven. (Testimony of Clapprod)

14. Commissioner Clapprod recounted that the appearance of Officer Bedinelli's name on the promotion list drew "public outrage", which she encountered at "public speak outs", that she attended prior to making her decision. (Testimony of Clapprod)

15. Commissioner Clapprod reviewed the disciplinary histories of all the candidates promoted above Officer Officer Bedinelli. Commissioner Clapprod concluded that the disciplinary histories of the promoted candidates "were not nearly as significant" as the disciplinary history of Officer Officer Bedinelli and did not produce the level of publicity that Officer Bedinelli's misconduct had produced. (Testimony of Clapprod) (Jx-16 - Jx-21)

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." *Massachusetts Assn. of Minority Law Enforcement Officers v.*

Abban, 434 Mass. 256, 259 (2001), citing *Cambridge v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300, 304 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 1. 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* at 304.

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 *Commissioners of Civil Service v. Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975); and *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. *City of Beverly v. Civil Service Comm'n.*, 78 Mass. App. Ct. 182, 189, 190-191 (2010) citing *Falmouth v. Civil Serv. Comm'n.*, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *Beverly* citing *Cambridge* at 305, and cases cited. "It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." *Town of Burlington and another v. McCarthy*, 60 Mass. App. Ct. 914, 915 (2004).

Disputed facts regarding alleged prior misconduct of an applicant must be considered under the "preponderance of the evidence" standard of review as set forth in the SJC's recent decision in *Boston Police Dep't v. Civil Service Comm'n.*, 483 Mass. 461 (2019), which upheld the Commission's decision to overturn the bypass of a police candidate, expressly rejecting the lower standard espoused by the police department. *Id.*, 483 Mass. at 333-36.

ANALYSIS

Officer Bedinelli's prior disciplinary history as a police officer was a valid reason to bypass him for promotional appointment to sergeant. I carefully reviewed the entire record here, paying particular attention to all reports and other documents related to Officer Bedinelli's prior misconduct.

The record shows that, in 1997, Officer Bedinelli was assigned to radio dispatch when a 911 call came in reporting that two Rottweiler dogs were attacking a child. Based on the address, Officer Bedinelli was sure that the dogs in question belonged to him and that the dogs must have gotten out of his backyard. Before being excused from duty to go home, Officer Bedinelli can be heard on a Department recording saying "we are not sending

a cruiser”. Based on the reports, it appears that no cruiser arrived on scene for 30 minutes after the call was made. Officer Bedinelli was suspended for six months based on various charges, including neglect of duty. Officer Bedinelli appealed that suspension to the Civil Service Commission and the Commission upheld the discipline [12 MCSR 126 (1999)]. The victim of the dogs’ attack, who was eight years old at the time, and, according to published reports included in the record, still has physical scars and anxiety from the attack, attended one of the “speak-outs” referenced by Commissioner Clapprood to speak against promoting Officer Bedinelli to sergeant in 2019.

The 2004 written warning involved an off-duty incident in which Officer Bedinelli became embroiled in a verbal dispute regarding a parking space. Based solely on reports and statements by *Officer Bedinelli* at the time, it is clear that he escalated the dispute by: exiting his vehicle (that he parked in front of a fire hydrant); walking over to the female’s vehicle; pulling out his police badge; and telling the female driver that she was “acting like a bitch”.

In 2006, Officer Bedinelli was terminated by the Springfield Police Department for allegations involving another off-duty incident at a local bar in which he allegedly punched a female bar patron and then allegedly made false statements about the incident in an Arrest Report. The termination was appealed to an arbitrator. The arbitrator agreed with the SPD that Officer Bedinelli’s actions that night were more akin to a “bouncer” as opposed to a police officer and concluded that a six-month suspension was the appropriate penalty for that misconduct. However, since the arbitrator concluded that Officer Bedinelli did not submit a false arrest report, he overturned the SPD’s decision to terminate Officer Bedinelli. The arbitrator’s decision states in part that “... I am convinced that the charges [against Officer Bedinelli] are sufficiently serious to impose a more demanding standard [on the SPD] than ‘preponderance of the evidence.’ Therefore, the standard I will apply in this case is ‘clear and convincing evidence.’” (emphasis added) Applying this higher evidentiary standard to the SPD, the arbitrator concluded that, “I am satisfied that there is not ‘clear and convincing’ evidence that Officer Bedinelli submitted [an] Arrest Report ‘... knowing the same to be false in a material matter ...’.”⁴ As the Commission correctly applies the “preponderance of evidence” standard in both bypass and disciplinary appeals, I gave no weight to the above-referenced conclusion by the arbitrator in the context of deciding whether the SPD was justified in bypassing Officer Bedinelli for promotion.

That turns to Officer Bedinelli’s second termination in 2017, which was also overturned by an arbitrator. In that matter, the City’s Community Police Hearing Board (CPHB), after a hearing, “found the testimony of the witnesses credible that Bedinelli [while on duty] choked and punched a civilian, Ms. [name redacted] without cause.” The CPHB also found that Officer Bedinelli had failed to submit the proper reports indicating that he had used

his pepper spray during the incident. The arbitrator, after conducting a hearing, made a series of conclusions including that: “there is not one scintilla of evidence which indicates that Officer Bedinelli conducted himself in anything but a professional manner in an attempt to get [female citizen’s son] to comply with his directives. In the opinion of this Arbitrator, there is no hint that he (Bedinelli) was guilty of misconduct or neglect of duty.” I have given the Arbitrator’s conclusions little weight as: 1) they appear to be contradicted by his *own* findings regarding what occurred; and 2) other eyebrow-raising findings of the arbitrator appear to miss, entirely, the responsibility that Officer Bedinelli has to de-escalate potentially volatile situations.

To ensure clarity (and transparency), the below “background” is taken verbatim from the arbitrator’s decision:

“On November 3, 2017, Officer Bedinelli and [police officer] were working a paid detail at a construction site and were positioned at a corner of Dearborn Street and Wilbraham Road. It was the duty of two officers at this site to prevent automobiles from entering Dearborn Street due to the street construction taking place at that location.

During the detail, a green Honda Civic approached to enter Dearborn Street. Officer Bedinelli stopped the driver of the Honda and informed him that he would be required to go around the block and enter Dearborn Street from a different direction. Evidence indicates that the driver of this Honda, which was described by witnesses as being very loud in a ‘souped up’ car used for street racing, was very loud to the officers swearing at them. When he was not allowed to enter Dearborn Street, which is where his mother lived, he sped off and eventually followed the detour to her home at a high rate of speed. The driver backed the Honda into the driveway at [address redacted] and both officers approached the driver to obtain his license and registration. When asked by Officer Bedinelli for his name and to produce his license and registration, the driver continued his tirade of refusing to cooperate while continuing his swearing to and at the officers. The driver was reported to have said loudly that the car was on private property. Further, he grilled the Officers saying what did I do wrong and when Officer Bedinelli asked for the keys, the driver continued to refuse to give the officers the keys to the car or his drivers’ license or the registration. Evidence clearly indicates that the driver continued to scream and use vulgar language directed toward the officers.

Officer Bedinelli then informed the driver that his failure to provide the information meant that he would be arrested. At some point the driver’s mother [Ms. R.] came to the area in an attempt to intervene in this encounter.

At that time, this driver, who was described by a neighbor as being a ‘loudmouth’ and drove the very loud car, ran from Officer Bedinelli who attempted to spray the individual with pepper spray but missed, and according to [Ms. R.], sprayed her sleeve. Subsequently, the subject turned, picked up an aluminum Swiffer handle and while holding it like a bat and swinging it, continuously yelling at the officers repeatedly saying, ‘Come on you mother fuckers I’ll beat you with this stick.’ Both officers unholstered their service revolvers as they were concerned for their safety and the subject ran from the driveway.

4. The arbitrator also opined that it would have been permissible for him to require the SPD to prove “beyond a reasonable doubt” that Officer Bedinelli submitted a false Arrest Report.

The driver's mother [Ms. R] came at the officers and pleaded with Officer Bedinelli not to shoot her son. While [Ms. R] stated that Officer Bedinelli grabbed her by the throat and punched her in the chest, Officer Bedinelli testified that he put his hand up for [Ms. R] to back off and also that he never grabbed her throat, nor did he punch her in the chest. [Police officer] also testified that Officer Bedinelli did not grab [Ms. R] by the throat, nor did he punch her in the chest.

In addition, [Mr. C], who testified that he observed the entire scene from his porch across the street from [address redacted], testified that he saw Officer Bedinelli put his hands on the throat of [Ms. R] but did not observe Officer Bedinelli punch her in the chest. However, a next-door neighbor, [Ms. M] testified that she observed Officer Bedinelli hit [Ms. R] in the chest and started choking her." (emphasis added) (R-17)

While the arbitrator was free to assess the credibility of witnesses, it is, difficult, at best, to square this "background", penned by the arbitrator, with the arbitrator's subsequent conclusion that: "there is not one scintilla of evidence which indicates that Officer Bedinelli conducted himself in anything but a professional manner in an attempt to get [female citizen's son] to comply with his directives. In the opinion of this Arbitrator, there is no hint that he (Bedinnelli) was guilty of misconduct or neglect of duty." Finally, the arbitrator concluded that, "One other factor involved in this case is the fact that Officer Bedinelli had two prior six-month suspensions. While this was used by the City to also justify the discharge of Officer Bedinelli, this, according to this Arbitrator was totally inappropriate and unjustified. The reason for this is the fact that Mr. Bedinelli had been disciplined for those two previous infractions and they cannot now be used as double jeopardy."

It is not for the Commission to determine whether there was just cause to terminate Officer Bedinelli from the Springfield Police Department for his alleged misconduct in 2017. That decision, which the City chose not to challenge through a judicial appeal, was for the Arbitrator.

In the context of this de novo proceeding before the Commission, however, I find that: 1) based solely on the Arbitrator's own description and findings, Officer Bedinelli's actions reflected poor judgment and an inability to deescalate an adversarial encounter; and 2) this represents an ongoing pattern which justifies the SPD's decision to bypass Officer Bedinelli for promotion to the supervisory position of police sergeant.

CONCLUSION

The Appellant's appeal under Docket No. G2-19-100 is *denied*.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein, and Tivnan, Commissioners) on June 18, 2020.

Notice to:

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City of Springfield
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* * * * *

DANIEL FLYNN

v.

HUMAN RESOURCES DIVISION

B2-20-039

June 18, 2020

Christopher C. Bowman, Chairman

Examination Appeal-E&E Credit-Fire Captain Promotion-Failure to Enter E&E Date Online—The Commission once again turned down an appeal from a fire captain seeking relief from a score lowered by his failure to complete the online module for E&E credit. The decision takes HRD to task for failing to develop a method of allowing candidates to show good cause why they should be able to complete the E&E module beyond the deadline particularly, as was the case here, where the candidate had provided the supporting documentation in a timely manner.

DECISION ON RESPONDENT'S MOTION FOR SUMMARY DECISION

On March 5, 2020, the Appellant, Daniel Flynn (Lt. Flynn), a Fire Lieutenant in the Winthrop Fire Department (WFD), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to not award him any "E&E" credit on a recent promotional examination for Fire Captain.

2. On March 24, 2020, I held a pre-hearing conference via videoconference which was attended by Lt. Flynn, his counsel and counsel for HRD.

3. As part of the pre-hearing conference, it was agreed that:

A. On November 16, 2019, Lt. Flynn took the Fire Captain examination.

B. The deadline for completing the E&E component of the examination was November 23, 2019.

C. Lt. Flynn did not complete the online E&E component of the examination.

D. Rather, he submitted, via an attachment to an email to HRD, his employment verification form from the Winthrop Fire Department.

E. Lt. Flynn received a 75.36 on the written component of the examination.

F. As a result of not completing the online E&E component, he received an E&E score of “0”, resulting in a final score of 60.29.

G. The passing score for the Fire Captain examination was 70.

H. Since Lt. Flynn failed the examination, his name does not appear on the current Fire Captain eligible list in Winthrop.

I. Two firefighters (the exam was open to lieutenants and firefighters) did pass the promotional examination and appear on the eligible list making it a “short list”.

J. When a “short list” exists, an Appointing Authority may choose not to make permanent, promotional appointments, but, rather, make a provisional promotion until such time as an eligible list is established with three names on it.

4. As part of the pre-hearing conference, Lt. Flynn indicated that the Fire Chief and the two firefighters whose names now appear on the eligible list were all supportive of his appeal, or rather, are “rooting for [him].”

5. Based on all of the above, I asked HRD to determine what Lt. Flynn’s rank would have been on the eligible list had he been given credit for the years of experience noted on his employment verification form.

6. HRD, upon review, determined that Lt. Flynn would have been ranked 2nd on the current eligible list had he been given credit for the employment experience.

7. In its response, HRD indicated that, even if the Fire Chief and two firefighters supported granting him relief (i.e. - placing his name 2nd on the eligible list), HRD would not support such relief and would seek to file a Motion for Summary Decision seeking to dismiss the Appellant’s appeal.

8. I provided Lt. Flynn with ten days to submit correspondence to the Commission, from the Fire Chief and the two firefighters on the eligible list, indicating whether they would support granting him relief by placing his name 2nd on the existing eligible list for Winthrop Fire Captain.

9. On April 9, 2020, Lt. Flynn submitted a reply to the Commission with a written statement from the Town’s Fire Chief stating that, based on the above-referenced information, he had “no objection” to placing Lt. Flynn second on the existing eligible list.

10. The Appellant’s reply also stated in part that the two (2) firefighters currently ranked first and second on the eligible list had declined to issue any statement to the Commission as they “did not want to do anything that might prejudice their future promotional opportunities.”

11. On April 20, 2020, HRD filed a Motion for Summary Decision and the Appellant filed an opposition on April 30, 2020.

LEGAL STANDARD

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons aggrieved by “... any decision, action or failure to act by

the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations” It provides, *inter alia*,

“No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record.”

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: “conduct[ing] examinations for purposes of establishing eligible lists.”

G.L. c. 31, § 22 states in relevant part: “In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held.”

G.L. c. 31, § 24 allows for review by the Commission of exam appeals. Pursuant to § 24, “[t]he commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator.”

In *Cataldo v. Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that “... under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as ‘credit for such training and experience as of the time designated by HRD.’ G.L. c. 31, § 22(1).”

ANALYSIS

The Appellant, and all applicants who took this most recent fire lieutenant examination, had until November 23, 2019 to file an E&E Claim with HRD. With the exception of supporting documentation, all applicants must complete the E&E application online. There is no evidence to show that the Appellant submitted the E&E claim on or before November 23rd. Since the Appellant cannot show that he followed HRD’s instructions regarding the E&E component, he cannot show that he has been harmed through no fault of his own. Thus, he is not an aggrieved person.

While the Commission, based on the above, must dismiss this appeal, two issues warrant discussion. First, as in many other prior appeals, we once again see a situation where a longtime public employee provided HRD with the necessary supporting documentation regarding his employment experience in a timely manner. He failed, however, to complete the online module that corresponds with that information. Thus, he was given a “0” on the E&E portion of the examination, resulting in his “failing” the overall examination. While consistency and uniformity bolster confidence in the examination process, this is a perfect example of how rigid adherence, with no exceptions, to non-statutory guidelines can produce an illogical result that prevents a Fire Department from promoting a person who may be best suited for the position of Fire Captain. As the Commission has noted in the past, there is nothing preventing HRD from developing a fair, objective process to prevent this unfortunate result, including the establishment of a process allowing candidates to show good cause as to why they

should be able to complete the online E&E module beyond the deadline, particularly if the candidate, as here, has submitted the supporting documentation in a timely manner. I renew the recommendation.

Second, as noted above, the eligible list currently in place here is a “short list” that, under civil service law, allows the appointing authority the ability to make a *provisional* promotion or appointment until an eligible list with at least three names has been established. While provisions of the applicable CBA may have some bearing on the use of a provisional appointment, it would behoove the WFD to carefully review the judicial decisions which prescribe the rules that apply when there is a conflict between a CBA and the civil service law, which may or may not provide an alternative means of resolving the problem with which the WFD is confronted here.

For all of the above reasons, HRD’s Motion for Summary Decision is allowed and the Appellant’s appeal under Docket No. B2-20-039 is hereby *dismissed*.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 18, 2020.

Notice to:

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* * * * *

SUMER GENIS

v.

DEPARTMENT OF CORRECTION

D-20-083

June 18, 2020
Christopher Bowman, Chairman

Transfers and Reassignment-Commuting Distance-Tenured Employee Prior to October 1968—The Commission dismissed for lack of jurisdiction the appeal from an MCI-Framingham Correction Officer upset at her “transfer” to MCI Shirley because it increased her commute from 15 to 40 minutes. The Commission only has jurisdiction over involuntary transfers for employees tenured before October 1968 or transfers to a location that is more than a commuting distance.

ORDER OF DISMISSAL

On May 20, 2020, the Appellant, Summer Genis (Ms. Genis), a Correction Officer II (CO II) at the Department of Correction (DOC), filed an appeal with the Civil Service Commission (Commission), contesting the decision of DOC to “transfer” her from MCI Framingham to MCI Shirley. On June 9, 2020, I held a pre-hearing conference via videoconference which was attended by Ms. Genis and a DOC representative.

Viewing the facts most favorably to Ms. Genis, I find the following:

1. On October 9, 2011, Ms. Genis was appointed by DOC as a CO I. (Undisputed)
2. On August 12, 2018, Ms. Genis was promoted to CO II. (Undisputed)
3. Prior to May 9, 2020, Ms. Genis was assigned to MCI Framingham. (Undisputed)
4. On May 9, 2020, Ms. Genis, while on duty, was speaking to a colleague about health and safety conditions at MCI Framingham. (Statement of Ms. Genis)
5. Sometime shortly after May 9, 2020, DOC initiated an investigation into allegations that, while walking away from the colleague referenced above, Ms. Genis made disparaging remarks about a senior DOC manager at MCI Framingham. (Undisputed)
6. By letter dated May 11, 2020, DOC notified Ms. Genis that she was being “administratively transferred” from MCI Framingham to MCI Shirley. (Undisputed)
7. Ms. Genis’s commuting time from her home to MCI Framingham is approximately fifteen minutes. (Statement of Ms. Genis)

8. Ms. Genis's commuting time from her home to MCI Shirley is approximately forty minutes. (Statement of Ms. Genis)

9. Ms. Genis will remain assigned to MCI Shirley at least until such time as the above-referenced investigation has been concluded, DOC has determined if the allegations are supported and, if so, whether discipline is warranted. (Undisputed)

10. Ms. Genis has filed a grievance regarding the "administrative transfer". (Undisputed)

11. A Step 2 hearing, scheduled to occur on May 26, 2020, was continued. (Undisputed)

LEGAL STANDARD / ANALYSIS

Ms. Genis argues that the Commission has jurisdiction to hear her appeal because, according to her, she has been involuntarily transferred from MCI Framingham to MCI Shirley without just cause.

G.L. c. 31, § 41, provides in relevant part:

"Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, **transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight**, lowered in rank or compensation without his written consent, nor his position be abolished." (emphasis added)

G.L. c. 31, § 35 provides in relevant part:

"A person who is aggrieved by a transfer, other than an emergency transfer or assignment, made pursuant to this section but who is not subject to the provisions of section forty-one with respect to such transfer, may appeal to the commission pursuant to the provisions of section forty-three and shall be entitled to a hearing and a decision by the commission in the same manner as if such appeal were taken from a decision of the appointing authority made, after hearing, under the provisions of section forty-one." (emphasis added)

First, Ms. Genis has not served as a tenured employee since prior to October 14, 1968. G.L. c. 31, § 41 only grants procedural protections to employees who have been transferred without their written consent if they were a tenured employee on or before October 13, 1968, which the Ms. Genis was not.

Second, in order to invoke the protection of another section of the civil service law, G.L. c. 31, § 35, Ms. Genis is required to establish that she was "transferred" within the meaning of the civil service law.

The Civil Service Commission has defined the term "Transfer" as a "change of employment under the same appointing authority from a position in one class to a similar position in the same or another class or a change of employ in the same position, under the same appointing authority, from one geographical location to a different geographical location, provided that a different geographical location shall be one which is both more than a commuting distance from the employee's residence than its prior location and more distant from the employee's residence than his prior lo-

cation..." *Sullivan v. Dep't of Transitional Assistance*, 11 MCSR 80 (1998), citing *Appellant v. Department of Revenue*, 1 MCSR 28, 29 (1985).

Here, while Ms. Genis is currently required to drive forty minutes from her home to MCI Shirley, as opposed to fifteen minutes to MCI Framingham, forty minutes cannot reasonably be deemed to be "more than a commuting distance".

Thus, even when viewing the facts most favorable to Ms. Genis, it appears, at this time, that Ms. Genis has been temporarily "re-assigned" as opposed to "transferred" from MCI Framingham to MCI Shirley. Further, DOC, as part of the pre-hearing conference, indicated that the investigation into the alleged misconduct has already been completed and is now pending final review, reinforcing the temporary nature of this reassignment at this time.

For all of above reasons, the Appellant's appeal under Docket No. D-20-083 is **dismissed**.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 18, 2020.

Notice to:

Sumer Genis
[Address redacted]

Joseph Santoro
Department of Correction
P.O. Box 946: Industries Drive
Norfolk, MA 02056

* * * * *

HECTOR MEJIAS

v.

CITY OF BOSTON

G2-20-047

June 18, 2020

Christopher C. Bowman, Chairman

Provisional Employment-Labor Service Position-Non Selection of Boston Acting Supervisor of Highway Maintenance as Supervisor of Highway Maintenance—The Commission declined to grant the Appellant’s appeal challenging his own non-selection and the provisional promotion of an incumbent to Boston Supervisor of Highway Maintenance where the successful candidate was shown to be an employee with the necessary supervisory experience and qualifications.

DECISION ON RESPONDENT’S MOTION TO DISMISS

On March 11, 2020, the Appellant, Hector Mejias (Mr. Mejias), filed an appeal with the Civil Service Commission (Commission), contesting his non-selection by the City of Boston to the position of Supervisor of Highway Maintenance.

On May 19, 2020, I held a pre-hearing conference via videoconference which was attended by Mr. Mejias; counsel for the City; and two representatives of the City. Prior to the pre-hearing, the City filed a Motion to Dismiss and Mr. Mejias filed a reply. Based on the documents submitted; the statements of the parties, and facts established regarding Mr. Mejias in prior Commission decisions, it is undisputed that:

1. Mr. Mejias has been employed by the City since 1997. He and dozens of other City employees became permanent labor service employees in 2012 after a Commission Investigation. (*Mejias et al v. City of Boston*, 24 MCSR 476 (2011); *Mejias et al v. City of Boston*, 25 MCSR 206 (2012).
2. Mr. Mejias has previously filed appeals with the Commission contesting his non-selection to other positions. (*Mejias and Allen v. City of Boston*; 25 MCSR 323 (2012)
3. In 2014, Mr. Mejias was appointed to the higher position of Construction Foreman. (Appellant’s Opposition to Motion to Dismiss)
4. Also in 2014, Mr. Mejias began serving as the Acting Supervisor of Construction. (Appellant’s Opposition to Motion to Dismiss)
5. The City’s Department of Public Works (Department) posted the Supervisor of Highway Maintenance position, both external-

ly and internally, as a provisional appointment on September 24, 2019. (Attachment D to City’s Motion to Dismiss)

6. The minimum qualifications for the job require that applicants “must have at least three (3) years of full-time, or equivalent part-time, experience in the repair, construction or maintenance of highways, streets or roadways, of which at least one year must have been in a supervisory capacity. Working knowledge of procedures and practices of snow removal, street repair, care of tools and equipment, laws, rules, regulations and policies pertaining to this position preferred. Ability in written and oral expression preferred. Must have the ability to exercise good judgment and be able to focus on detail as required by the job. Must have and maintain a current Mass. driver’s license. BOSTON RESIDENCY REQUIRED.” (Attachment D to City’s Motion to Dismiss)

7. The Department interviewed four candidates including the Appellant. All three interview panelists ranked Mr. Mejias third among the four candidates. (Attachment C to City’s Motion to Dismiss)

8. The Department selected Candidate CY, a candidate that was ranked first (tied) by the interview panel. (Attachment C to City’s Motion to Dismiss)

9. CY has been employed by the City since 2013. He has held the positions of Motor Equipment Operator; Heavy Motor Equipment Operator; Special Heavy Equipment Operator; Highway Maintenance Inspector; and Highway Maintenance Foreman. (Attachment B to City’s Motion to Dismiss)

10. As a Highway Maintenance Inspector (19 months), CY supervised the work of maintenance crews and inspected the work of contractors. As a Highway Maintenance Foreman (3 years), CY supervised a group of employees making repairs to streets and performed the duties of of supervisor when required to do so. (Attachment B to City’s Motion to Dismiss)

11. Collectively, the duties CY has performed in all positions appear to show that he has a working knowledge of procedures and practices of snow removal, street repair, care of tools and equipment, laws, rules, regulations and policies pertaining to the position of Supervisor of Highway Maintenance. (Attachment B to City’s Motion to Dismiss)

ANALYSIS

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for well over two (2) decades. These provisional appointments and promotions have been used as there have been no “eligible lists” from which a certification of names can be made for permanent appointments or promotions.¹ The underlying issue is the Personnel Administrator’s (HRD) inability to administer civil service examinations that are used to establish these applicable eligible lists. This is not a new issue—for the Commission, HRD,

1. By memorandum dated July 25, 1997, the personal administrator revoked non public safety civil service eligible lists over five years old.

the legislature, the courts or the various other interested parties including Appointing Authorities, employees or public employee unions.

In a series of decisions, the Commission has addressed the statutory requirements when making such provisional appointments or promotions. See *Kasprzak v. Department of Revenue*, 18 MCSR 68 (2005), *on reconsideration*, 19 MCSR 34 (2006), *on further reconsideration*, 20 MCSR 628 (2007); *Glazer v. Department of Revenue*, 21 MCSR 51 (2007); *Asiaf v. Department of Conservation and Recreation*, 21 MCSR 23 (2008); *Pollock and Medeiros v. Department of Mental Retardation*, 22 MCSR 276 (2009); *Pease v. Department of Revenue*, 22 MCSR 284 (2009) & 22 MCSR 754 (2009); *Poe v. Department of Revenue*, 22 MCSR 287 (2009); *Garfunkel v. Department of Revenue*, 22 MCSR 291 (2009); *Foster v. Department of Transitional Assistance*, 23 MCSR 528; *Heath v. Department of Transitional Assistance*, 23 MCSR 548.

In summary, these recent decisions provide the following framework when making provisional appointments and promotions:

- G.L. c.31, §15, concerning provisional promotions, permits a provisional promotion of a permanent civil service employee from the next lower title within the departmental unit of an agency, with the approval of the Personnel Administrator (HRD) if (a) there is no suitable eligible list; or (b) the list contains less than three names (a short list); or (c) the list consists of persons seeking an original appointment and the appointing authority requests that the position be filled by a departmental promotion (or by conducting a departmental promotional examination). In addition, the agency may make a provisional promotion skipping one or more grades in the departmental unit, provided that there is no qualified candidate in the next lower title and “sound and sufficient” reasons are submitted and approved by the administrator for making such an appointment.
- Under Section 15 of Chapter 31, only a “civil service employee” with permanency may be provisionally promoted, and once such employee is so promoted, she may be further provisionally promoted for “sound and sufficient reasons” to another higher title for which she may subsequently be qualified, provided there are no qualified permanent civil service employees in the next lower title.
- Absent a clear judicial directive to the contrary, the Commission will not abrogate its recent decisions that allow appointing authorities sound discretion to post a vacancy as a provisional appointment (as opposed to a provisional promotion), unless the evidence suggests that an appointing authority is using the Section 12 provisional “appointment” process as a subterfuge for selection of provisional employee candidates who would not be eligible for provisional “promotion” over other equally qualified permanent employee candidates.
- When making provisional appointments to a title which is not the lowest title in the series, the Appointing Authority, under Section 12, is free to consider candidates other than permanent civil service employees, including external candidates and/or internal candidates in the next lower title who, through no fault of their own, have been unable to obtain permanency since there have been no examinations since they were hired.

Applied to the instant appeal, the City has not violated any civil service law or rule regarding provisional appointments. The City posted this Supervisor of Highway Maintenance vacancy as pro-

visional appointment and, as such, was not required to appoint candidates with civil service permanency. They were permitted to consider both external candidates as well as internal candidates, as they did here.

Ultimately, the City provisionally appointed one (1) internal candidate to the position of Supervisor of Highway Maintenance. For the reasons cited above, this is not a violation of those sections of the civil service law related to provisional appointments and, further, does not constitute a “bypass” of the Appellant, which could typically be appealed under G.L. c. 31, § 2(b).

Although no bypass occurred here, the Commission always maintains authority under G.L. c. 31, § 2(a) to conduct investigations, including when allegations are made that an appointment process was not consistent with basic merit principles. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See *Boston Police Patrolmen’s Association et al v. Civ. Serv. Comm’n*, No. 2006-4617, Suffolk Superior Court (2007). See also *Erickson v. Civ. Serv. Comm’n & others*, No. 2013-00639-D, Suffolk Superior Court (2014).

I carefully reviewed Mr. Mejias’s written submission and his statements at the pre-hearing conference. Based on a review of the information provided and the statements of the parties, an investigation by the Commission is not warranted here. The City chose an incumbent employee who has the necessary qualifications, including supervisory experience. The allegation that two of the three interview panelists had, effectively, become annoyed with Mr. Mejias, is not sufficient for the Commission to initiate an investigation.

I reach this conclusion that an investigation is not warranted despite having some questions regarding the notes of the interview panelists. Those notes, while praising Mr. Mejias’s knowledge and abilities, appear to question Mr. Mejias’s supervisory performance over the years. Had this been a bypass appeal, in which a candidate ranked below Mr. Mejias was appointed (which is not the case here), I would have inquired as to whether this was an assessment of the Appellant’s interview performance or, rather, an assessment of his performance over the years. If it was the latter, the next level of inquiry would be whether the City had documented those concerns in prior performance evaluations.

This, however, is not a bypass appeal, as no candidate ranked below the Appellant was appointed as there is no eligible list in place. Rather, the question here is whether the Commission is warranted in initiating an *investigation* under Section 2(a), something the Commission does only sparingly. Based on a review of the entire record, such an investigation is not warranted. Employees such as Mr. Mejias are not, however, without recourse as the collective bargaining agreement provides for a grievance process where such issues can be addressed.

CONCLUSION

For all the reasons stated above, the Appellant’s appeal under Docket No. G2-20-047 **dismissed** and the Commission opts not to initiate an investigation under G.L. c. 31, § 2(a).

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 18, 2020.

Notice to:

Hector Mejias
[Address redacted]

Robert J. Boyle, Jr., Esq.
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Boston City Hall: Room 624
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* * * * *

GREGORY NOTENBOOM

v.

METHUEN PUBLIC SCHOOLS

D-19-265

June 18, 2020

Christopher C. Bowman, Chairman

Civil Service Commission Jurisdiction-Demotion of Provisionally Appointed Senior Custodian to Tenured Custodian—The Commission dismissed for lack of jurisdiction the appeal from a demoted provisionally appointed Senior Custodian to tenured Custodian. A demotion from a provisional appointment to an Appellant’s tenured permanent position is not appealable under G.L. c. 31.

DECISION ON RESPONDENT’S MOTION TO DISMISS

On December 13, 2019, the Appellant, Gregory Notenboom (Appellant), filed an appeal with the Civil Service Commission (Commission) to contest the decision of the Methuen Public Schools (Respondent) to demote him from Senior Custodian to Custodian.

