

**COMMONWEALTH OF MASSACHUSETTS**

**CIVIL SERVICE COMMISSION**

100 Cambridge Street – Suite 200  
Boston, MA 02108  
617-979-1900

**APPELLANT A<sup>1</sup>,**

*Appellant*

**G1-22-xxx**

v.

**CITY OF EVERETT,**

*Respondent*

Appearance for Appellant:

Appellant, *Pro Se*

Appearance for Respondent:

Albert R. Mason, Esq.  
Law Office of Albert R. Mason  
145 Springfield Street  
Chicopee, MA 01013

Commissioner:

Paul M. Stein

Summary of Decision

The Commission upheld the bypass of a candidate for municipal police officer based on a preponderance of the evidence showing that the candidate had not been truthful about his involvement in alleged criminal activity committed at the premises where he lived.

DECISION

On March 18, 2022, the Appellant, acting pursuant to G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from the decision of the Mayor of the City of Everett (Everett), the Appointing Authority, to bypass him for appointment to the position of a full-time permanent police officer in the Everett Police Department (EPD).<sup>2</sup> The Commission held a remote pre-

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<sup>1</sup> This appeal triggered a review by the Commission to determine whether additional steps should be taken to avoid an unwarranted invasion of the Appellant’s privacy. After careful review, the Commission opted to use a pseudonym for the Appellant as the appropriate balance of the Appellant’s privacy interests and the Commission’s statutory obligation to provide the public with a transparent record of its deliberative process and interpretation of civil service law.

<sup>2</sup> 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.

hearing on May 10, 2022 and a remote full hearing on August 9, 2022, which was audio and video recorded.<sup>3</sup> Neither party filed a Proposed Decision. For the reasons set forth below, the appeal is denied.

### **FINDINGS OF FACT**

Thirteen (13) exhibits were introduced into evidence (Resp.Exhs.1 through 13). Based on the documents submitted and the testimony of the following witnesses:

*Called by Everett:*

- EPD Captain Paul Landry

*Called by the Appellant:*

- Appellant
- Appellant's brother

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

1. The Appellant is a United States citizen who now lives in Everett, MA. He was born in the Dominican Republic. He emigrated to the United States with his family as a teenager in 2008 and spoke only Spanish at that time. He is a high school graduate and has taken courses toward an Associate Degree. (*Resp.Exhs 2, 7 & 9; Testimony of Appellant*)

2. The Appellant enlisted in the United States Army in 2013 and continues to serve in an infantry unit with the Army National Guard. He has served honorably and holds the rank of Specialist (E-4). (*Resp.Exhs 2,4 & 8; Testimony of Appellant*)

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<sup>3</sup> A link to the audio/video recording was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

3. The Appellant has been self-employed as a driver for a ride-share service for approximately 6 years. Uber has no record of any customer complaints against him. (*Resp.Exhs 2 & 4*)

4. On June 21, 2021, the Appellant took and passed the entry-level civil service examination for municipal police officer administered by the Massachusetts Human Resources Division (HRD). His name was placed on the eligible list established on September 1, 2021 as a qualified disabled veteran eligible for residency preference in Everett. (*Stipulated Facts; Administrative Notice [HRD email to Commission dated 4/8/2022]*)

5. On October 27, 2021, HRD issued certification #08206 authorizing Everett to appoint (10) full-time police officers to the EPD. The Appellant's name appeared third on the certification (*Stipulated Facts; Administrative Notice [HRD email to Commission dated 4/8/2022]*)

6. The Appellant's application was assigned by EPD Captain Paul Landry, the EPD officer with overall responsibility for the hiring process, to EPD Detective Joseph Furtado for a background investigation. Det. Furtado reviewed the Appellant's driver's history, criminal records, credit report, military history and education records. He checked the Appellant's name in the sex offender registry, spoke to his employer and personal references. (*Resp.Exhs.2 through 10; Testimony of Capt. Landry*)<sup>4</sup>

7. On November 7, 2021, the Appellant was required to complete an on-line "Psychological History Questionnaire" containing more than 150 questions. (*Resp.Exh.2*)

8. Save for the reports described below, Det. Furtado's background investigation found no negatives in the Appellant's background. His references, his military record, employment and education record, and credit were all positive. He had two motor vehicle infractions, a 2013 citation

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<sup>4</sup> Det. Furtado was expected to testify but, due to an emergency, he was unable to appear. (*Colloquy with Counsel*)

for speeding and a 2016 surchargeable accident. His name does not appear in the sex offender records. (*Resp.Exhs. 2, 4 through 8*)

