

# MASSACHUSETTS CIVIL SERVICE REPORTER

*Massachusetts Civil Service Commission  
Administrative Law Decisions*

**VOLUME 37  
2024**

## **Civil Service Commission**

100 Cambridge Street, Suite 200  
Boston, MA 02114  
Telephone (617) 979-1900  
Fax (617) 727-7590

CIVIL SERVICE COMMISSIONERS	YEAR APPOINTED
Christopher C. Bowman, Chair	2006
Paul M. Stein	2008
Kevin M. Tivnan	2015
Angela C. McConney	2022
Shawn C. Dooley	2022

## COMMENTARY BY:

### **Norris, Murray & Peloquin, LLC**

Melissa R. Murray, Esq.  
Brett Sabbag, Esq.  
Ian Keefe, Esq.

### **Reardon, Joyce & Akerson, P.C.**

Andrew Gambaccini, Esq.



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675 VFW Parkway, #354, Chestnut Hill, MA 02467

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Massachusetts Civil Service Commission—Administrative Law Decisions

In This Issue

BYPASS APPEALS

Original Appointment as a Brockton Firefighter-Absence of Thorough and Impartial Review of Candidacy-Lying-Failure to Submit Required Documents-Political Influences-Positive Attributes—Hearing Commissioner Angela C. McConney reversed the bypass of a female Hispanic candidate for original appointment to the almost exclusively male and white Brockton Fire Department, finding that her candidacy had not been properly or thoroughly reviewed. The decision also concludes that it had not been established by sufficient evidence by the City that she had violated the state’s firearms law when failing to update her LTC or that she misled Brockton as to her qualifications for the residency preference. Estrella v. City of Brockton (Decision) . . . 49

Original Appointment as a Springfield Police Officer-Psychological Profiles-Disqualifying Category B Condition-Multiple Terminations for Violence-Low Stress Tolerance—The Commission affirmed a tentative decision of General Counsel Robert L. Quinan upholding the bypass of a candidate for appointment as a Springfield police officer based on two disqualifying psychological profiles showing a low stress tolerance and a tendency to take action without thought. These testing conclusions were confirmed by an employment record in social services showing three terminations for resorting to violence when confronted with stressful situations and yet another termination for using inappropriate language with clients in a youth service organization. Doe v. Springfield Police Department (Decision) . . . . . 29

Original Appointment to the Brockton Police Department-Misrepresentation of Residency Status-Omission of Failed DOC Employment Candidacy—The Commission affirmed the bypass of a candidate for original appointment to the Brockton Police Department where an investigation revealed that he had misrepresented his residency status when applying previously for a position with the Boston Police Department and given inconsistent answers to the Brockton Police Department when applying for a position with that municipality. This candidate was also bypassed because he was found to have omitted from his employment history a failed application to become a DOC Correction Officer. That application was rejected due to a failed drug/testosterone test. Reynolds v. City of Brockton (Decision) . . . . . 37

Timeliness-60 Day Appeal Period—A candidate for appointment to the Boston Police Department saw his bypass appeal dismissed for lack of timeliness where it was filed 70 days after he was notified of his right to file such an appeal with the Commission. Mel v. Boston Police Department (Decision on Respondent’s Motion to Dismiss) . . . . . 33

..... continued on next page



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---

## DISCIPLINARY PROCEEDING

**Discharge of Student at Police Academy-Inaccuracies on POST Application-Recharacterization as Bypass Appeal-Delay in Bringing Appeal-Tolling**—In the case of a “disciplinary” appeal filed by a Lawrence student at the Police Academy who was discharged by the City after 19 weeks of training when inaccuracies surfaced on his POST application, the Commission determined that this appeal should be recharacterized as a bypass appeal since the Appellant was not yet even a probationary employee and would not begin to perform police duties until after graduation. Given that this appeal was brought six months after his discharge, the decision also tolls the 60-day appeal period for bypass appeals after concluding that Lawrence erroneously treated the matter as a disciplinary issue, did not act on the Appellant’s alleged untruthfulness until he was well on his way to graduation, and did not disclose the reasons for the bypass/discharge until well after the appeal was filed. *Abreu v. City of Lawrence (Decision and Interim Orders on Respondent’s Motion to Dismiss)* . . . . . 41

---

---

## EXAMINATION APPEALS

**Deputy Fire Chief Exam-ECT&E Credits-Failure to Enter Online-Improbability of Appointment Even with Credits**—The appeal of a Stoughton firefighter disputing the zero ECT&E score he obtained on the Deputy Fire Chief promotional examination due to his failure to properly complete the online entry of his information was dismissed by the Commission. The Commission noted that it is an important component of any senior command staff job to be able to follow instructions and protocol and that this candidate’s score, even with estimated ECT&E credits, would have been so low as to preclude his appointment. *Medeiros v. Human Resources Division (Decision on Respondent’s Motion for Summary Decision)* . . . . . 56

**Police Sergeant’s Examination-Calculation of E&E Credits-Failure to Submit Info Online**—An appeal from a Holyoke police officer challenging the denial of any E&E credits to him on the Police Sergeant’s promotional exam was dismissed by the Commission where the Appellant had simply failed to fill out the required online E&E forms, despite three reminders to do so, and clung to the notion that he could simply email the information to HRD. *Dunn v. Human Resources Division (Decision on Respondent’s Motion for Summary Decision)* . . . . . 45

**Time In Service-Police Sergeants’ Exam**—On motion from HRD, the Commission dismissed the appeal from a candidate for promotion to Cambridge police sergeant where he was ineligible to take the exam because he had not served at least three years as a police officer prior to its administration. This candidate sat for and passed the exam twice, and was included on the list by HRD based on erroneous information supplied the agency by the Cambridge Police Department regarding the Petitioner’s length of service. *Pasquarello v. Human Resources Division (Decision)* . . . . . 34

---

---

## NONBYPASS EQUITY APPEAL

**Seniority Date for Eligibility List-Ripeness-Collective Bargaining Agreement Matters**—Commission Chair Christopher C. Bowman granted the Department of Correction’s motion to dismiss the appeal from one of its cooks concerned about a future decision of the Department relating to his seniority on a certification list. Not only was the matter not ripe for appeal, given that the DOC had yet to make any determination as to the candidate’s seniority, but the matter would ultimately be determined pursuant to the collective bargaining agreement and therefore the Commission lacked jurisdiction. *Jamieson v. Department of Correction (Decision on Respondent’s Motion to Dismiss)* . . . . . 55

**Indices** . . . . . i-viii

---

*For 2020-2023 Civil Service Reporter indices, please consult the Cumulative Indices section in this volume.*

*For 1993-2019 cumulative Civil Service Reporter indices and searchable flash drive of decisions and commentary published in MCSR, please consult the stand-alone soft-bound supplemental index.*

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LANDLAW LEGAL PUBLISHERS

*Cumulative Cases Reported–January-April 2024*

**Plaintiff v. Defendant**

<b>Abreu v. City of Lawrence</b> . . . . .	<b>41</b>	Lugo v. City of Holyoke . . . . .	9
Alami v. Salisbury Police Department . . . . .	21	<b>Medeiros v. Human Resources Division</b> . . . . .	<b>56</b>
<b>Doe v. Springfield Police Department</b> . . . . .	<b>29</b>	<b>Mel v. Boston Police Department</b> . . . . .	<b>33</b>
<b>Dunn v. Human Resources Division</b> . . . . .	<b>45</b>	<b>Pasquarello v. Human Resources Division</b> . . . . .	<b>34</b>
Ellis v. City of Brockton . . . . .	1	Perez-Martinez v. City of Brockton . . . . .	13
<b>Estrella v. City of Brockton</b> . . . . .	<b>49</b>	<b>Reynolds v. City of Brockton</b> . . . . .	<b>37</b>
In Re: Request By Milton Police Department to Revive List v. Human Resources Division . . . . .	11	Sweeney v. City of Medford . . . . .	2
<b>Jamieson v. Department of Correction</b> . . . . .	<b>55</b>	Todd v. Boston Police Department . . . . .	23
		Veras v. City of Lawrence . . . . .	19

*Cumulative Cases Reported–January-April 2024*

**Defendant; Plaintiff v.**

<b>Boston Police Department; Mel v.</b> . . . . .	<b>33</b>	City of Medford; Sweeney v. . . . .	2
Boston Police Department; Todd v. . . . .	23	<b>Department of Correction; Jamieson v.</b> . . . . .	<b>55</b>
City of Brockton; Ellis v. . . . .	1	<b>Human Resources Division; Dunn v.</b> . . . . .	<b>45</b>
<b>City of Brockton; Estrella v.</b> . . . . .	<b>49</b>	Human Resources Division; In Re: Request By Milton Police Department to Revive List v. . . . .	11
City of Brockton; Perez-Martinez v. . . . .	13	<b>Human Resources Division; Medeiros v.</b> . . . . .	<b>56</b>
<b>City of Brockton; Reynolds v.</b> . . . . .	<b>37</b>	<b>Human Resources Division; Pasquarello v.</b> . . . . .	<b>34</b>
City of Holyoke; Lugo v. . . . .	9	Salisbury Police Department; Alami v. . . . .	21
<b>City of Lawrence; Abreu v.</b> . . . . .	<b>41</b>	<b>Springfield Police Department; Doe v.</b> . . . . .	<b>29</b>
City of Lawrence; Veras v. . . . .	19		

---

*Cumulative Subject Matter Index–January-April 2024*

---

*Appointments and Promotions***Bypass Appeals**

- Application
- Domestic Violence
- Driving Record
- Drug and Alcohol Abuse
- Employment Application
- Employment History
- Fighting
- Lying
- Nepotism
- Political Influences
- Psychological Profile
- Redeeming Factors
- Residency Preference

**Examination Appeals**

- Length of Service
- Training and Experience Credits

**Human Resources Division (Formerly DPA)**

- Certification Lists

---

*Commission Practice and Procedure***Appeal**

- Timeliness

**Ripeness**

---

*Disciplinary Action***Discharge**

- Probationary Period
- Tenured Employees

---

*Jurisdiction***Collective Bargaining Agreement****Tenured Employee**

---

*Other Personnel Actions***Non-Bypass Appeal**

- Eligibility List
- Equitable Relief

ABRIDGED SAMPLE

## Cumulative Subject Matter Digest–January–April 2024

### Appointments and Promotions

#### Bypass Appeals

##### – Application

The Commission disposed of a bypass appeal from a candidate for original appointment as a Salisbury reserve police officer who failed to submit an employment package or respond to emails requesting he do so. The candidate had been employed by the MBTA for 20 years and acknowledged receipt of the emails and his failure to open them. *Alami v. Salisbury Police Department (Decision)*, 37 MCSR 21 (2024).

##### – Domestic Violence

The Commission affirmed the bypass of a professional boxer seeking appointment as a Boston Police Officer where he had been the subject of recent abuse-prevention orders arising from violent conduct directed at the mother of his three children and well as her mother. *Todd v. Boston Police Department (Decision)*, 37 MCSR 23 (2024).

In a decision by Commissioner Angela C. McConney, a bypass decision by the Brockton Police Department was affirmed where the female candidate had a record of domestic violence where she committed a drunken assault and battery on her police officer boyfriend leading to a restraining order. *Perez-Martinez v. City of Brockton (Decision)*, 37 MCSR 13 (2024).

By a 4-1 vote, the Commission annulled the bypass of a candidate for original appointment to the Medford Police Department that had been based on one incident of domestic violence 21 years earlier and a spotty driving record. The majority found that the evidence of violence was not convincing and that the fact that the candidate had accepted a CWOFF did not presuppose his guilt in the matter. The Commission was much swayed by the fact that the purported victim of the violence testified on behalf of the Appellant, claiming that the police had made a mistake, and also by the fact that the background investigator found the testimony of the purported victim extremely credible. *Sweeney v. City of Medford (Decision)*, 37 MCSR 2 (2024).

##### – Driving Record

Commissioner Angela C. McConney rejected as a reason for bypass a police candidate's failure to timely renew her motor vehicle inspection sticker where the candidate, a single parent, lacked the resources to pay for the necessary repairs required for the vehicle to pass. *Perez-Martinez v. City of Brockton (Decision)*, 37 MCSR 13 (2024).

By a 4-1 vote, the Commission annulled the bypass of a candidate for original appointment to the Medford Police Department that had been based on one incident of domestic violence 21 years earlier and a spotty driving record. The majority found that the driving record of this candidate had been clean for 12 years and that the only police citations were for minor matters more than 20 years old. *Sweeney v. City of Medford (Decision)*, 37 MCSR 2 (2024).

##### – Drug and Alcohol Abuse

The Commission affirmed the bypass of a candidate for original appointment to the Brockton Police Department where an investigation revealed that he omitted from his employment history an unsuccessful application to become a DOC Correction Officer. The application was rejected due to a failed drug/testosterone test. *Reynolds v. City of Brockton (Decision)*, 37 MCSR 37 (2024).