2. On January 13, 2020, a pre-hearing conference was held at the Mercier Community Center in Lowell, MA which was attended by the Appellant, his counsel and counsel for the Respondent.

3. As part of the pre-hearing conference, the parties stipulated to the fact that, at the time of his demotion, the Appellant was a permanent, tenured Senior Custodian

4. A full hearing was scheduled to be held on March 9, 2020 which was continued until April 27, 2020.

5. In preparation for the full hearing, I asked the parties to provide me with verification that the Appellant, at the time of his demotion, was a permanent, tenured Senior Custodian.

6. The Respondent, upon further review, determined that the Appellant was *not* a permanent, tenured Senior Custodian at the time of his demotion. Rather, when the Appellant was promoted to Senior Building Custodian on November 27, 2018, there was no eligible list in place, as there had been no examination for the custodian series for approximately fifteen (15) years. Thus, at the time of his demotion, the Appellant was serving as a *provisional* Senior Custodian. He had been promoted to that position from his permanent, tenured position of custodian, which he was initially appointed to on September 26, 2000, when examinations for the custodian series were still being administered.

7. Based on this information, the Respondent filed a Motion to Dismiss the Appellant’s appeal, arguing that the Commission has no jurisdiction to hear an appeal from a provisionally appointed employee who was demoted to his permanent civil service position. The Appellant filed an opposition and I held a remote motion hearing via videoconference on April 27, 2020.

ANALYSIS & CONCLUSION

This is not a new issue for the Commission. In *City of Springfield v. Civ. Serv. Comm’n & Joseph McDowell*, 469 Mass. 370 (2014), the SJC upheld a Commission decision in which the Commission determined that a provisionally promoted employee, who previously held permanency in a lower title, only retains appeal rights in regard to that lower, permanent position (i.e. - employee could appeal a termination from employment or a demotion to a position lower than his permanent title.) Here, the Appellant has not presented any evidence to show that he ever obtained tenure in any position other than custodian, the position to which he has been demoted. Just as in *Springfield*, we conclude that this demotion is not an adverse action that can be appealed under G.L. c. 31.

For this reason, the Respondent’s motion to dismiss is allowed and the Appellant’s appeal under Docket No. D-19-265 is **dismissed**.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 18, 2020.

Notice to:

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* * * * *

MICHELLE ROGERS

v.

BOSTON POLICE DEPARTMENT

G1-17-185 and G1-19-240

June 18, 2020

Cynthia A. Ittleman, Commissioner

Joseph Sulman, Esq.¹

Joseph Donnellan, Esq.²

David Fredette, Esq.³

Bypass Appeal-Original Appointment as a Boston Police Officer-Psychological Profiling-Untruthfulness—The Commission reversed 2017 and 2019 bypasses by the Boston Police Department of a candidate for original appointment as a police officer finding unproven the Department's conclusion that the Appellant had been untruthful in recounting her medical history. The bypasses were also reversed because evaluations of the candidate by three different psychologists were deeply flawed by a lack of precision in specifying which psychological category merited bypass, general sloppiness, and undocumented assertions of disorders and conditions.

DECISION

The Appellant, Michelle Rogers (Ms. Rogers or Appellant), filed timely appeals with the Civil Service Commission (Commission) in appeal docketed G1-17-185 (2017 Appeal) on September 19, 2017 and G1-19-240 (2019 Appeal) on November 18, 2019, both under G.L. c. 31, s. 2(b), appealing the decisions of the Boston Police Department (BPD or Respondent) to bypass her for appointment to the permanent, full-time position of police officer. A prehearing conference was held in the 2017 Appeal on October 17, 2017 and in the 2019 Appeal on December 17, 2019, both at the Commission's office in Boston.⁴ A full hearing was held on January 17, 2018 and February 1, 2018 in the 2017 Appeal and on February 7, 2020 in the 2019 Appeal at the

same location. After the testimony of Dr. Brown in the 2017 appeal hearing, the Appellant made an oral motion for a directed verdict. There being no explicit authority therefor in the Standard Adjudicatory Rules of Practice and Procedure, the motion was taken under advisement; given the ruling in this decision, the motion is denied as moot. Both hearings were digitally recorded and copies of the recordings were sent to the parties.⁵ All witnesses, with the exception of the Appellant, were sequestered. In the 2019 Appeal, the parties agreed to consolidate the 2017 Appeal and the 2019 Appeal since the 2019 bypass relied on the untruthfulness alleged in the 2017 Appeal, in addition to alleging that the Appellant failed the psychological evaluation in the 2019 bypass. The parties in the 2019 appeal offered no additional evidence regarding the Appellant's alleged untruthfulness in 2017 and presented evidence relating solely to the Appellant's alleged failure of the psychological evaluation in the 2019 bypass. The parties in both appeals filed post-hearing briefs. For the reasons stated herein, the appeals are allowed.

FINDINGS OF FACT

In the 2017 Appeal, fourteen (14) exhibits (2017 Exhibits (Ex./s)) 1 - 4, 5A, 5B and 6 -11) were jointly entered into the record at the hearing and Appellant's Exhibits (2017 A.Exs.) 1 and 2 was entered into evidence at the hearing. In the 2019 Appeal, sixteen (16) exhibits were offered jointly by the parties and entered into evidence at the hearing (2019 Exs. 1 - 16). Based on the exhibits and the testimony of the following witnesses:

Called by the Appointing Authority in the 2017 Appeal:

- Nancy Driscoll, Director, BPD Human Resources
- Dr. Andrew Brown, Psychologist

Called by the Appellant in the 2017 Appeal:

- Michelle Rogers (Appellant)

Called by the Appointing Authority in the 2019 Appeal:

- Mary Flaherty, then-Director of BPD Director of Human Resources (HR)
- Donald Seckler, Ph.D. (self-employed)
- Lance Fiore, Ph.D. (self-employed)

Called by the Appellant in the 2019 Appeal:

- Michelle Rogers (Appellant)

1. Attorney Sulman represented the Appellant in appeal docketed G1-17-185.

2. Attorney Donnellan represented the Appellant in appeal docketed G1-19-240.

3. Respondent's counsel in the 2017 appeal was Juliana DeHaan Rice, Esq., who is no longer employed by the Respondent.

4. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31 or any Commission rules taking precedence.

5. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

and taking administrative notice of all matters filed in both appeals; stipulations; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts in both appeals:

2017 Appeal

1. The Appellant is a life-long resident of Boston, with the exception of her attendance at college in Arizona for a couple of years. (Testimony of Appellant) At the total of three (3) days of hearings in the 2017 Appeal and the 2019 Appeal, the Appellant appeared confident, her comments were direct and straight forward and she was articulate. For these reasons, I find the Appellant credible.

2. The Appellant took and passed the civil service police officer exam on April 25, 2015. (2017)

3. The state's Human Resources Division (HRD) issued the eligible list in connection with the 2015 exam and issued Certification 04401 to the BPD on February 22, 2017 and March 12, 2017. (2017 Stipulation)

4. The Appellant's name ranked 74th among those who had signed the Certification indicating their interest in employment as a BPD police officer. (2017 Stipulation)

5. The BPD selected one hundred (100) candidates for appointment, twenty (20) of whom ranked below the Appellant. (2017 Stipulation)

6. The BPD conducted a background investigation of the Appellant. The information gathered in the background investigation was presented to the BPD roundtable. (Testimony of Appellant and Driscoll)

7. After the roundtable, the BPD issued a conditional offer of employment to the Appellant and the Appellant was scheduled to take the required medical examination on July 3, 2017. (2017 Testimony of the Appellant and Driscoll)

8. G.L. c. 31, s. 61A requires HRD to establish medical fitness standards for police and firefighter candidates. Pursuant to G.L. c. 31, s. 61A, HRD established the Initial-Hire Medical Standards and the Physician's Guide to the Standards (Medical Standards).⁶

9. The Medical Standards provide, in part, that the person evaluating the candidate is required to "[c]arefully review the medical history with the examinee and record in detail ... Medical conditions listed in the Medical Standards are classified as 'Category A' or 'Category B' conditions. Category A conditions are considered absolutely disqualifying. For Category B conditions you are required to consider whether the particular examinee's condition would prevent him or her from safely and effectively performing the essential functions of the position ... If you find an examinee not qualified, you will need to indicate whether the condition is Category A or Category B and cite the applicable section of the

Medical Standards. ... If you find that an examinee failed to provide a complete and accurate medical history, you will need to explain such ... **By itself, failure to provide a complete and accurate medical history will not necessarily disqualify the examinee** from meeting the medical standards, but may subject the examinee to administrative disqualification of employment or other adverse action by the appointing authority...." (2017 R.Ex. 2, pp. 4,5)(emphasis added)

10. With regard to psychiatric conditions, the Medical Standards indicate that a Category A condition "... shall include: [a]ny psychiatric **condition** that results in the candidate not being able to safely perform one or more of the essential job tasks [of a police officer]." (*Id.*) A Category B condition includes "1) [a] history of psychiatric **condition** or substance abuse problem" or "2) [r]equirement for medications that increase an individual's risk of heat stress, or other interference with the ability to safely perform essential job tasks[.]" (*Id.* at 33)(emphasis added)

11. As part of a candidate's application packet, each candidate was required to provide the BPD with the candidate's complete medical record and to answer a questionnaire regarding his or her medical history (medical questionnaire). The Appellant obtained her medical records and answered this medical questionnaire; however, at the time that she filled out the questionnaire she had not yet received all of her medical records. When she received her medical records, she submitted them to the BPD. (2017 Testimony of Appellant and Brown) The Appellant's medical record does not include any information from mental health providers. (Testimony of Brown)

12. On the medical questionnaire, the Appellant answered questions about mental health. **She answered "yes" to the question asking if she had been prescribed medication for pain, sleep, stress, work problems, and family problems and wrote that she had been prescribed Trazodone.** (2017 R.Ex. 3 and Testimony of Appellant) Trazodone is classified as an anti-depressant but it is used for sleep problems instead of as an anti-depressant. (Testimony of Brown) The Appellant was prescribed Trazodone for sleeping difficulties after she was the member of her family who found her grandmother deceased. The Appellant did not indicate on the medical questionnaire that she had been prescribed two (2) medications (Celexa (10mg) and Xanax (.5mg) as needed) sometime in or about 2010 for mood and behavior because she did not take the medications and she did not even fill one of the prescriptions. (2017 R.Ex. 3 and Testimony of Appellant) However, the Appellant herself brought her medical records to her medical exam, which contained information regarding the medications that she was prescribed. (2017 R.Ex. 6) Therefore, I find that the Appellant was not trying to conceal her medical history and was not untruthful.

13. The Appellant's medical records included a primary care gynecology office visit in 2010 at which the Appellant was physically examined, years before she applied to the BPD in 2017 and

6. The Medical Standards have been modified multiple times but the sections referenced herein remained unchanged.

2019. The Appellant was approximately twenty-one (21) years old in 2010. The office visit notes state that certain medical tests would be done, that the Appellant complained of anxiety at the office visit, that the Appellant was **prescribed** Celexa (10mg), and that the Appellant was to see a social worker for anxiety. The same record also states that the Appellant had gone to a Boston behavioral health center at some point in time years earlier, where she was **given** Xanax for anxiety to take as needed but she “did not like the feeling of laways (sic) having the medication on Her (sic)”. (2017 R.Ex. 6)(emphasis added) The Appellant’s medical record further shows that in 2008, the Appellant had a medical appointment at the same location as the 2010 medical appointment. At the 2008 appointment, the Appellant was approximately nineteen (19) years old and she reported that she had experienced anxiety and/or panic attacks for the first time, which may have been connected to finding out that she could not complete a college education because her parents were no longer able to pay for her college tuition, and connected to her return to Massachusetts to live with her mother for the first time since her parents divorced when she was twelve (12) years old. As a teenager, the Appellant had a difficult relationship with her mother. The Appellant’s 2007 and 2006 medical records reflect solely annual medical exams. (2017 R.Ex. 6; Testimony of Appellant)

14. Prior to attending the BPD medical exam, the Appellant took two (2) psychological tests administered by BPD, which were scored by a computer and sent to Dr. Brown for his review. (2017 Testimony of Brown and Appellant) The two (2) tests were the Minnesota Multiphasic-Personality Inventory - 2-RF (MMPI-2-RF) and the Personality Assessment Inventory (PAI). (Testimony of Brown)

15. The MMPI-2-RF report states, in part,

Scores on the MMPI-2-RF validity scales raise concerns about the possible impact of under-reporting on the validity of this protocol. With that caution noted, scores on the substantive scales indicate somatic complaints. Somatic complaints relate to neurological symptoms. ...

The test taker presented herself in a positive light by denying some minor faults and shortcomings that most people acknowledge. This level of virtuous self-presentation may reflect a background stressing traditional values. She also presented herself as very well-adjusted. This reported level of psychological adjustment is relatively rare in the general population.

The test taker ... is likely ... to be prone to developing physical symptoms in response to stress. ...

There are no indications of emotional-internalizing dysfunction ...

There are no indications of disordered thinking ...

There are no indications of maladaptive externalizing behavior ...

These scales provide no further evidence of [interpersonal] dysfunction. ...

Somatoform disorder, if physical origins for neurological complaints have been ruled out[,] ... (2017 R.Ex. 5A)

The “areas for further evaluation” section of the MMPI-2-RF report states, “[e]xtent to which genuine physical health problems contribute to the score on the Neurological Complaints ... scale.” (*Id.*)

The report notes that the Appellant “produced scorable responses to all the MMPI-2RF items.” (*Id.*)

Finally, the MMPI-2-RF report found that the Appellant did not have an elevated T score on any of seven (7) critical responses, such as Anxiety, Helplessness/Hopelessness, Substance Abuse and Aggression. (*Id.*)

16. The Appellant’s PAI test report states about the Appellant, in part,

she has a “low risk of receiving ‘poorly suited’ rating” (i.e. 13% risk);

regarding endorsement of critical items with job-relevant content, the Appellant endorses fifteen (15) items, compared to the average ten (10) items for public safety employees;

regarding the likelihood of a negative behavior history in job-relevant areas (such as integrity problems, anger management problems and substance abuse proclivity), the Appellant was rated at low risk level for half of the subject matters and at a moderate risk level for the other half of the subject matters. (2017 R.Ex. 5)

17. On July 3, 2017, the Appellant met with Dr. Andrew Brown, a psychiatrist, for a psychiatric evaluation, as required by the BPD hiring process. Dr. Brown has been working regularly with the BPD since 2011, part-time prior to 2011, in the Occupational Health Services Unit and maintains a private practice. He has also been a consulting and a staff psychiatrist for a number of other municipalities and institutions since he earned his medical degree many years ago. In 2013, he was a consultant in the development of the 2014 HRD Medical Standards regarding appointment of law enforcement officers. (2017 R.Ex. 8)

18. In preparation for Dr. Brown’s appointment with the Appellant, Dr. Brown reviewed the Appellant’s answers to the medical questionnaire and the MMPI-2-RF and PAI reports. However, Dr. Brown did *not* review the Appellant’s medical records prior to her interview with him. Often Dr. Brown does not receive the candidates’ medical records until he has met with them for the evaluation. Even when he receives the candidates’ medical records before he meets with candidates, such records are voluminous and he does not have time to review them all prior to his meetings with candidates. Dr. Brown usually reviews the candidates’ medical records prior to writing the reports of his evaluations. (2017 Testimony of Brown and R.Ex. 7)

19. Dr. Brown usually asks applicants if they have taken any medication for emotional difficulties, psychological problems, anxiety, sleep, mood or behavior issues and if they have seen a mental health specialist. To Dr. Brown, such questions are important to help the evaluator determine if applicants have any illnesses or problems related to functioning or that are relevant to performing their duties. (Testimony of Brown) It was unclear how Dr. Brown

worded his questions to the Appellant about whether she had taken or been prescribed certain medicine. (Testimony of Brown)

20. Dr. Brown's meeting with the Appellant on July 3, 2017 lasted either one (1) hour or eighty (80) minutes or between forty (40) minutes to eighty (80) minutes. (Testimony of Brown) During the rest of the Appellant's interview with Dr. Brown, they primarily discussed her early history, academic history, work history and relationship history. (Testimony of Brown and Appellant) The Appellant told Dr. Brown about her stress when her father filed for bankruptcy but did not tell him about panic attacks she had at about that time although that information was in her medical record. The Appellant told Dr. Brown that she had been prescribed anxiety medications but had not taken them. (Testimony of Appellant) The Appellant told Dr. Brown in the interview that she had been prescribed Topamax, a weight-loss medication and disclosed on the health questionnaire that she had been prescribed Trazodone for sleep difficulties. (Testimony of Appellant)

21. Dr. Brown wrote a report on his interview of the Appellant, although his name does not appear on the report. The report is dated July 3, 2017, the date that he interviewed the Appellant but Dr. Brown did not recall if that is the date that he wrote his report. (2017 R.Ex. 7)

22. The longest paragraph in Dr. Brown's report relates to the Appellant's family history and her interest in law enforcement. This paragraph discusses some of the difficulties that led to the Appellant's parents' divorce when she was twelve years old and the difficulties that occurred later involving her father's bankruptcy, which prevented him from paying for the rest of the Appellant's college tuition. The Appellant reportedly resented that her parents did not tell her that they were having financial difficulties prior to the bankruptcy. This part of the report also states that the Appellant considered returning to Arizona to pursue a job in law enforcement there but her mother was supporting her financially and she agreed to stay in Boston. (2017 R.Ex. 7)

23. In the employment history section of his 2017 report, Dr. Brown wrote that the Appellant had been unemployed since September 2014. Dr. Brown reported that the Appellant lacked interest in jobs such as waitressing or bartending, stating that she still has money saved from when she worked and that she receives financial support from her parents. Dr. Brown reported that the Appellant said she had applied for many, many jobs but without success and that she wants a stable job or career. The Appellant's last formal job was at the Boston Medical Center (BMC) from 2012 to 2014; she did not like the environment. She asked a co-worker to take one of her shifts but the coworker did not show up and the Appellant received a warning. (*Id.*) Dr. Brown did not report that the Appellant had told him that she had been looking for another job in 2014 and believed that she would be hired by one particular employer after multiple positive interviews there. The Appellant resigned from the BMC, giving two (2) weeks' notice, but she did not get the other job. (Testimony of Appellant)

24. Dr. Brown's report states that the Appellant has "maintained many longer term friendships with a large number of peers" she

has known since grade school and friends she made while attending college. (2017 R.Ex. 7 and Testimony of Appellant)

25. Dr. Brown wrote that the Appellant "appears cooperative", "no attempt to conceal negativity or hostility towards other", that her affect was "irritable, prickly, tough", that her thought content showed "no evidence of perceptual disturbance", that her thought process was "**organized, goal directed.** ... No delusions. **No evidence of formal thought disorder.**" (*Id.*)(emphasis added) He wrote further that the Appellant lacked insight "into the nature and dynamics of continuing dependency on parents" but that her judgment was "adequate" and her cognition was "intact". (*Id.*)

26. Reflecting on the MMPI-2-RF and PAI results, Dr. Brown wrote that the MMPI-2-RF report "raises concerns about the possible impact of underreporting" but that there are "**no indications of somatic, cognitive, emotional, thought, behavioral or interpersonal dysfunction.**" (*Id.*)(emphasis added)

27. Dr. Brown's report states, with respect to the Appellant's appearance, that she wore a "bright red" dress at her meeting with him. (*Id.*) The Appellant does not own a bright red dress. The dark blue dress the Appellant wore to the Commission hearing is the same dress she wore to her meeting with Dr. Brown. (Testimony of Appellant)

28. Upon reviewing the Appellant's medical record, after his interview with her, Dr. Brown wrote in his report about her medical records in 2008 and 2010 without referencing the medical reasons for her doctor visits but including the Appellant's statements to her primary care doctor in 2008 and 2010 about anxiety and/or anger towards her mother. Dr. Brown wrote further that the Appellant had been referred to a therapist in 2008 and 2010 without noting that the Appellant's medical record did not include any counseling records. In addition, Dr. Brown wrote that a physician issued the Appellant a daily prescription for anxiety in 2008 and a different prescription for anxiety in 2010 as needed without indicating whether the Appellant filled the prescriptions and took the medications. (2017 R.Ex. 7) However, the Appellant did not even fill one of the prescriptions, nor did she participate in counseling at the time. (Testimony of Appellant) Since Dr. Brown did not review the Appellant's medical record *prior* to his meeting with the Appellant, and his report *does not disclose* that he did not review her medical records until after their meeting, she had no opportunity to address his questions regarding anxiety medications and counseling seven (7) and nine (9) years prior to her applications for employment at BPD. The Appellant did not even fill one of the prescriptions or participate in counseling at that time. (Testimony of Appellant)

29. While Dr. Brown asserted at the Commission hearing that consulting a mental health counselor and taking anti-anxiety medication are not automatic disqualifiers for police candidates but he also asserted that the Appellant had a very significant psychiatric history. (Testimony of Brown) Notwithstanding such statements, Dr. Brown's report "conclusions" stated, in full, "[t]he administrative director of [the Occupational Health and Safety Unit (OHSU) of the BPD Human Resources office] was informed regarding

the significant **disparities** between the insured's (sic) verbal and written reports to OHSU and this writer, on the one hand, and the content of the applicant's medical records. **The above-mentioned disparities reflect the presence of untruthfulness in this case.**" (2017 R.Ex. 7)(emphasis added)

30. Neither Dr. Brown's report, nor his testimony at the Commission, indicated that the Appellant had a condition or disorder, whether it was a Category A or B condition or disorder and which essential function of a police officer in the Medical Standards the Appellant was unable to perform because of such condition. (2017 R.Exs. 2 and 7)

31. Dr. Brown was unable to determine if the Appellant passed or failed the psychological evaluation based on the information he obtained. (Testimony of Brown) The Medical Standards provide, in part,

If you find that an examinee failed to provide a complete and accurate medical history and accurate medical history, you will need to explain such under Section I of the Medical Examination Form, 'Physician's Notice of Examinee's Failure to Provide Complete & Accurate Medical History'. **By itself, failure to provide a complete and accurate medical history will not necessarily disqualify the examinee from meeting the medical standards, but may subject the examinee to administrative disqualification of employment** or other adverse action by the appointing authority. (2017 R.Ex. 2, p. 4)(emphasis added)

Dr. Brown's report did not indicate which, if any, of the essential tasks of a police officer that the Appellant could not perform. (2017 R.Exs. 2 and 7)

32. Dr. Brown submitted his report to the OHSU and discussed it with the OHSU Administrative Director, Mark Cohen⁷. Dr. Brown and Mr. Cohen discussed whether Dr. Brown's report should proceed to a secondary evaluation by a psychiatrist or a psychologist, pursuant to the Medical Standards. At that time, Dr. Brown was not thinking of the part of the Medical Standards regarding a lack of complete and accurate medical information above. (Testimony of Brown)

33. Then-BPD Director of Human Resources, Nancy Driscoll, working with then Police Superintendent Wolcott were the people who decided which candidates would be bypassed. (Testimony of Driscoll) At that time, Ms. Driscoll had been working at the BPD as Director of the BPD Human Resources office for approximately a year and a half. As HR Director, Ms. Driscoll oversaw the OHSU. Mr. Cohen told Ms. Driscoll that there were discrepancies regarding the Appellant's medical information. Ms. Driscoll spoke to Dr. Brown about the supposed discrepancies and then she discussed the matter with then—Supt. Wolcott. Ms. Driscoll did not read Dr. Brown's medical report; she did not know if Dr. Brown had reviewed the Appellant's medical record prior to interviewing the Appellant. Ms. Driscoll and Dr. Brown did not discuss referring the Appellant for a second psychological evaluation. Thereafter, Ms. Driscoll drafted a bypass letter concern-

ing the Appellant and discussed it with Dr. Brown. (Testimony of Driscoll)

34. By letter dated August 31, 2017, Ms. Driscoll informed the Appellant that she had been bypassed, writing, in pertinent part,

... As detailed herein, the [BPD] has significant concern with the discrepancies you have made in your verbal and written statements during the **medical process**. Therefore, you will not be appointed ...

Truthfulness is an essential job requirement for a police officer. When an officer is found to be untruthful, it damages the officer's ability to testify in future court proceedings. Testifying in court is a fundamental job requirement for a police officer, and therefore it is essential that an officer's integrity and credibility are intact. As a result, the untruthfulness identified in your application, as well as the other concerns detailed herein, deem you unsuitable for employment as a Boston police officer ... (2017 R.Ex. 9)(emphasis added)

Although the bypass letter references details therein, there are none. However, attached to 2017 R.Ex. 9 (the bypass letter) is a form from the Medical Standards signed by Dr. Affeln, who is associated with the BPD OHSU, on August 22, 2017. Dr. Affeln apparently marked the section of the form that states that the Appellant failed the medical exam but without marking the form to indicate whether the failure was based on a Category A or Category B condition.⁸ (*Id.*)

35. The Appellant timely filed the 2017 appeal. (Administrative Notice)

2019 Appeal

36. The Appellant took and passed the civil service police officer exam on March 25, 2017. (Stipulation)

37. HRD issued the eligible list in connection with the 2017 Exam and issued Certification 06203 to the BPD on March 29, 2019. (Stipulation)

38. The Appellant's name ranked 78th among those who had signed the Certification indicating their interest in employment as a BPD police officer. (Stipulation)

39. The Respondent appointed 126 candidates who signed the Certification, 21 of whom (not including those with the same rank as the Appellant) were ranked below the Appellant. (Stipulation)

40. The Appellant attended candidate orientation and was assigned to have her background investigation conducted by Det. Brian Rivers, who also conducted her background investigation when she was being considered for appointment in 2017. (Testimony of Appellant)

41. At the time of the Appellant's consideration for employment at the BPD in 2019, Mary Flaherty had been the BPD HR Director

7. The Respondent did not call Mr. Cohen to testify and there is no indication of Mr. Cohen's knowledge of the HRD Medical Standards.

8. It is unclear if the form signed by Dr. Affeln, an M.D., was attached to the bypass letter sent to the Appellant.

for one (1) year and, before then, she was the Deputy Director of HR for two (2) years. The 2019 hiring cycle was the first time that Ms. Flaherty was in charge of the entire hiring process. (Testimony of Flaherty)

42. After Detectives conducted background investigations on the candidates, they presented their findings to the BPD roundtable, which is usually comprised of Ms. Flaherty, a representative of the Professional Standards unit at the Deputy or Superintendent level, someone from the Legal Department and a commanding officer who oversees the investigations. The roundtable decided which candidates will receive conditional offers of employment, requiring the pertinent candidates to undergo medical (including psychiatric) exams and the physical aptitude exam.⁹ (Testimony of Flaherty)

43. At the BPD roundtable consideration of the Appellant's application and background investigation in 2019, there was an **"oversight"** in that the information that the BPD had about the Appellant did not indicate that she had been considered for employment in the 2017 hiring cycle and that she had filed a pending appeal at the Commission because the BPD bypassed her in 2017. (Testimony of Flaherty) Following the presentation regarding the Appellant's application to the roundtable in 2019, the roundtable issued her an offer of employment conditioned on her successful completion of medical and psychological exams. (Testimony of Flaherty; 2019 Ex. 2)

44. Pursuant to the Medical Standards, the Appellant was then psychologically evaluated. For that purpose, Dr. Seckler, a psychologist, met with the Appellant on or about October 4, 2019 and then by Dr. Fiore, a psychologist, on October 18, 2019. (2019 Exs. 7 and 8) Dr. Seckler has prepared psychological preemployment evaluations for the BPD and a number of other municipalities for years. (2019 Ex.15) During the 2019 BPD hiring cycle involved in this case, Dr. Seckler evaluated between twenty and thirty candidates. The reports of both Dr. Seckler and Dr. Fiore repeatedly mistakenly refer to the Appellant as "Michelle Roberts".¹⁰ (2019 Exs. 7, 8 and 15)

45. Prior to meeting with Dr. Seckler, the BPD OHSU staff administered the MMPI-2-RF and the PAI to the Appellant. (Testimony of Seckler)

46. The MMPI-2-RF report for the Appellant's exam states, in part,

"Scores on the MMPI-2-RF validity scales raise concerns about the possible impact of under-reporting on the validity of this protocol. With that caution noted, there are **no indications of somatic or cognitive complaints, or of emotional, thought, behavioral, or interpersonal dysfunction.**"

[there are] "[n]o specific psychodiagnostic recommendations [] indicated ..."

"[n]o specific recommendations for treatment are indicated ..."

"The test taker responded relevantly to the items on the basis of their content."

"No specific recommendations for treatment are indicated ..."

(2019 Ex. 4, pp. 8-9)(emphasis added)

On seven (7) scales (including, for example, suicidal ideation, anxiety and aggression), the report found that the Appellant does not have an elevated score. (*Id.*) Regarding interpersonal functioning scales, the report states that the scales **"provide no evidence of dysfunction."** (*Id.*)(emphasis added)

47. The Appellant had a modest elevation on the MMPI-2-RF on candor relating to personal information. (2019 Ex. 4) The test report states, "This level of virtuous self-presentation may reflect a background stressing traditional values. ..." (2019 Ex. 4, p. 8) Dr. Seckler did not take into account the cultural background of the Appellant when determining if her score was a reflection of her background. (Testimony of Seckler)

48. The report on the Appellant's 2019 completion of the PAI found that the Appellant's "psychological rating risk factor" was 23%, a **"low risk of receiving a 'poorly suited' rating"** for the position of police officer. Among seven (7) "job-relevant" behaviors, the only high risk rating the Appellant received in the PAI report was a 61% probability of "integrity problems". (2019 Ex. 5)

49. The Appellant met with Dr. Donald Seckler for the 2019 psychological interview for approximately one (1) hour on October 4, 2019. At about that time, the Appellant's aunt had passed away and the Appellant's cousin was on life-support. She did not mention these matters to Dr. Seckler because she was trying to remain composed and the discussion at the interview concerned matters from years ago. (Testimony of Appellant)

50. Prior to meeting with the Appellant, Dr. Seckler reviewed the report of Dr. Brown, who evaluated the Appellant when she applied to the BPD in 2017 (*supra*), the results of the Appellant's 2019 MMPI and PAI tests and the Appellant's 2019 background investigation. (2019 Ex. 7) Dr. Seckler's report does not indicate whether he reviewed the Appellant's medical records prior to the interview. In his report, Dr. Seckler mentions the Appellant's medical records only once stating, parenthetically, "(her 2010 medical records indicates (sic) a history of diagnosis and medical care for anxiety)." (*Id.*)

51. Dr. Seckler's report contained the following statements:

the Appellant] walked quickly, with a notable rush of energy relative to most police job candidates. She sat down, looked quickly around and around the interview and said 'I was scared.' I asked, 'of what'. She replied, 'that you were Dr. Brown.' She said that she and Dr. Brown had not 'seen eye to eye' and stated that he 'didn't say what I said to him.' She claimed to have told him that

9. This 2019 hiring process also included a new Mass. Police Training Committee physical examination. (Testimony of Flaherty)

10. On cross-examination, Dr. Seckler acknowledged that he had changed his report at some later time to correctly refer to the Appellant's correct name. He did not recall that he had made any other changes to his report.

she was prescribed Trazodone and Ativan in the past, but had never taken the Ativan, and took the Trazodone, for ‘only maybe three weeks’ ...

Ms. Roberts (sic) went on to describe an important recent event in her life, the death of her paternal grandmother. ... Ms. Rogers said that she had provided part-time care for her grandmother. Neither she nor her father worked for some time during the grandmother’s decline. Ms. Roberts (sic) admitted that she had not worked since 2014. She said that she got ‘some money’ from her parents to support herself. She claimed that she had applied for many jobs, with no good results ... but professed to have ‘no idea’ why she wasn’t hired....