9. The Appellant had no history of criminal convictions. Det. Furtado identified three incidents that were of concern:

- A February 2009 incident in Manchester NH involving a large underage drinking party at which the Appellant was present. He was arrested for simple assault against a police officer as he was being taken into protective custody, as well as being charged as a minor in possession of alcohol. The charges were “Nolle Prosequi”. The Appellant was 17 years old at the time. He had been in the United States for about six months and needed a translator to understand the police officer. The Appellant disclosed this incident in his application, explaining that he was stopped by a police officer from behind whom he pushed away before realizing it was a police officer. (*Resp.Exh.2, 3 & 10; Testimony of Appellant*)<sup>5</sup>
- A May 2009 incident in Manchester NH involving allegations that the Appellant was one of several “suspects” involved in alleged criminal activities in his apartment. No arrests or charges resulted. (*Resp.Exhs. 2, 3 & 10*)<sup>6</sup>
- A September 2011 incident in Revere MA involving a motor vehicle stop by the Massachusetts State Police of a vehicle in which the Appellant was a passenger that

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<sup>5</sup> The Appellant’s younger brother was also at the party. He had the same recollection about how he had seen a police officer grab his brother from behind. (*Testimony of Carlos Souza*)

<sup>6</sup> The police reports introduced into evidence include 30 pages of highly redacted information, making it difficult to follow what happened and who was responsible. As explained in my analysis below, I find some (but not all) of this evidence reliable and give it the weight it deserves accordingly, taking account of the Appellant’s testimony and his explanation to the background investigator. (*Resp.Exhs. 9 & 10*)

resulted in the arrest of the operator on an outstanding default warrant for the operator's arrest on pending felony charges of aggravated assault and battery. (*Resp.Exh.10*)

10. On January 4, 2022, Det. Furtado conducted a personal interview with the Appellant at EPD headquarters. The only record of the interview is the report of the interview prepared by Det. Furtado. (*Resp.Exh.9; Testimony of Appellant*)

11. Det. Furtado asked the Appellant if he had ever been the subject of any criminal investigations, to which he answered, "Yes" and told Det. Furtado about the February 2009 incident in which was arrested after he "inadvertently pushed an officers (sic) hand when he was grabbed from behind." He told Det. Furtado he "was sorry for the incident." (*Resp.Exhs. 2 & 9; Testimony of Appellant*)

12. Det. Furtado then asked the Appellant "if he had had any other involvements with law enforcement" to which the Appellant said: "No." The Appellant was then shown the Manchester police report about the May 2009 party in which he was identified as a "suspect". The Appellant explained that he had forgotten about that party and now recalled it but denied any felonious behavior. Det. Furtado noted that the Appellant's demeanor while describing the incident was "calm and he showed no outward signs of nervousness. . . . The rest of [the Appellant's] interview was uneventful and he answered all [other] questions that I posed to him honestly . . . ." (*Resp.Exh.9; Testimony of Appellant*)

13. Det. Furtado concluded that he did not "feel comfortable" recommending the Appellant based on his review of the February 2009 police reports; the Appellant's failure to disclose the events described in the May 2009 police reports and the Appellant's presence related to the 2013 motor vehicle stop. (*Resp.Exh.9*)

14. Det. Furtado forwarded his interview report to Capt. Landry for review. (*Resp.Exh.9; Testimony of Capt. Landry*)

15. By letter dated January 12, 2022 from Capt. Landry (“on behalf of Mayor Carlo DeMaria Jr. [the Appointing Authority] and Chief Steven Mazzie [the Chief of Police]”), the Appellant was informed that he was bypassed for appointment as an EPD police officer due to his “disregard for the law, irresponsibility and poor judgment” as demonstrated by the following:

1. In November of 2009 [sic] you were arrested and charged with Assault on a Police officer in Manchester NH,
2. In May of 2009 you were a suspect in [alleged felonious activities] with four other individuals in Manchester NH.
3. During your Interview with the investigator, you had an issue with truthfulness. You told the investigator you had not been involved in any criminal investigations. When confronted with the report [of the May 2009 incident] you were able to recall the details. During this interview you admitted to having sex with a minor. (Note: you were an adult at the time)<sup>7</sup>
4. In 2019 [sic] you were in a car with a party who was a wanted felony [sic] and stopped by the Mass State Police, and the other party was taken into custody on a warrant for Assault with a Dangerous Weapon.