##### – Employment Application

The Commission affirmed the bypass of a candidate for original appointment to the Brockton Police Department where an investigation revealed that he omitted from his employment history a failed attempt to become a DOC Correction Officer. That application was rejected due to a failed drug/testosterone test. *Reynolds v. City of Brockton (Decision)*, 37 MCSR 37 (2024).

##### – Employment History

Commissioner Angela C. McConney rejected as a reason for bypass a police candidate's inconsistent employment record where this single mother did have a successful career in the National Guard and the pandemic and her child care responsibilities had an outsized effect on her employment prospects. *Perez-Martinez v. City of Brockton (Decision)*, 37 MCSR 13 (2024).

##### – Fighting

The Commission affirmed a tentative decision of General Counsel Robert L. Quinan upholding the bypass of a candidate for appointment as a Springfield police officer based on two disqualifying psychological profiles showing a low stress tolerance and a tendency to take action without thought. These testing conclusions were confirmed by an employment record in social services showing three terminations for resorting to violence when confronted with stressful situations. *Doe v. Springfield Police Department (Decision)*, 37 MCSR 29 (2024).

##### – Lying

Hearing Commissioner Angela C. McConney reversed the bypass of a female Hispanic candidate for original appointment to the almost exclusively male and white Brockton Fire Department, finding that her candidacy had not been properly or thoroughly reviewed. The decision also concludes that it had not been established by sufficient evidence by the City that she had violated the state's firearms law when failing to update her LTC or that she misled Brockton as to her qualifications for the residency preference. *Estrella v. City of Brockton (Decision)*, 37 MCSR 49 (2024).

The Commission affirmed the bypass of a candidate for original appointment to the Brockton Police Department where an investigation revealed that he had misrepresented his residency status when applying previously for a position with the Boston Police Department and given inconsistent answers to the Brockton Police Department when applying for a position with that municipality. *Reynolds v. City of Brockton (Decision)*, 37 MCSR 37 (2024).

Commissioner Angela C. McConney sustained the bypass of a candidate for original appointment to the Milton Police Department because she failed to accurately or candidly answer questions on her LTC application related to her court appearances and arraignment for domestic violence. *Perez-Martinez v. City of Brockton (Decision)*, 37 MCSR 13 (2024).

##### – Nepotism

The Commission dismissed the nonbypass equity appeal of a Brockton sergeant who claimed the Police Department's promotional process for lieutenant was tainted by nepotism since the successful candidate is the husband of the Police Chief. Following the original filing of the Appellant's appeal, the City agreed to redo the promotional process with an independent external review board which concluded that the Chief's husband should be promoted. The Commission found that this independent review was fair and impartial and adequately documented. *Ellis v. City of Brockton (Decision on Respondent's Motion to Dismiss)*, 37 MCSR 1 (2024).

##### – Political Influences

In reversing the bypass of a female Hispanic candidate for original appointment to the almost exclusively male and white Brockton Fire Department, Hearing Commissioner Angela C. McConney suggested that the City had failed to apply the same standards to all the candidates and been more severe with the Appellant. *Estrella v. City of Brockton (Decision)*, 37 MCSR 49 (2024).

##### – Psychological Profile

The Commission affirmed a tentative decision of General Counsel Robert L. Quinan upholding the bypass of a candidate for appointment as a Springfield police officer based on two disqualifying psychological pro-

**CUMULATIVE SUBJECT MATTER DIGEST–JANUARY-APRIL 2024**

files showing a low stress tolerance and a tendency to take action without thought. These testing conclusions were confirmed by an employment record in social services showing three terminations for resorting to violence when confronted with stressful situations and yet another termination for using inappropriate language with clients in a youth service organization. *Doe v. Springfield Police Department (Decision)*, 37 MCSR 29 (2024).

**– Redeeming Factors**

In wrongly bypassing a female Hispanic candidate for appointment to a basically all-white and all-male Brockton Fire Department, Hearing Commissioner Angela C. McConney found that the City of Brockton had failed to adequately consider all of this candidate's positive attributes relating to her exceptional educational background, successful career in property management, and service in the National Guard. *Estrella v. City of Brockton (Decision)*, 37 MCSR 49 (2024).

**– Residency Preference**

Hearing Commissioner Angela C. McConney reversed the bypass of a female Hispanic candidate for original appointment to the almost exclusively male and white Brockton Fire Department, finding that her candidacy had not been properly or thoroughly reviewed. The decision also concludes that it had not been established by sufficient evidence by the City that she had violated the state's firearms law when failing to update her LTC or that she misled Brockton as to her qualifications for the residency preference. *Estrella v. City of Brockton (Decision)*, 37 MCSR 49 (2024).

The Commission affirmed the bypass of a candidate for original appointment to the Brockton Police Department where an investigation revealed that he had misrepresented his residency status when applying previously for a position with the Boston Police Department and given inconsistent answers to the Brockton Police Department when applying for a position with that municipality. *Reynolds v. City of Brockton (Decision)*, 37 MCSR 37 (2024).

**Examination Appeals****– Length of Service**

On motion from HRD, the Commission dismissed the appeal from a candidate for promotion to Cambridge police sergeant where he was ineligible to take the exam because he had not served at least three years as a police officer prior to its administration. This candidate sat for and passed the exam twice, and was included on the list by HRD based on erroneous information supplied the agency by the Cambridge Police Department regarding the Petitioner's length of service. *Pasquarello v. Human Resources Division (Decision)*, 37 MCSR 34 (2024).

**– Training and Experience Credits**

The appeal of a Stoughton firefighter disputing the zero ECT&E score he obtained on the Deputy Fire Chief promotional examination due to his failure to properly complete the online entry of his information was dismissed by the Commission. The Commission noted that it is an important component of any senior command staff job to be able to follow instructions and protocol and that this candidate's score, even with estimated ECT&E credits, would have been so low as to preclude his appointment. *Medeiros v. Human Resources Division (Decision on Respondent's Motion for Summary Decision)*, 37 MCSR 56 (2024).

An appeal from a Holyoke police officer challenging the denial of any E&E credits to him on the Police Sergeant's promotional exam was dismissed by the Commission where the Appellant had simply failed to fill out the required online E&E forms, despite three reminders to do so, and clung to the notion that he could simply email the information to HRD. *Dunn v. Human Resources Division (Decision on Respondent's Motion for Summary Decision)*, 37 MCSR 45 (2024).

**Human Resources Division (Formerly DPA)****– Certification Lists**

In a decision by Chair Christopher C. Bowman, the Commission declined to review a 2020 Milton police sergeant's eligibility list that had been previously extended where a new eligible list would be in place soon after the issuance of this decision and the Town failed to articulate a cogent reason for reversing its previous decision to rely on the newly established list. Milton also has the possibility of participating in promotional examinations to be administered later in 2024 which would ensure promotional opportunities for candidates who did not sit for the 2023 examination. *In Re: Request By Milton Police Department to Revive List v. Human Resources Division (Decision)*, 37 MCSR 11 (2024).

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**Commission Practice and Procedure****Appeal****– Timeliness**

The Commission tolled the 60-day appeal period for bypass appeals in the case of an Appellant terminated at the Police Academy after inconsistencies were discovered on his POST application, because the City of Lawrence erroneously treated the matter as a disciplinary issue, did not act on the Appellant's alleged untruthfulness until he was well on his way to graduation, and did not disclose the reasons for the bypass/discharge until well after the appeal was filed. The appeal was filed six months after the Appellant's involuntary separation from service. *Abreu v. City of Lawrence (Decision and Interim Orders on Respondent's Motion to Dismiss)*, 37 MCSR 41 (2024).

A candidate for appointment to the Boston Police Department saw his bypass appeal dismissed for lack of timeliness where it was filed 70 days after he was notified of his right to file such an appeal with the Commission. *Mel v. Boston Police Department (Decision on Respondent's Motion to Dismiss)*, 37 MCSR 33 (2024).

**Ripeness**

Commission Chair Christopher C. Bowman granted the Department of Correction's motion to dismiss the appeal from one of its cooks concerned about a future decision of the Department relating to his seniority on a certification list. Not only was the matter not ripe for appeal, given that the DOC had yet to make any determination as to the candidate's seniority, but the matter would ultimately be determined pursuant to the collective bargaining agreement and therefore the Commission lacked jurisdiction. *Jamieson v. Department of Correction (Decision on Respondent's Motion to Dismiss)*, 37 MCSR 55 (2024).

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**Disciplinary Action****Discharge****– Probationary Period**

The Commission dismissed for lack of jurisdiction an appeal from a Lawrence firefighter terminated only three months into his probationary period for failing to complete the required course of study at the State's Fire Academy. *Veras v. City of Lawrence (Decision on Respondent's Motion to Dismiss)*, 37 MCSR 19 (2024).

**– Tenured Employees**

The Commission issued a routine dismissal of a discharge appeal from a Holyoke firefighter who had been terminated prior to finishing his 12-month probationary period and therefore was not a tenured employee. The decision also notes that the termination was based on legitimate concerns with the Appellant's performance. *Lugo v. City of Holyoke (Decision on Respondent's Motion to Dismiss)*, 37 MCSR 9 (2024).



## CUMULATIVE SUBJECT MATTER DIGEST–JANUARY-APRIL 2024

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**Jurisdiction****Collective Bargaining Agreement**

Commission Chair Christopher C. Bowman granted the Department of Correction’s motion to dismiss the appeal from one of its cooks concerned about a future decision of the Department relating to his seniority on a certification list. Not only was the matter not ripe for appeal, given that the DOC had yet to make any determination as to the candidate’s seniority, but the matter would ultimately be determined pursuant to the collective bargaining agreement and therefore the Commission lacked jurisdiction. *Jamieson v. Department of Correction (Decision on Respondent’s Motion to Dismiss)*, 37 MCSR 55 (2024).

**Tenured Employee**

In the case of a “disciplinary” appeal filed by a Lawrence student at the Police Academy who was discharged by the City after 19 weeks of training when inaccuracies surfaced on his POST application, the Commission determined that this appeal should be recharacterized as a bypass appeal since the Appellant was not yet even a probationary employee and would not begin to perform police duties until after graduation. Given that this appeal was brought six months after his discharge, the decision also tolls the 60-day appeal period for bypass appeals after concluding that Lawrence erroneously treated the matter as a disciplinary issue, did not act on the Appellant’s alleged untruthfulness until he was well on his way to graduation, and did not disclose the reasons for the bypass/discharge until well after the appeal was filed. *Abreu v. City of Lawrence (Decision and Interim Orders on Respondent’s Motion to Dismiss)*, 37 MCSR 41 (2024).

The Commission dismissed for lack of jurisdiction an appeal from a Lawrence firefighter terminated only three months into his probationary period for failing to complete the required course of study at the State’s Fire Academy. *Veras v. City of Lawrence (Decision on Respondent’s Motion to Dismiss)*, 37 MCSR 19 (2024).

The Commission issued a routine dismissal of a discharge appeal from a Holyoke firefighter who had been terminated prior to finishing his 12-month probationary period and therefore was not a tenured employee. As such the Commission lacked jurisdiction. *Lugo v. City of Holyoke (Decision on Respondent’s Motion to Dismiss)*, 37 MCSR 9 (2024).

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**Other Personnel Actions****Non-Bypass Appeal****– Eligibility List**

Commission Chair Christopher C. Bowman granted the Department of Correction’s motion to dismiss the appeal from one of its cooks concerned about a future decision of the Department relating to his seniority on a certification list. Not only was the matter not ripe for appeal, given that the DOC had yet to make any determination as to the candidate’s seniority, but the matter would ultimately be determined pursuant to the collective bargaining agreement and therefore the Commission lacked jurisdiction. *Jamieson v. Department of Correction (Decision on Respondent’s Motion to Dismiss)*, 37 MCSR 55 (2024).

**– Equitable Relief**

The Commission dismissed the nonbypass equity appeal of a Brockton sergeant who claimed the Police Department’s promotional process for lieutenant was tainted by nepotism since the successful candidate is the husband of the Police Chief. Following the original filing of the Appellant’s appeal, the City agreed to redo the promotional process with an independent external review board which concluded that the Chief’s husband should be promoted. The Commission found that this independent review was fair and impartial and adequately documented. *Ellis v. City of Brockton (Decision on Respondent’s Motion to Dismiss)*, 37 MCSR 1 (2024).