[The Appellant] recounted an education history of some success at [] high school ... but said she quit sports her senior year to ‘make a point’ because her coach had been fired. ... [H]er father declared bankruptcy and ... [s]he said she had ‘no idea why that happened.’ All she could say about this change in her life, was that ‘he had bought horses or something.’ ...

Roberts (sic) described an incident that she termed a ‘nightmare’ relating to conflict with her mother during Christmas vacation in 2007. She said that, at her father’s urging at that time, she went to South Boston Health Center primarily to appease her mother, and had been seen for psychiatric evaluation. ... She said she left with a prescription for Xanax (10 mg) for anxiety, but did not proceed in the caregiving system. ...

She feels her failure to ‘fill out the right paperwork’ cost her the BPD position in 2017. ...

Ms. Roberts (sic) ... has ‘never been in a long-term relationship’ because she ‘has no desire to settle down soon’.

(2019 Ex. 7)¹¹

52. Dr. Seckler’s report included the following subjective statements, lacking sufficient support in the record:

Ms. Roberts (sic) seemed agitated, filled with feeling, and in marginal control ...

He (sic) face and neck reddened. She was frequently in tears. Her speech was pressured and dramatic. Her ideas bounced from detail to detail ... At other times, she supplied almost no detail ... She [and her mother] ... ‘couldn’t stand being around each other ...

Ms. Roberts (sic) recounted a work history including a position ... at Boston Medical enter ... That job ended in conflict with co-workers and resignation.

Ms. Roberts (sic) presented with **intense and labile mood**. ... Her **executive skills appeared overwhelmed by the cascade of events, feelings, sand (sic) personal crises** she has experienced, **leading to either failure to register the information of contemporary inability to recall and express. This was consonant with both psychological trauma and borderline personality disorder, in both of which conditions thoughts and feelings generate ‘flooding’ of the ability to process and communicate important information.** She has struggled with work, relationships, impulse control, and the details, large and small, of life management. **She went to some length in rebutting the notion that she had been in therapy, but it was unclear to me, given her history, if seeking help would not have been a better**

choice. The police job requires sustainable skills of self-management, emotional control, and the ability judiciously regulate responses to stress under challenging work conditions. **Successful police job candidates must be able to integrate training experiences and accept direction in a hierarchal (sic) command structure. Ms. Roberts (sic) has demonstrated deficits in these areas.** For these reasons, Ms. Roberts (sic) appears unsuitable for the police job at this time. Since the BPD is unable to moderate work conditions to provide accommodation for her **deficits**, Ms. Roberts (sic) should not move forward in the hiring process at this time. (2019 Ex. 7)(emphasis added)

There is no indication in the record that Dr. Seckler asked the reason for her tears.

53. I take administrative notice that “labile” is defined as, “readily or continually undergoing chemical, physical, or biological change or breakdown: unstable”. (<https://www.merriam-webster.com/dictionary/labile> May 27, 2020)

54. While Dr. Seckler’s report asserted that the Appellant’s statements at the interview are “consonant” with trauma and “borderline personality disorder” that could affect her ability to process and communicate important information, he did not indicate whether it was a Category A complete disqualification or a Category B condition. (2019 R.Exs. 7)

55. Dr. Seckler’s report made no reference to the Appellant’s large circle of friends she has known since elementary school. (2019 Ex. 7; Testimony of Appellant)

56. At the Commission hearing, Dr. Seckler attempted to add information to his report to indicate that there were a number of police officer essential tasks in the HRD Medical Standards that the Appellant is unable to perform. However, he acknowledged that he had not made such statements in his report and that his report did not find that she was disqualified from being a police officer on the basis of a condition or disorder. He did not recall that the Appellant was a teenager or young adult when she had a particularly difficult relationship with her mother and mentioned to her primary care physician in 2008 and 2010 (when she was 19 and 21 years of age) that she was having problems with anxiety. Although Dr. Seckler’s report stated that the Appellant was “frequently in tears” during her interview, in his testimony at the Commission, he could not recall when during her interview the Appellant teared up. (Testimony of Seckler)

57. Dr. Lance Fiore conducted the second psychological evaluation of the Appellant in connection with the Appellant’s 2019 application to the BPD. A psychologist, Dr. Fiore has been in practice for many years. He has been conducting preemployment evaluations for the BPD for at least several years and also performs such evaluations for a number of other municipalities. (Testimony of Fiore; 2019 Ex. 16)

58. Dr. Fiore interviewed the Appellant on October 18, 2019 for approximately one (1) hour and on October 21, 2019, he wrote

11. Regarding her difficulties finding suitable employment, Dr. Seckler suggested to the Appellant that she look in the newspaper. (Testimony of Appellant)

his evaluation.¹² Dr. Fiore’s evaluation states, in part, that, he reviewed “all pertinent supporting application materials” relating to the Appellant, including the reports of Dr. Brown and Dr. Seckler. (2019 Ex. 7) It is unknown if he reviewed the results of the Appellant’s 2017 or 2019 PAI and MMPI-2-RF test results or the Appellant’s medical record, and, if he did, whether he reviewed them before or after he interviewed her interview. (*Id.*)

59. The Appellant told Dr. Fiore that she had had a difficult relationship with her mother when she was a teenager when her parents divorced. The Appellant told Dr. Fiore that, beginning in her early 20s, her relationship with her mother improved, although the Appellant allegedly told Dr. Seckler recently that she and her mother were seeing each other often but they still had difficulties. (2019 Ex. 7; Testimony of Appellant)

60. Dr. Fiore asked the Appellant about the incident in 2007, when she was a teenager, when she had a disagreement with her mother and her mother told her that she needed help. The Appellant went to the Boston Health Center, met with a counselor on that occasion who gave her a prescription for Xanax that she did not fill. The Appellant did not seek therapy thereafter although she told Dr. Fiore that she disclosed to a primary care provider at the time that she was having a difficult relationship with her mother. The Appellant further disclosed to Dr. Fiore that she met with a counselor at that time who prescribed Celexa but the Appellant did not fill the prescription. (2019 Ex.8; Testimony of Appellant)

61. Like Dr. Seckler, Dr. Fiore’s report mentioned the Appellant’s decision in high school in 2007 to leave her basketball team to express her disagreement that her coach had been terminated. (2019 Ex.8)

62. Like Dr. Seckler, Dr. Fiore wrote that, after high school, the Appellant went to college in Arizona but that she did not complete her education because of the family financial difficulties. Thereafter, Dr. Fiore wrote that the Appellant returned to Boston and worked as a waitress and at a private gym, following which she worked at the Boston Medical Center (BMC). Dr. Fiore wrote incorrectly that the Appellant worked at the BMC from 2012 to 2019 when, in fact, she worked there from 2012 to 2014. Dr. Fiore accepted Dr. Seckler’s report, which lacked sufficient support, that the Appellant left the BMC because of a “conflict with co-workers and termination” even though the Appellant had only received a warning about a shift coverage and she resigned, giving BMC two (2) weeks’ notice because she believed she was about to be offered a job involving veterans because she had been repeatedly interviewed for that job. (2019 Ex. 8; Testimony of Fiore and Appellant)

63. Like Dr. Seckler, Dr. Fiore wrote that the Appellant had applied to many jobs but not secured one in several years, other than odd jobs, and was financially supported by her parents. (2019 Ex.8)

64. Like Dr. Seckler, Dr. Fiore wrote that the Appellant has “never been in a long term relationship” stating “I haven’t settled down with anybody”. (2019 Ex. 8)

65. Like Dr. Seckler, Dr. Fiore did not inquire about the Appellant’s large group of friends whom she has known since they all attended elementary school, as well as friends she made when she attended college. (Testimony of Appellant)

66. Dr. Fiore concluded his report with a “Discussion” stating, in part,

“Ms. Roberts (sic) presented as an intense, mildly agitated woman who nonetheless was able to participate in this evaluation....

Ms. Roberts (sic) reviewed with me salient details of her life. Most prominent are differing characterizations of life events. Test results indicate ‘possible doubtful candor in reporting unflattering details of personal feelings and experiences.’ She described a long-standing conflictual relationship with her mother that she reported improved as she moved into her early 20’s who she sees several times a week. ...

She has a very difficult occupational history. ... she displayed little if no insight as to why (2019 Ex. 8)

67. Dr. Fiore’s report made no finding that the Appellant had a condition or disorder, as either a category A disqualification condition or a category B condition, nor did he identify an essential task of a police officer in the Medical Standards that the Appellant would be unable to perform. However, Dr. Fiore’s report states that the Appellant would have problems working in the “hierarchical” work setting of a police officer, like Dr. Seckler’s report, similarly without explaining what aspect of the Appellant’s interview and test scores support such an assertion. (2019 Ex. 8)

68. During his testimony at the Commission hearing, Dr. Fiore attempted to add information to his report to indicate that there were a number of police officer essential tasks in the HRD Medical Standards that the Appellant is unable to perform. However, he acknowledged that he had not made such statements in his report and that his report did not find that she was disqualified from being a police officer on the basis of a condition or disorder. (Testimony of Fiore)

69. By letter dated November 15, 2019, HR Director Flaherty notified the Appellant that she had been bypassed, stating, in pertinent part,

... As detailed herein, the [BPD] has significant concern with the **discrepancies** you have made in your verbal and written statements **during the 2017 medical process**. **Additionally, the results of your psychological screening indicate that you cannot adequately perform the essential functions of the public safety position** ... and a reasonable accommodation is not possible. ...

12. Dr. Fiore acknowledged in his testimony that his report to the BPD about his evaluation of the Appellant referred to her as Ms. Roberts and that there was an error in a date pertaining to the Appellant’s employment at the BMC, which errors

were corrected approximately one week after he submitted his report to the BPD. Since Dr. Fiore relied on Dr. Seckler’s report and Dr. Seckler also referred to the Appellant as Ms. Roberts, the error appears to have emanated from Dr. Seckler.

Truthfulness is an essential job requirement for a police officer. When an officer is found to be untruthful, it damages the officer's ability to testify in future court proceedings ...

[Dr.] Seckler ... conducted your first level psychological screening as part of the approved (sic) process. The police job requires sustainable skills of self-management, emotional control and the ability to judiciously regulate responses to stress under challenging work conditions. Successful police job candidates must be able to **integrate training experiences and accept direction in a hierarchical command structure**. The evaluating psychologist found **deficits** in these areas. As a result of this conclusion, you were evaluated by [Dr.] Fiore ... Dr. Fiore identified problems related to managing emotions, sustaining productive relationships and accepting direction in a hierarchical work structure.

... Your psychological evaluations indicate that you cannot adequately perform these essential functions. As the police officer position cannot be modified to compensate for these **deficits**, the [BPD] finds you ineligible for appointment ... at this time. ...

(2019 Ex. 14)(emphasis added)

70. The Appellant timely filed the 2019 appeal. (Administrative Notice)

APPLICABLE LAW

G.L. c. 31, s. 1 defines basic merit principles of civil service, in pertinent part, as follows,

(a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... ; ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens. *Id.*

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).

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 wheth-

er 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).

ANALYSIS

The Respondent has failed to establish by a preponderance of the evidence that it had reasonable justification for bypassing the Appellant in 2017 and 2019.

2017 Appeal

In the 2017 Appeal, the Respondent issued a conditional offer of employment to the Appellant and met with Dr. Brown for the first level psychological evaluation. Before meeting with the Appellant, Dr. Brown reviewed her MMPI-2-RF and PAI exam results and other background information he was provided but he did not review her medical record prior to interviewing the Appellant. After interviewing the Appellant, Dr. Brown decided that the Appellant was untruthful because she answered “no” on the BPD Health Questionnaire when asked if she had received “any type of psychiatric treatment, counseling, or talk therapy of any kind” (2017 R.Ex. 7; Testimony of Appellant) when, in fact, she testified credibly that she had not received any such counseling or talk therapy. The Appellant had told her primary medical professional that she was having trouble with anxiety and the medical professional suggested that she receive counseling in 2008 and 2010 but she chose not to do so. There were no mental health provider reports or notes in the Appellant's medical record. Dr. Brown acknowledged that when the Health Questionnaire asked if the Appellant had been “prescribed medication for anxiety, stress, pain or sleep” (2017 R.Ex. 7), the Appellant wrote that she had taken “Trazadone”, for a couple of weeks after being the family member who found her deceased grandmother but she did not mention that she had taken Celexa and Xanax in 2010 because she did not take the medications and did not even fill the prescription for one of them. When allegations of untruthfulness are made against a police department candidate, the effects can have devastating effects on a hoped-for career in law enforcement. Such allegations should be carefully reviewed before they are made. The Appellant had no opportunity to address the alleged untruthfulness. If Dr. Brown had reviewed the Appellant's medical record prior to her interview, as required by the HRD Medical Standards, he could have discussed this with her.

The Appellant was not given a second psychological evaluation, the opportunity to provide additional information for the round-table's consideration or a discretionary interview. In addition, Dr. Brown's report does not establish that the Appellant failed the psychological evaluation. His report scrutinizes her relationship with mother when she was a teenager and young adult years ago and having to drop out of college because her father was bankrupt and could no longer afford to pay her tuition. His report does not indicate that the Appellant has a psychological disorder, either a

Category A or Category B condition or disorder, nor does it indicate with sufficient support that because of a disorder or condition she was unable to perform the HRD Medical Standards list of essential tasks of a police officer.

The BPD's actions in connection with the 2017 appeal run afoul of key provisions of an appropriate psychological evaluation. First, in *Boston Police Department v. Kavaleski*, 463 Mass. 680 (2012)¹³ the Supreme Judicial Court confirmed that the requirements of the HRD Medical Standards must be met, meaning that in a bypass for original appointment based on a failed psychological evaluation, the Respondent must prove that its psychological assessment establishes that the candidate has a psychological condition or disorder, identify whether the condition or disorder is a disqualifying Category A disorder or a conditional disqualification as a Category B and, if it is a conditional disqualification, the evaluation must indicate the specific essential task or tasks that the candidate's condition or disorder prevents him or her performing. Dr. Brown did not establish a disorder or condition, whether it was a Category A or Category B disorder or condition, and did not identify what essential tasks the Appellant could not perform because the alleged disorder or condition.

The Respondent's 2017 bypass also ran afoul of the SJC's decision in *Kavaleski* because Dr. Brown stepped outside his role as a psychologist. Specifically, the SJC said that the evaluator's "sole task" was to determine if the candidates had a "psychiatric condition that would prevent her from performing, even with reasonable accommodation, the essential functions of the job." *Id.* at 694. In so stating, the Court cited G.L. c. 150B, s. 4 (16), the provisions of the MCAD statute regarding preemployment inquiries. Dr. Brown acknowledged that he made no such findings, reporting instead only that there were discrepancies in her information which he said were untruthful.

In addition to the Respondent's inappropriate reliance on Dr. Brown's untruthfulness allegations, the Respondent's decision to bypass the Appellant based thereon undermines the legal requirement that an employer issue a conditional offer to a candidate before subjecting them to medical and psychological evaluations. In *Morley v. Boston Police Department*, G1-16-096 (2016) [29 MCSR 456 2016], the Commission similarly found that the decision to bypass the candidate for alleged untruthfulness "occurred after he received a conditional offer of employment" which was conditioned upon his passing a medical and psychological exam and the Respondent had obtained medical information about the candidate, rendering it "impossible to know if the [BPD bypass] ... decision was influenced by their knowledge of Mr. Morley's medical history [...], the precise conundrum that the MCAD guidelines are meant to prevent." *Id.* I note that the MCAD guidelines section IV regarding preemployment inquiries states, "[i]n general employers may not ask applicants about handicaps or disabilities until after the applicant has been given a conditional job offer. The

purpose of this restriction is to isolate consideration of an applicant's job qualifications from any consideration of his/her medical or disability-related condition. ..." <https://www.mass.gov/files/documents/2018/12/11/MCAD%20Guidelines%20Disability%20Discrimination%20in%20Employment.pdf> (June 9, 2020). Having falsely based its 2017 bypass of the Appellant on an allegation of untruthfulness made after she was given a conditional offer of employment and following a psychological exam, the Respondent's 2017 bypass of the Appellant cannot stand.

2019 Appeal

The Respondent also failed to establish that it had reasonable justification to bypass the Appellant in 2019. First, the 2019 bypass relied on the "untruthfulness" that the Respondent asserted as the reason for its bypass in 2017, which has been found here to be fatally flawed. The second reason the Respondent gave for bypassing the Appellant in 2019 was that she failed the psychological evaluation in 2019. However, the Respondent has failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant on that basis. In what the BPD HR Director described as an "oversight", the BPD issued a conditional offer to the Appellant in 2019 even though it bypassed her in 2017 for alleged untruthfulness. On this occasion, the Appellant was deemed to have failed a first level psychological exam by Dr. Seckler and a second level psychological exam by Dr. Fiore. Dr. Seckler reviewed Dr. Brown's evaluation two years earlier and Dr. Fiore reviewed Dr. Brown's and Dr. Seckler's evaluations. The Appellant's 2019 MMPI-2-RF and PAI reports were mostly unremarkable. Dr. Seckler construed the Appellant's answers to his questions in an exaggerated manner with subjective remarks and little evidence in support of his assertions.

First, Dr. Seckler subjectively commented on the way that the Appellant walked into the interview, asserting that the Appellant "walked quickly, with a notable rush of energy ... she sat down, looked quickly around and around the interview room and said 'I was scared.'" (Testimony of Appellant) However, the Appellant was concerned that she would be interviewed again by Dr. Brown, who the Appellant believed had not reported her comments at their interview correctly.

Dr. Seckler also wrote in his report that the Appellant was "frequently in tears" during his interview but did not ask her why. Apparently, Dr. Seckler found it important enough to put in his report but not important enough to ask her why. The Appellant credibly testified at the Commission hearing that the reason she was tearful at the interview was that her aunt had just passed away and her cousin was on life support. This renders Dr. Seckler's observation in this regard inconsequential.

Dr. Seckler's report failed to note that the Appellant's medical record did not include the reports of any mental health providers and that the reason there were no such notes is that she did not participate in mental health therapy. Instead, he focused on the two

13. I note that the Supreme Judicial Court in *Kavaleski* found that, unlike in the instant appeal, the psychological evaluator in *Kavaleski* had reviewed the candidate's medical record prior to meeting with the candidate.

incidents (one in 2008 when the Appellant was a teenager, and the other in 2010, when the Appellant was a young adult) that she reported to her primary care physician that she was having difficulty with anxiety and that she had been offered but did not take Celexa and Xanax and did not even fill one of the prescriptions.

Dr. Seckler's report put emphasis on the Appellant's difficult relationship with her mother when she (the Appellant) was a teenager and a young adult, as if such difficulties are unusual, especially when parents divorce during their children's teen years. Similarly, Dr. Seckler focused on the Appellant's decision in high school, years ago, not to play in a sport to protest the firing of her coach when teenagers not infrequently make decisions that an adult would deem ill-advised.

Dr. Seckler also appeared to find the Appellant's lack of a long-term romantic relationship at the time a matter of concern, ignoring or not knowing that she has a large group of friends who have remained friends since grade school, in addition to friends she maintains from college.

Dr. Seckler clearly thought it was odd or not credible that the Appellant did not know the details of the Appellant's father's bankruptcy when each parent addresses such matters with their children as they deem appropriate and the Appellant was embarrassed about the subject and the Appellant's responses in this regard hardly qualify as a reason that a candidate cannot perform the essential functions of a police officer.

With insufficient support, Dr. Seckler asserted that the Appellant had been fired from her job at the BMC when, in fact, she resigned, with two weeks' notice, when she believed that she was about to be hired elsewhere.

Moreover, Dr. Seckler's report concluded, with insufficient support, that the Appellant has "**deficits**" relating to the "**integrat[ion of] training experiences and accept [ing] direction in a hierarchical command structure**". 2019 Ex. 7. In any event, a "deficit" is not a disqualifying condition or disorder under the HRD Medical Standards and Dr. Seckler did not indicate that the Appellant had a condition or disorder, whether it was a Category A or Category B condition, and which essential functions the Appellant was not able to perform because of such condition or disorder, as required in *Kavaleski*.

Further, in contravention of *Kavaleski*, Dr. Seckler concluded that the Appellant's behavior was "consonant" with trauma and a personality disorder. In *Kavaleski*, the Court stated that such characterizations are "vague assessments" lacking affirmation. *Id.* at 693. The only actual difficulty (which is also not a psychological condition or disorder) that Dr. Seckler noted that the Appellant had was that she had not been employed in a formal job for several years. However, that information was reflected in the Appellant's file prior to the roundtable and, in an "oversight" the Respondent

apparently overlooked it. As noted above regarding the 2017 Appeal, it is not acceptable to give a candidate a conditional offer of employment, conduct a psychological exam and then allege that the basis for the bypass is information that the Respondent had when it issued the conditional offer. Thus, Dr. Seckler's report does not provide reasonable justification for the Appellant's bypass.

The 2019 bypass appeal also must not stand because Dr. Fiore did not find that, as required in *Kavaleski*, the Appellant had a psychological condition or disorder and indicated whether it was a Category A or Category B condition or disorder and the record here contained insufficient facts to support the conclusion that the Appellant was unable to perform the essential tasks of a police officer. Dr. Fiore's report relies on Dr. Seckler's report to a significant extent, even including Dr. Seckler's assertion that the Appellant was fired from her job at the BMC when her credible testimony indicated that she had been looking for another job, had attended successful interviews expecting to be hired elsewhere and, therefore, resigned. Dr. Fiore even reiterated Dr. Seckler's assertion that the Appellant has "**deficits**" relating to the "**integrat[ion of] training experiences and accept [ing] direction in a hierarchical command structure**" with insufficient support therefor.¹⁴ 2019 Ex. 7.

CONCLUSION

Accordingly, for the above stated reasons, the bypass appeals of Ms. Rogers, docketed G1-17-184 and G1-19-240, are both hereby **allowed** and it is hereby ordered that,

- HRD, or the Respondent in its delegated capacity, shall place the name of Michelle Rogers at the top of any current or future Certification for the position of Boston Police Officer, so that she may be processed in the round of hiring for the next available Boston Police Academy class, until she is appointed or bypassed.
- BPD may elect to require Ms. Rogers to submit to an updated background investigation but BPD shall not bypass Ms. Rogers as a result of any facts or circumstances in her background which it had knowledge of prior to making its conditional offer of employment to her in connection with the 2017 Appeal and the 2019 appeal.
- Subject to Ms. Rogers passing the background investigation referenced above, the BPD shall extend a conditional offer of employment to Ms. Rogers. In the event that BPD extends a conditional offer of employment to Ms. Rogers following a background investigation, BPD may elect to require Ms. Rogers to submit to an appropriate psychiatric and medical screening in accordance with current BPD policy in the ordinary course of the hiring process. In the event of such evaluation, such screening shall be performed, *de novo*, by qualified professional(s) other than any of those who have performed prior psychological evaluations of Ms. Rogers.
- If Ms. Rogers is appointed as a Boston Police Officer, she shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 04401 in connection with the 2017 Appeal. This retroactive civil service seniority date is not intended

14. During their testimony, both Dr. Seckler and Dr. Fiore attempted to add reasons to their written reports for finding that the Appellant had failed the psychological evaluations. As indicated at the hearing, since G.L. c. 31, s. 27 and the Personnel Administrator Rules require the employer to notify a candidate of the reasons for

the candidate's bypass and bar the employer from adding reasons for the bypass thereafter, the testimony of Dr. Seckler and Dr. Fiore in this regard was not considered in this decision.

to provide Ms. Rogers with any additional pay or benefits including creditable service toward retirement.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 18, 2020.

Notice to:

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* * * * *

EVERETT ROSA

v.

CITY OF NEW BEDFORD

G1-20-073

June 18, 2020
Paul M. Stein, Commissioner

Bypass Appeal-Nonselection for Appointment as New Bedford Police Officer-Lack of Bypass-Successful Candidates Not Lower on List—The Commission dismissed this candidate’s appeal from his nonselection for original appointment as a New Bedford police officer because it was established that no bypass occurred since none of the successful candidates were ranked lower on the list.

DECISION ON RESPONDENT’S MOTION TO DISMISS

The Appellant, Everett Rosa, appealed to the Civil Service Commission (Commission), purporting to act pursuant to G.L. c.31, §2(b) & §27, to contest his non-selection by the Respondent, City of New Bedford (New Bedford) for appointment to the position of Police Officer with the New Bedford Police Department (NBFD). Following the pre-hearing conference May 22, 2020 (held via Webex Video Conference), New Bedford filed a Motion to Dismiss the appeal for lack of jurisdiction on the grounds that the Appellant’s non-selection was not a bypass.

FINDINGS OF FACT

Based on the submissions of the parties, I find the following material facts are not disputed:

1. The Appellant, Everett Rosa, took and passed the civil service examination for municipal police officer administered on March 23, 2019 by the Massachusetts Human Resources Division (HRD). His name was placed on the eligible list established on September 1, 2019. (*Administrative Notice [HRD Letter on File]; Stipulated Facts*)
2. On September 4, 2019, HRD issued Certification #06566 to New Bedford for appointment of new permanent full-time NBFD Police Officers. Mr. Rosa’s name was listed on the Certification in the 30th position, tied with two other candidates. Eventually, New Bedford made approximately 13 appointments from the Certification, but no candidates in the 30th tie group or below were appointed. (*Administrative Notice [HRD Letter on File]; New Bedford E-mail 5/26/2020; Stipulated Facts*)
3. By letter dated March 3, 2020, sent by certified mail, New Bedford informed Mr. Rosa that he had been “bypassed”. (*Claim of Appeal*)
4. On April 17, 2020, Mr. Rosa filed this appeal. (*Claim of Appeal*)

APPLICABLE LEGAL STANDARD

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. *See, e.g., Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School v. Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005)

ANALYSIS

The undisputed facts, viewed in a light most favorable to Mr. Rosa, establish that New Bedford’s letter dated March 3, 2020 erroneously stated that he was “bypassed” for appointment, when, in fact, he was not bypassed within the meaning of G.L. c.31, §2(b) & G.L. c.31, §27. In particular, a non-selected candidate may appeal to the Commission only when his or her name appears “high[r]” than one or more candidates who were appointed and, in this regard, appointment of a candidate in one tie group is not the appointment of a higher ranked candidate. *See, e.g., Damas v. Boston Police Dep’t*, 29 MCSR 550 (2016); *Servello v. Department of Correction*, 28 MCSR 252 (2015). *See also* PERSONNEL ADMINISTRATION RULES, PAR.02. Mr. Rosa believed that, since he received a letter stating that he was bypassed, his non-selection must have been a bypass. However, the erroneous characterization of his non-selection in the March 3, 2020 letter cannot alter the statutory requirements for bypass ap-

peals to the Commission. Thus, as no candidates ranked below him on the certification were selected, Mr. Rosa’s appeal must be dismissed for lack of jurisdiction.

CONCLUSION

In sum, for the reasons stated herein, the Motion to Dismiss is hereby ***granted*** and the appeal of the Appellant, Everett Rosa, CSC No. G1-20-073, is ***dismissed***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 18, 2020.

Notice to:

Everett Rosa
[Address redacted]

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* * * * *

CEDRIC CAVACO

v.

BOSTON POLICE DEPARTMENT

G1-17-203

July 16, 2020

Cynthia A. Ittleman, Commissioner

Bypass Appeal-Original Appointment to Boston Police Department-Criminal Record-Employment History—A currently model citizen was unable to overcome his criminal history of shoplifting in his early 20s and two employment terminations as the Commission affirmed his bypass for original appointment to the Boston Police Department. Boston was justified in finding that his more recent character improvement did not outweigh the risks of hiring him, having carefully considered his record.

Kristopher S. Stefani, Esq.

Devin T. Guimont, Esq.¹

DECISION

Cedric Cavaco (Mr. Cavaco or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on October 5, 2017, under G.L. c. 31, § 2(b), challenging the decision of the Boston Police Department (Respondent or BPD) to bypass him for appointment to the position of fulltime Police Officer. A prehearing conference was held in this regard on October 31, 2017 at the offices of the Commission. A hearing² was held on this appeal on January 19, 2018 at the Commission. The hearing was digitally recorded and the parties received a CD of the proceeding.³ The parties filed post-hearing briefs. The Respondent filed a reply to the Appellant's brief and the Appellant filed a sur-reply. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Twelve (12) exhibits were entered into evidence at the hearing and one (1) was ordered produced at the hearing and was filed post-hearing, for a total of thirteen (13) exhibits. This included six (6) Joint Exhibits (Jt.Ex./s), five (5) Respondent's Exhibits (R.Ex./s) and two (2) Appellant's Exhibits (A.Ex./s). Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Detective Gloria Kinkead (Det. Kinkead), Recruit Investigations Unit (RIU)

- Nancy Driscoll, Director of Human Resources, BPD

Called by Appellant:

- Cedric Cavaco, Appellant;

and taking administrative notice of all matters filed in the case; pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following:

1. The Appellant is an African American / Cape Verdean male who, at the time of the 2018 hearing, was in his late twenties. He speaks Cape Verdean Creole and some Portuguese. The Appellant began dating his future wife in 2011. They were married in 2014 and have a child. The Appellant has volunteered for a religious charity and for a Cape Verdean community organization. After struggling in college, the Appellant earned an Associate's degree in 2011 and then a Bachelor's degree in criminal justice in 2014. Between 2014 and when he applied to the BPD, the Appellant worked at a large bank in Quincy, where he had been promoted and had no record of discipline. While working at the bank, the Appellant sought employment at a number of law enforcement-related jobs. The Appellant obtained a license to carry a firearm in 2016, which license was issued by the BPD. He has taken a training course for reserve police officers. (Testimony of Appellant; Jt.Ex. 1)

2. The Appellant took and passed the 2015 police officer exam. The Appellant was ranked 75th among those who were willing to accept employment. The state's Human Resources Division (HRD) issued Certification 04401 to the BPD in February and March of 2017 with the names and ranks of the candidates who passed the exam. (Stipulation)

3. On March 26, 2017, the Appellant signed and submitted his written application to the BPD. (Jt.Ex. 1) Det. Kinkead was assigned to review the Appellant's application and perform the Appellant's background investigation. (R.Ex. 2; Testimony of Kinkead) Det. Kinkead has been a detective for twenty (20) years and a member of the BPD for thirty (30) years. Although she has conducted numerous investigations through her many years at the BPD, this is the first time she was assigned to conduct background investigations of a number of candidates, including the Appellant. (Testimony of Kinkead)

4. During the background investigation, Det. Kinkead reviewed the Appellant's application, driving history, criminal record, employment history, credit history, residency, and personal and professional references. (R.Ex. 2; Testimony of Kinkead) These are the same or similar investigative steps that Det. Kinkead employed in conducting all of the recruit background investigations

1. Devin Guimont is no longer employed with the Boston Police Department. The decision will be sent to David Fredette, Chief Legal Advisor for the Boston Police Department.