(*Resp.Exh.1; Testimony of Capt. Landry*)<sup>8</sup>

16. Seven (7) candidates ranked below the Appellant were appointed from certification #08206.

17. This Appeal duly ensued. (*Claim of Appeal*)

### **APPLICABLE CIVIL SERVICE LAW**

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

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<sup>7</sup> An erroneous observation as the Appellant was two months shy of 18 years of age at the time. (*Resp.Exhs.2 & 10; Testimony of Appellant*)

<sup>8</sup> The arrest occurred in February 2009 (not November) and the motor vehicle stop incident occurred in 2011 (not 2019). (*Resp.Exh.10; Testimony of Appellant*)

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

Original appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G. L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 461, 474-78 (2019); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law’”. Brackett v. Civil Service Comm’n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See

also Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”).

The governing statute, G.L. c. 31, gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority's action” and it is not necessary that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission “. . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*,” then the occasion is appropriate for intervention by the commission.” Id. (*emphasis added*). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

Public safety officers are vested with considerable power and discretion and must be held to a high standard of conduct. See, e.g., Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997); Police Comm'r v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986).

An Appointing Authority is well within its rights to bypass an individual for fudging the truth as part of an application for a civil service position. It is reasonable to infer that a person who does so in order to get a job will be inclined to lie on the job. See O'Brien v. Somerville, 25 MCSR 292 (2012). See also Minoie v. Town of Braintree, 27 MCSR 216 (2014); Polin v. Randolph, 23 MCSR 229 (2011).



However, providing incorrect or incomplete information on an employment application does not always equate to untruthfulness. “[L]abeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and [informed] review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety.” Kerr v. Boston Police Dep’t, 31 MCSR 35 (2018), citing Morley v. Boston Police Department, 29 MCSR 456 (2016). 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).

### **ANALYSIS**

Everett established by a preponderance of the evidence that one of the reasons provided for the decision to bypass the Appellant was valid; namely, the Appellant’s untruthfulness about his involvement in alleged felonious activities that occurred at his apartment in May 2009. Neither his earlier arrest in February 2009 (which he fully disclosed on his application), nor the 2011 incident in which he happened to be a passenger in a vehicle stopped by the police that was operated by a friend who was arrested on an outstanding default warrant, would have provided reasonable justification to bypass him. But his lack of candor with respect to the May 2009 incident, regarding which police reports convincingly establish by a preponderance of the evidence

that the Appellant's participation must have gone beyond what he described to EPD investigators, justifies Everett's conclusion that the Appellant was unsuitable to be appointed as an EPD police officer.

I credit the Appellant's recollection of the February 2009 arrest as substantially accurate. The only inconsistency between that police report and the version the Appellant consistently gave in his application, employment interview, and Commission testimony was whether he pushed the officer's hand away because he had been grabbed by the officer from behind or in front. The Appellant honestly acknowledges that, either way, he was sorry for his behavior. Everett did not provide any reasonable basis to conclude that this isolated event more than a decade ago, at a time when the Appellant was a minor, deserves any weight in assessing the present suitability of an otherwise qualified candidate with over a decade of uncontested good conduct.

Similarly, the fact that the Appellant once was mentioned in a police report to have been a passenger in a motor vehicle in 2011 that was operated by another person who had an outstanding warrant for his arrest does not support an inference that the Appellant had a pattern of "disregard for the law, irresponsibility and poor judgment." Neither does the fact that the Appellant did not mention that incident on his application or mention it to the investigator when asked about his "involvement" with law enforcement and criminal investigations. Indeed, this incident bears no meaningful relevance to the assessment of the Appellant's present suitability to serve as a police officer.

Finally, I have carefully reviewed the May 2009 police reports in which it was reported that the Appellant was named as a "suspect" in a criminal investigation of alleged felonious activities that reportedly occurred at his apartment in May 2009. I cannot credit all of the hearsay contained in these heavily redacted reports, but I do find certain portions to be relevant and reliable.

The reports reference a month-long investigation by the Manchester Police Department, beginning on the afternoon of May 2, 2009 through June 3, 2009. As part of that investigation, the police conducted an audio/video recorded interview with the Appellant and another one with his younger brother at the same time and place, executed a thorough search of their apartment, removing many items, and collected other evidence. The Appellant and his brother both were treated as suspects on whom the police investigation focused. On June 5, 2009, the investigators turned their reports over to the county prosecutor with the notation that the minor alleged to be the victim did not want to press charges but the minor's parent did.