## Cumulative Cases Cited–January–April 2024

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 Dunn v. Human Resources Div., 37 MCSR 48 (2024)  
 Medeiros v. Human Resources Div., 37 MCSR 60 (2024)
- Ash v. Police Commissioner of Boston, 11 Mass. App. Ct. 650 (1981)**  
 Pasquarello v. Human Resources Div., 37 MCSR 36 (2024)
- Bailey v. Human Resources Division, 36 MCSR 461 (2023)**  
 Pasquarello v. Human Resources Div., 37 MCSR 36 (2024)
- Board of Selectmen of Brookline v. Smith, 58 Mass. App. Ct. 813 (2003)**  
 Abreu v. City of Lawrence, 37 MCSR 43 (2024)
- Boston Police Department v. Civil Service Commission, 483 Mass. 461 (2019)**  
 Abreu v. City of Lawrence, 37 MCSR 42 (2024)  
 Alami v. Salisbury Police Dept., 37 MCSR 22 (2024)  
 Estrella v. City of Brockton, 37 MCSR 53 (2024)  
 Perez-Martinez v. City of Brockton, 37 MCSR 17 (2024)  
 Reynolds v. City of Brockton, 37 MCSR 39 (2024)  
 Todd v. Boston Police Dept., 37 MCSR 26 (2024)
- Boston Police Department v. Civil Service Commission, 483 Mass. 474 (2019)**  
 Doe v. Springfield Police Dept., 37 MCSR 31 (2024)
- Boston Police Department v. Kavaleski, 463 Mass. 680 (2012)**  
 Alami v. Salisbury Police Dept., 37 MCSR 22 (2024)  
 Doe v. Springfield Police Dept., 37 MCSR 30 (2024)  
 Estrella v. City of Brockton, 37 MCSR 53 (2024)  
 Perez-Martinez v. City of Brockton, 37 MCSR 17 (2024)  
 Reynolds v. City of Brockton, 37 MCSR 39 (2024)  
 Sweeney v. City of Medford, 37 MCSR 6 (2024)  
 Todd v. Boston Police Dept., 37 MCSR 26 (2024)
- Brackett v. Civil Service Commission, 447 Mass. 233 (2006)**  
 Alami v. Salisbury Police Dept., 37 MCSR 22 (2024)  
 Doe v. Springfield Police Dept., 37 MCSR 31 (2024)  
 Estrella v. City of Brockton, 37 MCSR 53 (2024)  
 Reynolds v. City of Brockton, 37 MCSR 39 (2024)  
 Sweeney v. City of Medford, 37 MCSR 6 (2024)  
 Todd v. Boston Police Dept., 37 MCSR 26 (2024)
- Brandao v. Boston Police Department, 32 MCSR 255 (2019)**  
 Abreu v. City of Lawrence, 37 MCSR 42 (2024)
- Brandao v. Boston Police Department, Suffolk Sup. Ct. C.A. No. 1984CV2602 (2020)**  
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- Brooks v. Boston Police Department, 12 MCSR 19 (1999)**  
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- Bucella v. Human Resources Division, 32 MCSR 226 (2019)**  
 Dunn v. Human Resources Div., 37 MCSR 48 (2024)  
 Medeiros v. Human Resources Div., 37 MCSR 60 (2024)
- Burns v. City of Holyoke, 23 MCSR 162 (2010)**  
 Reynolds v. City of Brockton, 37 MCSR 39 (2024)
- Burns v. Commonwealth, 430 Mass. 444 (1999)**  
 Sweeney v. City of Medford, 37 MCSR 8 (2024)
- Camacho v. Department of Environmental Police, 28 MCSR 18 (2015)**  
 Estrella v. City of Brockton, 37 MCSR 54 (2024)
- Carnell v. Boston Police Department, 33 MCSR 68 (2020)**  
 Abreu v. City of Lawrence, 37 MCSR 43 (2024)
- Carroll v. Human Resources Division, 27 MCSR 157 (2014)**  
 Dunn v. Human Resources Div., 37 MCSR 48 (2024)  
 Medeiros v. Human Resources Div., 37 MCSR 60 (2024)  
 Pasquarello v. Human Resources Div., 37 MCSR 36 (2024)
- Castater v. Boston Police Department, 34 MCSR 265 (2021)**  
 Abreu v. City of Lawrence, 37 MCSR 43 (2024)
- City of Beverly v. Civil Service Commission et al., 78 Mass. App. Ct. 182 (2010)**  
 Abreu v. City of Lawrence, 37 MCSR 42 (2024)  
 Alami v. Salisbury Police Dept., 37 MCSR 22 (2024)  
 Doe v. Springfield Police Dept., 37 MCSR 31 (2024)  
 Estrella v. City of Brockton, 37 MCSR 53 (2024)  
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- Reynolds v. City of Brockton, 37 MCSR 39 (2024)  
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- City of Boston v. Boston Police Patrolmen's Association, 8 Mass. App. Ct. 200 (1979)**  
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- City of Cambridge v. Civil Service Commission, 426 Mass. 1102 (1997)**  
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 Todd v. Boston Police Dept., 37 MCSR 26 (2024)
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- Commonwealth v. Casimir, 68 Mass. App. Ct. 257 (2007)**  
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- Commonwealth v. Fano, 400 Mass. 296 (1987)**  
 Sweeney v. City of Medford, 37 MCSR 7 (2024)
- Commonwealth v. Jackson, 45 Mass. App. Ct. 666 (1998)**  
 Sweeney v. City of Medford, 37 MCSR 7 (2024)
- Commonwealth v. Mahadeo, 397 Mass. 314 (1986)**  
 Sweeney v. City of Medford, 37 MCSR 7 (2024)
- Commonwealth v. Petros, 20 Mass. L. Rptr. 664 (2006)**  
 Sweeney v. City of Medford, 37 MCSR 7 (2024)
- Correale v. Human Resources Division, 36 MCSR 468 (2023)**  
 Pasquarello v. Human Resources Div., 37 MCSR 36 (2024)
- Cotto v. City of Taunton, 36 MCSR 103 (2023)**  
 Doe v. Springfield Police Dept., 37 MCSR 32 (2024)
- Cox v. New England Tel. & Tel. Co., 414 Mass. 375 (1993)**  
 Perez-Martinez v. City of Brockton, 37 MCSR 18 (2024)
- Davis v. Allard, 37 Mass. App. Ct. 508 (1994)**  
 Sweeney v. City of Medford, 37 MCSR 8 (2024)
- Davis v. Allard, 420 Mass. 739 (1995)**  
 Sweeney v. City of Medford, 37 MCSR 8 (2024)
- Desharnias v. City of Westfield, 23 MCSR 418 (2009)**  
 Reynolds v. City of Brockton, 37 MCSR 40 (2024)
- Doe v. Department of Correction, 35 MCSR 99 (2022)**  
 Doe v. Springfield Police Dept., 37 MCSR 32 (2024)
- Downer v. City of Northampton, 31 MCSR 98 (2018)**  
 Abreu v. City of Lawrence, 37 MCSR 42 (2024)
- Downer v. City of Northampton, 97 Mass. App. Ct. 1119 (2020)**  
 Abreu v. City of Lawrence, 37 MCSR 43 (2024)

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JOHN DOE

v.

SPRINGFIELD POLICE DEPARTMENT

Case No. [redacted]

March 21, 2024

Christopher C. Bowman, Chair

**B**y *bypass appeal—original appointment as a Springfield Police Officer—Psychological Profiles—Disqualifying Category B Condition—Multiple Terminations for Violence—Low Stress Tolerance*—The Commission affirmed a tentative decision of General Counsel Robert L. Quinan upholding the bypass of a candidate for appointment as a Springfield police officer based on two disqualifying psychological profiles showing a low stress tolerance and a tendency to take action without thought. These testing conclusions were confirmed by an employment record in social services showing three terminations for resorting to violence when confronted with stressful situations and yet another termination for using inappropriate language with clients in a youth service organization.

#### DECISION

**P**ursuant to G.L. c. 31, § 43, the undersigned Chair of the Civil Service Commission (Commission) charged the Commission’s General Counsel, Robert L. Quinan, Jr., with conducting a full evidentiary hearing regarding this matter on behalf of the Commission.

Pursuant to 801 CMR 1.01 (11) (c), Presiding Officer Quinan issued the attached Tentative Decision to the Commission on February 1, 2024, and the parties had thirty days to provide written objections to the Commission. No objections were received in a timely fashion.

After careful review and consideration, the Commission voted to adopt the Tentative Decision of the Presiding Officer, accept the recommendation stated therein, and deny the Appellant’s bypass appeal, thus making this the Final Decision of the Commission. The evidentiary record supports the Presiding Officer’s conclusion that the Respondent properly bypassed the Appellant for appointment to an entry-level police officer position due to what the Commonwealth’s Human Resources Division has deemed a disqualifying “Category B” condition in its published *Initial Hire and Physical Ability Test Standards* (2020). Because the appeal revolved around a confidential psychological evaluation of a civil service candidate, the Commission voted, in accordance with its

published privacy standard, to redact the Appellant’s name and substitute a pseudonym.<sup>1</sup>

\* \* \*

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners, voting unanimously to adopt the Tentative Decision, with Commissioner Dooley voting “no” on substituting a pseudonym) on March 21, 2024.

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February 1, 2024

Presiding Officer: Robert L. Quinan, Jr., Esq.<sup>2</sup>

#### SUMMARY OF TENTATIVE DECISION

The Commission should deny the appeal of a candidate who was turned down for employment as a municipal police officer based on the results of his psychological evaluation. Both evaluating (Ph.D. or M.D.-level) clinicians concluded that the Appellant had low stress tolerance and a tendency to resort to violence in volatile situations, making him unsuitable for such employment. Their conclusion was informed and supported by several employment discharges by prior employers due to incidents involving the Appellant’s use of force against youths.

#### TENTATIVE DECISION

**P**ursuant to G.L. c. 31, § 2(b), the Appellant, John Doe (“Appellant” or “Doe”), timely appealed to the Civil Service Commission (“Commission”), contesting the decision of the Springfield Police Department (“SPD”) to bypass him for appointment to the position of police officer. A pre-hearing conference was held via Webex on May 23, 2023. I held a full hearing at the State Office Building in Springfield, MA on July 21, 2023, and at the Office of the Attorney General in Worcester, MA on September 22, 2023.<sup>3</sup> Both days of the hearing were digitally recorded, and a copy was electronically transmitted to both parties.<sup>4</sup> The Commission also retained copies of the hearing recordings. For the reasons stated below, I recommend that Mr. Doe’s appeal be denied.

#### FINDINGS OF FACT

Eleven exhibits were offered into evidence at the hearing: ten by the Respondent and one by the Commission. The Respondent also chose to file a post-hearing brief. Based on these exhibits and the testimony of the following witnesses:

Called by the Respondent:

- Sgt. Monique McCoy, SPD
- Lynn Vedovelli, Human Resources and Payroll Manager, SPD

1. An unredacted version of this decision will be made available upon request to public safety agencies conducting pre-employment background investigations regarding prospective candidates.

2. The Commission acknowledges the assistance of Law Clerk Daniel Taylor in the drafting of this Tentative Decision. As the duly-appointed Presiding Officer, I am filing this initial decision with the Commission today. Pursuant to 801 Code Mass. Regs. 1.01(11)(b) and (c), the parties shall have 30 days from today to file any written objections to this Tentative Decision.

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. Due to a malfunction in the audio recorder, the recording of much of the September 22 hearing was damaged. I prepared a supplementary summary of this portion of the hearing, to which neither party objected. This summary was entered into evidence as Commission Exhibit #1.

- Dr. John Madonna, Chandler Psychological Services
- Dr. Kamlyn Haynes, MD

Called by the Appellant:

- John Doe, Appellant

and taking administrative notice of all pleadings filed in the case, plus pertinent rules, statutes, regulations, case law and policies, and drawing reasonable inferences from the credible evidence, I make the following findings of fact:

*Appellant's Background*

1. The Appellant, John Doe, graduated from high school in 1997. He obtained an associates degree in energy system technology in 2003, and a bachelor's degree in human services in 2013. (Resp. Ex. 10)

2. The SPD assigned Sgt. Monique McCoy to investigate the Appellant's background and review the details contained in his employment application. (Resp. Ex. 10; Testimony of McCoy)

3. From 2001 to 2014, the Appellant worked in security and recreation at a Springfield-area technical school. The Appellant was terminated from this position following an altercation with an adult student. The student punched the Appellant in the face, and the Appellant responded by striking him with a closed fist, knocking him to the ground. (Resp. Ex. 10; Testimony of the Appellant)

4. From 2013 to 2015, the Appellant was also employed as a behavioral interventionist at a Springfield-area educational program. The Appellant was terminated from this position following an altercation with a student that led to injury. The Appellant had been escorting the student to another area of the school, and the two became involved in a physical struggle during which the Appellant and the student fell against an uncovered radiator, and the student was burned. (Resp. Ex. 10; Testimony of the Appellant)

5. From 2016 to 2017, the Appellant was employed as a residential supervisor in a Springfield-area youth home. The Appellant was terminated for injuring a resident's wrist during an escort in which he restrained the resident by the arm.<sup>5</sup> (Resp. Ex. 10; Testimony of the Appellant)

6. From 2018 to 2021, the Appellant was employed at a Springfield-area organization to teach young adults skills like landscaping, carpentry, and plumbing. The Appellant was terminated from this position for using inappropriate language in an interaction with several of the organization's clients. (Resp. Ex. 10; Testimony of Appellant)

7. During the same period, 2018 to 2021, the Appellant was also employed at a fiberglass insulation company. He left this position without giving notice. (Resp. Ex. 10)

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5. The Appellant contends that this termination was wrongful, and that the resident was being dishonest in claiming injury. (Resp. Ex. 10; Testimony of the Appellant)