2. The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. c. 31, or any Commission rules, taking precedence.

3. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

to which she was assigned. (Testimony of Kinkead) Det. Kinkead also reviewed pertinent court records relating to the Appellant. (R.Exs. 2 and 3)

5. The BPD employment application asks candidates to provide information regarding any law enforcement jobs they have applied for and the results of their application. The Appellant listed a number of law enforcement jobs he applied to between 2014 and 2016, including his application to the Department in 2014. The Appellant indicated that he had not been hired by the law enforcement employers and that he failed the background check when he applied to the Department of Correction (DOC).⁴ (Jt.Ex. 1) Det. Kinkead obtained a copy of the DOC investigator's background report. Det. Kinkead relied on the report because it was written by a Corrections Officer, who is obliged to provide accurate reports as assigned. (Testimony of Kinkead) The DOC investigator's report indicates, in part, that she spoke directly with knowledgeable people who worked with the Appellant at a retail sporting goods store in 2009 and at a gas station in 2011 and that she obtained a police report relating to the Appellant in 2009. (R.Ex. 1)

6. The BPD employment application asks candidates for their employment history. The application also asks candidates if they have been terminated from employment. In response, the Appellant wrote that he had "shoplifted" a "few things" from his employer, a retail sporting goods store, where he worked from September to November in 2009, resulting in his termination. (R.Exs. 2 and 3; Jt.Ex. 1)

7. On November 3, 2009, members of the local police department arrested the Appellant for shoplifting and larceny over \$250 for stealing retail items from his then-employer, the sporting goods store. (Jt.Ex. 3)

8. When confronted by the local police, the Appellant orally confessed to stealing from the sporting goods store. The Appellant provided a written confession later at the police station. The monetary value of the inventory Appellant had stolen was \$349.92. (Jt.Ex. 3)

9. The Appellant was subsequently charged in court with one count of shoplifting over \$100 in violation of G.L. c. 266, § 30A and one count of larceny over \$250 in violation of G.L. c. 266, § 30 (1), a felony. (Jt.Ex. 4) The shoplifting charge was dismissed at the request of the Commonwealth. (Jt.Ex. 5) The larceny charge was reduced to larceny under \$250, a misdemeanor. The Appellant admitted to sufficient facts in connection with the larceny charge, he was ordered to pay restitution, court costs and fines, and to stay away from the sporting goods store and the case was continued without a finding for six (6) months, ending in July 2010, following which the case was dismissed. (Jt.Ex. 5)

10. The Appellant was also terminated from a job at an athletic shoe company where he had worked from September 2015 to January 2016. In his application, the Appellant added,

Terminated for using an old Merchandise Gift Card that I obtained long before I started working at [the athletic shoe company] Used it Online in the Employee store, which I was not aware, could not be done until months later into my employment because I did not go through Orientation training and was not told it was not allowed to use a merchandise card as an employee (*Id.*)

Det. Kinkead contacted Ms. P at the athletic shoe store regarding the Appellant's employment there. (R.Ex. 2) Ms. P stated that company policy prevents her from providing details of the Appellant's employment other than to state that the Appellant was involuntarily terminated. (R.Ex. 2; Testimony of Kinkead)

11. The Appellant worked at a gas station from May 2011 to December 2011. (Jt.Ex. 1) When the Appellant applied for employment at the DOC, the gas station owner told the DOC investigator that the Appellant was a poor employee and alleged that the Appellant attempted to steal the laptop of a fellow employee. (R.Ex. 1) Det. Kinkead did not discuss these allegations with the Appellant. (Testimony of Kinkead) The Appellant credibly testified at the Commission hearing that this was the first time he has been told of this allegation and that he was not disciplined in this regard. (Testimony of Appellant)

12. The BPD application also asks candidates if they have been sued. The Appellant checked "yes" and provided the two (2) court docket numbers for the lawsuits filed in or about 2011 in which he was involved (one a civil action and one for supplementary process) and the case captions indicated that the plaintiff was an insurance company and the Appellant was the defendant. (Jt.Ex. 1) The Appellant did not disclose in his application that the plaintiff insurance company had insured the sporting goods store where the Appellant had worked and was fired for shoplifting, that the insurance company paid the store for its inventory losses and assumed the legal right to sue the Appellant to recoup the insurance company's loss. However, at the Commission hearing, the Appellant provided the dockets for the civil court litigation. The Appellant was represented by counsel in the civil litigation. The court dockets indicate that the plaintiff was the insurance company for the sporting goods store where the Appellant had worked, that the insurance company alleged it had sustained \$45,562 in damages and that in 2013 the parties agreed to settle the case by having the Appellant pay the plaintiff \$7,500. (Jt.Ex. 1; A.Ex. 1) The litigation continued until the Appellant issued a check for \$5,175 to plaintiff's counsel on June 15, 2017, at which time the Appellant was applying for employment at BPD. (A.Ex. 1; R.Ex. 4 and Jt.Ex. 1)

13. After completing her background investigation, Det. Kinkead drafted a Privileged and Confidential Memorandum ("PCM")

4. The Appellant appealed his bypass by the DOC to the Commission. The Commission adopted the findings of a recommended decision of the DALA Magistrate who conducted the hearing in the case and found that the DOC had rea-

sonable justification to bypass the Appellant. *Cavaco v. Department of Correction*, Docket No. G1-14-22 [27 MCSR 436 (2014)].

with her findings, which is standard practice for each applicant investigation. (Testimony of Kinkead; R.Ex. 2)

14. Det. Kinkead submitted her PCM for the Appellant to her Superior Officer, Sgt. Det. Lucas Taxter, who submitted it to the BPD Director of Human Resources, Nancy Driscoll. (Testimony of Kinkead and Driscoll)

15. Det. Kinkead presented her investigative findings and PCM at the Appellant's initial roundtable discussion, which included Dep. Supt. Walcott, Sgt. Det. Taxter, Diversity Officer Gaskins, Attorney Taub and Ms. Driscoll. (Testimony of Kinkead and Driscoll) The roundtable can advance a candidate in the appointment process, recommend that a candidate be bypassed, and, in some scenarios, request that the investigating detective obtain further information regarding a candidate. (Testimony of Driscoll)

16. Following the Appellant's initial roundtable, the roundtable asked Det. Kinkead to obtain further information regarding the 2009 theft incident at the sporting goods store where the Appellant had worked. (*Id.*) Det. Kinkead contacted the owner of the sporting goods store and the store manager. The owner who told Det. Kinkead that he noticed an "uptick in his merchandise loss for about 30 days", that "he and his manager [name redacted] started tracking the dates and times of the merchandise loss", they "devised a plan to have a managers (sic) meeting" during which the Appellant took items from the store and put them in his car, the owner called the police and the Appellant was arrested, and the owner conducted a merchandise inventory analysis that indicated that the loss was approximately \$30,000. (Testimony of Driscoll and Kinkead; R.Ex. 3)

17. A second roundtable was held to consider the Appellant's candidacy in light of the additional information obtained by Det. Kinkead. (Testimony of Driscoll) After considering all aspects of Appellant's application, the roundtable recommended that the BPD bypass the Appellant because of concerns regarding the criminal and employment misconduct discovered in his background (Testimony of Driscoll; Jt.Ex. 6)

18. The BPD Recruit Investigations Unit, Standard Operating Procedures (SOP) include an attachment entitled "Exclusions and Timeframe Guidelines", which provides a list of nine (9) items that may exclude a candidate from being selected. This list includes, for example, a felony conviction; a felony CWO ("juvenile & adult. Check with supervisor"); an OUI within the last ten years; a 209A restraining order involving domestic violence ("check with supervisor"); and one year residency prior to the exam. (Respondent Post-Hearing Exhibit) The list states that it is not "exhaustive", that each candidate is to be assessed on a case by case basis, and that "[a]ny of the [listed factors] could exclude a person from the job. ..." (Respondent Post-Hearing Exhibit)

19. By letter dated August 31, 2017, Ms. Driscoll informed the Appellant that he had been bypassed. This letter stated, in part,

... the [BPD] has significant concern with your criminal and employment history. While employed at [the sporting goods store], you were suspected of taking merchandise from the company

without paying. It was subsequently confirmed that you had taken over \$250.00 of inventory and you were placed under arrest and charged with shoplifting and larceny; however, when explaining this incident in your application you reported that you had shoplifted by 'taking a few things.' ... You were subsequently terminated from your position. ...

Furthermore, when you worked for [the athletic shoe store] from [September 2015 to January 2016] you were involuntarily terminated for using a gift card online in an employee discounted website in violation of company policy.

Police officers must behave in a manner consistent with the laws that they are sworn to enforce in order to gain and preserve public trust, maintain public confidence, and avoid an abuse of power by law enforcement officials. Police officers are required to provide sound judgment ... As a result, your inability to perform these job tasks deem you unsuitable for employment as a Boston police officer

(Jt.Ex. 6)

20. The BPD selected approximately 130 of the available candidates, six (6) of whom ranked below the Appellant. (Stipulation)

21. The Appellant timely filed the instant appeal. (Stipulation)

APPLICABLE LAW

Upon an appeal of a bypass by a candidate for employment, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law." *Comm'rs of Civil Serv. v. Mun. Ct.*, 359 Mass. 211, 214 (1971)(quoting *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 485 (1928)).

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. *See City of Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 189 (2010). In its review, the commission is to "find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority." *Id.* at 187 (quoting *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). However, the commission's work "is not to be accomplished on a wholly blank slate." *Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 823 (2006). Further, the commission does not ignore the previous decision of the appointing authority, but rather "decides whether 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." *Id.* at 824 (quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

Therefore, in deciding an appeal, the commission "owes substantial deference to the appointing authority's exercise of judgment in determining whether there was reasonable justification" for

the bypass. *Beverly*, 78 Mass. App. Ct. at 188. The Commission should not substitute its own judgment for that of an appointing authority. *Id.* (citing *Sch. Comm'n of Salem v. Civil Serv. Comm'n*, 348 Mass. 696, 698-99 (1965)); *Debnam v. Belmont*, 388 Mass. 632, 635 (1983); *Comm'r of Health & Hosps. of Boston v. Civil Serv. Comm'n*, 23 Mass. App. Ct. 410, 413 (1987)). Rather, the Commission is charged with ensuring that the system operates on “basic merit principles.” *Mass. Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259 (2001).

The deference that the Commission owes to the appointing authority is “especially appropriate” in respect to the hiring of police officers. *Beverly*, 78 Mass. App. Ct. at 188. The Commission is mindful of the standard of conduct expected of officers of the law. *See Dumeus v. Boston Police Dep't*, 24 MCSR 124 (2014) (finding that a police officer must be a model of good citizenship). An officer of the law “carries the burden of being expected to comport himself or herself in an exemplary fashion.” *Mclsaac v. Civil Serv. Comm'n*, 38 Mass. App. Ct. 473, 474 (1995). Police officers “voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” *Attorney General v. McHatton*, 428 Mass. 790, 793 (1999). Therefore, the appointing authority can give some weight to an applicant’s criminal record when making its hiring decisions. *Thames v. Boston Police Dep't*, 7 MCSR 125, 127 (2004).

G.L. c. 41, § 96A provides that “[n]o person who has been convicted of any felony shall be appointed as a police officer of a city, town or district.” *Id.* The charge of larceny can be a misdemeanor or larceny depending on the dollar value of the items taken. G.L. c. 266, s.30. In 2009, the theft of items valued less than \$250 constituted a misdemeanor. A continuance of a criminal case without a finding (CWOFF) is defined by the Massachusetts Court System Glossary as follows,

In a criminal case, if a judge finds there is enough evidence to support a finding of guilt, he or she can continue the case for a period of time without making a guilty finding. The charges will be dismissed without a finding of guilt at the end of that period if the defendant complies with any conditions imposed. ...

(*Id.*, Administrative Notice, <http://www.mass.gov/courts/selfhelp/court-basics/glossary.html> , 1/30/17)

ANALYSIS

The BPD has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant in connection with the events on which the BPD relied except that it did not establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant for allegedly taking the laptop of a co-worker at the gas station where he had worked in 2011 since there is no indication that the Appellant was disciplined therefor, he continued to work at the gas station thereafter, the investigator did not afford the Appellant the opportunity to address the allegation, and the Appellant credibly stated that he had not been told about such allegation previously.

The BPD bypass letter to the Appellant in this regard was based on both his criminal record and his employment history. A police department may consider a candidate’s criminal record since the community places its trust in police officers to adhere to the law themselves and uphold the laws the officer enforces. The position of a police officer is one of “special public trust.” *Police Comm'r of Boston v. Civil Serv. Comm'n*, 22 Mass. App. Ct. 364, 372 (1986). In seeking employment by the public, “[p]olice officer candidates] implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” *Id.* at 370-71. “Prior misconduct has frequently been a ground for not hiring or retaining a police officer.” *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 305. “Such is the level of public trust placed in a police officer that nearly any public indiscretion could be regarded as conduct unbecoming a police officer.” *Thames v. Boston Police Dep't*, Docket No. G-02-82 (2004) (citing *School Comm. of Brockton v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 486, 491-92 (1997)). In view of the trust placed in a police officer, the BPD was justifiably concerned that the Appellant repeatedly admitted to police that he stole merchandise from his employer and was ultimately charged with larceny under \$250, a misdemeanor.

When considering criminal conduct short of a felony conviction, an appointing authority must consider candidates by taking account of “... the amount of time that has passed since the misconduct occurred, the nature of the offense, and evidence of the candidate’s subsequent record” *Hardnett v. Town of Ludlow*, Docket No. G1-11-239 [25 MCSR 286] (2012). With respect to the passage of time since the occurrence of prior misconduct, the Commission has stated that, depending on circumstance, “it [is] within the [Appointing Authority’s] discretion to find that the Appellant’s improvements, while laudable, do not outweigh his earlier transgressions, at least at [the time of the application].” *Lancaster v. Boston Police Dep't*, Docket No. G1-15-72 [28 MCSR 580] (2015).

The Appellant was previously bypassed for a law enforcement position with the DOC in 2013 based, in part, on the same criminal misconduct at issue in the instant case. *Cavaco v. Dep't of Correction*, Docket No. G1-14-22 [27 MCSR 436] (2014). In addition to the 2009 criminal misconduct, the DOC also cited Appellant’s poor driving record in support of its decision to bypass Appellant. *Id.* The Commission upheld Appellant’s bypass. With respect to Appellant’s 2009 criminal misconduct, the Commission’s decision stated,

The Appellant admitted at hearing that he committed the crimes of shoplifting and larceny by stealing merchandise from his employer’s store. Although the larceny case was continued without a finding and both cases were ultimately dismissed, the fact that the Appellant would steal from an employer is especially troubling. It calls into question the Appellant’s ability to conform his behavior to the law and reflects immaturity, and bad judgment. (*Id.*)

In the present instance, the BPD was similarly justified in bypassing Appellant based on his prior criminal misconduct.

The evidence in this instance indicates that Appellant admitted, at the time of the incident and at the Commission hearing, to stealing merchandise from his employer in 2009. The value of the stolen merchandise found in Appellant's car at the scene of the arrest was nearly \$350. The Appellant was charged criminally with shoplifting and larceny in an amount over \$250, the latter constituting a felony. *See, e.g., Public Employee Retirement Admin. Comm'n v. Bettencourt*, 474 Mass. 60, 75, fn. 25, (2016). Although the Appellant was not convicted of a felony, and each charge was eventually dismissed (the larceny charge was reduced to larceny under \$250, he admitted to sufficient facts and the criminal case was continued without a finding before dismissal), the Appellant repeatedly admitted to the theft. The BPD considered the conduct underlying criminal charges to be significant and it may do so even where the charges are later continued without a finding and dismissed. As the Commission's decision noted with respect to the exact criminal misconduct at issue here, the BPD considered "the fact that the Appellant would steal from an employer . . . especially troubling. It call[ed] into question the Appellant's ability to conform his behavior to the law and reflect[ed] immaturity, and bad judgment." *Cavaco v. Department of Correction*, Docket No. G1-14-22.

The Commission has held that an admission to sufficient facts on a felony charge, on its own, is not a sufficient reason to bypass an individual for employment as a police officer. *Finklea v. Boston Police Dep't*, G1-15-70 [30 MCSR 93] (2017). Although the criminal charge against the Appellant in the present case began as a felony, it concluded as a misdemeanor larceny, to which the Appellant admitted to sufficient findings for a guilty finding and was continued without a finding for six (6) months and then dismissed. The Superior Court in *Finklea* upheld the Commission's determination regarding an admission to sufficient facts. *Finklea v. Massachusetts Civil Service Comm'n*, Sup. Ct. No. 1784CV00999 (Fahey, J., Feb. 9, 2018). *Finklea* is distinguishable from the instant appeal. First, the Superior Court noted that at the time of the continuance without a finding, *Finklea* "disputed the charges" brought against him, but accepted the continuance anyway. *Id.* There is no such indication here as the Appellant admitted to the criminal conduct at the scene of the arrest, subsequently in writing, and at the Commission hearing. Secondly, the court considered the *Finklea* incident "stale" at fourteen-years old (*id.*) while in the present instance, the Appellant's theft was just over seven years old at the time of his application, making it more probative of law-abiding character. Third, the *Finklea* court noted that the Department did not undertake a "reasonably thorough review of the circumstances" surrounding the incident in question. *Id.* In the present instance, the BPD requested further investigation of Appellant's 2009 thefts at an initial roundtable. Det. Kinkead followed up with the owner of the sporting goods store, who had personal knowledge of the thefts at issue and provided further details about the events, including that he had noticed a thirty (30)-day merchandise loss about that time, he noted the date and time of the losses, and that the merchandise loss was approximately \$30,000. Based on the information gleaned from reliable documents and personal accounts gathered by Det. Kinkead, there was no doubt

that Appellant had engaged in criminal misconduct at the time the BPD decided to bypass him.

The Appellant testified that his theft from the sporting goods store was an isolated incident. In addition, in his application to the BPD the Appellant downplayed the significance of the event, stating that he had just "taken a few things" from the store. In fact, the store owner informed the police on the day of Appellant's arrest that, based on the patterns of shrinkage, he had suspected the Appellant of stealing merchandise while unsupervised for some time. (Jt.Ex. 3). The owner's statements in this regard remained consistent in his description of these events several years later when speaking with Detective Kinkead during her background investigation. The court dockets in the record, offered by the Appellant, show that in 2011, after the Appellant was criminally charged and admitted to sufficient facts regarding his theft at the sporting goods store, the store's insurance company civilly sued the Appellant for the losses it incurred in covering the lost merchandise, alleging that the Appellant was responsible for a loss of \$45,562.84. The civil suits (the initial case, followed by supplementary process) remained open, as the Appellant noted on his BPD application, until he filled out the application. The court dockets also indicate that the matter was settled for \$7,500 and the case was finally closed in June 2017. The record also includes a copy of the June 15, 2017 check from the Appellant's attorney to the insurance company's attorney resolving the matter. Although this undermines that BPD's contention that the value of the store's loss attributable to the Appellant was \$30,000, it also indicates that the Appellant's misconduct and its ramifications are not stale.

The Appellant avers that the theft was a youthful mistake and that the BPD failed to take adequate account of the passage of time since the incident and intervening behavior indicating a reformed character. However, the Department performed a reasonably thorough review of the Appellant, considering both the favorable and unfavorable aspects of his background before reaching its decision to bypass him. Furthermore, the BPD Department has the discretion to find that Appellant's prior serious transgressions were not outweighed by any claimed improvements in character in the intervening time. *See Lancaster*, Docket No. G1-15-72 [28 MCSR 580 (2015)]. The BPD had serious concerns about Appellant's fitness for appointment based on his previous criminal conduct, irrespective of claimed indications of an improved character.

The Appellant's personal history following the 2009 sporting goods store theft is not uniformly marked by improvement. As recently as 2016, the Appellant was terminated from his employment at an athletic shoe company for violating company policy. While this misconduct was not criminal, it shows further poor judgment and justification that the BPD was allowed to determine was conduct unbefitting a police officer, despite the passage of time and intervening life events. The BPD also based its decision to bypass the Appellant on the allegations of the owner of a gas station where the Appellant worked that the Appellant stole the laptop of a coworker. Det. Kinkead did not ask the Appellant about this alleged incident. In addition, the Appellant expressed credible surprise at this assertion at the Commission hearing, stat-

ing that he had never heard such an allegation and that he was not disciplined for the alleged misconduct. As a result, the allegation that the Appellant stole the coworker's laptop has not been established by a preponderance of the evidence.

The BPD also had reasonable justification to bypass the Appellant in regard to his employment history. The Appellant was terminated from both the sporting goods store in 2009 and the athletic shoe company in 2016. An appointing authority is entitled to consider negative aspects of a candidate's employment history in reaching its decision as to whether to appoint that candidate. *See City of Beverly*, 78 Mass. App. Ct. at 189-90 (2010); *see also Henderson v. Civil Serv. Comm'n*, 2016 Mass. App. Ct. Unpub. LEXIS 695 ("[W]ork history is . . . indisputably a proper consideration in evaluating applications [for public safety positions]."). This is the case even where the Applicant has been entirely candid about, and taken responsibility for, the employment misconduct at issue. *See, e.g., Desmaris v. Dep't of Correction*, CSC No. G1-12-41 [25 MCSR 575] (2012). Here, the Appellant admitted that he was fired from the sporting goods store for theft but he did not accept responsibility for his termination from the athletic shoe company in 2016.

Finally, the Appellant avers that the BPD bypass violates the BPD's Recruit Investigations Unit, Standard Operating Procedures Guidelines since his conduct is not among those listed as possible reasons for bypass. The Guidelines are just that—Guidelines—as the text of the document states. They are not intended to be a finite list or a list indicating that a candidate with one of the background problems on the list is to be automatically bypassed in every instance and that determinations in this regard are to be determined on a case by case basis. Just because a candidate's misconduct is not specifically mentioned on the list does not mean that any other misconduct may not be considered by the BPD. For these reasons, the Appellant's argument in this regard lacks merit.

CONCLUSION

For all the reasons stated herein, the appeal of Mr. Cavaco, Docket No. G1-17-203, is hereby *denied*.

However, for the compelling public policy arguments in favor of giving more weight to the Appellant's more recent years of being a good citizen, as cited in the Concurring Opinion, the Commission is making this decision effective sixty days from the date of issue. (*See Golden v. Dep't of Correction*, G1-19-198 [33 MCSR 194] (2020)) As in *Golden*, if the BPD ultimately decides that the Appellant, at a minimum, deserves a second look in a subsequent hiring cycle, the Commission would grant the appropriate relief to facilitate that reconsideration.

CONCURRING OPINION OF COMMISSIONER BOWMAN

I concur with the conclusion here, but for different reasons.

To me, the record shows that Mr. Cavaco is currently a model citizen. After struggling academically at Dean College, he was placed on academic probation. Refusing to accept this setback, he

enrolled at a local community college, successfully improved his grades and *re-enrolled* at Dean College, eventually earning an associate's degree. He then enrolled at Bridgewater State University and obtained a bachelor's degree in criminal justice.

Mr. Cavaco has been employed by a local financial institution for several years, where he has received multiple promotions and currently holds a position which requires a high degree of maturity and responsibility. He participates in company-sponsored volunteer events, including clean-up activities around Neponset River and Thompson Island in Quincy. Outside of work, he volunteers his time for the Catholic Charities of Massachusetts, serving as a mentor for youth. Mr. Cavaco, who is bilingual and speaks Cape Verdean Creole, also spends time helping organize the local Cape Verdean parade each year.

Mr. Cavaco speaks poignantly about his family, including his wife and young child, explaining that being married and having a child has served as a turning point in his life. To provide for his family, he supplements his income by driving for Uber and Lyft part-time. Finally, the Boston Police Department has concluded that Mr. Cavaco is responsible enough to be issued a license to carry a firearm.

Mr. Cavaco acknowledges, however, that, approximately *ten years ago*, he made a serious mistake. At or around the time that he had been put on academic probation at Dean College, he became employed at a sporting goods store, where he admits to stealing: two pairs of cleats; four pairs of spandex and two jerseys. He was arrested; criminally charged; and ultimately admitted to sufficient facts to Larceny under \$250. He describes that time period as the lowest point in his life, having disappointed himself and his parents. Although Mr. Cavaco agreed to settle a civil suit brought by the insurance company of the sporting goods store, that settlement, to me, does not establish, by a preponderance of the evidence, that Mr. Cavaco stole more than the items referenced above.

In regard to a subsequent termination at another sporting goods store, Mr. Cavaco offered a credible explanation that he was unaware that, when making employee purchases online, employees were not permitted to make those purchases with gift cards, leading to the end of his short tenure.

The Commission, in *Kodhimaj v. DOC*, 32 MCSR 377 (2019), previously concluded that a criminal justice agencies may rely on criminal records not available to non-criminal justice employers, stating in part:

"[A criminal justice agency]'s ability to receive all of the Appellant's CORI information from CJIS appears to be derived from that section of the state's CORI Law (G.L. c. 6, § 172) which states in relevant part:

' . . . Criminal justice agencies may obtain all criminal offender record information, including sealed records, for the actual performance of their criminal justice duties . . . '

That turns to whether the Appellant's criminal conduct is a *valid* reason for bypass here.

In its recent decision in *Boston Police v. Civ. Serv. Comm'n and Gannon*, the SJC confirmed that an Appointing Authority must prove, by a preponderance of the evidence, that the Appellant actually engaged in the alleged misconduct used as a reason for bypass. However, the Court also *reaffirmed* that, once that burden of proof *regarding the prior misconduct* has been satisfied, it is for the appointing authority, not the Commission, to determine whether the appointing authority is willing to risk hiring the applicant. Specifically, the SJC stated in relevant part:

“a police department should have the discretion to determine whether it is willing to risk hiring an applicant who has engaged in prior misconduct ... However, where, as here, the alleged misconduct is disputed, an appointing authority is entitled to such discretion only if it demonstrates that the misconduct occurred by a preponderance of the evidence. *See Cambridge*, 43 Mass. App. Ct. at 305; G. L. c. 31 § 2 (b).”

In *Cambridge*, *supra* at 305, the Appeals Court held that where an applicant has engaged in past misconduct, it is for the appointing authority, not the commission, to determine whether the appointing authority is willing to risk hiring the applicant. However, the misconduct in *Cambridge* was undisputed by the applicant. Here, in contrast, the question whether Gannon engaged in past misconduct was the single issue brought before the commission. Because the failed drug test was the department’s proof that Gannon ingested cocaine and was the sole reason for the bypass, it was the department’s burden to prove by a preponderance of the evidence that the test reliably demonstrated that Gannon had ingested cocaine. To the extent that the dissent suggests that there are occasions when an appointing authority need not demonstrate reasonable justification by a preponderance of the evidence as required by G. L. c. 31, § 2 (b), we disagree.

In *Beverly*, 78 Mass. App. Ct. at 190, the Appeals Court concluded that the commission erred as a matter of law when it required the city to prove that the candidate committed the misconduct for which he was fired from a previous job. In so doing, the Appeals Court articulated a different standard of proof to be applied in cases where an applicant’s misconduct is in dispute, i.e., an appointing authority need only demonstrate “a sufficient quantum of evidence to substantiate its legitimate concerns.” *Id.* at 188. *See* O. L. c. 31, § 2 (b). [30] It is error to apply any standard other than a preponderance of the evidence in this context. *See Anthony’s Pier Four Inc. v. HBC Assocs.*, 411 Mass. 451, 465 (1991), quoting *Commonwealth v. Hawkesworth*, 405 Mass. 664, 669 n.5 (1989) (“an appellate court ‘carefully scrutinizes the record, but does not change the standard of review’”).

Citing to *Cambridge*, 43 Mass. App. Ct. at 305, the court in *Beverly*, 78 Mass. App. Ct. at 190, further suggested that to require an appointing authority to prove a candidate’s alleged misconduct “would force the city to bear undue risks.” However, the “risk” discussed in *Cambridge* pertained to risk that the candidate might engage in future misconduct, not risk that the candidate engaged in past misconduct.

For these reasons, the department may not rely on demonstrating a “sufficient quantum of evidence” to substantiate its “legitimate concerns” about the risk of a candidate’s misconduct. *Beverly*, 78 Mass. App. Ct. at 188. Instead, it must, as required by G. L. c. 31, § 2 (b), demonstrate reasonable justification for the bypass by a preponderance of the evidence.”

There are strong public policy arguments suggesting that the reason for bypass here is *not* valid. Leaders across the political spec-

trum in Massachusetts have stressed the need to avoid looking at a snapshot of who a candidate was many years ago, but, rather, to look at who that candidate is today, as defined primarily by the intervening years since the misconduct occurred. That is particularly true when the non-appointment of a candidate, as here, stymies the Appointing Authority’s stated goal of enhancing the diversity of the police force. In short, the Appellant has a years-long record of being a good citizen which would appear to be the best predictor of whether he has the characteristics needed to serve as a police officer.

The Commission reached a somewhat similar conclusion in *Laguerre v. Springfield Fire Department*, 25 MCSR 549 (2012). In *Laguerre*, the Appellant had pled “no contest” to a charge of assault and battery with a dangerous weapon (a felony) 15 years prior to seeking appointment as a firefighter. The Commission questioned the reasonableness and legitimacy of relying on this criminal misconduct, particularly given that Mr. Laguerre, similar to Mr. Cavaco, had been a model citizen for the intervening years. In *Laguerre*, however, the Springfield Fire Department failed to even *consider* the intervening 15 years, discontinuing the review process after learning of Laguerre’s criminal record.

Here, as referenced in Commissioner Ittleman’s well-reasoned decision, the BPD did consider the intervening years since Mr. Cavaco engaged in criminal behavior and the BPD *did* give Mr. Cavaco the opportunity to address his criminal history. After what appears to be careful review and consideration, the BPD’s Roundtable, after weighing all factors, concluded that it would be too great of a risk to appoint Mr. Cavaco as a police officer. To me, that conclusion stretches the bounds of reasonableness, common-sense and equity. However, given that the criminal misconduct is undisputed; given that the BPD did the type of thorough review required, which included a consideration of the Appellant’s entire history; and given that the BPD has articulated specific reasons supporting their conclusion that the Appellant’s appointment could, arguably, create too high of a risk, I see no basis upon which the Commission can overturn the BPD’s discretionary decision here. For those reasons, I reluctantly concur with the decision to deny the Appellant’s bypass appeal and join the majority in allowing the BPD the opportunity to reconsider Mr. Cavaco’s candidacy, should they wish to exercise that discretion.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 16, 2020.

Notice to:

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* * * * *

MICHAEL LOSI

v.

BOSTON FIRE DEPARTMENT

D1-19-176

July 16, 2020

Christopher C. Bowman, Chairman

Disciplinary Action-Discharge of Boston Firefighter-Lying-Getting Paid for Detail While on Light Duty-Failing to Report to Work While on Light Duty-Reporting Late for Details—The Commission dismissed a Boston firefighter's appeal from his discharge after evidence confirmed his lack of truthfulness on multiple occasions and his failure to report to work while on light duty. The Appellant was also found to have accepted payment for a detail he worked while he was supposed to be on light duty and then appearing 90 minutes late for another detail.

Kevin R. Mullen, Esq.

John J. Greene, Esq.

Connie Wong, Esq.

Robert J. Boyle, Jr., Esq.¹

DECISION

On August 20, 2019, the Appellant, Michael Losi (Appellant), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Fire Department (Department) to terminate him from his position as a Boston Firefighter. On

September 17, 2019, I held a pre-hearing conference at the offices of the Commission in Boston. I held a full hearing at the same location over two days on November 8 and December 16, 2019.² As no written notice was received from either party, the hearing was declared private. A CD of the digitally-recorded hearing was provided to both parties. Counsel for the Appellant submitted a stenographic transcription of the hearing which the Commission has taken as the official record of the proceeding. The parties submitted post-hearing briefs in the form of proposed decisions on May 1, 2020 (Respondent) and May 22, 2020 (Appellant).

FINDINGS OF FACT

At the outset of the hearing, I entered into evidence Exhibits 1 through 35, with the exception of Exhibit 5 (Appellant objection sustained). During the second day of hearing, I entered additional documents as Exhibits 36 through 40, with Exhibit 39 conditioned on the receipt of additional information from the Appellant, which was not received. Therefore, Exhibit 39 was not entered. The Department forwarded additional documents after the hearing, some at my request and others on their own initiative. After review, I entered those documents as Exhibits 41 through 48. Based on these exhibits, the testimony of the following witnesses:

Called by the Department:

- Gerard Viola, District Fire Chief;
- David Walsh, Deputy Chief of Personnel;
- Jonathan Holder, M.D., Department Medical Examiner;
- Gerard Cianciulli, Fire Captain, Ladder Company 21, East Boston.

