COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

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

JOHN BUCKLEY, Jr.,
Appellant

v.

BOSTON POLICE DEPARTMENT,
Respondent

Case No.: G1-12-110

DECISION

The Civil Service Commission (Commission) voted at an executive session on June 13, 2013 to acknowledge receipt of the Recommended Decision of the Administrative Law Magistrate dated March 13, 2013, the Appellant's objections to the Recommended Decision; and the Respondent's response to the Appellant's objections. After careful review and consideration, the Commission voted to adopt the findings of fact and the Recommended Decision of the Magistrate therein. A copy of the Magistrate's Recommended Decision is enclosed herewith. The Appellant's appeal is hereby ***dismissed.***

By vote of the Civil Service Commission (Bowman, Chairman [AYE]; Ittleman [AYE], Marquis [AYE], McDowell [AYE] and Stein [NO], Commissioners) on June 13, 2013.

A true record. Attest.

Christopher C. Bowman
Chairman

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.

Notice to:
John J. Greene, Esq. (for Appellant)
Amanda E. Wall, Esq. (for Respondent)
John Marra, Esq. (HRD)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

DISSENTING OPINION OF COMMISSIONER STEIN

I respectfully dissent. For the reasons expressed in prior Commission decisions, I do not believe that the scope of discretion by an appointing authority to exercise sound judgment in selecting candidates for appointment to the position of a municipal police officer based on a prior history of criminal misconduct extends so far as to permit the "automatic" disqualification of every candidate, even those whom it is not disputed had otherwise shown all the requisites of being currently suitable for appointment, solely on the basis of an arbitrary rule, such as the purported 10-year rule for a candidate with a record of a CWOF for OUI. See, e.g., Benevento v. Springfield, 25 MCSR 537 (2012); Cruz v. City of Lowell, 25 MCSR 255 (2012) (dissent); Gallo v. Lynn, 23 MCSR 348 (2010). See also Plaza v. Boston Police Dep't, 21 MCSR 320 (2008), vacated sub nom Boston Police Dep't v. Plaza, SUCV2008-03020 (2009) (unopposed motion for judgment on pleadings). I believe that every candidate has the right to prove rehabilitation on an individual basis and to saddle all candidates with the same rote bias and assumptions, is not consistent with basic merit principles that govern appointments to public service positions and cannot support bypassing otherwise qualified candidates.

This concern is exacerbated, here, by the fact that the underlying conduct is not a criminal conviction or even based on a guilty plea. E.g., Fire Chief of East Bridgewater v. Plymouth Co. Ret. Bd., 47 Mass.App.Ct. 66, 71n13, 710 N.E.2d 644, 647 (1999) citing Commonwealth v. Jackson, 45 Mass. App.Ct. 666, 700 N.E.2d (1998).

> [T]he [retirement] board rejected Chief Pratt's assertion that Smith's admissions to sufficient facts rose to the level of conduct unbecoming because it was equivalent to his pleading guilty. *The board correctly determined that Smith's admission was not akin to a guilty plea and*, further, that *if Smith completed his probationary period* without violating the terms of his probation or committing another offense, *all charges against him would then be dismissed* and he would have no criminal conviction on his record."

Id. 47 Mass.App.Ct. at 647, 710N.E.2d at 671. (*emphasis added*)

In Wardell v. Director of Div. of Empl. Sec., 397 Mass. 433, 436-37, 491 N.E.2d 1057, 1059-60 (1986) (*emphasis added*), the Supreme Judicial Court similarly held:

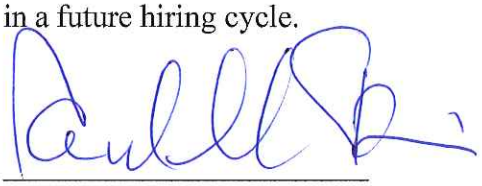
> *An admission to sufficient facts, absent a subsequent finding of guilt, does not constitute substantial evidence* from which a finder of fact in a collateral civil proceeding can determine *that the alleged misconduct has indeed occurred. Factors other than consciousness of guilt – including expedience or avoidance of publicity – may motivate a defendant to admit to sufficient facts* in exchange for a continuance and eventual dismissal. *Criminal charges not resulting in conviction do not provide adequate or reliable evidence that the alleged crime was committed. To the extent that the 'deliberate misconduct' relied upon by the board refers to the alleged criminal act of the employee, there was no substantial evidence on the record to warrant his disqualification* [from receiving unemployment benefits]."

See also Burns v. Commonwealth, 430 Mass. 444, 449-451, 720 N.E.2d 798, 803-805 (1999) (State Police trial board's discipline based on officer's admission to sufficient facts and resulting CWOF on the underlying charges was reversed as legal error); Santos v. Director of Div. of Empl. Sec., 398 Mass. 471, 474, 498 N.E.2d 118, 120 (1986) ("The record reflects that the plaintiff claimed he was innocent; for all that is shown in the record, he may have admitted to sufficient facts to avoid the expense, publicity, and notoriety which a full trial might engender")

In sum, a candidate with a nine-year-old CWOF should be allowed the opportunity to have the matter considered on the basis of more than a paper record. This is especially true when, as here, (a) the "colloquy" to which the defendant "admitted" was apparently not made a matter of record and not considered by the BPD, and (b) the degree of variability from court to court in the enforcement of the OUI laws is well-known. I recognize that my view of the appropriate use of a CWOF may not be shared by the majority of the Commission, but I continue to believe that my interpretation is the appropriate and rational one and the most consistent with basic merit principles. See Commonwealth v. Angelo Todesca Corp., 446 Mass. 128, 154n20, 842 N.E.2d 930 (2006) (Cordy,J. dissenting in 4-3 decision, favorably citing Wardell for proposition that "admission to sufficient facts, absent a subsequent finding of guilt, does not constitute substantial

evidence from which a finder of fact . . . can determine that the alleged misconduct has indeed occurred"), cited in Suppa v. Boston Police Dep't, 21 MCSR 614, reconsideration denied, 21 MCSR 685 (2008), vacated sub nom Boston Police Dep't v. Suppa, SUCV2008-05237 (2009), aff'd, 79 Mass.App.Ct. 1121 (20211 (unpublished decision).