I am unable to credit the investigative reports in their entirety because the reports do not clearly identify who is being interviewed and often do not identify who is being referred to as the alleged perpetrators. The police reports do contain substantially consistent accounts of how the alleged victim and other witnesses recall the incident, which I find reliable, and which call into question the truthfulness of Appellant's account of his lapse of memory about his behavior during that incident.

First, the layout of the apartment was consistently described by the Appellant, the alleged victim, and other witnesses, to contain one room (used by the Appellant's sister) accessed through a door from the main area of the apartment, and another room (used by the Appellant and his brother), connected by a door to the sister's room or accessed through an outside window. The alleged victim, her companion, and the Appellant, all asserted that they entered the apartment through the window to the Appellant's room and the alleged victim's companion left the room through the window once the alleged felonious activities commenced.

Second, although there are many redactions in the written police report in evidence<sup>9</sup>, leaving the identity of the persons involved somewhat unclear, the Appellant does not deny that he was present in the apartment. Multiple witnesses identified the Appellant and his brother as both present in the room where the allegedly felonious activities occurred and as being active participants in those activities. I also find significant the reports that the participants in the alleged felonious activities all were students at the same school and, to some extent, were acquainted, which adds a level of confidence in the reliability of those persons' accounts to the police.

Third, the police report of the interview with the Appellant's sister states that she had come home and gone to bed before her brothers arrived. She also confirmed the relationship between her room and her brothers' room, which does add credibility to the explanation given by the Appellant, the alleged victim, and others about how they all entered and left through the window in the brothers' room, not through the sister's room. Although I am unable to credit everything reported by the sister, I am persuaded that the sister would have no motive to lie about being in her room that night, which makes the Appellant's claim that he left his room to have sex in a "different room" dubious, as that would mean he would have to have used (or at least gone through) his sister's room with his alleged romantic partner.

These reliable portions of the police reports raise serious questions about the Appellant's truthfulness. In particular, reliable portions of the police reports raise serious question about the Appellant's veracity in claiming to have recalled his arrest three months earlier at a party in February 2009 but then having forgotten entirely about the May 2009 incident, which I do not find credible. I simply do not believe the Appellant's testimony that, even after he "recalled" the

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<sup>9</sup>Most of the interviews described in the written report were recorded, but the recordings were not produced. No explanation was provided as to who or when the redactions in the written reports were made.

incident, he wasn't sure who was present, and although he remembered "an argument" involving "the guys", he said he had gone to a "different" room (implying he meant his sister's room) and didn't "know what happened. I fell asleep." He also claimed that he had convinced the Manchester police that it was all a "misunderstanding", but that department's police reports do not support this assertion.<sup>10</sup>

I also do not overlook the positive aspects of the Appellant's subsequent clean record, including his honorable and continued military service. Nevertheless, and although it is a close call, there are, however, sufficient consistencies in the police reports from I conclude that the Appellant was "fudging the truth" and was not forthcoming to EPD investigators when questioned about his involvement in this incident. The Appellant's present unwillingness to be truthful about his behavior during the May 2009 incident, does, alone, provides reasonable justification for Everett's decision to bypass him.

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<sup>10</sup>Had the issue here not been present truthfulness, but whether the Appellant had committed the alleged felonious acts or been an accessory, the limited investigation conducted by Everett and failure to call the background investigator as a witness would have raised a different concern. I would have expected that Everett would have made a more thorough review of the May 2009 incident to ascertain with better clarity how strong the case against the Appellant actually was. For, example, Everett could have obtained the actual audio/video recordings and other evidence that the police had turned over to the county prosecutor. I also would have expected that counsel would have conducted some cross-examination of the Appellant and his younger brother, at a minimum, to test the inconsistencies between the Appellant's testimony about the May 2009 incident and the information contained in the police reports that Everett introduced into evidence. Everett investigators failed to be completely up-front with the Appellant about their knowledge of the incident and failed to conduct a more thorough investigation to determine that he did, in fact, engage in disqualifying felonious conduct for which he was never arrested or charged. Given this, and especially after the Appellant had claimed his innocence during his employment interview, I have serious doubt that the review that Everett undertook would meet the required standard of a thorough review required by civil service law to bypass him on that basis. See, e.g., Boston Police Dep't v. Civil Service Comm'n, 483 Mass. 461, 474-78 (2019).

## **CONCLUSION**

For all of the above stated reasons, the appeal of the Appellant, Docket No. G1-22-046, is

***denied.***

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair [Absent]; Dooley, McConney, Stein & Tivnan, Commissioners) on April 6, 2023.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Appellant A (Appellant)

Albert R. Mason, Esq. (for Respondent)