Called by Mr. Losi:

- Michael Losi, Appellant;

and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following:

1. The Appellant was employed as a firefighter with the Department from 2013 until his termination in 2019. Prior to becoming a firefighter, the Appellant served in the United States Marine Corps from 2007 to 2011, and was honorably discharged. As part of his military service, the Appellant served in Iraq and Afghanistan. (Testimony of Appellant)
2. Based on a reported on-the-job injury, the Appellant was placed on injured leave from November 11, 2018 to December 20, 2018. (Exhibits 43 & 44; Testimony of Appellant)

1. Attorney Devin Guimont and Attorney Connie Wong represented the Respondent at the Commission hearing. Attorney Guimont is no longer employed by the Respondent. Attorney Boyle subsequently submitted a notice of appearance and, after reviewing the record, submitted a post-hearing brief on behalf of the Respondent.

2. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00 *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

3. On December 7, 2018, the Department received a fax from the Boston Sports and Shoulder Center stating: “The following is a summary of Michael Losi’s visit with Jason Rand, PA [Physician’s Assistant], on 11/30/2018.” On page 2 of the faxed communication, the PA wrote:

“We discussed a more supportive sling because he does not feel the current sling is providing stability and educated the patient with regard to this. We discussed him working on posture, utilizing the sling and getting an MRI. The MRI will be used to evaluate the integrity of his rotator cuff, extent of AC joint separation and question of the fracture fragment.” Also on Page 2, the PA wrote: “Return to Work Status: No Duty.” (emphasis added) (Exhibit 43)

4. On December 20, 2018, the Appellant met with Dr. Britt Hatfield, the Department’s Medical Examiner at Department Headquarters. At that time, Dr. Hatfield informed the Appellant that he (the Appellant) was being placed on light duty status (as opposed to injured leave), effective December 21, 2018. (Testimony of Appellant; Exhibit 32; Exhibit 43, pp. 52-53)

5. The Appellant questioned why Dr. Hatfield was assigning him to light duty when the physician’s assistant at Furnace Brook Physical Therapy had told him that he (the Appellant) was not to return to work. (Testimony of Appellant)

6. The relevant collective bargaining agreement states in part:

“Where the Department Medical Examination (or his/her physician designee) determines that the employee is capable of performing limited duty, the Department shall notify the involved employee and the Union. The Department shall provide the employee and Union with its limited duty plan including a detailed description of the duties and the specific work schedule. Limited duty tasks and assignments shall be determined by the Commissioner and may include any work or assignments performed by any bargaining unit personnel employed by the Department, except for fire suppression, consistent with the employee’s medical restrictions.³ The work schedule may provide, at the Department’s option, for a Monday through Friday, eight (8) hour work day, forty hours per week, provided, however, that regardless of limited duty service, the involved employee shall receive on a weekly payroll basis all compensation provided by this Agreement to which he/she would be entitled if he/she were performing regular duty pursuant to his/her regular schedule.” (emphasis added) (Exhibit 41)

7. That same day (December 20th), the Appellant called his firehouse and told Lt. [Timothy] Foley that he (the Appellant) had been told by a lieutenant in the personnel office (at headquarters) that he was to be coded as light duty as of December 21st, “but I was not to show up at the firehouse because of my medication.” (Testimony of Appellant)⁴

3. There is no evidence in the record showing that the Appellant and/or his union were provided with this information.

4. Whether or not a lieutenant in the Personnel Office at Department headquarters ever told the Appellant this is a disputed fact that is discussed in further findings and the analysis section of this decision.

8. The Appellant never appeared at the firehouse for light duty for the weeks that he was coded as light duty in December, January and February. (Testimony of Appellant)

9. On December 21, 2018, one day after Dr. Hatfield had assigned the Appellant to light duty, the BFD received another fax from Boston Sports & Shoulder Center, this time from orthopedist Brian P. McKeon, M.D. The fax, now signed by Dr. McKeon, confirmed that the Appellant had been seen in his office on November 30, 2018 and that the Appellant may not return to work until he is re-evaluated on December 28, 2018. (Exhibit 43)

10. The relevant collective bargaining agreement states in part:

“Should the employee’s medical provider disagree with the Department’s Medical Examiner (or his/her physician designee) as to the medical propriety of the employee performing the Department’s limited duty schedule and/or assignment plan and she/he so notifies the Department’s Medical Examiner (or his/her physician designee), the Department’s Medical Examiner (or his/her physician designee) will contact the employee’s medical provider to discuss potential resolution of the disagreement.⁵ Failing resolution, the Department Medical Examiner (or his/her physician designee) shall designate an IME from the panel provided pursuant to section C(3) of this PART C to examine the employee. The examination by the IME shall be at the City’s expense and shall be limited to the subject area of the disability claimed. The IME shall forward a binding decision to the Department’s Medical Examiner as to the medical propriety of the employee’s performing the Department’s desired limited duty schedule and/or assignment plan. The Department’s Medical Examiner shall forward a copy of the IME’s decision to be involved employee and the Union. In the event that the IME determines that the employee is unfit for any portion of the limited duty plan, then the employee shall remain on injury leave status pending future medical evaluations and determinations by the IME.” (emphasis added) (Exhibit 41)

11. On December 28, 2018, the Appellant had an appointment with the Physician’s Assistant at Boston Sports & Shoulder Center. Excerpts from the PA’s summary of the visit state:

“The patient is a 31-year-old male who presents today for evaluation of his left shoulder. He is a Boston firefighter. He is currently struggling with his work. He is out of work and evidently this has been a huge stress on him. He would like to go back to work. He has been at his current employer for 6-7 years. His date of injury was 11/11/18. He is being seen here for a second opinion. He presents today for a review of his MRI.

He continues to report rather significant shoulder pain. He comes in with his arm in a sling-type position secondary to the discomfort with guarding of the upper extremity. He continues to report discomfort within the whole shoulder girdle. He denies any significant numbness or tingling into his arm, but it is his whole shoulder girdle which is his source of discomfort.”

....

5. There is no evidence in the record that the Department’s Medical Examiner contacted Dr. McKeon upon receipt of this letter and, based on the testimony of Dr. Holder, I infer that no such contact was ever made.

“... we discussed a cortisone injection today in both the joint and subacromial space, as well as physical therapy. I do believe that the time bracing his shoulder has led to a significantly tight shoulder, a capsulitis as sequelae of an acute injury.”

....

“In terms of his work status, certainly with his level of discomfort, I cannot imagine him working as a full duty firefighter at this time, and he was given a work restriction note.⁶ We are going to see him back for further review with Dr. McKeon in 3-4 weeks to assess his response to the injection. He is in agreement with this treatment plan and consented accordingly.” (emphasis added)

(Exhibit 43)

12. The above-referenced PA’s summary was not faxed to the Department until January 4, 2019. (Exhibit 43)

13. Department records indicate that the Appellant was seen by Dr. Hatfield, the Department’s physician, on January 2, 2019 and January 15, 2019. The January 2nd note indicates that the Appellant was awaiting results of an MRI and that the Appellant should follow-up with Dr. Hatfield on January 15th. The January 15th note makes reference to new doctor that the Appellant was now seeing. (Exhibit 43)

14. The Appellant stopped seeing Dr. McKeon after December 28, 2018. In January 2019, he began treating with Arun J. Ramappa, MD and John-Paul D. Hezel, MD at Beth Israel Deaconess Medical Center (BIDMC). (Exhibit 44)

15. Dr. Ramappa’s January 8, 2019 notes state in part:

“... He [Appellant] has significant discomfort in his shoulder. He is experiencing a fair amount of spasm. He is yet to move his shoulder. He would benefit from formal physical therapy to provide a prescription for this. I have also asked him to see 1 of my colleagues to address his trapezius spasm and myofascial pain. He may be a candidate for dry needling and potentially for an AC joint injection. We will arrange for this appointment for later this week.”

(Exhibit 44)

16. Dr. Hezel’s January 11, 2019 notes state in part:

“He [Appellant] has some AC joint arthropathy but has significant myofascial restriction throughout the left shoulder and neck. He should definitely continue with physical therapy, we also discussed the role of targeted dry and trigger point injections to help unlock the shoulder and periscapular region. After risks/benefits were discussed, he wished to proceed. Excellent twitch response in all muscles ... I like to see him back in about 3 weeks for reevaluation.”

(Exhibit 44)

17. The Appellant had a follow-up visit with Dr. Hezel on February 1, 2019. Dr. Hezel’s notes state in part:

“Assessment and plan: 31-year-old gentleman status post work-related left shoulder injury now with persistent stiffness in the setting of a healed clavicle fracture. He has had an intra-articular and subacromial injection already, neither of which really gave him lasting benefit. I am okay if he pushes through some of the pain and physical therapy. No role for repeat MRI or other injections at this time. Also hold off on more dry needling trigger point were given that the benefit was minimal.

We will give it another month and then follow-up with me at that point.” (emphasis added) (Exhibit 44)

18. On February 5, 2019, the Appellant had a physical therapy appointment at Furnace Brook Physical Therapy. The notes from that visit state in part:

“Pt. reports a subject 40-50% improvement in L shoulder P and function since beginning skilled PT. Pt. reports he follow-up with Dr. Hezel, who re-assured patient there was no injury within the shoulder joint, and encouraged patient to begin moving the arm normally and without guarding. Pt. reports that he has begun doing so, and has been able to improve his motion, though it remains painful and uncomfortable. Notes that he hasn’t been experiencing pain past his elbow joint, and denies radicular paresthesias right now. Reports that MD cleared him to return to work, and he will be returning to department MD tomorrow for clearance there.” (emphasis added)

...

Pt. has made fair-good progress through skilled physical therapy to date towards both short and long-term functional goals. Pt. demo improvements in A/PROM, myofascial integrity, and postural awareness. Continues to lack sufficient power, strength, and stability required in the LUE for a full return to PLOF, and will benefit from cont. skilled PT oversight to reach those goals while minimizing re-injury risk.”

(Exhibit 44)⁷

19. On Wednesday, February 6, 2019, the Appellant saw another Department Medical Examiner, Dr. Jonathan Holder, who covers for Dr. Hatfield when he is out. (Testimony of Dr. Holder)

20. During that February 6th examination, the Appellant told Dr. Holder that Dr. Hezel had cleared him for regular, full duty. (Testimony of Dr. Holder) Dr. Holder’s notes from the February 6, 2019 visit state in part: “Had ortho apt yesterday—told no restrictions.” (Exhibit 10)

21. Dr. Holder also did a limited physical examination which led him to conclude that the Appellant was ready to return to full duty. (Testimony of Dr. Holder)

22. The Appellant, however, told Dr. Holder that he (the Appellant) was still experiencing pain and stiffness in his shoulder. (Testimony of Dr. Holder)

23. Asked to explain how he reconciled this conflicting information (i.e. - being told by the Appellant that Dr. Hezel had cleared him for regular duty and his own observation from the physical

6. The Appellant was unable to produce any document which referenced work restrictions.

7. The Appellant claimed he received another letter from Furnace Brook Physical Therapy that said “I was good to go back to work.” But the Appellant failed to produce the letter before or after the hearing.

examination contrasted with the Appellant's reporting of pain and stiffness), Dr. Holder stated: "So, when the patient says that they're still in pain and they feel the need to do more physical therapy, it tells me they're in doubt about their physical ability to go back to regular work and I put a lot of weight on what the firefighter says. I'm not going to, you know, force him to go back to regular work when he's feeling that he's not ready. It doesn't pay to butt heads. And the outcomes aren't good." (Testimony of Dr. Holder)

24. Dr. Holder's notes from the February 6, 2019 visit also state: "has PT tomorrow." (Exhibit 10)

25. During this appointment on Wednesday, February 6th, Dr. Holder told the Appellant that he could return to full duty on Tuesday, February 12, 2019. (Testimony of Dr. Holder; Exhibit 10 and Exhibit 32)

26. Dr. Holder was aware that Thursday, February 7, 2019 was the next work day for Group 2 at Ladder Company 21 (where the Appellant is assigned) but he did not put the Appellant back on February 7, 2019 because of the above-referenced statement from the Appellant that he still had pain in his shoulder and wanted to do more physical therapy. (Testimony of Dr. Holder)

27. When I asked Dr. Holder why he did not schedule the Appellant for a follow-up visit prior to assigning him to return to work on February 12th, Dr. Holder stated: "... where I practiced before, you could often discharge a patient the following week without necessarily seeing them. Where I work now, they always like to actually see them again before discharge .. So [I] expect I would have seen him again. Well, actually Dr. Hatfield would have seen him." (Testimony of Dr. Holder)⁸

28. Weeks later, when Dr. Holder reported to Department Headquarters to cover for Dr. Hatfield again, there was a folder on his desk that contained the February 1st notes from Dr. Hezel as they related to the Appellant, which stated in relevant part: "We will give it another month and then follow-up with me at that point." Also in the folder were February 5th notes from Furnace Brook Physical Therapy which stated in part: "Continues to lack sufficient power, strength, and stability required in the LUE for a full return to PLOF⁹, and will benefit from cont. skilled PT oversight to reach those goals while minimizing re-injury risk." (Testimony of Dr. Holder)

29. Dr. Holder concluded that the above-referenced notes directly contradicted what he had been told by the Appellant during his visit on February 6th, (that he had been cleared to return to work by Dr. Hezel) but he chose not to take any further action as the Appellant was not scheduled to attend any further medical examinations with the Department. (Testimony of Dr. Holder)

30. On the same day (Wednesday, February 6th) that the Appellant met with Dr. Holder and was told that he could return to full duty on Tuesday, February 12th, the Appellant left the Medical Office at headquarters, walked down the hall to the Personnel Office, and volunteered to work four paid details (on Thursday, February 7th; Friday, February 8th; Saturday, February 9th and Monday, February 11th). (Testimony of Appellant)

31. Department Rule 18.33(e) states that "Members shall not: Be employed in, or give personnel attention to, any other business while on injured leave, sick leave without loss or administrative leave without loss." (Exhibit 6)

32. Exhibit 21 is an email that appears to be from the Department's Personnel Office to "BFD-SWORN MEMBERS" dated April 7, 2016 which states:

"The following is a notice that can be considered a visual aid to the Return to Work reminder in Revised Special Order 18 dated today. There seems to be some confusion as to what constitutes a return to work date and what duties a member can do before that date. Please print and post.

PLEASE READ

All uniformed members (all Members Local 718) are reminded that when returning to full duty from injured leave, no member is allowed to work any type of shift until they have worked on their regularly assigned group; this includes overtime, swaps and paid details. There are numerous disciplinary precedents within the department for violating this rule; the officer who allowed the violation and the member who worked the tour have been / will be considered for formal discipline."

(Exhibit 11)

33. On Thursday, February 7th, the Appellant worked and was paid for a detail from 6:45 A.M. to 4:45 P.M. when he was also coded and paid for light duty for the same day. (Exhibit 11)¹⁰

34. After his return to full duty, the Appellant put in to work a paid detail on March 6, 2019. The Appellant telephoned the contractor that he was running late because he had worked the night before and was awaiting relief. The Appellant arrived an hour and thirty-five minutes late for the detail. He did not work the night before and, when he telephoned the contractor, he was not at the firehouse awaiting relief. (Testimony of Appellant and Viola)

35. On March 11, 2019, the Appellant's superior officer, Captain Gerard Ciancuilli, spoke to him regarding his conduct on March 6, 2019. (Testimony of Ciancuilli)

36. After speaking with Captain Ciancuilli, the Appellant left the firehouse, went to EAP, and then to the VA for stress. (Testimony of Appellant)

8. Counsel for the Department confirmed that the Appellant was not seen by Dr. Holder or Dr. Hatfield before returning to regular duty on Tuesday, February 12th.

9. Neither party was able to identify what PLOF stands for and Dr. Holder was not asked about this during his testimony.

10. The Department also alleges that the Appellant was paid for both light duty and a paid detail on Friday, February 8th and Monday, February 11th. The Department did not, however, submit payroll records to support this allegation. The only payroll records submitted that show that the Appellant was coded for and paid for light duty was for Thursday, February 7th.

37. A memo from Captain Cianciulli dated March 13, 2019 states that, after the Appellant left the firehouse, “[t]he company was notified to code FF Losi FSK [sick leave] until further notice. (Exhibit 15)

38. Deputy Walsh spoke to EAP representative Pat Hayes and discussed options for providing the Appellant with medical assistance. (Exhibit 34A)

39. The following is Deputy Walsh’s testimony from the local appointing authority hearing regarding whether the Appellant was ever told that he was being put on sick leave until he received clearance from a Department Medical Examiner:

“Q. In your discussion with Pat Hayes, you decided we’ll put Firefighter Losi out sick for the time being?

A. Yeah, yeah, he had to be - - yeah, he had to be out sick. He was under - he was going to, Pat Hayes thought he [had] him [] lined up [for medical assistance] .. he got him under the care of the VA ...

Q. By putting him out sick, was there any other discussion about how long he would be out sick?

A. No, I just do (sic) Pat, make sure he has to be cleared by the department Doctor, because he had this episode during work, so he has to be, you know, cleared by the department doctor before he gets back to work.

Q. How many conversations did you have with Pat Hayes?

A. I had a couple, I think. Probably two or three. But I called him around and Pat called me back and said I got him.

Q. Pat Hayes called you back?

A. Yeah.

Q. During one of those subsequent conversations, did Pat confirm that he relayed everything you instructed him to?

A. Yes.” (Exhibit 34A)

40. The Appellant worked a paid detail on March 13, 2019. (Testimony of Appellant)

41. Shortly thereafter, Deputy Chief Walsh was notified that the Appellant had worked this detail on March 13th. At or around the same time, a Department employee at headquarters made Deputy Chief Walsh aware that the Appellant had allegedly worked prior details while on light duty. Based on this information, Deputy Chief Walsh initiated an investigation. (Testimony of Walsh)

42. During an interview with the Appellant, the Appellant confirmed that he told Lieutenant Timothy P. Foley that he did not have to report to Ladder 21 for his light duty assignment based on instructions from the Personnel Division because he was taking pain medication, Tramadol. (Testimony of Walsh)

43. Deputy Chief Walsh interviewed every member of the Personnel Division Assignment Office. According to Deputy Chief Walsh’s May 9, 2019 report, “Each of these members stated that they did not tell FF Losi that he did not have to report to his light duty assignment, and each also stated that they had never

told anyone else that they didn’t have to report to their light duty assignment.” (Testimony of Walsh; Exhibit 8)

44. As a result of the investigation, the Department charged the Appellant with allegedly being untruthful on four occasions as follows: a) claiming that the Department’s Personnel Division gave him permission not to report to the firehouse while on light duty between December 21, 2018 and February 12, 2019; b) telling Department Medical Examiner Dr. Holder during an examination on Wednesday, February 6, 2019 that he (the Appellant) had a physical therapy appointment the next day (Thursday, February 7th); c) repeating during an investigative interview with Deputy Chief Walsh that he did have a physical therapy appointment on February 7th and d) telling a private contractor on March 6th that he was going to be late for a paid detail because he worked the prior night and there was a delay in being relieved. (Exhibit 4)

45. The Department also charged the Appellant with violating Department rules by working paid details on February 7th; 8th; 9th; and 11th, 2019 while he was on light duty. Relatedly, the Department charged the Appellant with being absent without leave (for his light duty) on February 7th (Thursday); February 8th (Friday); and February 11th (Monday). (Exhibit 4)

46. The Department also charged the Appellant with violating Department rules by working a paid detail on March 13, 2019 while he was on sick leave. (Exhibit 4)

47. On August 7, 2019, the Department held a Trial Board hearing. The Trial Board consisted of a Deputy Chief and two District Chiefs. Deputy Chief David Walsh testified for the Department. The Appellant appeared with his personal attorney but did not testify in his own defense during the Trial Board. The Trial Board sustained all of the charges against the Appellant. (Exhibit 22)

48. The Fire Commissioner upheld the findings of the Trial Board and the Appellant was terminated from his position as a firefighter on August 14, 2019. (Testimony of Walsh) This appeal followed.

49. The Appellant has previously received warnings and suspensions for being absent without leave; being disrespectful to a superior officer; and excessive absenteeism. (Exhibits 24-28)

LEGAL STANDARD

The Civil Service Commission is charged with ensuring that employment decisions are made consistent with basic merit principles. Basic merit principles requires, among other things:

“ ... retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected”; and ... assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens” and; “assuring that all employees are protected ... from arbitrary and capricious actions.” (G.L. c. 31, § 1)

G.L. c. 31, § 41 states in part:

“Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days ...”

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law;” *Commissioners of Civil Service v. Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971); *Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304 (1997); *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service;” *School Comm. v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

The Appointing Authority’s burden of proof by a preponderance of the evidence is satisfied “if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.” *Tucker v. Pearlstein*, 334 Mass. 33, 35-36 (1956).

G.L. c. 31, § 43 states in part:

“If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission ...

If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew;” *Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he commission’s task... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘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’,” *Id.*, quoting internally from *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

ANALYSIS

As a preliminary matter, the Appellant does not dispute that he was late for a paid detail on March 6, 2019, arriving at the New Sudbury Street construction project approximately ninety minutes after the scheduled start time of 7:00 A.M. Further, the Appellant acknowledges that, when speaking to the contractor on the phone shortly after 7:00 A.M., he (the Appellant) attributed his tardiness to having worked at the firehouse the night before. That wasn’t true.

The District Fire Chief working the same detail sent the Appellant home and penned a note to the Fire Captain at Ladder Company 21 in East Boston, where the Appellant was assigned. The District Fire Chief’s note summarized what occurred and deferred to the Fire Captain regarding what, if any, action should be taken against the Appellant. What happened next, in part, ultimately triggered an investigation into whether the Appellant had been violating the Department’s rules regarding light duty, injured leave and when a firefighter is permitted to work paid details.

When the East Boston Fire Captain counseled the Appellant about what occurred at the New Sudbury Street construction project, the Appellant responded poorly, accusing the District Fire Chief of having a grudge against him. After that conversation, the Appellant left the firehouse. A complete review of the record shows that BFD officials, at that point, were sincerely concerned about the Appellant’s mental well-being, trying to quickly facilitate support through EAP and/or other medical attention for the Appellant.

Deputy Chief of Personnel David Walsh was notified and he (Walsh) spoke directly with the EAP representative about providing the Appellant with support. At or around the same time, it was brought to Deputy Walsh’s attention that the Appellant had possibly violated Department rules by recently working paid details while he was on light duty. Having now received three pieces of information about the Appellant (his tardiness at the detail; his departure from the firehouse after being counseled about it; and potential rule violations related to working paid details while on light duty), Deputy Walsh initiated an investigation. The starting point of that investigation was effectively December 20, 2018, the date that the Appellant’s status was converted from injured leave to light duty.

As outlined in the findings, the Appellant had been out on injured leave since November 2018 based on a work-related injury. While on injured leave, firefighters are required to regularly (i.e. - weekly) report to Fire Department headquarters to be examined by a Department Medical Examiner. On December 20, 2018, the Appellant appeared at headquarters and was examined by Department Medical Examiner Dr. Britt Hatfield at which time Dr. Hatfield told the Appellant that he was being converted from injured leave to light duty.

I credit the Appellant’s testimony that he had somewhat of a verbal dispute with Dr. Hatfield on December 20th regarding the decision to take him off injured leave. As referenced in the findings,

a Physician's Assistant recommended that the Appellant not be returned to duty. The Appellant was understandably perplexed as to why Dr. Hatfield was effectively overruling the findings of the Physician's Assistant. Based on reasonable inferences drawn from the Appellant's testimony, I conclude that Dr. Hatfield did not feel obliged to defer to the PA's recommendation nor did he believe that a PA's recommendation triggered the requirement in the CBA to discuss the divergent recommendation related to whether the Appellant should be removed from injured leave. Even if this interpretation is correct, the Department, upon receiving Dr. McKeon's correspondence the next day (December 21st) was clearly obligated to reach out to Dr. McKeon to discuss his divergent conclusion regarding whether the Appellant should be removed from injured leave. That didn't happen.

Dr. Hatfield, on December 20th, removed the Appellant from injured leave and placed him on light duty, effective the next day. What occurred immediately after the Appellant's visit with Dr. Hatfield is in dispute. According to the Appellant, he (the Appellant) spoke with a lieutenant in the personnel office at headquarters; and, after telling the lieutenant he was taking Tramadol, was told by the lieutenant that he would not need to report for work at the firehouse while he was out on light duty. The BFD argues that the Appellant is lying. Deputy Chief Walsh testified that, upon being told this by the Appellant, he questioned every member of the personnel department and that each of them vehemently denied ever making this statement to the Appellant. In fact, according to Deputy Chief Walsh, each of the employees insisted that they would never tell any employee that he/she did not need to report for work while out on light duty.

I don't credit the Appellant's testimony that he was told by a lieutenant in the personnel office that he didn't need to report for work at the firehouse while out on light duty. First, the Appellant was unable to specifically identify who in the personnel office purportedly told him this (i.e. - the name of the person). Second, I kept the record open for the Appellant to provide a record of refilled prescriptions showing that he was indeed taking Tramadol during the time period which he was assigned to light duty. I drew an adverse inference from the Appellant's failure to provide this information. Third, the Appellant's testimony, even standing alone, just didn't ring true to me. It differed from other parts of his testimony which were more specific and logical. Thus, I conclude that the Appellant was untruthful when he told Deputy Chief Walsh that a lieutenant in the personnel office told him that he didn't need to report for work while out on light duty.

The Appellant acknowledges that he called the East Boston firehouse and told a lieutenant that, according to the personnel office, he was being put on light duty, but did not need to report for work. Remarkably, over the next several weeks, 6-8 Fire Captains and lieutenants at this East Boston firehouse recorded the Appellant as being on light duty when they knew he was not reporting for light

duty at the firehouse. The Appellant testified that this has been a longstanding common practice in firehouses in the Boston Fire Department. Deputy Chief Walsh and East Boston Fire Captain Gerald Cianciulli dispute this. While there is not sufficient evidence to show that such a practice exists, it was disappointing that the Department failed to conduct any retrospective review and/or audit to determine whether other firefighters, assigned to light duty, had failed to report to duty at their respective firehouses. Rather, the Department appeared to solely take a prospective look, ensuring that, going forward, firefighters are not paid for light duty if they are not reporting to work. Having found that the Appellant was not excused from reporting to duty by someone in the personnel office, I conclude that the Appellant engaged in misconduct by not reporting for duty during the multiple weeks in December, January and February 2018 that he was assigned to light duty. The language in the CBA does not change my conclusion. If the Appellant believed that the Department's decision to place him on light duty was not permitted under the CBA, he had a right to grieve that order. He did not. Rather, he falsely reported to a fire lieutenant in the East Boston firehouse that he had been excused from reporting to duty. That untruthfulness, along with his actual failure to report to duty, constitutes misconduct.

The next critical juncture relevant to this appeal is when the Appellant met with Dr. Holder on Wednesday, February 6th. Dr. Holder was serving as the Department's Medical Examiner that day, filling in for Dr. Hatfield. I credit Dr. Holder's testimony that, during that examination, the Appellant verbally told him that his new orthopedic doctor, Dr. Hezel, had cleared him to return to duty. That wasn't true. In fact, when Dr. Hezel last met with the Appellant on February 1, 2019, he had not cleared the Appellant to return to full duty. Rather, he instructed the Appellant to appear for a follow-up visit weeks later before any such determination would be made. I also credit Dr. Holder's testimony that the Appellant told him that he had a physical therapy appointment the next day, Thursday, February 7th, the day in which the Appellant, based on his assignment, would have otherwise been assigned to work if he was returned to full duty effectively immediately.

Instead, based on the Appellant's representation that he had a physical therapy appointment the next day, and based on the Appellant's statement to him that he (the Appellant) was still feeling minor pain and discomfort, Dr. Holder made the return to duty effective Tuesday, February 12th. At a minimum, this would mean that the Appellant was still required to report to the firehouse in East Boston for light duty on Thursday, February 7th. The undisputed evidence shows that, instead of reporting for light duty, the Appellant performed a detail during almost the same hours that he should have been reporting to the firehouse for light duty. In short, the Appellant, on Thursday, February 7th, received light duty pay and detail pay for the same hours. By doing so, the Appellant engaged in misconduct.¹¹

11. It is an understatement to say that there appears to be a systemic problem at the Department in which there is no automated system to automatically block the assignment of details to employees who are coded as being on light duty.

In summary, the Appellant engaged in misconduct by: being untruthful on multiple occasions; failing to report to work at the firehouse when assigned to light duty; getting paid for a detail for the same hours that he was supposed to be performing light duty; and appearing 90 minutes late for a paid detail. These actions violate multiple rules of the Department and constitute substantial misconduct which adversely affected the public interest.

Having determined that the Appellant did engage in the alleged misconduct, I must determine whether the level of discipline (termination) was warranted. As stated by the SJC in *Falmouth v. Civ. Serv. Comm'n*, 447 Mass. 814, 823-825 (2006):

“After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], s. § 43 (“The commission may also modify any penalty imposed by the appointing authority.”) Here the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘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.’” *Id. citing Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

“Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the ‘equitable treatment of similarly situated individuals.’ citing *Police Comm’r of Boston v. Civ. Serv. Comm’n*, 39 Mass. App. Ct. 594, 600 (1996). However, in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system—‘to guard against political considerations, favoritism and bias in governmental employment decisions.’” *Id.* (citations omitted).

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“Unless the commission’s findings of fact differ significantly from those reported by the [Appointing Authority] or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation.” *Id.* at 572. (citations omitted)

First, while my findings are not identical to the Department’s (i.e. - the evidence only supports one day of “double-dipping” as opposed to multiple days), they do not differ significantly from the Department as, like the Department, I found that the Appellant engaged in misconduct by being untruthful, failing to report to work at the firehouse when assigned to light duty; getting paid for a detail on one day for the same hours that he was supposed to be performing light duty; and appearing late for a paid detail.

Second, the evidence did not show that the Department’s decision here was based on political considerations, favoritism or bias. Rather, the Department’s initial efforts to provide the Appellant with assistance from EAP and other medical assistance appears to show the opposite. In short, the Appellant was not targeted by the Department; his own actions resulted in a well-founded decision to conduct an investigation. The findings of that investigation show that the Appellant engaged in repeated misconduct.

Third, the Appellant’s personnel file shows that he engaged in similar misconduct in the past, receiving warnings and suspensions for being absent without leave; being disrespectful to a superior officer; and excessive absenteeism. This shows that corrective action through a lesser penalty (i.e. - a long-term suspension) is unlikely to correct the Appellant’s performance.

For these reasons, a modification of the penalty (termination) is not warranted.

CONCLUSION

The Appellant’s appeal under Docket No. D1-19-076 is **denied**.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on July 16, 2020.

Notice to:

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* * * * *

HERRIO LAMOTHE

v.

MassDOT

C-19-067

July 16, 2020

Christopher C. Bowman, Chairman

Reclassification Appeal-MassDOT-Civil Engineer I to II-Lack of Complex and Financially Weighty Projects—A “highly-educated, competent, detail-oriented” DOT employee did not perform the level distinguishing duties of Civil Engineer II because he served essentially as an Assistant Resident Engineer on projects lacking the complexity and size of those worked on by employees in the desired classification.