8. Beginning in February 2021, the Appellant worked as an insulator for a Boston-area union. His employer described him as respectful and reliable, though he had heard that the Appellant would sometimes "push back" when given an instruction. (Resp. Ex. 10)

9. Since 2021, the Appellant has also been employed part-time to provide security at an adult-entertainment club in Springfield, Massachusetts. The Appellant did not include this information on his employment application, as he did not believe it was necessary given the "under the table" nature of the position. (Testimony of McCoy; Testimony of Appellant)

10. On June 26, 2021, the Appellant took and passed the civil service examination for police officers, receiving a score of 88. (Stipulated Facts)

11. On August 1, 2022, the Massachusetts Human Resources Division (HRD) issued Certification No. 08756. The Appellant was ranked 29th among those willing to accept appointment. Of the 33 candidates ultimately appointed, 13 were ranked below the Appellant. (Stipulated Facts)

12. Following an interview with the SPD, the Appellant's application was considered "pending" while the psychological examination was conducted. (Testimony of Vedovelli)

*Psychological Evaluations*

13. HRD has promulgated rules defining the medical standards that a candidate for the position of municipal police officer must meet. Disqualifying medical and psychiatric conditions are sorted into "Category A" and "Category B" conditions. (Initial-Hire and Physical Ability Test Standards and Physician's Guide 2020, p. 7)

14. A "Category A" medical condition is one that "would preclude an individual from performing the essential job functions of a municipal police officer or present a significant risk to the safety and health of that individual or others." A "Category B" medical condition is one that, "based on its severity or degree, may or may not preclude an individual from performing the essential job functions of a municipal police officer, or present a significant risk to the safety and health of that individual or others."<sup>6</sup> (Initial-Hire and Physical Ability Test Standards and Physician's Guide 2020, p. 8)

15. Dr. John Madonna was responsible for conducting the Appellant's first psychological evaluation. This evaluation included a questionnaire designed for law enforcement candidates, the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), the 16 Personality Factor Inventory (16PF), and a clinical interview which lasted approximately 45 minutes. (Resp. Ex. 4; Testimony of Madonna)

16. Based on the results of his evaluation, Dr. Madonna concluded that while the Appellant was "very affable," he did not possess the

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6. The Supreme Judicial Court largely deferred to these standards in *Police Dep't of Boston v. Kavaleski*, emphasizing the requirement that a candidate not possess a condition which prevents them from performing the essential functions of a position. 463 Mass. 680, 684, 694-95 (2012).

which he was employed, and the resident later complained of lingering wrist pain.

Following each of these incidents, the Appellant was terminated for the inappropriate use of force, following an altercation in which an individual was resistant to his instructions. This generally supports the conclusion of Drs. Madonna and Haynes that there is a substantial risk that, under high levels of stress, the Appellant would resort to physical force in situations that do not require it. Again, this tendency is not necessarily a permanent bar to employment as a police officer, but the Appellant must take certain tangible steps (e.g., counseling, mentorship, or other training) to improve his candidacy and demonstrate that he possesses the necessary psychological attributes and behavioral control impulse to serve as a police officer.

CONCLUSION

For all of the above reasons, I recommend that the appeal of John Doe under Docket No. [Redacted] be *denied*.

Notice to:

John Doe  
[Address redacted]

David J. Wenc, Esq.  
City of Springfield  
36 Court St., Room #5  
Springfield, MA 01103

\* \* \* \* \*

SOKHON MEL

v.

BOSTON POLICE DEPARTMENT

G1-23-234

March 21, 2024  
Christopher C. Bowman, Chair

**Bypass Appeal-Timeliness-60 Day Appeal Period**—A candidate for appointment to the Boston Police Department saw his bypass appeal dismissed for lack of timeliness where it was filed 70 days after he was notified of his right to file such an appeal with the Commission.

SUMMARY OF DECISION

The Commission dismissed the bypass appeal of the Appellant for lack of jurisdiction as it was not filed within 60 days of receiving the reasons for bypass from the Boston Police Department and there was no good cause that would warrant tolling the filing deadline.

**DECISION ON RESPONDENT’S MOTION TO DISMISS**

PROCEDURAL BACKGROUND

On November 16, 2023, the Appellant, Sokhon Mel (Appellant), filed a bypass appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Police Department (BPD) to bypass him for original appointment to the position of permanent, full-time police officer. On January 30, 2024, I held a remote pre-hearing conference which was attended by the Appellant and counsel for the BPD. The BPD subsequently filed a motion to dismiss the Appellant’s appeal based on timeliness, and the Appellant did not file a reply.

UNDISPUTED FACTS

The following is undisputed:

1. On June 30, 2021, the Appellant took the civil service examination for police officer.
2. On September 1, 2021, the state’s Human Resources Division (HRD) established the eligible list for Boston police officer.
3. Between September 2022 and January 2023, HRD issued Certification No. 08848 to the BPD to appoint candidates to the position of Boston police officer.
4. The Appellant was ranked 61st among those candidates willing to accept appointment on the certification.
5. On September 7, 2023, the BPD notified the Appellant that he was being bypassed for appointment. The bypass letter notified the Appellant of his right to file a bypass appeal with the Commission.

6. 70 days later, on November 16, 2023, the Appellant filed a bypass appeal online with the Commission, contesting the decision of the BPD.

#### RULE REGARDING DISMISSAL FOR LACK OF JURISDICTION

The Presiding Officer may at any time, on his or her own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter, for failure of the Petitioner to state a claim upon which relief can be granted or because of the pendency of a prior, related action in any tribunal that should first be decided. 801 CMR 1.01 (7)(g)(3).

#### ANALYSIS

The Commonwealth's Standard Adjudicatory Rules of Practice and Procedure, specifically the provision codified at 801 CMR 1.01 (6)(b), states that:

"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." (emphasis added)

More than two decades ago, the Commission adopted by rule a Bypass Appeal Statute of Limitations that allows bypassed candidates to file an appeal with the Commission up to 60 days "from receipt of ... notice" of the bypass reasons. The Appellant received the reasons for bypass from the BPD on September 7, 2023. Given the above-referenced statute of limitations, the Appellant had until November 6, 2023, to file a timely bypass appeal with the Commission.

Ten days after the November 6, 2023 filing deadline, the Appellant, on November 16, 2023, filed an appeal online with the Commission. As such, his bypass appeal is not timely.

At the pre-hearing conference, to determine if there was good cause to toll the period for filing a bypass appeal with the Commission, I asked the Appellant about the circumstances surrounding his late appeal. He acknowledged receiving the bypass reasons, which contained his right to appeal within 60 days, but indicated that his busy work schedule prevented him from filing within 60 days. While I am sympathetic to the demands of a busy work schedule, that alone does not constitute good cause for tolling the filing deadline here, particularly given the relatively generous period of time allotted to file an appeal as well as that appeals can now be filed online with the Commission at any hour.

#### CONCLUSION

The Appellant's appeal under Docket No. G1-23-234 is hereby *dismissed*.

\* \* \*

By a vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) on March 21, 2024.

Notice to:

Sokhon Mel  
[Address redacted]

Omar Bennani, Esq.  
Boston Police Department  
Office of the Legal Advisor  
One Schroeder Plaza  
Boston, MA 02120

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THOMAS PASQUARELLO

v.

HUMAN RESOURCES DIVISION

B2-24-002

April 4, 2024

Paul M. Stein, Commissioner

**Examination Appeal-Time In Service-Police Sergeants' Exam—** On motion from HRD, the Commission dismissed the appeal from a candidate for promotion to Cambridge police sergeant where he was ineligible to take the exam because he had not served at least three years as a police officer prior to its administration. This candidate sat for and passed the exam twice, and was included on the list by HRD based on erroneous information supplied the agency by the Cambridge Police Department regarding the Petitioner's length of service.

#### SUMMARY OF DECISION

The Commission upheld HRD's decision that the Appellant was ineligible to take the September 2023 readministered Statewide Police Sergeant Promotional Exam because he had not been employed as a Cambridge police officer at least three years prior to November 2022, which was a statutory prerequisite to eligibility to take the first-level promotional exam originally administered in September 2022—and only officers eligible to take the originally scheduled exam were eligible to take the readministered exam.

#### DECISION ON RESPONDENT'S MOTION FOR SUMMARY DECISION

On January 3, 2024, the Appellant, Thomas Pasquarello, a Cambridge police officer, appealed to the Civil Service Commission (Commission)<sup>1</sup>, after he was informed that his eligibility to participate in the Statewide Police Sergeant Promotional Exam, originally administered in September 2022 and re-administered on September 23, 2023 by the state's Human Resources Division (HRD), had been revoked. I held a remote pre-hearing conference on this appeal on January 30, 2024. After further investigation, HRD filed a Motion for Summary Decision, in which it confirmed that the Appellant had not been employed

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1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 (formal rules), apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

Ian Keefe, Esq.

Melissa Murray, Esq.

Norris, Murray & Peloquin, LLC

## COURT DECISIONS

*Superior Court Rules that Provision In City Of Somerville Charter Conditioning The Mayor's Appointments To Civil Service Positions On Confirmation By City Council Does Not Conflict With MGL c. 31 And Upholds Commission's Decision Affirming Bypass Of Police Candidate For Promotion To Lieutenant For Pattern Of Untruthfulness*

Suffolk Superior Court denied the appeal of a Civil Service Commission decision upholding the bypass of Sergeant Michael Kiely for promotion to the position of Lieutenant in the Somerville Police Department (“SPD”). *Michael Kiely v. Massachusetts Civil Service Commission and City of Somerville*, Suffolk Superior Court, DKT No. 2284CV02483 (April 5, 2024). The Court held that the City of Somerville (the “City”) could consider a nearly 15-year-old disciplinary case related to untruthfulness, when considering a candidate for promotion. Additionally, the Court agreed with the Commission that there was insufficient evidence to support Kiely’s claim that a City Council member was biased against him. The Court also rejected Kiely’s argument that the City Charter provision, which establishes that the mayor shall make appointments to Civil Service positions, *subject to confirmation by the city council*, conflicted with M.G.L. c. 31.

Michael Kiely was appointed as a police officer to the SPD in 1995 and later promoted to sergeant in 2014. Prior to his promotion to sergeant, Kiely was subjected to discipline on two separate occasions. In 2003, Kiely was disciplined for falsifying records, being untruthful, and filing an untimely report. He was suspended for fifteen days. On appeal, the Commission found that Kiely’s conduct constituted untruthfulness. In 2005, Kiely was suspended for five days for using a school computer in an elementary school to view pornography while working overtime and leaving the pornography on the screen. Kiely did not appeal the suspension.

Later in 2016, Kiely filed an internal complaint against a superior officer for harassment. As a result of the complaint the officer was suspended for five days. On appeal the Commission overturned the suspension because Kiely failed to testify. *Michael Mulcahy, Appellant v. City of Somerville*, 31 MCSR 134 (2018). The Commission noted in its decision that Kiely had “casually retracted” the allegations. *Id.*

In September 2017, Kiely took the promotional examination to become a lieutenant. Following the exam, he was ranked second on the City’s list of candidates willing to accept promotion. After

going through the City’s internal promotion process which included a panel interview with the Chief of the Police, two deputy chiefs and the Director of Personnel, the Mayor made a conditional offer of promotion, subject to confirmation by the City Council.

Somerville’s City Charter provides in relevant part: “The mayor may appoint, subject to confirmation by the city council” officers and members of the police department. Prior to the events related to this appeal the Somerville City Council created the Confirmation of Appointments and Personnel Matters Committee (the “CAPM Committee”) to review the Mayor’s chosen candidates. The CAPM reviewed Kiely’s proposed promotion and decided not to recommend him for promotion.

Subsequently, the City Council voted against promoting Kiely, based on the Committee’s recommendation and concerns that his previous disciplinary matters and his retraction of his harassment accusations against a superior officer demonstrated a pattern of untruthfulness.

In his appeal to the Court, Kiely argued that his prior discipline should not have been considered because it was stale and therefore there was not a sufficient nexus between his prior misconduct and his current ability to perform the duties of lieutenant. In addition, he argued that the Chair of the Committee was biased against him when he voted on bypassing Kiely. Finally, Kiely argued that the City’s Charter provision, subjecting the Mayor’s civil service appointments and promotions to the approval of the City Council conflicted with Chapter 31 and therefore the Mayor’s decision to promote Kiely should stand.<sup>1</sup>

The Court rejected Kiely’s claim that his prior discipline was stale holding that “[i]t was reasonable for the City and the Commission to rely on conduct that pertained to Kiely’s untruthfulness, particularly considering their concerns with his pattern of untruthfulness.” Further, giving the Commission wide deference in its evidentiary findings, the Court concluded there was insufficient evidence to support a claim of bias and substantial evidence to support the bypass.