DECISION

On March 20, 2019, the Appellant, Herrio Lamothe (Appellant), pursuant to G.L. c. 30, § 49, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state’s Human Resources Division (HRD) to deny his request for reclassification from Civil Engineer I (CE I) to Civil Engineer II (CE II) at MassDOT. On April 16, 2019, I held a pre-hearing conference at the offices of the Commission. I held a full hearing at the same location over two days on July 12th and 31st, 2019.¹ The hearing was digitally recorded and both parties were provided with a usb drive containing a recording of the hearing.² The Appellant submitted a post-hearing brief on July 10, 2020. The Respondent opted not to submit a brief.

FINDINGS OF FACT

Twenty-six (29) exhibits (Respondent Exhibits 1-21 (R1-R21) and Appellant Exhibits 1-8 (A1-A8)) were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by MassDOT:

- Tom Maloy, District 4 Construction Engineer, CE VI

For the Appellant:

- Harry B. Thompson, CE III
- Herrio Lamothe, Appellant

and taking administrative notice of all matters filed in the case, and pertinent rules, statutes, regulations, case law, policies, and

reasonable inferences from the credible evidence; a preponderance of credible evidence establishes the following facts:

BACKGROUND

1. The Appellant was appointed as a CE I by MassDOT in 2012. (Stipulated Fact) He has a bachelor’s degree in civil engineering and a master’s degree in engineering management. According to the Appellant, he is also “EIT certified.” (Testimony of Appellant) The website for the Massachusetts Society for Professional Engineers states: “If you’re a graduate from an engineering program approved by the MA state licensure board, you can become classified as an “engineer intern” (EI) or “engineer-in-training” (EIT) by successfully completing the Fundamentals of Engineering (FE) exam. Achieving EI or EIT status signals that you have mastered the fundamental requirements and taken the first step toward earning your PE licensure.” (Administrative notice: <https://mspe.com/licensing-and-registration/path-to-licensure>)

2. From December 2010 until May 2017, MassDOT and the Coalition of MassDOT Unions for bargaining Unit E were engaged in a classification study in accordance with the provisions of the Master Labor Integration Agreement (MLIA), an agreement that was negotiated between and among MassDOT and all of the unions that represented MassDOT employees. (R1)

3. Pursuant to the Classification Study, the Appellant submitted a Job Analysis Questionnaire (JAQ) to a consultant for review. The consultant reviewed the Appellant’s classification of CE I and recommended that his position maintain its classification as a CE I. (R2 and R3)

4. On May 8, 2017, MassDOT and the CMU reached a Memorandum of Understanding (MOA) resolving the Classification Study. Under this MOA, the Appellant was recommended to remain classified as a CE I although he had the right to appeal this determination in accordance with the MOA and G.L. c. 30, s. 49. (R4)

5. The Appellant had already submitted a traditional Chapter 30, Section 49 classification appeal to MassDOT on June 16, 2016. (Stipulated Fact)

6. Pursuant to the MOA, MassDOT, on January 3, 2019, after conducting an audit interview, notified the Appellant that his request for reclassification to CE II was denied, concluding that he was properly classified as a CE I. (Stipulated Facts)

7. The Appellant appealed MassDOT’s denial to HRD. HRD affirmed MassDOT’s decision and denied the Appellant’s appeal on February 27, 2019. This appeal to the Commission by the Appellant followed. (Stipulated Facts)

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. In the event of a judicial appeal, the appealing party would be responsible for using the recording to have a transcript prepared.

Job Specifications

8. The Classification Specifications for the Civil Engineer, approved in 1989, define the CE I position as the entry level professional job in the series, the CE II as the second level professional job in the series, and the CE III as the first level supervisory job in the series. (R14)

9. The examples of duties common to all levels in the series are:

- A. Prepares and/or reviews plans, designs, specifications, and cost estimates for elements of engineering projects such as the construction or maintenance of highways, bridges or facilities.
- B. Provides engineering data for the preparation and review of engineering or environmental reports and studies.
- C. Performs calculations such as those related to survey traverses, traffic forecasting, soil capacity, groundwater flow, and quantity of materials by using calculators, computers and other instruments.
- D. Writes memoranda, letters and technical or general reports to supervisors concerning the status of engineering projects or problems.
- E. Analyzes changes in scope of work during design and/or construction of projects to recommend corrective action.
- F. Conducts field investigations such as those needed to gather information needed to resolve construction, maintenance, environmental or traffic problems.
- G. Recommends modifications to plans, specifications, and engineering agreements for elements of engineering projects.
- H. Reviews applications for licenses or permits for the transportation of materials and for the construction of projects in order to make recommendations to supervisors for approval.
- I. Approves construction and service contract payment estimates and/or invoices for materials, equipment and supplies.
- J. Inspects construction operations, such as drainage, steel placement, paving or concrete to ensure that work is being performed according to specifications.**
- K. Inspects maintenance work, such as highway landscaping, repaving operations, and snow and ice removal.
- L. Acts as resident engineer on projects, such as intersections reconstruction and traffic signal installation.**
- M. Performs engineering surveys, including the operation of transits, levels and other surveying instruments.
- N. Acts as Chief of Party in performing surveys for taking detail or laying out constructions projects.
- O. Performs related duties, such as collecting, compiling and correlating engineering and environmental data; reading manufacturers' publications and meeting with manufacturers' representatives to keep abreast of latest technical advances, new products, product prices, safety hazards and specification; maintaining records; providing information on such matters as department procedures and applicable standards; operating technical equipment and devices and attending meetings and conferences. (emphasis added) (R14)

10. The Classification Specifications indicate in the section called "Differences Between Levels in Series" that a CE II performs the following ten additional duties:

- A. Prepare and/or review plans, specifications and cost estimates for engineering projects, such as intersection upgrading, repaving projects, box culverts and single span bridges.
- B. Prepare and/or review engineering or environmental reports and studies.
- C. Recommend alternate methods of construction and/or substitution of materials specified to resolve problems as they occur.
- D. Determine feasibility of proposed construction through on site inspection, discussions and review of available data.
- E. Conduct field investigations to determine the necessity of repair or reconstruction of roads or structures.
- F. Act as resident engineer on projects such as multi lane intersection reconstruction; traffic signal installation, including control loops and turn signals; two lane highway construction or reconstruction in a rural setting.**
- G. Inspect construction operations** such as single span bridges.
- H. Act as chief of a survey party in performing surveys of a high order.
- I. Supervise maintenance work such as highway landscaping, repairing operations and snow and ice removal.
- J. Collect and analyze traffic flow data and make speed control studies. (emphasis added) (R14)

11. The duties most applicable to the Construction division at MassDOT are duties F & G. (Testimony of Maloy)

12. As referenced above, both CE Is and CE IIs can be assigned as Resident Engineers and both CE Is and CE IIs can be assigned to inspect construction operations. The distinction between the work of a CE I and CE II relates more to the *size and complexity* of the project assigned to the employee, discussed in more detail below regarding "Guidelines for the Assignment of Resident Engineers." (Testimony of Maloy; R14, R19)

13. Tom Maloy has been the District 4 Construction Engineer since February 2010. He is responsible for administering all of the construction projects in District 4. He has been employed at MassDOT or its predecessor since 1991. (Testimony of Maloy)

14. In terms of the most direct oversight over construction projects, MassDOT utilizes employees in the functional role of Resident Engineers and Assistant Resident Engineers. Depending on the size and complexity of the project, those functional roles can often be performed by CE Is, CE IIs, CE IIIs; General Construction Inspectors (GCI) Is and GCI IIs. (Testimony of Maloy)

15. The Resident Engineer is the person assigned to oversee the day-to-day operations of the construction project. MassHighway, a predecessor agency to MassDOT, produced "Guidelines for the Assignment of Resident Engineers." (Guidelines) for the functional role of Resident Engineer I, II and III. The Guidelines: a) list what classification titles can serve as RE I, RE II and RE III;

and b) identifies the types and complexity of each project that can be assigned to an RE I, RE II and RE III. (R19)

16. According to the Guidelines, the functional role of RE I can be performed by a CE I, a GC I or Environmental Analyst I. (R19)

17. Under the Category “Highway Construction”, the Guidelines state that the work associated with an RE I “includes the construction or reconstruction of two-lane roadways on existing or new locations. Construction activities may include minor geometric modifications, including widening, vertical profile and horizontal alignment, safety improvements, sidewalks, drainage improvements and pavement markings and signs. This work also includes the construction of bike paths.” (emphasis added) (R19)

18. The Guidelines state that that the work associated with an RE II “includes the construction or reconstruction of multi-lane roadways on existing or new locations. Construction activities may include simple grade separated interchanges such as diamonds and cloverleafs, roadway widenings that increase capacity, safety improvements, drainage improvements and pavement markings and signs.” (emphasis added) (R19)

19. Under the Category “Surfacing”, the Guidelines state that the work associated with an RE I “includes the cold planning, resurfacing and repaving of two-lane roadways. The work may also include the resurfacing of sidewalks and parking lots.” (emphasis added) (R19)

20. The Guidelines state that the work associated with an RE II “includes the cold planning, resurfacing and repaving of multi-lane roadways and highway ramps. The work can include divided and undivided roadways and more involved traffic management or specialized pavements.” (emphasis added) (R19)

21. Under the Category “Traffic Signals”, the Guidelines state that the work associated with an RE I “includes traffic signal betterment contracts, pedestrian signal locations, and single or multiple traffic signal locations for two lane roadways. The work also includes minor widening for turning lanes or geometric improvements, other safety improvements and pavement markings and signs.” (R19)

22. The Guidelines state that work associated with an RE II “includes single or multiple traffic signal locations for multi-lane roadways. The work also includes roadway widening that increases capacity through the addition of travel lanes, the installation of strain poles and the interconnection / coordination between signal locations.” (R19)

23. Area Engineers that report to Mr. Maloy make recommendations to Mr. Maloy regarding whether a construction project should be assigned an RE I, RE II or RE III. Mr. Maloy, after review, signs a “Notice of Assignment of Resident Engineer” for each project. (Testimony of Maloy; R20 & R21)

24. Regardless of whether someone is assigned as an RE I, RE II or RE III, they are referred to, on a day-to-day basis, as the “Resident Engineer” of that particular project. (Testimony of Maloy)

25. MassDOT, and Mr. Maloy in particular, try to ensure that RE I, II and III functional jobs are assigned to employees consistent with the guidelines (i.e. - an RE I job would be assigned to a CE I.) (Testimony of Maloy)

26. In those limited circumstances where MassDOT, because of resource issues, cannot strictly abide by the Guidelines (i.e. - a CE I is assigned to work a project where an RE II is needed), that employee can request to receive additional compensation for working temporarily out-of-grade. (Testimony of Maloy)

27. An Assistant Resident Engineer can also be assigned to a construction project. They are there to *support* the Resident Engineer, primarily focused on conducting inspections (i.e. - ensure that the proper concrete is being poured, etc.). (Testimony of Maloy)

28. Depending on the size and complexity of a project, a Resident Engineer could be assigned more than one Assistant Resident Engineer to conduct inspections. The Resident Engineer is typically onsite, but the Resident Engineer would be focusing more on administrative items, depending on the size and complexity of the project. (Testimony of Maloy)

29. Employees typically assigned to the functional title of Assistant Resident Engineer can be CE Is, CE IIs, GCI Is, and GCI IIs, with the size and complexity of the project being the most important factor. (Testimony of Maloy)

30. “Area Engineers”, who work below Mr. Maloy, typically assemble a team to support the Resident Engineer, based upon the size and complexity of the project and the available resources available across the District. (Testimony of Maloy)

31. Sometimes employees can be pulled off one project (i.e. - a project is wrapping up) and assigned to a new project. (Testimony of Maloy)

32. During Mr. Maloy’s tenure, the Appellant has never been assigned to serve as a Resident Engineer on any construction project. Rather, Mr. Maloy has been assigned to serve as an Assistant Resident Engineer on various construction projects. (Testimony of Maloy)

33. The Appellant filed his reclassification appeal with MassDOT on June 16, 2016. (Stipulated Fact)

34. The construction projects to which the Appellant was assigned as an Assistant Resident Engineer on around that time included: a) Somerville - East Broadway project; b) Melrose - Lebanon Street project; c) Lawrence - Union Street / Canal project. (R20)

35. Harry B. Thompson III was the Resident Engineer on the Melrose - Lebanon Street project between 2015 and 2016. (Testimony of Thompson and R20)

36. Mr. Thompson has worked for MassDOT for twenty-eight years. He has served as a CE I, CE II and CE III. He has been assigned as both an Assistant Resident Engineer and Resident Engineer. (Testimony of Thompson)

37. For the past ten years, Mr. Thompson was a CE III who would get assigned as a Resident Engineer. (Testimony of Thompson)

38. Mr. Thompson describes a larger, complex project as typically being more than \$7M. (Testimony of Thompson) The cost of the Melrose project was between \$3.8M to \$4.5M. (R18 and R20)

39. In regard to the above-referenced Melrose project, Mr. Thompson primarily assigned the Appellant to “reconcile” various invoices with the work performed by the contractor since there was a significant backlog of invoices which had resulted in the contractor’s payment being delayed. (Testimony of Thompson)

40. Mr. Thompson was typically on-site at the Melrose project. Thus, the Appellant was not required to fill-in as the Resident Engineer. (Testimony of Thompson)

41. The Somerville - Broadway project (2014-2015) was a \$7.9M project. The person assigned to be the Resident Engineer was a CE II. The Appellant served as an Assistant Resident Engineer on that project. The project included roadway and sidewalk reconstruction, including the construction on new water, drain and sewer lines, maintenance or replacement of other utilities, street lighting, traffic signal system, new curbing, concrete paver crosswalks, street trees, signing, pavement markings and other streetscape items as shown on the contract drawings. (R20; R21)

42. The Lawrence - Union Street Project (2015 - 2016) was a \$655,000 project. The person assigned to be the Resident Engineer was a GC I. The Appellant served as the Assistant Resident Engineer. (R20; R21)

43. The Lawrence - Union Street project was a streetscape enhancement and pedestrian safety improvement project that involved reconstruction of a sidewalk and improved traffic signals and crosswalks, including ADA-compliant features; and a new 20-space parking lot. (Testimony of Appellant and R20)

44. A fourth project, which began *after* the Appellant filed his reclassification request with MassDOT, was a “Safe Roads” project named the “Somerville - Mystic / Temple” project. The person assigned to be the Resident Engineer was a GC II. The Appellant was the Assistant Resident Engineer. (R21) The bid amount on that project was \$944,000. (R18)

45. In his Interview Guide, the Appellant listed his duties and percentage of time spent on each as follows:

A. Assist with administering construction contracts by monitoring/inspecting contractor’s work for compliance with plans, specifications and schedules, monitoring and coordinating the collection of material for samples for testing, coordinating construction survey and traffic signal inspections, conducting and/or witnessing all testing upon contract materials, equipment, installation, etc., establishing and maintaining effective working relationships with all parties, providing and maintaining construction photos. (40%)

B. Assist with construction management activities by participating in and conducting planning, preconstruction, coordination, progress, scheduling and field staff meetings, preparing project

documentation including inspector’s daily report, force account and construction records, reviewing plan specifications and updating logs in regard to RFIs, submittals, and shop drawings, and change orders, making field measurements and maintaining as-built and red-lined drawing records, reviewing and monitoring contractor’s approved construction baseline schedule, preparing and initiating field change notices, and ensuring all required tests, operations, measurements, and inspections are scheduled, ordered and satisfactorily completed and documented. (30%)

C. Assist in the approval of contractor payments by verifying, reviewing and preparing quantity and progress estimates and payment forms for payments. (10%)

D. Assists in negotiating and preparing documentation for change order or claims by reviewing and evaluating change order requests or claims, preparing engineer’s estimate for change order, and maintaining records on unit price quantities for material, labor and equipment. (10%)

E. Monitors and coordinates safety and quality control on projects by ensuring project is constructed in accordance with applicable safety regulations, reporting safety, traffic hazards and defective work to the contractor for correction, and preparing and issuing appropriate reports for compliance documentation. (10%) (Exhibit 6)

LEGAL STANDARD

“Any manager or employee of the commonwealth objecting to any provision of the classification of his office or position may appeal in writing to the personnel administrator and shall be entitled to a hearing upon such appeal Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it.” G.L. c. 30, § 49.

The Appellant has the burden of proving that he is improperly classified. To do so, he must show that he performs the duties of the CE II title more than 50% of the time, on a regular basis. *Gaffey v. Dep’t of Revenue*, 24 MCSR 380, 381 (2011); *Bhandari v. Exec. Office of Admin. and Finance*, 28 MCSR 9 (2015) (finding that “in order to justify a reclassification, an employee must establish that he is performing the duties encompassed within the higher level position a majority of the time . . .”).

ANALYSIS

The level distinguishing duties (LDDs) associated with the *classification* titles of Civil Engineer I, II and III are inexorably tied to MassDOT guidelines related to the *functional* titles of Resident Engineer I, II and III. District Construction Engineers, after assessing the size and complexity of a construction project, determine whether a project should be overseen by a RE I, II or III. Once that has been determined, MassDOT then looks to fill those functional positions with employees with corresponding classification titles of CE I, II and III. There is actually a symmetry between the functional and classification titles, with the job specifications indicating that Civil Engineers at all three levels can serve as Resident Engineers and oversee operations and inspections. In short, both the functional and classification titles are tied to the size and complexity of the project.

First, the Appellant acknowledges that he has never been assigned and/or designated to serve as a Resident Engineer. Rather, he argues, in part, that on some projects to which he has been assigned as an Assistant Resident Engineer, he has, at times, filled in for and served as the de facto Resident Engineer. Since MassDOT acknowledges that CE IIs may, at times, serve as Assistant Resident Engineers, I have looked at the same guiding principles related to size and complexity of project, while keeping in mind that the Assistant Resident Engineer is designed to do exactly what the title says—*assist* the Resident Engineer.

James F. Norton, Esq.
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10 Park Plaza
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* * * * *

The Appellant's own witness acknowledged that, in regard to the project (Melrose - Lebanon Street) in which he (the witness) served as Resident Engineer, the Appellant, at almost all times, served strictly as the *Assistant* Resident Engineer. Further, and just as importantly, the Appellant's witness acknowledged that a project typically needs to exceed \$7M in costs in order to be considered larger in scope and responsibilities. The Melrose - Lebanon project fell a few million short of that threshold. Finally, the Appellant's witness acknowledged that the Appellant was primarily focused on one discrete task on the project: fixing a backlog of invoices in which the contractor had gone unpaid for many months. While, based on a review of the record, it appears that the Appellant excelled at this task, it works against the Appellant's argument that he had been performing as the de facto Resident Engineer on large complex, projects.

While the Somerville - East Broadway project was just over \$7M, the Appellant served as an Assistant Resident Engineer and reported to a CE II. Also, the time worked on that project was only about one year.

The two other projects cited by the Appellant were both less than \$1M in cost, did not appear to meet the definition of complex, and, in one instance, was being coordinated by a Resident Engineer who held the classification title of CE I.

The Appellant is a highly-educated, competent, detail-oriented employee who is passionate about the work he does for MassDOT and the Commonwealth. He has not shown, however, that he performs the level distinguishing duties of a CE II a majority of the time, the issue the Commission is responsible for ruling on here.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. C-19-067 is hereby *denied*.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on July 30, 2020.

Notice to:

Herrio Lamothe
[Address redacted]

MATTHEW WRIGHT

v.

CITY OF LAWRENCE

G1-17-191

July 16, 2020

Cynthia Ittleman, Commissioner

Bypass Appeal-Original Appointment as Firefighter-Residency Requirement-Electronic Records—Relying on flawed electronic information from Lexis Nexis and other sources, the City of Lawrence wrongfully bypassed this candidate for original appointment as a firefighter after concluding he was a resident of Methuen and not Lawrence during the year prior to taking the 2016 firefighter civil service exam. The City never gave this candidate the opportunity to provide residency information before bypassing him and, in fact, the first time he was able to provide records documenting his Lawrence residency was before the Commission.

Thomas J. Gleason, Esq.

Caroline Thibeault, Esq.

Nicholas Dominello, Esq.¹

DECISION

On September 26, 2017, the Appellant, Matthew Wright (Appellant), pursuant to G.L. c. 31, s. 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Lawrence (City or Lawrence) to bypass him for appointment to the position of permanent, full-time firefighter with the Lawrence Fire Department (“LFD”). A pre-hearing conference was held on October 31, 2017 at the Armand P. Mercier Community Center in Lowell, Massachusetts and a full hearing was held on January 8, 2018 at the same location.² The hearing was digitally recorded and both parties were provided a copy of the recording of the hearing.³ The parties submitted post hearing briefs. For the reasons stated herein, the appeal is allowed.

1. At the time of the hearing, Respondent’s counsels were associated with another firm. I encourage then-Respondent’s counsel to notify the appropriate person at their prior firm.

2. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

3. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

4. The exhibits include twelve (12) for the Respondent (R.Ex.) and twenty-three (23) for the Appellant (A.Ex.) entered at the hearing, as well as fifteen (15) documents ordered by the Commission at the hearing to be produced thereafter (PH. Ex.) The Respondent states that its Exhibit 6, the CJIS License to Carry a Firearm printout, printed November 7, 2017, is identical in substance to the report that was generated by the Lawrence Police Department during its residency investigation

FINDINGS OF FACT

Based on the fifty (50) exhibits entered into evidence⁴, the stipulations of the parties and the testimony of the following witnesses:

Called by the Respondent:

- Frank Bonet, Director of Personnel for the City of Lawrence

Called by the Appellant:

- Matthew Wright, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, rules, and policies, a preponderance of the credible evidence, and reasonable inferences from the evidence, establishes the following findings of fact:

BACKGROUND

1. The Appellant is a veteran who has served overseas, has also served in the Army National Guard for six (6) years and has a Bachelor’s degree in criminal justice. In addition, at the time of the hearing in this appeal, the Appellant had been working at an area hospital in security for approximately (2) years. Prior to that, the Appellant worked at the Middlesex Sheriff’s office for approximately two (2) years. (Testimony of Appellant)

2. The Appellant took and passed the April 16, 2016 Firefighter civil service exam with a score of 92. (Stipulation)

3. In January 2017, the City sought to appoint three (3) permanent, full-time firefighters to the Lawrence Fire Department. (Stipulation)

4. HRD issued Certification # 04314, dated January 3, 2017, upon which the Appellant was listed fourth among those who signed the certification indicating that they would accept employment. (Stipulation)

5. The City ultimately appointed four (4) applicants, all of whom were ranked below the Appellant on Certification # 04314. (Stipulation)⁵

for the Lawrence Fire Department and that because the LPD did not keep a hard copy of the report it generated, a second copy was generated for the purpose of this appeal. Regarding Respondent’s Exhibit 7, the Respondent states that the version that was introduced into evidence is identical in substance to the report that was generated by the LPD during its residency investigation but because the LPD did not keep a hard copy of the report it generated, a second copy was generated for the purpose of this appeal. Finally, the Respondent notes that while its Exhibit 12 is a copy of G.L. c. 140, s. 129B regarding firearm licenses generally, the more applicable citation is to G.L. c. 140, s. 131(l), which it references in its post-hearing brief.

5. The City’s decision to hire a fourth applicant was made after the City discovered that it had bypassed an individual on Certification # 04314 in error. After discovering the error, the Personnel Department sought and received permission from the Chief of the Fire Department and the Human Resources Division (“HRD”) to extend a conditional offer of employment to that individual. (Testimony of Bonet)

Appellant's Application and Residency Investigation

6. On or about January 8, 2017, the Appellant filled out and submitted an "Application for Employment" form to the City's Personnel Department. (R.Exs. 3 and 4; Testimony of Bonet)

7. The Appellant indicated that he qualified for the Lawrence residency preference. (R.Ex. 2)

8. Pursuant to the City's hiring procedure, the Personnel Department provided the names, stated addresses, dates of birth, and social security numbers of the applicants, including the Appellant's, to the Lawrence Police Department ("LPD") to conduct a residency investigation. (Testimony of Bonet)

9. The task of conducting the City's residency investigations for employment candidates for the Lawrence Fire Department (LFD) is delegated to the Lawrence Police Department (LPD) by the City Personnel Department. (Testimony of Bonet)

10. The residency investigation for applicants to the LFD involves the review by LPD personnel of LexisNexis Public Records reports, records from the Registry of Motor Vehicles (RMV), and licenses held by the applicants. It does not involve interviews or home visits. (Testimony of Bonet)

11. Pursuant to G.L. c. 31, s. 58, the relevant period for purposes of determining eligibility for residency preference is one (1) year prior to the pertinent civil service exam. Since the Appellant took the April 16, 2016 firefighter civil service exam, the residency preference period was April 16, 2015 through April 15, 2016. (Administrative Notice)

12. The residency preference investigation by the LPD found:

a. The Appellant's driver's license was issued to the Appellant in 2014 and would expire in 2019 at an address in Methuen.

b. The Appellant's license to carry a firearm (LTC) was issued by the Methuen Police Department to the Appellant in 2011 and expired in 2017 at an address in Methuen.

c. The information obtained by the LPD stated, in pertinent part, that:

- i. the Appellant had a Methuen address in October 2015,
- ii. the Appellant's voter registration was in Methuen, although not all of the dates of the voter registration information were provided,
- iii. the Appellant had a car registered in Methuen between 2013 and 2017. R.Ex. 7; Testimony of Bonet)

13. The Appellant did not notify the RMV that his address had changed to Lawrence and he did not notify the Methuen Police (regarding the LTC it had issued to the Appellant) that he had moved to Lawrence and he did not notify the LPD that he had an LTC and had moved to Lawrence. (R.Ex. 7; Testimony of Bonet and Appellant) G.L. c. 140, s. 131(l) requires that an LTC licensee notify the police in the municipality in which the LTC was issued and the police in the municipality to which the licensee that he is moving. (G.L. c. 140, s. 131(l))

14. There are errors in the residence information contained in the residency information obtained by the LPD. Specifically, the information erroneously stated that:

the Appellant resided on Broadway in Methuen;

the Appellant lived in Methuen in 2015;

the Appellant lived on Hideaway Lane in Methuen in March 2011; and

the Appellant bought a Camaro in 2013.

(Testimony of Appellant)

15. Then-LFD Chief Moriarty and Captain Martin interviewed the Appellant on March 17, 2017. The LFD does not maintain a written list of the questions it asks at interviews. The question categories are: education, relevant job experience, supervisory experience, technical skills, interpersonal skills, motivation, strengths, weaknesses and overall ranking. The Appellant's interview rankings were not a basis for the Appellant's bypass. (PH.Ex. 10) The interviewers did not ask the Appellant about his residence. (Testimony of Appellant; Post-Hearing Affidavit of Appellant) Since the LPD investigates residency, Chief Moriarty and Capt. Martin did not ask the candidates about the candidates' residences at the Fire Department interviews. (Testimony of Bonet)

16. The following documents indicate that the Appellant resided in Lawrence continuously for at least the one (1) year prior to the 2016 firefighter exam that the Appellant took and passed:

a. the initial and renewing leases for the one (1) apartment in Lawrence where the Appellant lived for:

- i. June 2014 to June 2015
- ii. June 2015 to January 2016
- iii. February 2016 to August 2016

b. the apartment complex ledger of charges and payments for rent and associated expenses for the Appellant's apartment in Lawrence:

- i. from April 2014 through January 2016
- ii. from February 2016 through August 2016

c. electricity bill payments for the Appellant's Lawrence apartment from March 2015 through March 2016

d. the Appellant's W-2 Wage and Tax Statements for 2015 and 2016

e. the Appellant's car insurance policy for April 2015 to April 2016

(A.Exs. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 11)

17. By letter dated April 12, 2017, the City informed HRD that it was bypassing the Appellant for lack of residency during the one year prior to the 2016 firefighter exam, stating that the Appellant had provided "conflicting information" in that regard. (R.Ex. 9) By email dated September 7, 2017, HRD informed the Appellant HRD that it accepted the reason provided by the City for the

Appellant’s “non-selection” and attached the City’s April 12 letter to HRD in this regard. (Administrative Notice)

18. The Appellant timely filed this appeal. (Administrative Notice)

APPLICABLE LAW

G.L. c. 31, the civil service statute, is based on basic merit principles. That phrase is defined in section 1 of the G.L. c. 31, in part as,

(a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... ; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens

Id.

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).

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).

ANALYSIS

The City has failed to establish by a preponderance of the evidence that the Appellant was not a resident of Lawrence for one year prior to taking the April 2016 firefighter civil service exam. The City Personnel Department assigns to the LPD the task of verifying a candidate’s residency for the one year prior to the pertinent civil service exam under G.L. c. 31, s. 58. In this case, that one year period was April 2015 to April 2016. The LPD researched the Appellant’s residency, checking certain online sources, and reported that the sources checked indicated that he resided in Methuen for at least part of the pertinent time period. For example, the information appeared to indicate that he was registered to vote, he registered a car and he lived in multiple places all in Methuen. When the Appellant was interviewed by the LFD, no one asked him about his residency. On the Appellant’s application, the only address provided was the Appellant’s then address in Methuen.⁶ However, the bypass letter asserts that the Appellant provided “conflicting information” about his address in the one year prior to the civil service exam.

At the Commission hearing, the Appellant had his first opportunity to provide information about his residence the year before the exam. It includes ten (10) documents indicating that he did indeed live in Lawrence for the pertinent time. The documents include the multiple leases in the Appellant’s name at the Lawrence address, W-2s for both 2015 and 2016, a car insurance policy for that time period, rent and related payments for that time period, and electricity charges for that time period. In addition, some of the information obtained by the LPD was erroneous stating, for example, that he bought a car while he was overseas at the time on active military duty in 2013 but he did not buy the car until 2016 and the erroneous information stated that the Appellant lived at two (2) addresses in Methuen where the Appellant had not lived (one address in 2011; another address in 2015). Thus, the City failed to establish by a preponderance of the evidence that the Appellant did not reside in Lawrence between April 2015 and April 2016. Moreover, it was not the Appellant who provided “conflicting information” since he was not afforded the opportunity to provide added or clarifying residence information and the only address he provided on his application that is in the record here provides his then-current address in Methuen.

CONCLUSION

For the reasons established herein, the Appellant’s appeal under Docket No. G1-17-191, is hereby **allowed**. Therefore, pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of 1993, the Commission hereby orders HRD, or the City of Lawrence, as delegatee, to:

- 1) place the name of Matthew Wright at the top of the existing or next Certification issued to the City of Lawrence for the position of permanent fulltime firefighter until such time as he is appointed or bypassed.

6. The LFD application in the record is only four (4) pages long and there is only one place to indicate a residence and that is on the first page, where the candidate is asked to fill in his name and, presumably, current address. (R.Ex. 3)

2) If Mr. Wright is appointed, he shall receive the same civil service seniority date as those candidates appointed from Certification No. 04314. This retroactive civil service seniority date is related solely to civil service seniority and is not intended to provide the Appellant with any additional compensation or benefits, including creditable time towards retirement.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 30, 2020.

Notice to:

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* * * * *

Investigation Re: CITY OF NORTHAMPTON LABOR SERVICE APPOINTMENTS

Tracking No.: I-18-029

August 13, 2020

Christopher C. Bowman, Chairman

Investigation by Commission-Northampton Labor Service Appointments-Tenure-Probationary Period—The Commission closed out its investigation into certain Northampton labor service appointments after the City and HRD developed a plan to ensure that all labor service appointments and promotions be made consistent with civil service rules on a go-forward basis. The decision provides tenure to employees hired into non-temporary labor service positions who have completed six months of employment and for those who will complete their probationary period.

RESULTS OF COMMISSION INVESTIGATION AND ORDERS PURSUANT TO CHAPTER 310 OF THE ACTS OF 1993

On or about March 15, 2018, following an appeal hearing before the Civil Service Commission (Commission) in *Dean Downer v. City of Northampton*, CSC Case No. D1-17-133 [31 MCSR 98 (2018)], where an issue was raised about whether the City of Northampton (City) was properly making labor service appointments, the Commission ordered, among other things, that, absent evidence the City has removed certain labor service positions from civil service, the City shall request, within three (3) months, that the state's Human Resources Division (HRD) conduct an audit of the City's practices regarding labor service appointments and promotions and make recommendations how the City can begin complying with the civil service law regarding such appointments and promotions.

2. The Decision also ordered that, following the audit, the City would consult with HRD and representatives from any local unions representing incumbent labor service employees, to provide the Commission with a plan to ensure compliance with the civil service law on a going-forward basis and provide relief (i.e. - civil service permanency) to any incumbent civil service employee impacted by the City's failure to comply with the civil service law and rules with respect to labor service appointments and promotions.

3. HRD completed the audit, identified which of the City's job titles fell under labor service and recommended the appropriate labor service titles from the "Municlass Manual".

4. The City provided this information to the officers of the Northampton Association of Municipal Employees (N.A.M.E.); counsel for N.A.M.E., and the impacted incumbent employees, including those employees who may have previously held a labor service position but were provisionally promoted to an official service position.

5. Specifically, each impacted employee was provided with their proposed labor service title and proposed civil service permanency

date. A limited number of employees had inquiries which were addressed by the City and shared with the Commission. Ultimately, no impacted employee, after being given the opportunity to do so, has objected to the proposed title and/or civil service permanency date proposed by the City.

6. Finally, the City, in concert with HRD, has developed a plan to ensure that all labor service appointments and promotions, on a going forward basis, will be made consistent with the civil service law and rules.

For all of the above reasons, the Commission, pursuant to its authority under Chapter 310 of the Acts of 1993, hereby orders the following:

1. All City of Northampton employees hired into non-temporary labor service positions who have completed at least six (6) months of employment with the City, shall be deemed permanent, tenured, civil service employees in their current, non-temporary labor service positions to be effective as of the date of this decision.

2. The civil service seniority date of any individual referenced in Paragraph 1 shall be the individual's first day of service as a labor service employee with the City.

3. For those employees hired into non-temporary labor service positions who have not completed six (6) months of employment with the City as of the date of this decision, they shall be deemed permanent / tenured upon serving their six (6) month probationary period.

4. Any individual referenced in Paragraph 1 who was subsequently promoted to an official service title for which there was no eligible list shall be considered provisionally promoted into that official service title and retain their labor service appointment date and all rights that come with that. (The City provided an attachment which includes the names, titles and seniority dates of impacted employees.)

5. The City shall not make any provisional appointments or provisional promotions into labor service titles except as permitted under the provisions provided by law and shall comply with all civil service laws and rules regarding labor service appointments and promotions.¹

6. The City shall provide a copy of this decision to all impacted employees.

SO ORDERED.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein & Tivnan, Commissioners [Camuso—absent]), on August 13, 2020

Notice to:

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* * * * *

1. Failure by the City to maintain appropriate labor service rosters shall not be justification to make provisional appointment.

LINCOLN HOLSKE

v.

HUMAN RESOURCES DIVISION

B2-20-053

*August 27, 2020**Christopher C. Bowman, Chairman*

Examination Appeal-Fire Lieutenant Promotional Exam-Failure to Complete Online Component—The Commission affirmed an HRD decision refusing to grant E&E credits on a promotional exam for Fire Lieutenant where the candidate was unable to show he had completed the E&E component online.

DECISION ON RESPONDENT'S MOTION FOR SUMMARY DECISION

On March 19, 2020, the Appellant, Lincoln S. Holske (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to not award him any education and experience (E&E) credit for the Fire Lt. examination.

2. On May 19, 2020, I held a pre-hearing conference via video-conference which was attended by the Appellant and counsel for HRD.

3. As part of the pre-hearing conference, the parties stipulated to the following:

- a. On 11/16/19, the Appellant took the Fire Lt. Examination.
- b. The deadline for completing the E&E component of the examination was 11/23/19.
- c. Although the Appellant has a recollection of completing the online E&E component on 11/21/19, HRD has no record of the Appellant completing this E&E component.
- d. The Appellant did not receive a confirmation email confirming that he completed the E&E online component of the examination.
- e. The Appellant did submit supporting documentation to HRD on 11/21/19 including a diploma and employment verification form.
- f. HRD sent the Appellant an email confirming receipt of the documents.
- g. On 2/3/20, the Appellant received his score.
- h. He received a written score of 71 and an E&E score of 0.
- i. His total weighted score was 57.

j. The Appellant filed an appeal with HRD on 2/4/20.

k. HRD denied the Appellant's appeal on 3/2/20.

l. The Appellant filed a timely appeal with the Commission on 3/19/20.

m. The eligible list for Mansfield Fire Lt. was established on 5/3/20.

n. The Appellant is not on the eligible list.

o. Two candidates are on the eligible list.

4. At the pre-hearing conference, the Appellant reiterated his belief that he did indeed complete the E&E online component and submitted the documentation the same day. Upon receiving the confirmation email from HRD regarding the supporting documentation, he believed that this was the confirmation email referenced in the instructions.

5. HRD had 30 days to file a Motion for Summary Decision and the Appellant had 30 days thereafter to file a reply.

6. HRD filed a Motion for Summary Decision. The Appellant did not submit a reply.

LEGAL STANDARD FOR MOTION FOR SUMMARY DECISION

A motion for summary decision may be filed pursuant to 801 CMR 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". *See, e.g., Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School v. Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005).

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons aggrieved by "... any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations" It provides, *inter alia*, "No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record."

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: "conduct[ing] examinations for purposes of establishing eligible lists." G.L. c. 31, § 22 states in relevant part: "In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held."

G.L. c. 31 § 24 allows for review by the Commission of exam appeals. Pursuant to § 24, "...[t]he commission shall not allow credit for training or experience unless such training or experience

was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator.”

In *Cataldo v. Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that “... under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as ‘credit for such training and experience as of the time designated by HRD’”.

ANALYSIS

The facts presented as part of this appeal are not new to the Commission. In summary, promotional examinations, such as the one in question here, consist of two (2) components: the traditional written examination and the E&E component. HRD provides detailed instructions via email regarding how and when to complete the online E&E component of the examination. Most importantly, applicants are told that, upon completion of the E&E component, the applicant will receive a confirmation email—and that the component is not complete unless and until the applicant receives this confirmation email.

Here, it is undisputed that Mr. Holske sat for the written component of the Fire Lieutenant examination on November 16, 2019. He had until November 23, 2019 to complete the online E&E component of the examination. According to Mr. Holske, on November 21, 2019, he completed the E&E module and submitted it electronically. Mr. Holske acknowledges, however, that he never received a confirmation email from HRD stating that the E&E examination component was completed. HRD has no record of Mr. Holske completing the E&E component, but, rather, only receiving supporting documentation.

While I am not unsympathetic to Mr. Holske’s plight here, it is undisputed that: 1) HRD has no record showing that Mr. Holske completed the E&E component of the examination; 2) Mr. Holske did not receive a confirmation email verifying that he completed the E&E component; and, thus, 3) he is unable to show that he followed the instructions and actually completed the E&E component of this examination (i.e., he did not contest HRD’s motion and raised no factual dispute as to whether or not he completed the E&E component and received a confirmation as required.) Thus, this is not a case in which there is a genuine factual dispute that would require an evidentiary hearing.

Consistent with a series of appeals regarding this same issue, in which applicants have been unable to show that they followed instructions and submitted the online E&E claim, intervention by the Commission is not warranted as the Appellant cannot show that he was harmed through no fault of his own.

For this reason, Mr. Holske’s appeal under Docket No. B2-20-053 is *dismissed*.

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on August 27, 2020.

Notice to:

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* * * * *

KENNETH KOCERHA

v.

HUMAN RESOURCES DIVISION

B2-20-049

August 27, 2020
Christopher C. Bowman, Chairman

Examination Appeal-Fair Test Appeal-Fire Captain Promotional Exam-Questions Not Included in the Reading Material—Once again the Commission dismissed a fair test appeal from a Fire Lieutenant after HRD showed that it had effectively removed from scoring the 14 questions on the exam that were not covered in the reading. The Commission has previously concluded that a question “defect” rate of 20% does not void an exam so long as the defective questions are removed from scoring.

DECISION ON HRD’S MOTION TO DISMISS

On March 12, 2020, the Appellant, Kenneth Kocerha (Appellant), a Fire Lieutenant, filed an appeal with the Civil Service Commission (Commission), arguing that the recent Fire Captain examination administered by the state’s Human Resources Division (HRD) was not a “fair test”, as according to the Appellant, 14 of the 80 questions were either not included in the reading material or were questions in which multiple answers were acceptable.

2. On May 19, 2020, I held a pre-hearing via videoconference which was attended by the Appellant, his counsel and counsel for HRD.

3. As part of the pre-hearing conference, the parties stipulated to the following:

- a. On 11/16/19, the Appellant took the Fire Captain examination.
- b. On 11/19/19, the Appellant filed a fair test appeal with HRD.
- c. On February 3, 2020, the scores were released.
- d. The Appellant received a score of 90.
- e. On March 3, 2020, HRD sent the Appellant a reply to this fair test appeal.

f. HRD's reply stated in part: "Your appeal has been denied. Be advised that all test questions that were presented from information outside the reading list have been accounted for and the results of these changes have been applied to the final scores for all candidates."

g. On March 4, 2020, the eligible list was established.

h. The Appellant is tied for 8th on the local eligible list.

i. On March 12, 2020, the Appellant filed a timely appeal with the Commission.

j. The Appellant has been serving as a Temporary Fire Captain since 2/7/20.

4. The Commission recently issued a series of decisions regarding a similar issue related to the Fire Lieutenant examination administered the same day (e.g. - *Pellizzaro v. Human Resources Division* [33 MCSR 172 (2020)]).

5. In the decisions related to the Fire Lieutenant examination, it was alleged that up to 13 of 80 questions were removed from the examination as they were not contained in the reading material.

6. Here, HRD indicated at the pre-hearing conference that the amount of questions removed for this reason from the Captain examination was "less than the Fire Lt. examination."

7. At the pre-hearing conference, HRD argued that the Commission should reach the same decision here as it did in the Fire Lt. Examinations.

8. Counsel for the Appellant argued that there are potential factual disputes which could distinguish this matter from the Fire Lt. Examinations (i.e. - was one entire section of the examination eliminated; or were the removal of questions disbursed across various sections?) At the pre-hearing conference, HRD stated that no examination topics were excluded as a result of the removal of certain questions.

9. HRD submitted a Motion to Dismiss and the Appellant submitted an opposition.

APPLICABLE LAW

G.L. c. 31, s. 2(b) states in part:

"No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."

G.L. c. 31, s. 22 states in part:

"An applicant may request the administrator to conduct a review of whether an examination taken by such applicant was a fair test of the applicant's fitness actually to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination."

G.L. c. 31, s. 24 states in part:

An applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three relative to (a) the marking of the applicant's answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination taken by such applicant was a fair test of the applicant's fitness to actually perform the primary or dominant duties of the position for which the examination was held. Such appeal shall be filed no later than seventeen days after the date of mailing of the decision of the administrator.

SUMMARY DISPOSITION STANDARD

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 CMR 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". See, e.g., *Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School v. Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005)

PARTIES' ARGUMENTS

HRD makes the same argument here that it did in *Pelizzaro*, arguing that, even if, after review, 14 of the 80 test questions were effectively removed from the examination because those questions were not referenced in the reading list, the Appellant cannot show that this promotional examination was not a fair test of his abilities to perform the duties of a Fire Captain. Further, HRD argues that the circumstances here are no different than the circumstances before the Commission when it decided *O'Neill v. Lowell and Human Resources Division*, 21 MCSR 683 (2008) (The Commission concluded that the "defect rate" of 20% did not, standing alone, rise to the level of proof necessary to deem the test unfair.)

The Appellant's brief, submitted by his counsel, includes unsupported statements or suggestions that: a) Dismissing this appeal will result in HRD being able to continue its "in competence (sic)"; b) the removed questions were part of some pre-planned, nefarious attempt by HRD to "change the scope of the exam"; c) the Commission has dismissed prior appeals dealing with identical issues because HRD is a "fellow State Administrative Agency" and/or because the Appellants were not represented by counsel. The brief goes on to raise a series of other hypothetical scenarios and questions which are not reflective of the undisputed facts in the instant appeal or are just farcical (i.e. - what if 40% of the questions were removed?; "If and when I go out expecting to buy a new car, I am not satisfied if I get a car that is eighty (80%) per cent (sic) of what I expected especially if I were told I was getting something one hundred (100%)."

ANALYSIS

The reality here is that the Commission has previously addressed when a test administered by HRD would not constitute a “fair test” warranting intervention by the Commission which could potentially result in the entire examination being rescinded. In *DiRado v. Civ. Serv. Comm’n*, 352 Mass. 130 (1967), the Massachusetts Supreme Judicial Court reviewed the Commission’s decision to cancel a ten-question examination for the position of artist. The Commission had determined that cancellation was appropriate where “some applicants had the advantage of using certain drawing aids which they had brought to the examination, whereas the appealing applicants had not brought aids with them because the notice of the examination gave no indication that their use would be permitted. *Id.* at 195. The Court upheld the Commission’s decision, noting that it had been “correct in deciding that the evidence showed that the use of drawing aids was a factor in the results of the examination, that the applicants at large had not been given an equal opportunity to use them, and that a new examination with uniform standards was the feasible way to provide an equal opportunity.” *Id.* at 196 Here, there is no allegation that the Appellant was treated differently (i.e. - unfairly) from any other applicant and/or that HRD did not apply uniform standards.

In *Boston Police Super. Officers Federation v. Boston Police Dep’t and HRD*, I-02-606 [21 MCSR 59] (2008), the Commission allowed a series of appeals where the subject matter relating to a “Rule 200” was not included in the reading material, but questions appeared on the examination related to this “Rule 200”. The Commission ordered that the applicants’ examinations be rescored after removing the “Rule 200” questions from the examination. Here, consistent with the Commission’s 2008 decision, HRD, after review, proactively removed those exam questions on the 2019 Fire Captain examination that were found not to be specifically referenced in the reading material.

In *O’Neil*, as referenced above, the Commission, after hearing, squarely addressed the central issue of the Appellant’s instant appeal: whether or not HRD’s decision to remove questions from the examination that were not referenced in the reading material made the test “unfair”? The answer was “no”. In *O’Neil*, the number of questions removed constituted 20% of the total questions. Here, even viewing the facts most favorably to the Appellant, the number of questions removed for the same reason is less than 20%.

The Appellant’s suggestion that the 14 questions removed could all involve one subject matter appears to be a red herring designed to distinguish the facts of this appeal from *O’Neil*. The Appellant never raised such an argument in his appeal to HRD, something he clearly would have known at the time. Further, his counsel doesn’t actually make such an allegation as part of the brief, but, rather, only suggests that such a possibility exists.

In short, the Appellant’s appeal is not distinguishable from *O’Neil*. Even if 14 questions were removed from the Fire Captain examination, that would not deem it an “unfair” test that would warrant intervention and relief (i.e. - vacating the examination) by the Commission. Since the Appellant is dismissive of those parts of

prior decisions urging HRD to take proactive steps to ensure that all future examination questions correspond to the reading material, I will not repeat them here.

CONCLUSION

For all of the above reasons, HRD’s Motion to Dismiss is allowed and the Appellant’s appeal under Docket No. B2-20-049 is hereby **dismissed**.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on August 27, 2020.

Notice to:

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* * * * *

STEPHENS LIMA

v.

NEW BEDFORD POLICE DEPARTMENT

G1-20-080

August 27, 2020

Christopher C. Bowman, Chairman

Bypass Appeal-Domestic Violence-Unauthorized Consultation of CJIS Network-Staleness—The Commission reaffirmed the second bypass of a candidate for original appointment to the New Bedford Police Department following his high score on the 2019 exam after the Commission had previously issued a decision in 2019 affirming his bypass after the 2017 exam. The candidate was bypassed both times for having a restraining order on his record and his unauthorized consultation of the CJIS Network while serving as a police cadet. The Commission agreed with New Bedford that these offenses, being only 5 years old, were not stale and the misconduct was serious and still worthy of supporting a bypass.

DECISION ON RESPONDENT’S MOTION FOR SUMMARY DECISION

On February 18, 2019, the Civil Service Commission (Commission) upheld a decision by the New Bedford Police Department (NBPD) to bypass Stephens Lima (Appellant) for appointment as a police officer. *See Lima v. New Bedford Police Department*, G1-17-093 [32 MCSR 98] (2019).

2. In the 2019 decision, the Commission concluded that the reasons put forth for bypass by the NBPD (i.e. - Appellant accessing CJIS information of private citizens while a cadet; existence of a restraining order against him for one year) were valid reasons for bypass.

3. The 2019 decision also stated in part that, “It may be that, in time, he will be able to establish that the blemishes on [his] record which tripped him up this time are behind him.”

4. On September 4, 2019 and December 26, 2019, the Appellant’s name appeared on Certification No. 06566 from which the NBPD appointed 13 police officer candidates, all of whom were ranked below the Appellant.

5. The NBPD relied on the same reasons for bypass that were upheld by the Commission in its 2019 decision.

6. The Appellant filed an appeal with the Commission on May 8, 2020 and I held a pre-hearing conference via videoconference on June 2, 2020 that was attended by counsel for both parties.

7. As part of that pre-hearing, counsel for the Appellant argued that given the passage of time since the underlying incidents, and given that the Appellant has had an exemplary record during that time period, there is no longer reasonable justification to bypass the Appellant.

8. Counsel for the NBPD argued that the reasons for bypass reflected serious misconduct and the City’s decision to bypass here is less than 1 year since the Commission upheld the reasons for bypass as valid.

9. Based on the above, I provided the NBPD with thirty (30) days to file a Motion for Summary Decision with the Appellant to file an opposition within thirty (30) days thereafter, which the parties submitted.

LEGAL STANDARD FOR MOTION FOR SUMMARY DECISION

A motion for summary decision may be filed pursuant to 801 CMR 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. *See, e.g., Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School v. Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005).

PARTIES’ ARGUMENTS

The NBPD argues that it was proper to rely on the same reasons identified in the prior hiring cycle, as the City’s current decision came less than one year after the Commission upheld those reasons for bypassing the Appellant in the prior hiring cycle. Even, however, if more time had passed, the NBPD argues that time alone is not enough to overcome the serious impairments to the

Appellant’s candidacy for police officer—improperly accessing citizens’ CJIS records while serving as a Cadet for the NBPD and being subject to a restraining order that, after a hearing, was extended by the Court for one year.

The Appellant argues that the NBPD’s “recycled” reasons for bypass are not justified in the current hiring cycle given the passage of time since the actual prior non-selection (2017) and because of the Appellant’s exemplary record during this intervening time, including obtaining “secret” security clearance with the United States Army.

ANALYSIS

Prior Commission decisions have clearly stated that an Appellant’s prior misconduct, with the exception of certain criminal conduct that statutorily disqualifies a candidate, should not and cannot serve as an automatic disqualifier of a candidate for a public safety position. Leaders across the political spectrum in Massachusetts have stressed the need to avoid looking at a snapshot of who a candidate was many years ago, but, rather, to look at who that candidate is today, as defined primarily by the intervening years since the misconduct occurred, which is a better predictor of whether the candidate is suitable for employment.

Here, however, relatively little time has transpired since the misconduct occurred. Less than five years ago, the Appellant was the subject of a restraining order, which, after hearing, was extended by the Court by one year. At or around the same time, the Appellant, while serving as a Police Cadet for the NBPD, improperly accessed the CJIS system to obtain information on private citizens, on one occasion using another Cadet’s sign-in credentials to do so. This misconduct is serious; relatively recent; and occurred while the Appellant was employed by a Police Cadet for the same agency for which he now seeks to be a permanent, full-time police officer.

In his brief, the Appellant raises some of the same issues raised in the prior appeal, including allegations of disparate treatment and termination of the restraining order. These issues were already considered and addressed by the Commission as part of the prior bypass appeal. Given the relatively short period of time that has transpired since the Appellant’s misconduct occurred, the serious nature of the misconduct; and the Commission’s very recent decision upholding those reasons for bypass as valid, the Appellant has no reasonable expectation of prevailing in this new bypass appeal.

For this reason, the NBPD’s Motion for Summary Decision is allowed and the Appellant’s appeal under Docket No. G1-20-080 is **dismissed**.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on August 27, 2020.

Notice to:

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* * * * *

DEVON WILDES

v.

HUMAN RESOURCES DIVISION

B2-20-048

August 27, 2020

Christopher C. Bowman, Chairman

Examination Appeal-E&E Credits-Fire Lieutenant Exam-Bachelor's Degree From Online Columbia Southern University-Regional vs National Accreditation—Consistent with its prior decisions on the issue, the Commission declined to disturb HRD's refusal to grant E&E credit on a firefighter promotional exam for a degree from Columbia Southern University due to its lack of regional accreditation. This "university" is strictly online, holds a national accreditation from the Distance Education and Training Council, and even warns Massachusetts candidates for admission to the Fire Science Program that they should contact the Civil Service Commission to determine eligibility to sit for promotional exams. The Commission here, as before, concluded that it could not find HRD's reliance on regional accreditation entities to be arbitrary or capricious.

DECISION ON RESPONDENT'S MOTION FOR SUMMARY DECISION

On March 10, 2020, the Appellant, Devon Wildes (Mr. Wildes), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to not give him 6.0 education and experience (E&E) points on a recent Fire Lieutenant examination for a bachelor's degree that the Appellant received from Columbia Southern University.

2. On May 12, 2020, I held a pre-hearing conference via video-conference which was attended by Mr. Wildes and counsel for HRD.

3. As part of the pre-hearing conference, the parties stipulated to the following:

- a. On November 18, 2019, the Appellant took the Fire Lt. examination.
- b. As part of that examination, Mr. Wildes timely completed the E&E portion of the examination, seeking 6.0 points for his bachelor's degree

c. Mr. Wildes was initially given 6.0 points for his bachelor's degree.

d. After HRD conducted an audit, the 6.0 E&E points were removed as Columbia Southern University is not accredited by one of the regional accrediting organizations related to higher education.

e. As a result, Mr. Wildes's overall score was reduced from a total of 80 to 77.

f. An eligible list for Haverhill Fire Lt. was established on 2/3/20.

g. Mr. Wilde's rank is now second.

h. Had Mr. Wilde received 6.0 E&E points, his rank, according to the Appellant, would have been first.

i. The first ranked candidate has now been promoted.

j. Mr. Wildes anticipates that another vacancy for Fire Lt. will become available before the expiration of the eligible list and he will be eligible for consideration for that promotion.

4. At the pre-hearing conference, Mr. Wildes argued that Columbia Southern University is accredited by an organization known as the Distance Education and Training Council, and, as such, HRD should give him credit for his bachelor's degree.

5. Similar arguments were addressed most recently in *Mercado v. HRD*, CSC Case No. B2-18-095 [31 MCSR 348] (2018), citing *Carroll v. HRD*, 27 MCSR 157 (2014), in which the Commission concluded that HRD's reliance on the regional accrediting entities was not arbitrary and capricious.

6. As part of the pre-hearing conference, I asked HRD to provide any information regarding whether Columbia Southern University had ever sought regional accreditation and to refresh my memory on the decision-making process that resulted in HRD not accepting the Distance Education and Training Council accreditation for the purposes of awarding credit for a college degree.

7. HRD had 30 days from the date of the pre-hearing to file a Motion for Summary Decision and the Appellant had 30 days thereafter to file a reply.

8. HRD submitted a Motion for Summary Decision. The Appellant did not submit a reply.

ANALYSIS

This is not a new issue for the Commission. As referenced above, in *Carroll v. Human Resources Division*, 27 MCSR 157 (2014), the Appellant sought E&E credit for a Fire Science degree conferred by Columbia Southern University (CSU). HRD denied credit for that degree, because CSU had accreditation from the Distance Education and Training Council (DETC), a national, but not regional, accreditation body. The Commission determined that:

"In view of HRD's statutory considerable discretion in granting E&E credit, its expertise, and the manner in which HRD has exercised its discretion, the Commission cannot state that HRD's actions were clearly arbitrary or otherwise unsupported by 'logic and reason' ... Further, the Appellant's disagreement with HRD's E&E determination does not render it arbitrary, unfair, or

an abuse of discretion. HRD established a policy, approximately seven years prior to the Appellant's exam, that it would grant E&E credit only for degrees or credits from regionally accredited institutions of higher education. The U.S. DOE website references two forms of accreditation: regional and national. HRD's policy indicates that it chose to accept credits from one of two available sources of accreditations. I find nothing arbitrary, unfair or unreasonable in HRD's policy."

As part of its Motion for Summary Decision, HRD provided some additional information which supports the Commission's prior decision that HRD's policy here is not arbitrary and capricious. First, prior to students enrolling in a Fire Science Program at CSU, CSU specifically notifies students from Massachusetts that they "should contact the Civil Service to determine eligibility to sit for promotional exams". Second, HRD provides clear notice to all candidates that it will only accept a degree conferred by a regionally accredited institution with the United States. Third, credits obtained at a nationally accredited institution (i.e. - CSU), according to HRD, are not accepted as transfer credits by regionally accredited schools.

HRD has continued to adhere to the same uniform policy regarding E&E credits here and there is no reason for the Commission to effectively reverse its decision in *Carroll*.

CONCLUSION

For all of the reasons stated in HRD's Motion for Summary Decision, including those referenced above, the motion is allowed and Mr. Mercado's appeal under Docket No.B2-20-048 is hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on August 27, 2020.

Notice to:

Devon Wildes
[Address redacted]

Alexis N. Demirjian, Esq.
Human Resources Division
100 Cambridge Street, 6th Floor
Boston, MA 02108

* * * * *

ROBERT MAILEA

v.

HUMAN RESOURCES DIVISION

B2-20-096

September 24, 2020

Christopher C. Bowman, Chairman

Examination Appeal-E&E Credits-Correctional Program Officer EC Exam-Credit for Master's Degree in Public Administration with Criminal Justice Specialization—The Commission affirmed a ruling by HRD that a candidate for promotion to Correction Officer C with a Master's degree in Public Administration was not entitled to the same number of credits as a candidate with a Master's degree in Criminal Justice. The candidate argued that his Master's program included a criminal justice specialty and should be considered equivalent to a Master's in Criminal Justice. The Commission found HRD's policy not unreasonable or capricious, particularly here since the candidate's master's program only required him to take three criminal justice courses.

DECISION ON MOTION FOR SUMMARY DECISION

On June 19, 2020, the Appellant, Robert Mailea (Appellant), acting pursuant to G.L. c. 31, § 22, timely appealed to the Civil Service Commission (Commission), contesting the decision of the Respondent, the Massachusetts Human Resources Division (HRD), to credit him with 6 “Education and Experience” points for his master's degree, as opposed to the 9 points he was requesting on the Correctional Program Officer C (CPO C) promotional examination.

On July 7, 2020, I held a pre-hearing conference via videoconference which was attended by the Appellant and counsel for HRD. HRD subsequently filed a Motion for Summary Decision and the Appellant filed an opposition.

Based on the submissions and the statements made at the pre-hearing conference, the following appears to be undisputed:

1. The Appellant is employed at the Massachusetts Department of Correction (DOC).
2. On February 15, 2020, the Appellant took the promotional examination for CPO C, administered by HRD.
3. The Appellant received a “written score” of 90 and an Education and Experience (E&E) score of 79.6, for a total score of 86.
4. On June 11, 2020, HRD established an eligible list for CPO C. The Appellant is tied with 17 other applicants for 11th on the eligible list.
5. If his appeal is allowed, it would result in his rank on the eligible list being improved.
6. HRD provides CPO C applicants with 9 E&E points for a master's degree from a regionally accredited college or university

in any of the following majors: “Counseling, psychology, social work, sociology or criminal justice.”

7. HRD provides CPO C applicants with 6 E&E points for a master's degree from a regionally accredited college or university “in a major not listed [above].”

8. At the time of the examination, the Appellant had a master's degree in public administration from Anna Maria College with a “criminal justice specialization.”

9. Courses completed by the Appellant included: Executive Leadership; Strategic Management of Human Capital; Management Policies of Government Finance; Organization Theories; Public Policy; Managerial Statistics; Strategic Planning; Ethical Theory; Community Partnerships; Criminal Justice Administration; Criminal Justice and Public Policy; and a “Capstone” final assignment in which the Appellant compared the leadership development and training programs for various states.

SUMMARY DECISION STANDARD

Section 1.01(7)(h) of the applicable standard adjudication Rules of Practice and Procedure at 801 CMR provides that, “When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues”. 801 CMR 1.01(7)(h). The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass.R.Civ.P.56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing. *See Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992); *Massachusetts Outdoor Advertising Counsel v. Outdoor Advertising Board*, 9 Mass. App. Ct. 775, 782-83 (1980).

APPLICABLE CIVIL SERVICE LAW

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, citing *Cambridge v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300, 304 (1997). “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, § 1. 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* at 304.

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons aggrieved by “... any decision, action or failure to act by the administrator, except as limited by the provisions of section

twenty-four relating to the grading of examinations” It provides, *inter alia*,

“No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record.”

In *Cataldo v. Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that

“... under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as ‘credit for such training and experience as of the time designated by HRD.’ G.L. c. 31, § 22(1).”

Parties’ Arguments

The Appellant effectively argues that his master’s degree in public administration with a “criminal justice specialization” should be considered equivalent to a master’s degree in criminal justice because some of the courses deal with criminal justice-related issues. Even, however, if it is not deemed equivalent, the Appellant argues that a master’s degree in public administration should qualify for 9 points given the value that candidates with such a degree offer to DOC in general and CPO Cs specifically.

HRD argues that the Appellant is not an aggrieved person since HRD applied a uniformly enforced standard that grants candidates with a master’s degree in public administration 6 points and candidates with a master’s degree in criminal justice 9 points. Since the Appellant does not have a master’s degree in criminal justice, he was correctly awarded 6 points.

Analysis

The Appellant appears to be a dedicated DOC employee who is passionate about his career in public service. He is making smart decisions regarding his education and professional goals that will benefit DOC and the Commonwealth. The issue before the Commission, however, is whether the Appellant is an aggrieved person. For the reasons discussed below, he is not.

First, HRD’s determination that a master’s degree in public administration with a criminal justice specialization is not equivalent to a master’s degree in criminal justice is not arbitrary and capricious. Rather, it is a logical, reasonable determination based on the fact that the “specialization” designation appears to only require that 3 criminal-justice courses be completed to obtain this specialization. Logic and commonsense dictate that this is not equivalent to a master’s degree in criminal justice. At the pre-hearing conference, the Appellant conceded that it could be somewhat duplicative to obtain a master’s degree in criminal justice, having already obtained a bachelor’s degree in criminal justice.

In regard to the Appellant’s argument that a master’s in public administration is just as valuable as a master’s in criminal justice for CPO C candidates, the Appellant has not shown that HRD’s determination, which is made in cooperation with DOC, is unreasonable, illogical or arbitrary and capricious. Further, there is no

evidence that the Appellant was treated differently than any other applicants. Rather, HRD, acting as the Personnel Administrator, uniformly implemented a reasonable grading system for all applicants. For these reasons, the Appellant is not an aggrieved person and intervention by the Commission is not warranted.

CONCLUSION

HRD’s Motion for Summary Decision is allowed and the Appellant’s appeal under Docket No. B2-20-096 is ***dismissed***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on September 24, 2020.