The Court also rejected Kiely’s claim that as the Appointing Authority, the Mayor cannot “subvert” his authority to appoint and promote members of the police department to the City Council. The Court ruled that there was no conflict between Chapter 31 and the City Charter.<sup>2</sup> Chapter 31 defines “appointing authority” as

1. Kiely also argued that he had not been treated fair and impartial because the City Council decided in 2018 to conduct a more thorough review of the Mayor’s recommendations. The Court dismissed Kiely’s unsupported claim in a footnote explaining that Kiely failed to show how even if true this would affect the Commission’s decision of whether there was a reasonable justification for his bypass.

2. See *Town Council of Agawam v. Town Manager of Agawam*, 20 Mass. App. Ct. 100, 103 (1985).

“any person, board or commission with power to appoint or employ personnel in civil service positions.” “Thus, under G.L. c. 31, in Somerville, the Mayor, subject to City Council confirmation, is the ‘appointing authority.’”

While much of the decision is specific to Somerville and the interplay between G.L. c. 31 and the City Charter, the court’s decision regarding Kiely’s discipline and its ruling that there is no time bar on when or whether an appointing authority may consider discipline related to untruthfulness has broader significance. It is important to note, however, that the court did not specify the weight that should be given to such prior discipline. Arguably, if Kiely had only been disciplined in 2003, the City Council might have concurred with the Chief of Police and the Mayor that the discipline was outdated or given it much less weight. However, in this case, the court determined that the City Council reasonably concluded that Kiely had exhibited a pattern of evasiveness and bending the truth when it suited him, and that this pattern of behavior undermined the trust necessary for the position he was seeking, prompting the City Council’s decision to bypass him.

## BYPASS APPEALS

*Commission Overturns Bypass For 21-Year-Old Domestic Violence Incident Where Alleged Victim Consistently Denied Abuse*

The Commission granted a bypass appeal of the City of Medford’s decision to bypass Ryan Sweeney for the position of police officer due to an alleged 21-year-old domestic violence incident. *Ryan J. Sweeney v. City of Medford*, 37 MCSR 2 (January 25, 2024). The Commission found that the City of Medford (the “City”) failed to prove by a preponderance of the evidence that the alleged domestic violence incident, for which the Appellant was criminally charged and later accepted a Continuance without a Finding (“CWO”), justified bypassing Mr. Sweeney given conflicting evidence about the incident’s occurrence as reported by the arresting police officer.

At the time of his application with the Medford Police Department, Mr. Sweeney had been employed at Harvard University in its Property Maintenance division for over 10 years. During his tenure, he was nominated twice for the “Harvard Hero” award, given by the university to high-performing staff and as part of his background investigation, he received glowing recommendations from co-workers, supervisors, family members, and friends.

Despite the positive references and work history, the City bypassed Mr. Sweeney on the basis of a 21-year-old police report of domestic violence that was alleged to have occurred when Mr. Sweeney was in college between himself and his girlfriend at the time. The police report stated that in November 2002, when Mr. Sweeney was 19 years-old, a campus police officer observed “pushing and shoving” between a male and female. The report notes that the officer originally thought the interaction could just have been a snowball fight or joking around in the snow. However, according to the report, as the officer approached, he witnessed Mr. Sweeney

push the woman to the ground, shout and jump on her and strike her with a closed fist.

Mr. Sweeney was arrested on the scene. The report states that during the arrest, the female, who was crying, asked the officer to let Mr. Sweeney go, denied the assault and refused assistance or a restraining order. She later went to the police station to reiterate that Mr. Sweeney did not strike her but was placed in protective custody due to her level of intoxication. Mr. Sweeney was arraigned on charges of domestic assault and battery the next day. A few months later, on the advice of his lawyer, he admitted to sufficient facts that the events occurred as detailed in the report and received a CWO. The criminal case was dismissed a year later.

During his background investigation, Mr. Sweeney repeated what he told the police officer in November 2002. He claimed that he and his girlfriend were walking home from a college party, and she kept falling over due to intoxication. He denied assaulting her and stated that he only accepted the CWO on his lawyer’s advice to avoid the risk of a trial. He also mentioned that he would have contested the case at trial had he known the CWO would remain on his criminal record.

In addition to reviewing the police report and Mr. Sweeney’s criminal record, the background investigator contacted the alleged victim, who had not been in contact with Mr. Sweeney for over 20 years. She continued to deny that the incident happened as was reported and stated that Mr. Sweeney never assaulted her. She claimed that the arresting officer and the court had refused to listen to her version of events, even when she appeared in court with her parents during Mr. Sweeney’s arraignment.

Medford Chief of Police Jack Buckley testified that in making his recommendation to bypass Mr. Sweeney, he relied heavily on the police report and the Department’s “near” zero-tolerance policy towards domestic violence. He testified that he found the report was timely, relative to the events giving rise to the arrest and that he expected the reporting officer to be honest unless given a reason to believe otherwise.<sup>3</sup>

Although noting the strong precedent for upholding a bypass for position of police officer for past incidents of domestic violence, the Commission held that in this specific instance, the City failed to show a sufficient nexus between the alleged incident over 21 years ago and Mr. Sweeney’s ability to perform the roles and responsibilities of a police officer. The Commission indicated that had the alleged victim not been consistent for over 21 years that the assault never happened, the City would have been within its right to bypass Mr. Sweeney. *Contra Khiry Todd v. Boston Police Department*, 37 MCSR 23 (March 7, 2024) (affirming bypass despite alleged victim of domestic violence recanting allegations).

The Commission also credited Mr. Sweeney’s testimony that he only took the CWO to avoid the risk and expense of taking the case to trial and that he believed that after the case was dismissed it would no longer be on his record. The Commission specifically

3. It should be noted that the background investigator had requested that she be able to interview the arresting officer, however her request was denied. Her superi-

ors instructed her that an interview with the arresting officer was not necessary, and that the Department would let the arrest report stand on its own.



noted that under Massachusetts law, “there are no circumstances under which an admission to specific facts, followed by a CWOFF in a case that is later dismissed, would be considered a conviction in the absence of a guilty plea or finding.” *Ryan J. Sweeney v. City of Medford*, 37 MCSR 2 (January 25, 2024) citing: *Memorandum of Decision, Finklea v. Massachusetts Civil Service Comm’n*, Suffolk Sup. CA No. 1784CV00999 (Feb. 9, 2018) and cases cited, affirming in relevant part, *Finklea v. Boston Police Dep’t*, 30 MCSR 93 (2017).

This case presents a good example for practitioners and appointing authorities, highlighting the potential pitfalls of relying solely on hearsay evidence, including police reports rather than interviews with the parties involved. *See also Yasmine Estrella v. City of Brockton*, 37 MCSR 49 (April 18, 2024). This limitation becomes particularly apparent when the criminal charges do not result in a conviction. Had the Chief of Police authorized the investigator to speak with the arresting officer, the City may have obtained sufficient testimonial evidence to support the bypass, or, more likely, found supporting or sufficient reason to disregard the incident all together as unconvincing or stale.

*Commission Affirms Bypass for Admitted Domestic Violence Incident and Finding of Untruthfulness For Incorrect Information On LTC Application*

The Commission upheld a bypass for the position of police officer due to an admitted domestic violence incident and for untruthfulness on an application for a Resident Class A license to carry (“LTC”). *Sabrina Perez-Martinez v. City Of Brockton*, 37 MCSR 13 (February 8, 2024).<sup>4</sup> Although there was ample evidence and precedential support to uphold the bypass based on the domestic violence incident alone, the Commission’s additional finding of untruthfulness diverges from prior decisions which have tended to give substantial deference and leeway to candidates who submit incorrect information during the application process (especially post Massachusetts Police Reform).

Except for a domestic violence incident that ended with the dismissal of all criminal charges, Ms. Sabrina Perez-Martinez demonstrated herself as a strong candidate for the position of police officer with the Brockton Police Department (“BPD”). Ms. Perez-Martinez presented with over seven years in the National Guard and experience overcoming adversity growing up as a foster child. She was also a full-time water treatment specialist and was one rank away from being a sergeant. In addition, she had an emergency medical technician (EMT) license, a first aid license, a CPR license, and had completed a basic firearms course.

However, on November 26, 2016, she was involved in a domestic incident with her boyfriend, a police officer with the BPD. As a result of the incident, her boyfriend obtained a temporary restraining order, and she was issued a criminal summons with charges of

assault and battery on a family/household member, malicious destruction of property, and intimidation of a witness. The restraining order was never properly served on Ms. Perez-Martinez, and it expired in December 2016. The criminal charges were dismissed after she appeared in court on at least two occasions.

During her interview with the BPD background investigator, she admitted that on November 26, 2016, while inebriated, she struck her ex-boyfriend’s motor vehicle with her motor vehicle, and then hit her ex-boyfriend in an attempt to grab his phone to stop him from calling 911. She also admitted that she was inebriated when she drove away from the scene.

Then, on November 22, 2019, after the dismissal of the criminal charges and the restraining order, Ms. Perez-Martinez applied for a Resident Class A license to carry a firearm (“LTC”) with the BPD. The BPD ultimately denied the LTC based on the 2016 domestic violence incident. In addition, she was determined to be untruthful when she answered “NO” to the following questions on the LTC application:

*Question #4 - Have you ever been arrested or appeared in any court as a defendant for any criminal offense?*

*Question #10 - Are you now, or have you ever been the subject of a restraining order issued pursuant to MGL c. 209A, or a similar order issued by another jurisdiction?*

When questioned by the background investigator, Ms. Perez-Martinez stated that she did not realize she was being dishonest in response to Questions 4 and 10. She explained that her lawyer informed her that the charges would not appear on her record and that her record would be sealed. She also stated that she answered “no” to Question 10 because she had never been served with the restraining order.

With ample precedential support<sup>5</sup>, the Commission found that the November 2016 incident of domestic violence, on its own, was enough to justify the bypass. The Commission also noted that the “incident had the twin effect of (1) garnering her a place on the statewide *domestic violence record keeping system*; and (2) providing a disqualification for a license to carry, a prerequisite for the position of police officer.” [*emphasis added*].

Regarding the charges of untruthfulness on the LTC application, the Commission did not find that she was being untruthful when she denied being the subject of a restraining order. However, the Commission did find Ms. Perez-Martinez was untruthful when she answered “No” to Question 4, whether she had been arrested or ever appeared in court as a criminal defendant. Moreover, the Commission held that her failure to answer this question truthfully, by itself, provided reasonable justification to bypass Ms. Perez-Martinez.

4. The Commission rejected City’s additional reasons of alleged poor work history, failure to follow directions in obtaining an inspection sticker for her motor-vehicle, and failure to be forthcoming with information regarding a change in her residential address during the application process.

5. “A series of prior Commission decisions demonstrate that the Commission takes issues surrounding domestic violence seriously and that they merit particularly strict scrutiny when any violence has been perpetrated by a police officer can-

didate. Police officers are held to a higher standard of conduct and proven acts of domestic violence are a valid reason for bypassing a candidate for appointment.” *Khiry Todd v. Boston Police Department*, 2024 WL 1616174, at \*7; *See, e.g., Adams v. Department of Correction*, 32 MCSR 1 (2019); *Pilling v. City of Taunton*, 32 MCSR 69 (2019); *Lima v City of New Bedford*, 32 MCSR 98 (2019); *Lavery v. Town of North Attleborough*, 30 MCSR 373 (2017).

The Commission reasoned that because she was never served with the restraining order, it was plausible that she was not aware of it at the time she completed the LTC application. Consequently, although the answer was incorrect, the Commission was not able to say it was a deliberate lie. In contrast, the Commission found that her answer “No” to Question 4, was deliberate because she knew she had appeared in court as a defendant on two separate occasions, once for her arraignment and then again for the dismissal of the charges. The Commission did not credit Ms. Perez-Martinez’s explanation that she did not believe she was being dishonest because she thought the charges were not on her record.

The Commission has, especially in recent years, afforded candidates a level of deference and benefit of the doubt when they are determined to have supplied incorrect information on an application or during the application process:

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). 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. Thus, the serious consequences that flow from a finding that a law enforcement officer or applicant has violated the duty of truthfulness require 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); *Morley v. Boston Police Dep’t*, 29 MCSR 456 (2016); *Lucas v. Boston Police Dep’t*, 25 MCSR 420 (2012) (mistake about appellant’s characterization of past medical history).

*Johnny Denis v. City of Somerville*, 36 MCSR 304 (May 5, 2022).<sup>6</sup>

In this case, the Commission’s finding of untruthfulness diverges somewhat from its prior decisions. However, notwithstanding its finding of untruthfulness, and consistent with its prior acknowledgment that a finding of untruthfulness can negatively impact a candidate in future applications for employment, the Commission encouraged the BPD to consider Ms. Perez-Martinez for future employment should she apply in the future:

Nothing in this decision is meant to suggest that the Appellant is permanently disqualified for appointment as a Brockton Police Officer, particularly given her many positive attributes, including her commendable military service. Rather, with the passage of time, and more attention to ensuring that all questions are answered in a thorough, forthright manner, I would encourage Brockton to provide the Appellant with full, fair consideration on a going forward basis.

So, although the Commission’s decision in this case deviated from prior decisions where candidates were given the benefit of doubt in order to shield them from the long-term harm being labeled “untruthful” the Commission continued to advocate for giving candidates another chance. It is unclear whether this case was an anomaly or the start of a new trend of holding candidates to a higher standard when it comes to providing incorrect information in the application process.

*Commission Upholds Bypass for Appointment To Police Officer Position Due To Finding In Psychological Exam Of Disqualifying “Category B” Condition, Despite Significant Procedural Flaws In Application Process*

In *John Doe v. Springfield Police Department*, 37 MCSR 29 (February 1, 2024), the Commission found there was reasonable justification for the Springfield Police Department (“SPD”) to bypass John Doe<sup>7</sup> (the “Appellant”) based on the finding of a disqualifying Category B medical condition during his psychological examination.

The Appellant’s background investigation with the SPD revealed that he was terminated from three prior employers for interactions involving excessive use of force with individuals under his care or charge. In 2014, the Appellant was terminated from his position in security and recreation at a Springfield area technical school for physically striking a student in the face during an altercation where the student struck the Appellant first. In 2015, the Appellant was terminated from his position as a behavioral interventionist in an education program following an altercation with a student that resulted in an injury to the student. And then in 2017 the Appellant was terminated from his position as a residential supervisor in a youth home for injuring a resident’s wrist while restraining the resident. In addition, he was terminated in 2021 from an organization that teaches young adults’ vocational skills for using inappropriate language during an interaction with a client.

After the completion of the background investigation and without first making a conditional offer, the SPD required the Appellant to undergo a psychological evaluation. The evaluation, conducted by Dr. John Madonna, included a questionnaire designed for law enforcement candidates, the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), the 16 Personality Factor Inventory (16PF), and a clinical interview which lasted approximately 45 minutes.

Based on the results of his evaluation, Dr. Madonna concluded that while the Appellant was “very affable,” he did not possess the psychological qualifications necessary to serve as a police officer. Dr. Madonna relied on test profiles that indicated the Appellant had “a low stress tolerance”, a “below average reasoning ability, and an inclination to be dominant, controlling, and to take action without sufficient thought.” Dr. Madonna also expressed concerns about the potential misuse of force if the Appellant were to become a police officer, given the Appellant’s history of multiple terminations involving physical restraint and evaluation results indicating a tendency toward impulsivity.

6. In *Denis*, the Commission upheld a bypass for “lack of candor” for multiple inaccuracies and inconsistencies in the application process but specifically did not make a finding of untruthfulness despite characterizing the appellants responses in the application as “implausible.” *Id.*

7. Because the appeal revolved around a confidential psychological evaluation of a civil service candidate, the Commission voted (4-1), in accordance with its published privacy standard, to redact the Appellant’s name and substitute a pseudonym.

The Appellant underwent a second psychological examination, at his own expense, with Dr. Kamlyn Haynes. Dr. Haynes, who reviewed Dr. Madonna's report, concurred with Dr. Madonna's findings. Specifically, Dr. Haynes concluded that the Appellant did not possess the qualifications to become a police officer and expressed a particular concern about his several consecutive terminations and inability to manage stress in both the long- and short-term.

The SPD bypassed the Appellant based on the results of his psychological evaluations.

The Human Resources Department ("HRD") promulgates the rules and standards for physical and psychological testing, which can be found in HRD's Initial-Hire and Physical Ability Test Standards and Physician's Guide-2020. Disqualifying medical and psychiatric conditions are grouped into "Category A" and "Category B" conditions. (Initial-Hire and Physical Ability Test Standards and Physician's Guide 2020, p. 7). A "Category A" medical condition is one that "would preclude an individual from performing the essential job functions of a municipal police officer or present a significant risk to the safety and health of that individual or others." A "Category B" medical condition is one that, "based on its severity or degree, may or may not preclude an individual from performing the essential job functions of a municipal police officer, or present a significant risk to the safety and health of that individual or others." (Initial-Hire and Physical Ability Test Standards and Physician's Guide 2020, p. 8).

Despite testifying at the hearing that they were not aware of the standards and rules promulgated by HRD, the Commission found that the evaluations by Dr. Madonna and Dr. Haynes "were sufficiently thorough and professional, and identified in the Appellant abnormal psychological characteristics that could pose a significant risk to the safety and health of others should the Appellant become an SPD police officer." During the hearing, when read the HRD standards, both Dr. Madonna and Dr. Haynes testified that their opinion remained the same; that the Appellant could not perform the essential functions of a police officer<sup>8</sup>. Specifically, Dr. Haynes testified that "the Appellant was ill-suited for employment as a police officer; based on the results of the evaluation, she remained concerned about the risk that the Appellant would pose to the safety of others, especially given his past use of force in volatile situations."

Finding that the SPD established by a preponderance of evidence that the results of the psychological evaluation provided reasonable justification for its decision to bypass the Appellant, the Commission denied the appeal.

This decision, favoring the employer, offers valuable guidance for practitioners and representatives of police and fire departments who encounter procedural errors during the application process. While addressing two specific errors made by the SPD in this instance, the Commission noted that these errors did not prejudice

the appellant. However, they underscore the importance of rectifying procedural errors in the application process to prevent potential appeals in the future.

First, the Commission raised the issue of requiring the Appellant to undergo a psychological evaluation prior to receiving a conditional offer of employment. "Massachusetts and federal law prescribe that a firm "bona fide" conditional offer based on an evaluation of "all relevant non-medical information" is necessary before a candidate can undergo medical or psychological screening." *Luis E. Cotto, Appellant v. City of Taunton*, 36 MCSR 103, 106 (2023); See G.L. c. 151B, § 4(16); Americans With Disabilities Act, 42 U.S.C. §§ 12112(d)(2)-(3); Massachusetts Commission Against Discrimination, "Guidelines; Employment Discrimination on the Basis of Handicap - Chapter 151B", § IV & § V, <http://www.mass.gov/mcad/resources/employers-businesses/emp-guidelineshandicap-gen.html> (MCAD Guidelines). See also *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 682 n.5 (2012); *O'Neal v. City of New Albany*, 293 F.3d 998, 1007-1009 (7th Cir. 2002); *Leonel v. American Airlines, Inc.*, 400 F.3d 702, 708 (9th Cir. 2005); *Downs v. Massachusetts Bay Transp. Auth.*, 13 F.Supp.2d 130, 137-39 (D. Mass. 1998), citing, "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations" (EEOC Notice 915.002 October 10, 1995). "Adherence to MCAD guidelines ensures that: a) employers do not gain access to a candidate's sensitive medical information; and b) candidates are not subjected to inherently invasive medical and psychological evaluations, unless necessary." *Nelson N v. Department of Correction*, 35 MCSR 259, 267 (2022).

In this case the Commission did not find that administering the psychological evaluation without first making a conditional offer prejudiced the Appellant or indicated that the bypass was motivated by any improper reason. See *Sherman v. Town of Randolph*, 472 Mass. 802, 812, 37 N.E.3d 1043, 1052 (2015). Although arguably the Appellant's negative employment history alone could have been reasonable justification for a bypass, the SPD relied on the results of the psychological evaluations by both Dr. Madonna and Dr. Harper, who in a somewhat circular fashion incorporated the prior negative employment history to support their conclusions that the Appellant had a Category B condition. In this case, the SPD could have avoided the error in two separate ways. First, the SPD could have simply bypassed the Appellant for his negative work history alone and therefore would have avoided the psychological evaluation all together. Or, the other option, suggested by the Commission, would have been to offer the Appellant the position on the condition that he passes the psychological examination.

Second, the SPD failed to ensure that Dr. Madonna and Dr. Haynes were aware of HRD's Initial-Hire and Physical Ability Test Standards and Physician's Guide 2020, prior to conducting the evaluation of the Appellant. Fortunately for the SPD, both ex-

8. It should be noted that the Tentative Decision, as adopted by the full Commission, does not indicate whether Dr. Madonna or Dr. Haynes specifically identify that the Appellant's "low stress tolerance" and "inclination to be dominant, controlling and to take action without sufficient thought," were together or apart, Category B med-

ical conditions. It is only in the actual decision by the Commission, adopting the Tentative Decision, that the Commission stated the Appellant was disqualified for having a "Category B" condition.

pert witnesses were able to pivot on the stand and testify that applying HRD's standards did not change their ultimate opinion on the Appellant's ability to perform the essential duties of a police officer. However, that will likely not be the case with all expert witnesses in similar bypass appeals. Clearly, as the Commission noted in a footnote, all appointing authorities should "ensure that anyone performing a psychological evaluation of a civil service candidate in the future becomes well-versed in the standards for use in the hiring process of any adverse evaluation, as articulated by HRD and the Supreme Judicial Court."

*Commission Granted a Bypass Appeal of A Candidate Due To City's Failure To Complete A Fair, Impartial And Sufficiently Thorough Review Of the Applicant and Failure to Provide Sufficient Evidentiary Support For Its Cited Reasons For Bypass*

In *Yasmine Estrella v. City of Brockton*, 37 MCSR 49 (April 18, 2024), the Commission overturned the City of Brockton's decision to bypass Yasmine Estrella for the position of firefighter because it failed to provide sufficient evidentiary support for its cited bypass reasons. In addition, the Commission found that the City failed to prove it conducted a fair, impartial and sufficiently thorough review of Ms. Estrella's candidacy. Unsatisfied with the City's application process and reasons for bypass, the Commission ordered the City comply with additional safeguards to its application process.

When Ms. Yasmine Estrella applied to be a firefighter with the City of Brockton (the "City"), she was a 31-year-old graduate of UMASS Boston with a degree in Business Management. She had also served eight years in the Army National Guard where she ultimately reached the rank of sergeant and was honorably discharged. During her time with the National Guard, she was activated for numerous public emergencies including Storm Nemo and each Boston Marathon during her tenure, including the infamous Boston Marathon that was the subject of a terrorist act. She also served overseas in Kosovo from January 2018 to November 2018 as a team leader.

During her background investigation the issue of whether she qualified for residency preference with the Brockton Fire Department arose due to her inability to provide her social security card and certain documentation related to her License to Carry ("LTC"), all of which she indicated were locked in a safe that she could not open.

As part of the application process, all candidates were interviewed by a panel that consisted of the Brockton Fire Department Command Staff. Each panelist was required to complete a rating form listing their name, the candidate's name, and comments related to the candidate's responses, using the following categories: appearance; enthusiasm; poise and confidence; honesty in responses to questions; and additional notes. The panelists' rating forms for Ms. Estrella presented during the hearing showed only cursory notes from the panelists, with one panelist failing to identify his/her own name. Every panelist noted her lack of LTC documentation on the form and 3 out of the 5 panelists noted that Ms. Estrella blamed her failure to provide the requested documentation on others. Further, only the Fire Chief's rating form noted anything related to her being untruthful, stating, "Not really too upfront when asked questions about residency."

After her panel interview, the City issued a letter bypassing her for the position of firefighter with the Brockton Fire Department. The letter listed the following reasons for the City's decision to bypass:

- 1.) *Your application was incomplete. Missing among other documents your Massachusetts License to Carry Firearms (LTC) and a copy of your social security card. When asked about these items, you stated, "It is locked in a safe and cannot be retrieved at the moment". Based on the following, this statement is deceptive.*
- 2.) *You have an issue with your LTC. Documentation you presented in a previous interview, not this present interview, stated your significant other transferred several weapons to you in July of 2020. The transfer required paperwork where you did not claim Brockton as your residence. You did not submit a current copy of your LTC stating the address as being updated, but the system is backed up. Your statements are untruthful.*
- 3.) *You claim residency at [B Road] in Brockton for approximately 3 years but at no time did you register your LTC in Brockton. Placing you in violation of Massachusetts general Law section 1298 and 131.*

After the hearing where only the Fire Chief and Ms. Estrella testified, the Commission granted the bypass appeal. The Commission found that for numerous reasons, "the City failed to prove, by a preponderance of the evidence that it conducted a fair, impartial and sufficiently thorough review that resulted in valid reasons that bear negatively on the Appellant's current fitness to perform the duties and responsibilities of a Brockton firefighter."

First and foremost, the City did not submit a background investigation report outlining the findings of the background investigation nor did it call the investigator to testify to support the City's reasons for bypass. The City's sole witness was the Fire Chief, who did not question any of the candidates during the interview process and could not recall key details of Ms. Estrella's background information or response to the interview panel.

The City also failed to produce any evidence to support the claim that she failed to register her LTC in Brockton, in violation of the law. The Commission balked at the City's attempt to support this cited reason by simply submitting a City-issued bypass letter from a previous hiring cycle restating the allegation and expecting the Commission to accept the statement in the letter as fact with no supporting documentation. Furthermore, the Commission noted that even if the allegation of her failing to update her LTC in a timely manner were true, the City did not demonstrate any nefarious intent nor explain why this failure would render her unfit to serve as a Brockton firefighter.