Notice to:

Robert Mailea
[Address redacted]

Patrick Butler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * *

DANIEL O'DONNELL

v.

CITY OF SOMERVILLE

G1-20-044

September 24, 2020

Christopher C. Bowman, Chairman

By *bypass Appeal-Original Appointment as a Permanent Reserve Somerville Police Officer-Failed Interview-Poor Response to Scenario Questions Involving Alcohol Consumption Before a Shift*—In a decision by Chairman Christopher C. Bowman on an appeal from a bypassed candidate for original appointment as a Somerville Permanent Reserve police officer, the Commission declined to disturb the City's rejection of this candidate based on his troubling responses before the interview panel with regard to a scenario involving the consumption of alcohol at a wedding before a shift. The candidate applied different and looser standards to himself with regard to alcohol consumption in the wedding scenario than he did to a hypothetical concerning a superior officer appearing to be drunk on duty.

DECISION

On March 13, 2020, the Appellant, Daniel O'Donnell (Mr. O'Donnell or Appellant), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the City of Somerville (City) to bypass him for original appointment to the position of permanent reserve police officer in the City's Police Department (SPD). A pre-hearing conference was held remotely via videoconference on May 12, 2020; a Status Conference was held remotely on June 25, 2020, and a full hearing was held remotely on July 23, 2020.^{1,2} The remote full hearing was digitally recorded and both parties were provided with a CD of the hearing³. Both parties submitted post-hearing proposed decisions.

FINDINGS OF FACT

Six (6) exhibits were entered into evidence by the Respondent and thirteen (13) exhibits were entered into evidence by the Appellant at the full hearing on July 23, 2020.⁴ Based on these exhibits, the testimony of the following witnesses:

Called by the City:

- Skye Stewart, Administration Representative on the Interview panel;
- Stephen Carrabino, Deputy Chief of the SPD;

Called by Mr. O'Donnell:

- Daniel O'Donnell, Appellant;

and taking administrative notice of all matters filed in this case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence; a preponderance of credible evidence establishes the following facts:

1. Mr. O'Donnell is thirty (30) years old and is a lifelong resident of Somerville. He obtained an associate's degree from the New England Institute of Art and he received an Emergency Medical Technician Certification from Middlesex Community College in 2018. (Testimony of Appellant)

2. Mr. O'Donnell is currently employed as a full-time carpenter. He previously worked as a paraprofessional in the City's Public Schools from 2009 to 2014. (Testimony of Appellant)

3. On March 23, 2019, Mr. O'Donnell took the civil service examination for the position of Police Officer and received a score of 93. (Stipulated Facts)

4. On September 1, 2019, the state's Human Resources Division (HRD) established the eligible list for Police Officer. (Stipulated Fact)

5. On December 4, 2019, HRD issued Certification No. 06794 to the City, authorizing the City to appoint ten (10) reserve police officer candidates. (Stipulated Fact)

6. On January 6, 2020, HRD approved the City's request to expand the number of candidates for potential appointment from ten (10) to sixteen (16). (Stipulated Fact)

7. The City ultimately appointed nine (9) permanent, reserve police officers, seven (7) of whom were ranked below Mr. O'Donnell. (Stipulated Facts)⁵

8. The seven (7) candidates on the Certification, each of whom was given an anonymous identifier as part of this proceeding, who bypassed Mr. O'Donnell are: R4A; R4C; R4H; R4G; R4I; R4D; and R4E. (Exhibit R1A)

9. All candidates, including Mr. O'Donnell, were required to submit documentation to the City including an application, resume, credit scores, tax returns, verify residency through a residency check, and undergo a background investigation conducted by a Detective of the SPD. (Testimony of Carrabino; Testimony of Appellant).

1. Videoconference proceedings via Webex have temporarily replaced in-person hearings at the Commission given the ongoing COVID-19 pandemic.

2. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

3. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD

should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

4. By email notice sent to the parties on July 20, 2020 prior to the full hearing, Appellant Exhibits P-7, P-9, P-11, P-13, P-15, P-17 were determined to be duplicative of Respondent exhibits contained in R-4. As such these were not entered as Appellant Exhibits.

5. It appears that the appointments, authorized by the Mayor as Appointing Authority, have not yet been approved by the City Council, as required by the City's Charter.

10. Mr. O'Connell's background investigation showed that he has no criminal record, no driving citations and a positive credit report. All of his references provided positive feedback about Mr. O'Donnell. (Testimony of Stewart and Carrabino)

11. Following the background investigation, all candidates, including Mr. O'Donnell, were interviewed by the same Interview panel consisting of the following individuals: Skye Stewart (former Chief of Staff to the City's Mayor; Deputy Chief Stephen Carrabino of the SPD; and the Director of Health and Human Services for the City of Somerville, Nancy Bacci. (Testimony of Stewart; Testimony of Carrabino).

12. Deputy Chief Stephen Carrabino has been a member of the SPD for twenty-five (25) years. He has held positions in various areas of the SPD including the patrol division, community policing, detective bureau, domestic violence, gang unit, commander and accreditation manager, and as Captain he oversaw the East District of the City. He now serves as Deputy Chief of the SPD in charge of operations. He has been a Deputy Chief of the SPD for the past six to seven years. There are only two Deputy Chiefs within the SPD and they rank right below the Chief. (Testimony of Carrabino).

13. Skye Stewart served as the Chief of Staff to the City's Mayor from June of 2016 to her departure in August of 2019 (due to her family move to Michigan). Prior to serving as Chief of Staff, she worked as an analyst in the City's "SomerStat" office in 2011, became budget manager for the City in 2014, then moved into the Director role in SomerStat in 2014. (Testimony of Stewart)

14. Ms. Stewart was contacted in the beginning of February 2020 by the then-current Chief of Staff for the Mayor and asked if she had any availability and willingness to sit in on the Interview panel for police reserve candidates on Certification No. 06794. The City's Personnel Director, who normally sat on these interview panels, was on leave.. (Testimony of Stewart)

15. Prior to the interviews, all interview panelists were given access to electronic files of the various candidates. These files consisted of documents such as the candidates' full application, resume, transcript, tax returns, credit scores, military documentation, certifications, police records and background investigation reports on each candidates which included interview notes of investigators with the various candidates. (Testimony of Stewart; Testimony of Carrabino).

16. The Interview panel met to discuss the candidates on the day of the candidates' interviews. The Panel reserved half an hour to discuss any concerns they had based on their individual review of the electronic file prior to each interview. (Testimony of Stewart; Testimony of Carrabino).

17. During the discussion of the Appellant prior to his interview, the Interview panel did not have any major concerns and viewed him as a strong candidate. (Testimony of Stewart; Testimony of Carrabino).

18. During the interviews, the three panelists took turns asking questions. The general format of each recorded interview was the same: the panelists walked through the application and background report with each candidate and then asked each candidate 17 general interview questions, which included questions regarding how the candidate would respond to hypothetical scenarios. Once that was complete, the Panel gave the candidate an opportunity to ask any questions and then wrapped up the interview. (Testimony of Stewart; Exhibits R4A - R4I)

19. Once the candidate left, Jessica Pavao of the City's HR (Personnel) Department came into the room, gathered any documents the panelists had written on, and jotted down on a yellow piece of paper the top concerns the panel had with the candidate. She then assembled this piece of paper with the general concerns of the candidate, and any documents the panelists had written on or highlighted, into an "Interview Packet" that the Panel, specifically Ms. Stewart who was drafting the bypass letters and would be offsite doing so, could refer to later on when reviewing the candidates. (Testimony of Stewart; Exhibit R-2; Exhibits P-8, P-10, P-12, P-14, P-16, P-18).

20. The yellow sheets of paper at the start of each interview packet with these concerns, were not a "bypass" list, just an assembled list of concerns that the panel wished to discuss as a group later on when reviewing each candidate. (Exhibits P-8, P-10, P-12, P-14, P-16, P-18).

21. Subsequent to the last interview taking place, the panel met again to discuss and review all candidates. After the interviews, the panel knew some they would be moving forward, some who were a definite no, and identified others in the middle who required further discussion. The Appellant fell into the middle category and required further discussion of the panel's concerns. (Testimony of Stewart).

Panelists' Concerns with Appellant's Answers to Alcohol-Related Questions

22. Ms. Bacci, an interview panelist, asked Mr. O'Donnell the following question. Mr. O'Donnell gave the following answer and the following dialogue occurred:

Bacci: The police department schedule will require you to work during many family and holiday events. If you are scheduled to report to work at 6:00 pm for the night shift or⁶ attending a family function such as a wedding in the afternoon, how many drinks would you consume at that function?

6. The Combined Interview Packets of the Appellant (Respondent Exhibit 3) and the other Candidates (Respondent Exhibit 7) contain the panel's list of scenario/hypothetical questions. Question 5 is stated as follows:

The Police Department's schedule will require you to work during many family and holiday events. If you are scheduled to report to work at 6:00 pm for the night shift and were attending a family function such as a wedding in the afternoon, how many drinks would you consume at that function?

O'Donnell: I would do my best to not consume if I knew I might be on call, I would um...

Bacci: But, tell me ... [interrupted]

Stewart: Not on call, but actually, you, you're scheduled to report ... [interrupted]

Bacci: You're scheduled to go in...

O'Donnell: Scheduled? Um, I tend to only have a beer or two, maybe three, if it's a big family event.

[pause]

Bacci: So, at this wedding we're going to say you're the best man. So best man typically stands up, says a few nice words, and has a toast. How do you handle the toast?

O'Donnell: Um... I would handle it well. I'm not the best public speaker but, um, I would do my best to take my time with the speech and... [interrupted]

Bacci: I'm sorry, I mean in regards to the alcohol.

O'Donnell: Ohh, in re... I apologize [laughter]

Bacci: That's okay.

[laughter in room]

Bacci: But I am sure you are a good public speaker.

[laughter in room]

Bacci: That's okay. How would you handle it, because typically you would toast with champagne as you had indicated earlier.

O'Donnell: Yes.

Bacci: So how would you handle that?

O'Donnell: Glasses up and take a sip.

(Exhibit R-3 at 44:32).

The second of the two-alcohol related hypothetical questions posed to Mr. O'Donnell was as follows:

Carrabino: You report to work on the night shift. The night commander is in his office doing paperwork. There is an officer on duty that appears to be under the influence of alcohol and you detect the odor of alcohol. What, if any, action would you take and why?

O'Donnell: In that situation, I would report it to my superior. It's one thing I would not want to risk all the hard work I put into establishing myself and my career or the name of the department. And, I would hope that he would seek help.

Carrabino: What if the guy says I was at a wedding earlier today and I was the best man and had to give a toast. I had a beer, just one, I can handle my alcohol. That's why you smell it. If you report me I'm in trouble. What do you do then?

O'Donnell: I would've told him that he should not have came to work. He should've called in. But I would still report forward to my supervisor.

Bacci: I have a follow up to that. So, you had said he should not have come to work. Correct?

O'Donnell: Yes.

Bacci: In the previous one if you had been the best man you had said usually I would have a beer or two, or three at a wedding, and you would be scheduled to work at six o'clock. So, tell me the difference between that?

O'Donnell: I would have ... there is no difference. I also should have said that I would have called out of work if necessary, if I didn't feel...

Bacci: Thank you.

(Respondent Exhibit 3 at 44:20)

23. The Panel was surprised and concerned that Mr. O'Donnell would consider drinking hours before a scheduled shift, and thought his willingness to come to work potentially impaired showed a lack of judgment and could pose a risk to public safety. (Exhibit R-5; Testimony of Stewart; Testimony of Carrabino).

24. The Panel also found the Appellant's responses showed inconsistency in his responses to the two scenarios, including that he held himself to a different standard than a fellow officer (he would come into work after having a few drinks prior to his shift).

25. In discussing the general concerns of the Appellant post-interview, the one remaining concern the panel could not overcome were his responses to the above questions. The panel found significant problem with him never acknowledging that he would not drink before work or that that would be a major problem. He also held a colleague to a different standard in his answers, and acknowledged that if he did drink he would call into work rather than just not drink in advance. This was very concerning as others would then have to pick up the slack, and cover for him at the last minute. The panel was surprised at his responses and it was a combination of these concerns the panel could not overcome with the Appellant. (Testimony of Stewart; Testimony of Carrabino).

The Responses of Candidates who Bypassed the Appellant to the Alcohol-related questions

26. All of the candidates who bypassed Mr. O'Donnell for appointment stated they would not drink at the wedding if they were scheduled to work later that day. None of these selected candidates said that they would drink and/or call in sick. Specifically, these selected candidates stated: :

- Candidate R-4A: During the toast if they have water could grab water bottle, if friends do respect your profession, knowing a drink could impair jeopardize your job put yourself and others in jeopardy they would respect your decision of not drinking. - (Exhibit R-4A at 1:24:20);
- Candidate R-4C: Immediately responded none. Would have water during the toast would not risk anything with his job. (Exhibit R-4C at 41:35);
- Candidate R-4D: Doesn't drink and doesn't plan on drinking. Would fill the glass with water during the toast. (Exhibit R-4D at 24:06);
- Candidate R-4E: Immediately answered none, said he would still handle the toast but without alcohol. (Exhibit R-4E at 49:40);
- Candidate R-4G: Answered would have zero, would pour some ginger ale in a glass and fake it. Added the bride/groom would un-

derstand if they were a friend and knew you had to report to work. (Exhibit R-4G at 29:56);

- Candidate R-4H: Would not drink at all. Would perform the toast but would handle it with sprite or water and thinks the person would understand they couldn't drink at the wedding. (Exhibit R-4H at 49:57);
- Candidate R-4I: Immediately responded zero. Would ask bartender with something without alcohol and participate in the toast but would not consume any alcohol. If best man would think friend knows he has a job and if they didn't understand they wouldn't be friends of mine. (Exhibit R-4I at 48:54).

Interview Question Responses of Candidates who Bypassed the Appellant to Other Questions

27. Excerpts from R4I's interview included the following::

Carrabino: You and your partner have arrested a suspect for selling drugs. During the arrest procedure at the scene, you've recovered illegal drugs and a large amount of money. While you are securing these items for submittal to evidence, you observe your partner place some of the money into his pocket. What would you do?

R4I: I'd tell him to put it back, first. Um... say it's not right. If he refuses to, I'd be forced to take it to the shift commander.

Carrabino: So, if he puts it back, you're not going to take it to the shift commander?

R4I: I think if he puts it back the issue has been resolved in that moment. Um... it's not the right thing to do...

Carrabino: So that's the end of it.

R4I: I think...

Carrabino: Ok.

R4I: Yeah. Obviously that doesn't pose a danger to the community, it's just dishonest.

Carrabino: So he tells you, I don't know what I was thinking but, it won't happen again, that's...

R4I: And I think it differs from the situation with the intoxicated officer, because the intoxicated officer poses a danger to the community. I think this situation is ... it's just dishonest, and it's not right. I think that to solve it in the moment might be a good approach because he's not going to ... like I said, cause a danger to anybody else. But, the officer who's intoxicated is an outward threat to the wellbeing of the community.

Carrabino: So the intoxicated officer you report, but this one, if he puts it back, you're okay with it?

R4I: I wouldn't say I'm okay with it. I ... I just think that would be my ... my gut reaction, my instinct to follow. And obviously the reasons why.

Bacci: Would you think that this was the first time the person had done it?

R4I: I could speculate all I want but if I didn't have any proof, all I have is that one instance that I witnessed. Obviously, like I said, I could have my speculations but I would not be able to hang my hat on any of them.

Bacci: Do you think it would be more dangerous to the community if it was the fifth or the hundredth time they had done it?

R4I: It obviously shows a habit of, um, dishonesty. And, you know, disregard for the trust that has been bestowed upon this officer.

Stewart: What if they had pocketed some of the drugs instead?

R4I: That's definitely ... that would be a danger. Show's that he may be using them. Using them on the job maybe. But ... I think I would tell him to put it back and... you know.

Stewart: Ok.

Carrabino: So the distinction is dictated by the substance, in your mind?

R4I: I think it's the threat at the moment to the community, is what it is. And the threat to the officers around him that have to rely on him, potentially, in an emergency.

Stewart: Do you think if you have a partner who might be stealing, would that be a threat to you as a partner?

R4I: I mean, it would have to depend on the partner. I think, physically, probably not at that moment. But... yeah, I guess. If he's being dishonest. That's his pattern, that could probably take me down with it.

(Appellant Exhibit 17 at 1:03:45).

28. Candidate R4H's combined packet and interview revealed the following:

- He failed to list a college he attended on his application and answered "No" that he was suspended while in school. When questioned he admitted he was kicked off campus for smoking marijuana. (Candidate Interview at 11:00) When questioned why he answered "no" he said "I didn't put it because I didn't put Framingham State, or, like you said, I didn't read it carefully enough."
- He did not indicate any accidents in his records when, in fact, he had two accidents; (Candidate Interview at 13:00)
- He failed to list multiple jobs; (Candidate Interview at 16:00)
- He withdrew his name from consideration as a Somerville Firefighter because he was smoking marijuana at the time of the hiring process and "did not want to jeopardize [his] chances"; (Candidate Interview at 21:00)
- He did not list an incident that occurred at Powder House Park in Somerville where he and a friend were questioned by the police for smoking marijuana and drinking Hennessy in the park; (Candidate Interview at 39:00)

29. Mr. O'Donnell received a bypass letter at the end of this hiring process dated March 3, 2020. As reasons for the bypass, the City stated that he had demonstrated poor judgment in response to scenario questions during the interview. Specifically, as referenced above, the Panel had serious concern with his responses to pre-written questions # 5 and # 6, which they could not overcome and ended up bypassing Appellant for these responses. (Testimony of Stewart and Carrabino)

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with

ensuring that the system operates on “[b]asic merit principles.” *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, citing *Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 304 (1997). “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, section 1. 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* at 304.

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 *Commissioners of Civil Service v. Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975); and *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. *City of Beverly v. Civil Service Comm’n*, 78 Mass. App. Ct. 182, 189, 190-191 (2010) citing *Falmouth v. Civil Serv. Comm’n*, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. *Beverly* citing *Cambridge* at 305, and cases cited. “It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree.” *Town of Burlington and another v. McCarthy*, 60 Mass. App. Ct. 914, 915 (2004).

Disputed facts regarding alleged prior misconduct of an applicant must be considered under the “preponderance of the evidence” standard of review as set forth in the SJC’s recent decision in *Boston Police Dep’t v. Civil Service Comm’n*, 483 Mass. 461 (2019), which upheld the Commission’s decision to overturn the bypass of a police candidate, expressly rejecting the lower standard espoused by the police department. *Id.*, 483 Mass. at 333-36.

ANALYSIS

In regard to bypass appeals, the core mission of the Civil Service Commission is to ensure that Appointing Authorities, as part of a fair and impartial hiring process, offer valid reasons for bypassing a candidate in favor of lower-ranked candidates. As part of that review, the Commission must consider whether there is any evidence of personal or political bias by the Appointing Authority. Here, I found none. Both Ms. Stewart and Deputy Chief Carrabino were good witnesses. Neither of them had any personal animus against the Appellant. In fact, they both candidly acknowledged that, based on a review of the background investigation report, they both found Mr. O’Donnell to be a strong candidate prior to

his interview. Neither of them tried to paint Mr. O’Donnell in a bad light and/or pile on with other reasons to justify their decision here. They considered both the positive and negative aspects of Mr. O’Donnell’s candidacy. Further, as part of the interview process, they gave Mr. O’Donnell (and many other candidates) the benefit of the doubt regarding various errors or omissions on his application after listening to Mr. O’Donnell’s explanations for these errors. In summary, the interview panelists were not predisposed to bypassing Mr. O’Donnell nor did they develop any animus or bias against Mr. O’Donnell that factored into their decision to bypass him for appointment.

Rather, the panelists testified credibly that they had serious concerns regarding the troubling answers that Mr. O’Donnell provided to scenario questions meant to assess whether the candidate understood the need to refrain from drinking alcohol when he was scheduled for duty later the same day. The Appellant argues that the City should have simply asked a more straightforward question (i.e. - Would you drink alcohol prior to a scheduled shift?) as opposed to posing a hypothetical scenario involving attendance at a wedding reception. I disagree. The case scenario presented was realistic; it was designed to elicit a candid answer regarding a serious issue; and it was not complicated.

Likely anticipating that all of the candidates would state that they would *not* drink alcohol at a wedding reception prior to a scheduled shift, the interview panelists were ready with a follow-up question to see if the answer remained the same if drinking alcohol was limited to giving a toast at the wedding reception. All of the selected candidates stated unequivocally that they would not drink alcohol at a wedding reception being held before a scheduled shift. The Appellant, even after being provided with a clarification, referenced drinking multiple beers at the hypothetical wedding reception. He was then specifically asked how he would handle giving a toast at that same reception, to which he inexplicably replied: “glasses up and take a sip.” Later, when asked to square these answers with his statement that he would report an on-duty officer who had been drinking before his shift, the Appellant compounded his bad answers by saying, after reflection, that he should have called-out if he had something to drink before a scheduled shift.

All of these responses troubled the interview panelists, who were concerned that the Appellant was unable to clearly state, as all selected candidates had, that he simply would not drink alcohol at a social event on the same day that he was scheduled to report to duty. This is a reasonable and obvious concern, particularly given that police officers carry a firearm and are required to make split second decisions regarding use of force that have life and death consequences.

The Commission, in a series of prior decisions, has ruled that a candidate’s poor interview performance can serve as a basis for bypass where there is no evidence of inappropriate motivations. See *McMahon v. Town of Brookline*, 20 MCSR 24 (2007) (poor interview performance can stand alone as the sole basis for bypass where there is no evidence of any inappropriate motivations

on the part of the Appointing Authority). *See also O'Connor v. Police Comm'r of Boston*, 408 Mass. 324, 328 (1990). An applicant's poor performance during the interview process is a relevant factor an appointing authority can use to judge an applicant. *Frost v. Town of Amesbury*, 7 MCSR 137 (1994) (Commission upholds bypass where applicant's answers to situational questions were unsatisfactory); *LaRoche v. Department of Correction*, 13 MCSR 159 (2000) (Commission upholds bypass where applicant's answers to situational scenarios did not comply with department policies and procedures and failed to demonstrate an ability to lead).

The Appellant argues, either explicitly, or tacitly, that the process here was not fair and impartial. I address each of the Appellant's arguments below.

First, the Appellant argues that Candidate R-4B has a criminal history and that he gave a poor response to an interview question when he initially stated that he *may* report his partner if he witnessed the partner stealing money from the scene of a crime, then clarifying his answer only after Deputy Carrabino asked a follow-up question.

To ensure clarity, Candidate R-4B did *not* bypass Mr. O'Donnell as Candidate R-4B was ranked *higher* than Mr. O'Donnell on the Certification. Put another way, the City is not required to provide the Appellant with sound and sufficient reasons for appointing someone ranked higher than him on the Certification. That notwithstanding, both interview panelists offered credible testimony that past indiscretions or mistakes of candidates did not result in an automatic bypass recommendation by the Panel. The Panel noted various concerns with some candidates that were discussed at length with those candidates during their interviews. The Panel was not looking for "perfect people". Rather, they were looking for maturity, those with good judgment, who have grown and learned from their mistakes in the past. For the panelists, the way the individual was able to reflect on their personal growth, and who they are today was what was important to them in deciding who would make a successful police officer. In regard to whether Candidate R-4B's initial answer to a scenario regarding another officer stealing money was: a) a poor answer; and b) equally as poor as the Appellant's answer to a different question involving drinking alcohol before a scheduled shift, that type of hair-splitting analysis is not the role of the Commission, particularly when the interview panelists who testified before the Commission showed no signs of bias against the Appellant. In the sound judgment of the unbiased interview panelists, they concluded that the Appellant's answers regarding the alcohol-related scenario raised red flags about the Appellant that did not arise regarding Candidate R-4B's answers to a different question. As noted above, the Appellant's poor answers involved his own hypothetical actions (drinking at a social event before a scheduled shift; calling in sick to the shift instead of abstaining from alcohol altogether) and then applying a different standard to another officer. The Appellant's argument that Candidate R-4B was purportedly given an opportunity to clarify his answer and that the Appellant was not falls into the same category of micromanagement of the Appointing Authority interview process that is not the purview of the Commission. The interview

panelists did, however, attempt to provide the Appellant with clarity when he first misunderstood the question. More importantly, I did not see any evidence that the Panelists' clarifications during Candidate R-4B's interview was designed to give that candidate an unfair advantage over any other candidate, including the Appellant.

Second, the Appellant argues that Candidate R-4F also "performed poorly" in the interview and that, according to the hand-written notes of Ms. Pavao (provided by the panelists), there were "omissions and falsehoods" in Candidate R-4F's application. Similar to Candidate R-4B, Candidate R-4F did not bypass the Appellant and the City was not required to provide the Appellant with sound and sufficient reasons for appointing Candidate R-4F. That notwithstanding, as referenced above, the interview panelists put less weight on errors and omissions on an application for *all* candidates, including certain errors and omissions of the Appellant.

Third, the Appellant argues that the City, in a different hiring cycle that took place approximately four years ago, purportedly appointed a candidate (identified in a prior Commission decision as "Candidate 7") who stated that he would consume one or two alcoholic beverages at a social function prior to a scheduled shift. Not only is this far outside the bounds of what should be considered in regard to whether there was fair and impartial treatment in *this* hiring process, in 2020, but the Appellant acknowledges, that "Candidate 7" ultimately clarified and corrected his answer, as opposed to stating, in retrospect, that he should have called in sick if he drank at a social event before a scheduled shift.

Fourth, the Appellant cites two candidates from *this* hiring cycle who *did* bypass the Appellant for appointment: Candidates R-4H and R-4I. Candidate R-4H had errors and omissions on his application, including failing to list that he has attended college before being asked to leave and failing to list an "interaction" with police in which Candidate R-4H and a friend, many years ago, were spotted drinking alcohol and smoking marijuana in a park. As referenced above, errors and omissions on an application, including those of the Appellant, were not necessarily a reason to automatically bypass a candidate for appointment. Further, consistent with prior Commission decisions, candidates, as part of the application process, may only be asked a limited number of questions related to their criminal history. The question regarding any "police interactions" appears to be an impermissible application question and it would not be appropriate to use that as a yardstick here to show whether the Appellant received fair and impartial treatment. Also, as referenced above, the Panelists candidly acknowledged that prior misconduct, particularly if it occurred many years ago, would also not be an automatic disqualifier for appointment today, depending on various other factors, including whether the candidate showed that he/she had matured and learned from past mistakes.

In regard to Candidate R-4I, the Appellant argues that he gave an "even more egregious answer" (than Candidate R-4B) to the question regarding whether he would report a fellow officer that he witnessed stealing. First, in regard to the *alcohol-related* questions,

which formed the basis for the Appellant's bypass, Candidate R-4I immediately responded "zero" in regard to how much alcohol he would consume at the social event; that he would ask the bartender for something without alcohol and participate in the toast but would not consume alcohol; and, if the friend who was getting married didn't understand, they would no longer be friends. That was precisely the type of unambiguous moral clarity that the panelists were looking for. In regard to that same candidate's response to the question regarding observing a fellow officer stealing, the panelists concluded that this was not an "ideal answer". After discussing the matter, they ultimately concluded that the less than ideal response was not a reason to bypass this candidate. While the panelists were not able to clearly articulate during their testimony before the Commission why the less than ideal answer did not result in his bypass, it is clear, based on their testimony, that they were far more troubled by the multi-faceted troubling answers provided by the Appellant regarding the alcohol-related questions. Here, where the evidence does not show any impermissible motivations by the decision-makers, the Appointing Authority maintains the discretion to assess how much weight is given to problematic answers by candidates.

Finally, the Appellant argues that since one of the other selected candidates who bypassed the Appellant was the son of a Somerville Police Captain, it calls into question whether the process here was fair and impartial. The Appellant was provided with the recorded interviews of each candidate, including this particular candidate. I infer that, had the Appellant concluded that this candidate performed poorly during his interview, including the case scenarios, the Appellant would have identified that candidate as a purported example of disparate treatment. The Appellant made no such argument.⁷

I have, however, as part of this appeal, and another appeal pending before the Commission, considered the sequence of events that resulted in this candidate and 3 other lower-ranked candidates being considered for appointment. As referenced in the findings, the City first requested authorization to appoint ten (10) reserve candidates, which would limit the City's consideration to the first 21 candidates who signed the Certification as willing to accept appointment under the so-called 2N+1 formula. At least four candidates who were ultimately appointed by the City were not among the first 21 candidates on the Certification. Approximately four weeks later, the City requested authorization from HRD to appoint 16 (as opposed to 10) candidates from this Certification, thus, arguably increasing the number of candidates that could potentially be considered from 21 to 33. As a result, the City considered additional, lower-ranked candidates on the Certification, including 4 other lower-ranked candidates who were ultimately appointed. However, the City only appointed a total of 9 reserve candidates, based on the interview panel's recommendation.

The above-referenced sequence of events may warrant additional inquiry by the Commission in regard to the City's rationale for requesting authorization to hire 16 candidates, as opposed to 10, and whether, based on the City's decision to appoint only 9 candidates, those additional, lower-ranked candidates were even eligible for appointment.⁸

In regard to the instant appeal, however, I gave the City's decision to bypass Mr. O'Donnell heightened scrutiny based on the above-referenced questions. Specifically, I considered whether the decision to bypass Mr. O'Donnell was somehow related to a possible pre-determination by the City to reach lower-ranked candidates on the Certification. As discussed above, I found the two interview panelists who testified before the Commission to be highly credible. Even applying heightened scrutiny to their testimony, my assessment of their testimony has not changed. I believe they were sincerely troubled by Mr. O'Donnell's problematic answers to the alcohol-related scenario questions, causing them to conclude it would be too much of a risk to appoint Mr. O'Donnell as a reserve police officer at this time, and, but for the Appellant's problematic answers to the alcohol-related questions, they would have recommended Mr. O'Donnell for appointment.

In summary, the Appellant is a good person who performed badly on a multi-faceted question that the interviews panelists gave great weight to. Ultimately, his poor performance (i.e.- his inability to say unequivocally that he would not drink alcohol before a scheduled shift) caused the interview panel to conclude that the City would be taking too much of a risk in granting him a conditional offer of employment. Absent evidence that the Appointing Authority acted in bad faith here, the City is afforded deference in its judgment to bypass the Appellant for this valid reason.

While the City has shown reasonable justification for bypassing the Appellant at this time, nothing in this decision should be construed to hold that the Appellant's poor interview performance during this hiring cycle should serve as a permanent bar to appointment. Mr. O'Donnell is a lifelong resident of Somerville with a sincere desire to serve the City as a police officer. He has worked hard to obtain a college degree; scored well on a civil service examination; and he has a solid employment history, coupled with strong personal and professional references. Should his name appear among those eligible for consideration in the future, his candidacy should get a fresh look by the City.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. G1-20-044 is hereby **denied**.

* * *

7. While this appeal was pending, I held a hearing regarding *Tivinis v. Somerville*, G1-20-045. Tivinis was also bypassed for appointment during this hiring cycle. As part of the *Tivinis* appeal, the audio recording of the Police Captain's son was entered into evidence. In response to the alcohol-related scenario question, that

candidate stated that he doesn't drink and wouldn't drink at a wedding reception before a scheduled shift, even if he was the best man giving a toast.

8. The Commission has authority to conduct such inquiries, on its own initiative, through G.L. c. 31, s. 2(a).

By a vote of the Civil Service Commission (Bowman, Chairman;
Camuso, Ittleman, Stein and Tivnan, Commissioners) on
September 24, 2020.

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