The Commission also took issue with the lack of information contained in the interview forms created by the panelists during the interview. The Commission noted that the information provided on the forms was not sufficient to support an allegation of dishonesty. Moreover, the Commission noted that despite the issue with the LTC, which the City could not prove, the City failed to account for all the supporting documentation (i.e., bank and mortgage statements, a homeowner's insurance policy, and RMV records) provided by Ms. Estrella that listed Brockton as her residence and supported her argument that she met the residency requirement.

In a similar vein, the Commission admonished the City for failing to show how the alleged deficiencies in her application outweighed all of the positive attributes presented by Ms. Estrella. The Commission highlighted Ms. Estrella's "rather remarkable success story" whereby she was raised by her grandparents, became president of the national honor society in high school, served in active military duty at home and overseas and returned home to attain a bachelor's degree and embark on a successful career in property management. While the Commission recognized there is strong precedential support granting appointing authorities discretion in weighing a candidate's positives against their negatives, appointing authorities are not free to ignore the positives all together. Furthermore, the Commission noted, appointing authorities do not have discretion to unfairly tarnish a candidate's reputation without a "careful, thoughtful review supported by a preponderance of the evidence."

Finally, the Commission addressed a last-minute reason for bypass that was not raised in the bypass letter. At the hearing, the City alleged that Ms. Estrella falsely claimed a homestead exemption for a property she recently purchased in Brockton but purportedly never lived there. The Commission summarily dismissed this claim because it was not raised in the bypass letter. However, the Commission noted that in the future it expects that the City to produce evidence that all candidates for appointment are held to the same standard regarding violations that may be automatically disqualifying.

Although it is unclear whether the application and interview process with the BFD itself was flawed, or whether the City simply failed to adequately prepare and present its case at the hearing, or a combination of the two, the Commission was clearly not satisfied with the City's application process and reason for bypass. The Commission has long held that "a finding of untruthfulness must be supported by 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). By only presenting the Fire Chief to testify in support of the City's decision to bypass Ms. Estrella, the City was limited to presenting insufficient hearsay evidence and the cursory notes from the interview panelists. Although hindsight is twenty-twenty, if the background investigation report was never completed, the City should have at least presented the background investigator to testify as well as members of the interview panel.

In fact, due to the lack of evidentiary support proffered by the City, the Commission ordered, along with placing Ms. Estrella at the top of the next list as a remedy, that the City improve how it documents its interview process for future firefighter candidates. Specifically, the Commission ordered that "[a]s part of any future hiring cycle regarding the appointment of firefighters, all interviews of candidates shall be audio and video recorded with the recording preserved for review by the Commission in the event of any bypass appeal(s)." In addition, the Commission ordered that, "[t]he City shall work to ensure that its interview panel is representative of the community it serves, both in terms of sex and race, and shall develop questions and criteria (beyond poise, appearance, confidence, etc.) that provide a more accurate assess-

ment of a candidate's ability to perform the essential functions of a firefighter."

Practitioners and appointing authorities should note that the remedies, in this case, are what the Commission considers as best practices and generally encourages, rather than orders, all appointing authorities to adopt said practices when interviewing candidates for police and fire. Although the requirements can be cumbersome, they can help to prevent credibility issues, as noted in this case. Furthermore, this case is also a great example of why following the Best Evidence Rule is paramount. The City may have prevailed if it had not relied so heavily on hearsay evidence. Official documentation regarding the LTC registration, the investigation report, the investigator himself, and calling the interview panel members as witnesses would have been more persuasive than the Fire Chief's testimony and prior bypass letter. Finally, this decision serves as a reminder that an appointing authority severely risks being unable to rely on a legitimate reason for bypassing a candidate if that reason is not sufficiently detailed in the bypass letter.

*Commission Upholds Bypass Of Candidate For Boston Police Officer Who Had Been Subject To Recent Abuse-Prevention Orders Arising From Uncharged Domestic Violence Incidents*

In *Khiry Todd v. Boston Police Department*, 37 MCSR 23 (March 7, 2024), the Commission upheld the Boston Police Department's ("BPD" or the "Department") decision to bypass former boxer Khiry Todd due to multiple accusations of domestic violence.

Mr. Todd is a professional boxer (record of 12 wins, 10 by knockout) and lifelong Massachusetts resident, who resides with his fiancée, "TZ", and their three children. He graduated from high school in 2010 and continued his boxing career until December 2022 when he joined a County Sheriff Department's Academy to become a Correction Officer with a County Sheriff's Office. According to Mr. Todd, he was terminated from the Academy in January 2023 for attending a job interview, which he asserts he obtained permission to attend from his supervisor the day before.

Mr. Todd and TZ have been in an on and off relationship for the past 15 years that resulted in multiple restraining orders against Mr. Todd on behalf of TZ and her mother, "KZ". In July 2018, TZ filed a complaint for restraining order against Mr. Todd. Her accompanying affidavit stated that Mr. Todd "attempted to fight [the man TZ was with at the beach] while I tried breaking it up. He showed up at my house later on with his sister who then fought me. This puts me in fear because in the past we have had physical altercations when arguing and things have escalated to phones being smashed and pushing [and] shoving." An *ex parte* hearing was scheduled for later that day, but the complaint was denied after TZ failed to appear.

Later in September 2018, TZ's mother, KZ, filed a separate complaint for a restraining order. She alleged in her affidavit that "Khiry Todd came to my home yesterday... As in the past he has refused to leave my house [and] has verbally [and] physically assaulted me... Before the cops came Khiry called my house [and] threatened to send his mother to come over [and] 'f\*\*\* me up'. I am afraid of him he has knocked me down in the past when I ask him to leave. If I attempt to close my door when I am asking him

not to come in he holds the door. In the past he threatens me. I am in great fear of him.”

The Lynn District Court issued a temporary restraining order that day. An evidentiary hearing was held in October 2018, where both KZ and Mr. Todd appeared. After the hearing, the Lynn District Court extended the restraining order to one year, after which it was vacated as KZ did not request to extend the restraining order.

In June 2020, TZ filed a second complaint for a restraining order against Mr. Todd alleging that they had been in a physical fight the night before. A temporary restraining order was issued on June 11, 2020, and then expired on July 8, 2020.

Later in January 2022, TZ called the police to report that she had been in a verbal fight with Mr. Todd and that she was afraid that the situation may escalate into physical violence. No criminal charges were filed, however when the police arrived at the home, it was discovered that Mr. Todd had an open warrant for an unrelated matter. He was arrested and taken into custody. When interviewed by the BPD background investigator, the arresting officer stated that “During the interaction in which Mr. Todd was arrested he was extremely uncooperative.” However, the police report related to the arrest stated that he was arrested without incident.

As part of the background investigation, the BPD investigator also contacted the Lynn Police Department and obtained Mr. Todd’s 2022 application for a LTC, which Mr. Todd testified was necessary to be employed in the Sheriff’s Department. The Lynn Police Department had denied his LTC application due to his history of domestic violence and his failure to disclose the January 2022 incident that led to his arrest on an unrelated open warrant. As part of his application for the LTC, Mr. Todd submitted affidavits signed by both TZ and KZ<sup>9</sup>. KZ’s affidavit did not deny or recant the statements she made in her application for the 2018 restraining order. TZ on the other hand, recanted the allegations she made regarding the prior restraining orders. She stated in her affidavit that, “[I] said what I felt like I need to say in order for the temporary restraining order to be granted.” She also contradicted her earlier statements when she wrote that she had “never been in fear of Khiry, he has also never been a threat to me.”

As part of their process, the BPD submitted Mr. Todd’s application and background investigation to a panel for review. After a round table discussion comprised of designees from the Department’s Internal Affairs Division, Human Resources Department, and member of the Legal Advisor’s Office, the BPD elected to bypass Mr. Todd. In a letter to Mr. Todd dated July 28, 2023, the BPD in-

dicated that it was bypassing Mr. Todd based on his work history, judgment, and prior history involving restraining orders.

On appeal, the Commission found that the BPD had ample evidence to support a reasonable justification to bypass Mr. Todd for appointment as Boston Police Officer based on “concerns regarding domestic violence-related incidents, including one incident that involved a physical altercation with the mother of his fiancée, which resulted in the issuance of a one-year restraining order.” The Commission gave significant weight to the incident involving KZ that resulted in a one-year restraining order. Although KZ testified at the hearing that she was no longer in fear of Mr. Todd and was ultimately supportive of him, she did not deny the events she had described in her 2018 affidavit. The Commission held that the 2018 incident alone justified the BPD’s decision to bypass, even though there were no criminal charges filed.

Regarding the allegations TZ made in her affidavits for the prior restraining orders and call to the police, all of which she recanted at the hearing, the Commission found that:

Given the complexities surrounding cases of domestic violence, the recency and frequency of these accusations, and the overall seriousness of the allegations (although now recanted), all three of these incidents remain significant when looking at the Appellant’s overall suitability to be appointed as a Boston Police Officer and the BPD was justified in considering them when deciding whether to bypass the Appellant for appointment.

However, in a footnote, the Commission clarified that because the 1-year restraining order by KZ, including the underlying misconduct, was sufficient on its own to bypass Mr. Todd, the Commission did not need to assess the credibility of TZ, who had recanted her earlier allegations.

It is unclear whether the bypass would have been upheld solely based on TZ’s recanted allegations. First, as the temporary restraining orders were dismissed due to TZ’s failure to appear at the scheduled evidentiary hearings, Mr. Todd was never given the opportunity to respond or defend himself in court. Moreover, Mr. Todd was never criminally charged for the alleged acts of domestic violence and therefore there were no criminal convictions. *See Ryan J. Sweeney v. City of Medford*, 37 MCSR 2 (January 25, 2024) (Commission overturned bypass for 21-year-old incident of domestic violence incident where alleged victim denied abuse and criminal charges were dismissed). It is likely however, that the Commission could have upheld the bypass when considering the circumstances surrounding TZ’s recanted allegations in conjunction with the fact that he failed to disclose the January 2022 incident in his LTC and BPD application and his interaction with law enforcement during his arrest. ■

9. The BPD investigator attempted to speak with TZ and KZ as part of the background investigation, leaving several voice messages, however, neither one was responsive.

Andrew J. Gambaccini  
 Reardon, Joyce & Akerson, P.C.

## DISCIPLINE CASES

*The Commission Confirms The Timetable For Public Safety Probationary Employees To Become Tenured Employees*

Deeply woven into the fabric of the civil service system is the concept of employee vetting, particularly in the public safety space. Firefighter or law enforcement candidates must sit for and pass examinations that are intended to evaluate aptitude for the work sought. Those candidates then are ranked based upon examination performance so that those who perform comparatively better have the first, and perhaps only, opportunities to advance. At that point, candidates must navigate background investigations and other hiring processes, including interview panels, before a conditional offer of employment is made, following which there may be a series of medical reviews, psychological evaluations and the need to complete successfully a training academy.

Once all of that work has been done and the hired candidate has begun actually performing official employment duties, there is another marker that exists before the important procedural and substantive safeguards of a tenured civil service employee, including the requirement of just cause for discipline, attach to the employee—the employee must pass through a probationary period. During the probationary period, the employee has very few rights. Obviously, the employee cannot be sanctioned for otherwise illegal reasons such as disciplinary action based on race or any other protected characteristic. However, for the most part, a probationary civil service employee can be disciplined or removed with little in the way of substantive rights and, in terms of procedure, without even the benefit of an appeal to the Civil Service Commission. Pursuant to G.L. c. 31, § 43, only an individual who has been aggrieved by disciplinary action imposed pursuant to G.L. c. 31, § 41 may appeal the discipline to the Commission. In turn, § 41 applies only to a “tenured employee[.]” which status is achieved following completion of the probationary period imposed by law. *See* G.L. c. 31, § 1 (defining a tenured employee).

For firefighters and police officers, the probationary burden is enhanced. Whereas other civil service employees must undergo a six-month probationary period; *see* G.L. c. 31, § 34; firefighters and police officers are to complete a twelve-month period. *See* G.L. c. 31, § 61. As important as the length of probationary time is, an equally critical issue is when the clock begins to run on the probationary period. After all, because firefighting and police academies run for several months, if the probationary period is inclusive of that time, an employee would be well on the way to tenured status at the time of academy graduation.

The law now is settled, however, that academy time does not count toward the calculation of a probationary period. The legal principle is bolstered by the language of § 61, which refers to a probationary period as the period of time during which an employee “shall actually perform the duties of [the] . . . position on a full-time basis . . .” When an individual is in a training academy, that individual no doubt is learning how to perform the duties of a position, but it also is true that the individual is not performing those duties in real life. A police academy recruit is learning when and how to arrest, but is not actually making arrests. Beyond statutory language, excluding academy time from the computation of the probationary period is consistent with legislative intent—an intent evidenced by the doubling of the probationary period for firefighters and police officers—that additional and critical oversight attention needs to be cast upon those who seek employment in the public safety arena. That intent would be frustrated if about half of the probationary period was taken up by academy time, meaning firefighters and police officers then could be evaluated actually doing their jobs only for about as long as “other” civil service employees who have a six-month probationary period.

During this period, the Commission twice was presented with instances in which probationary employees who had been removed during their probationary periods thereafter sought to challenge their removals through appeals to the Commission. In *Lugo v. City of Holyoke*, 37 MCSR 9 (2024), a firefighter was terminated for performance-related reasons after eleven months of employment. While the appointing authority hearing requirements of § 41 apply only to tenured employees, Lugo nevertheless was provided with an appointing authority hearing prior to his termination. The reason the hearing was held did not have to do with Lugo’s status, but it would appear rather because the appointing authority for the City’s firefighters is a Board of Fire Commissioners, meaning that the Board only can convene as a body and pursuant to open meeting law requirements, which include the right of an individual who might be subject to discipline to appear and to be heard.

On appeal to the Commission, short work was made of the appeal because, the Commission said, it had no jurisdiction to hear the appeal given that Lugo was not a tenured employee. However, because Lugo specifically questioned the rationale of the City’s decision, indicating that his performance evaluations had been satisfactory and it therefore would be illogical to remove him for performance reasons, the Commission elected to ask for and to review information concerning Lugo’s performance, then concluding that the City had legitimate concerns about Lugo’s ability to perform all required aspects of the job. It is an interesting hypothetical to ponder what might have occurred if the City’s articulated basis for removing Lugo was found by the Commission to

be problematic. Even in that instance, the Commission still would have no jurisdiction over a disciplinary appeal from Lugo but, at least conceptually, the Commission could have engaged its investigatory authority to probe further or, perhaps, could have suggested to Lugo that he seek a remedy elsewhere, including before the Massachusetts Commission Against Discrimination.

Next, in *Veras v. City of Lawrence*, 37 MCSR 19 (2024), another firefighter within his probationary period challenged his separation. Concluding that Veras indisputably had not performed the duties of a firefighter for twelve months, the Commission concluded that he was in his probationary period and dismissed the disciplinary appeal because Veras had no right of appeal to the Commission and the Commission had no jurisdiction to hear the appeal. Although Veras could not contest his separation, given that the reason for the separation was a failure to pass academy requirements and not, for instance, misconduct or poor performance, the Commission noted that, if Veras wanted to pursue the career still, he should take an upcoming civil service examination and attempt to begin the hiring process anew.

In all, *Lugo* and *Veras* confirm that, in an instance in which a probationary employee has been separated, a disciplinary appeal to the Commission will not succeed. There may be instances in which the Commission could be asked to use its investigatory powers to consider some aspect of the individual's employment or removal but, given that those powers are used sparingly, an individual's means of redress, if any exist, most likely would be in another forum.

## BYPASS DECISIONS

### *Stale Bases For A Bypass Lead To A Successful Appeal*

Generally speaking, the standard for a bypass decision centers upon the candidate's suitability at the time the employment decision is made. In the many circumstances in which a bypass decision is predicated upon events within a candidate's personal history, employers and the Civil Service Commission inevitably are called upon to calibrate how best to consider past conduct as bearing upon present suitability. On the one hand, it certainly can be true that prior actions can, and even should, inform the evaluation of current fitness. On the other hand, any given individual may not be a static being with respect to maturity level or behavioral appropriateness and who a person was may not necessarily be who the person is. This careful analysis often includes substantive and temporal factors. Substantively, the more serious the prior concerning behavior, or the more repeated the incidents of misconduct, the more that the history could become material in evaluating current fitness. Temporally, it hardly can be argued that the more recent the conduct, the more relevant the conduct might be.

The Commission dealt with these concepts in *Sweeney v. City of Medford*, 37 MCSR 2 (2024). In 2023, Ryan Sweeney was bypassed for original appointment as a police officer for the City of Medford. The bypass rationale was twofold: an incident of domestic violence, which resulted in a criminal charge against Sweeney later resolved through a continuance without a finding disposition, and Sweeney's driving history.

Consumers of Commission decisions know that the Commission, in a string of decisions over the course of years, has placed great and serious weight on incidents of domestic violence perpetrated by public employees or candidates for public employment. Many of those decisions also have discussed the reasons why victims or reporters of abuse later may retract their statements—reasons that often have nothing to do with the accuracy or inaccuracy of the initial complaint but instead flow from factors external to the merits (e.g., a spouse who does not wish to assist in a disciplinary process that could have financial impact upon the family).

The presentation of the domestic violence incident in *Sweeney*, however, was somewhat unique. As the evidence established, Sweeney was charged criminally in 2002, some twenty-one years prior to the bypass decision. The charge was based on a law enforcement officer's observation of what he perceived to be an assault and battery by Sweeney on Sweeney's then-girlfriend. According to Sweeney, the incident was misperceived by the officer and, far from a criminal act, Sweeney only was attempting to assist his intoxicated girlfriend as she kept falling while walking through snow and on ice. Sweeney's then-girlfriend not only corroborated that account at the time of the arrest but held to that position throughout the criminal proceeding and even to the point of an interview during the background investigation for Sweeney more than two decades later. In other words, there was no recanting of an allegation made by a victim—here the alleged victim never said that there was any abuse.

The criminal charge was resolved through an agreed-upon disposition of a continuance without a finding and, when the period of the continuance expired, the dismissal of the charge. Sweeney indicated that he accepted the resolution not because he believed he had done anything wrong, or because he thought the prosecution could prove wrongdoing, but rather because he was not in a financial position that rendered litigation to a conclusion practical and because he was advised by counsel that the arrangement would result in the dismissal of the charge and the incident would not appear on his record. Given that evidentiary record concerning the domestic violence arrest, the Commission concluded that evidence of violence by Sweeney was not convincing and Sweeney's plea deal should not be interpreted in a fashion so as to concede misconduct by Sweeney.

With respect to Sweeney's driving history, the Commission noted that Sweeney's driving history contained eighteen entries, but Sweeney was found responsible in connection with only four: a speeding violation and three citations for failing to wear a seatbelt. As to those four responsible determinations, all were over nineteen years old. Sweeney also had been involved in four surchargeable accidents, with the last one occurring in 2011, twelve years prior to the bypass decision. While taking care to note that the driving incidents were not being swept aside or wholly minimized, the Commission determined that context was important, including that the Medford Police Chief testified that Sweeney's driving history alone would not have been a sufficient reason for bypass and that Sweeney's four citations as to which he was found responsible were stale, respectively occurring twenty-three, twenty-two, twenty and nineteen years before the bypass decision.



*Sweeney* did not break new ground as to how the Commission evaluates, substantively and temporally, events in a candidate's history that were used in an attempt to justify a bypass decision. The opinion does, however, represent the latest exposition of the concepts that the Commission considers in such situations. In all, context and time matters greatly in the bypass analysis of whether an employee with negative historical events is a suitable candidate now.

*The Commission Clarifies The Framework By Which To Classify Academy Removal*

*Abreu v. City of Lawrence*, 37 MCSR 41 (2024), presented the Commission with a fairly unique dispute: whether an appeal properly should be considered to be a challenge of a probationary employee to a termination, in which case the Commission would not have jurisdiction because the employee was not tenured, or whether the appeal should be considered otherwise and consistent with Commission jurisdiction.

After passing a civil service examination for police officer, Richard Abreu underwent a background investigation conducted by the City of Lawrence with respect to Abreu's candidacy to be a Lawrence police officer. Following the background inquiry, Abreu was given a conditional offer of employment, with future hire dependent upon, among other things, the successful completion of a police academy. Abreu resigned from his then-present employment and, in February, 2023, enrolled in a police academy.

In June, 2023, after completing approximately nineteen weeks of the academy (well more than half of the training), the City notified Abreu that it had initiated Abreu's involuntary removal from the academy and, effective immediately, it was separating Abreu from employment with the City. According to the City, the removal and separation were based upon misstatements and omissions of critical information by Abreu during the background investigation.

Some six months after the notification from the City, Abreu filed an appeal with the Commission in which he claimed that his termination was unlawful and in violation of civil service procedure. After the filing with the Commission, the City moved to dismiss the appeal, arguing that Abreu was terminated during his probationary employee and had no right to appeal his separation to the Commission; additionally, the City asserted that Abreu's appeal was untimely.

In a decision and set of interim orders concerning the motion to dismiss, authored by Commissioner Paul Stein and later ratified by the full Commission, the Commission disagreed with the City's framing of the nature of the appeal. Relying upon Commission precedent, Commissioner Stein wrote that civil service law consistently has stated that the probationary period of a newly appointed police officer only may begin after academy graduation because it is only after that point that an individual actually may perform the duties of the position. Applying that concept to this record, Abreu logically could not be considered to be a probationary employee because his probationary period had not yet begun.

Instead, the Commission determined that the situation properly should be characterized as a revocation of Abreu's conditional offer of employment and a decision to bypass Abreu. In that vein,

the Commission also stated that good cause existed to toll the sixty-day statute of limitations for a bypass appeal because the City, which had treated the situation as a termination for a probationary employee, never notified Abreu of his right to appeal a bypass to the Commission. As a result, in addition to noting serious concerns with the City's behavior, including the City failing to act until Abreu was close to graduation and the City failing to provide specific details of its allegations to Abreu until long after it separated him, the Commission denied the City's motion to dismiss and ordered the appeal to proceed to a full hearing on the merits of whether there was reasonable justification for the bypass.

While *Abreu* might prove to be a fairly narrow decision given the uniqueness of its facts, it does serve to flesh out the properly understood status of a civil service employee who is attending a training academy at the time adverse employment action is taken.

## OTHER DECISIONS

*A Promotional Candidate Loses Out Based Upon Examination Ineligibility*

*Pasquarello v. Human Resources Division*, 37 MCSR 34 (2024), represents, hopefully, a singular instance in which an individual was determined to be ineligible for promotion based upon a subtlety of civil service law that, it would appear, neither he nor his employer were aware existed. As a result of a seeming lack of awareness, the candidate twice sat for a promotional examination, and completed all of the preparatory tasks associated with the endeavor, only to learn after the fact that it was an error for him to have taken either examination.

In September of 2022, Thomas Pasquarello registered and took the police sergeant promotional examination. At the time of the examination, it had been more than three years since Pasquarello was appointed as a Cambridge police officer, but it had been less than three years since Pasquarello graduated from the academy and began performing police duties. Pasquarello sat for the examination because, among other things, the Cambridge Police Department certified him as an individual eligible to take the promotional examination.

Within weeks of the examination, the now well-known decision in *Tatum v. Commonwealth of Massachusetts*, C.A. No. 0984-CV-00576 (Mass.Super. 2022), was delivered. Within the fallout of *Tatum* was a determination that the September, 2022 police sergeant promotional examination would not be scored and a readministered examination, which all of those who sat for the September, 2022 examination would be eligible to take, would be given in the future. That readministered examination ultimately took place in September, 2023, and Pasquarello took and passed that examination.

Thereafter, the Cambridge Police Department notified the Human Resources Division that it made a mistake in certifying that Pasquarello was eligible for the 2022 examination. In short, in order to be eligible to sit for the promotional examination, Pasquarello needed to serve as a police officer for three years prior to the date of the originally scheduled examination. While Pasquarello was appointed to the position of police officer more than three years before the September, 2022 examination, he attended the police academy after his appointment and therefore did

not begin performing police duties until a date some months after his appointment. In other words, Pasquarello was appointed more than three years before the examination, but he had not served as a police officer for three years or more at the time of the 2022 examination.

Further operating to Pasquarello's detriment, the Human Resources Division already had determined that only those who were registered and took the 2022 examination would be eligible for the 2023 examination. While Pasquarello fit that description, the Human Resources Division took the position that, because Pasquarello was ineligible for the 2022 examination and only was permitted to take the 2022 examination in error, he thereby also was ineligible for the 2023 examination, although he already had taken and passed that examination by the time of the determination of ineligibility. So, while Pasquarello would have been eligible based upon years of service to take the 2023 examination, because eligibility for that examination process was linked to eligibility for the 2022 examination, Pasquarello was disqualified.

Although the Commission believed that the circumstances were unfortunate for Pasquarello, as he endured the time and expense of taking a promotional examination twice before being told that he was ineligible for it, the Commission allowed a motion for sum-

mary decision filed by the Human Resources Division and dismissed Pasquarello's challenge.

In a footnote within the decision, Commissioner Stein offered what is undeniably a good idea to the Human Resources Division. Specifically, Commissioner Stein wrote:

[t]his situation illustrates that appointing authorities cannot be presumed to follow all of the nuanced interpretations, frequent changes, and clarifications to civil service law and rules and it would behoove HRD to ensure that appointing authorities regularly receive updates about such matters, especially when they can have significant career consequences for the men and women who have given years of service in vital—and dangerous—public safety positions, such as involved in this appeal.

The rules of the road for civil service decision-making can change, sometimes substantially, over time through Human Resources Division, Civil Service Commission, judicial and legislative action. It seems to make all the sense in the world for the Human Resources Division, as a guide for appointing authorities and employees across the Commonwealth, to publish periodic updates that discuss the law, and revisions to it, with respect to hiring and promotional processes. Doing so and making those discussions public could serve to train and educate hiring personnel and avoid unfortunate circumstances such as those found within the plight of Thomas Pasquarello. ■