Accordingly, I would have granted relief to the Appellant and provided him at least one opportunity for appointment after a full consideration of his prior record is made on the merits. Hopefully, even without the Commission's intervention, this may well turn out to be the result, as the Appellant's stale record will likely be more than 10 years old should he be reached again in a future hiring cycle.



Paul M. Stein
Commissioner

THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-626-7200
FAX: 617-626-7220
WEBSITE: www.mass.gov/dala

March 13, 2013

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: John Buckley, Jr., v. Boston Police Department
DALA Docket No. CS-12-624
CSC Docket No. G1-12-110

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,

Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: John J. Greene, Esq.
Amanda E. Wall, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

John S. Buckley, Jr.,
Appellant

v. Docket No. G1-12-110
DALA No. CS-12-624

Boston Police Department,
Respondent

Appearance for Appellant:

John J. Greene, Esq.
15 Foster Street
Quincy, MA 02169

Appearance for Respondent:

Amanda Wall, Esq.
Boston Police Department
One Schroder Plaza
Boston, MA 02120

Administrative Magistrate:

Maria A. Imparato, Esq.

SUMMARY OF RECOMMENDED DECISION

The Boston Police Department has met its burden of demonstrating by a preponderance of the evidence that it had reasonable justification for the bypass of the Appellant for original appointment as a police officer based on its uniformly enforced policy not to entertain the application of a candidate who has had a CWOF for an OUI within the previous ten years. The Appellant has not demonstrated that the reason for his bypass is untrue, applies equally to the selected and bypassed candidate, is incapable of substantiation, or is a pretext for other, impermissible reasons.

RECOMMENDED DECISION

John S. Buckley, Jr. filed a timely appeal under M.G.L. c. 31, s. 2(b) of the decision of the Boston Police Department (BPD) to bypass him for original appointment to the position of Police Officer.

I held a hearing on November 9, 2012 at the office of the Division of Administrative Law Appeals, One Congress Street, 11th floor, Boston, MA.

I admitted eight exhibits into evidence. (Exs. 1 – 8)

The BPD offered the testimony of Detective Wayne K. Williams and Robin Hunt, the BPD Director of Human Resources. John S. Buckley, Jr. testified on his own behalf.

The record closed on January 25, 2013 with the filing of post-hearing briefs by both parties.

FINDINGS OF FACT

1. John S. Buckley, Jr., born in 1979, took the Civil Service examination for appointment as a police officer in 2009. His name appeared on page 16 of Certification 202233 dated March 12, 2010. (Stipulated Facts.)
2. On February 19, 2011, Mr. Buckley signed a Student Officer Application and submitted it to the Recruit Investigation Unit (RIU) for a round of hiring for the June 2011 academy class. (Exs. 1, 3; Testimony, Williams.)
3. By report of March 15, 2011, Detective Kenneth Westhaver of the RIU indicated that Mr. Buckley had a CWOF for OUI on September 23, 2002, and that he had previously been bypassed on December 30, 2008 for this reason. "Since this is sufficient reason for by-pass under our current standards no further action will be taken unless otherwise directed." (Ex. 4.)
4. There was a second round of hiring in late 2011, after the BPD requested the certification from the Human Resources Division. (Stipulated Facts.)
5. Mr. Buckley submitted a File Update on September 15, 2011, indicating that there had been no change in his residence, work status, driving record or criminal record since the

background check that had been performed in or about February 2011. (Ex. 2, Testimony, Williams.)

6. Detective Wayne Williams was assigned to do an update on Mr. Buckley's background check. Detective Williams did another Board of Probation (BOP) check, another driving record check, a change of employment check, an attendance check and a home visit. On October 1, 2011, Detective Williams sent a memo to Robin Hunt, BPD Human Resources (HR) Director, that there had been no change in Mr. Buckley's criminal history, driver history, attendance history and employment history. He indicated that the home visit revealed "nothing unusual." (Ex. 3.)
7. Mr. Buckley's BOP revealed an OUI charge from an arrest on September 23, 2002. The case was continued without a finding (CWOF) and dismissed on September 22, 2003. Mr. Buckley also had two charges of a minor transporting alcohol in 1997, when he was 18 years old that were dismissed. (Exs. 5, 6, 7; Testimony, Williams.)
8. The BPD will not entertain an application for original appointment as a police officer if the candidate has had a CWOF for OUI within the previous ten years. The standard has been uniformly applied since at least 2005. (Testimony, Hunt.)
9. Mr. Buckley's application was discussed at a roundtable review in October 2011 by Ms. Hunt in her capacity as Director of Human Resources, the Commander of Internal Affairs, and the Commander of the RIU. In October 2011, Mr. Buckley's arrest for OUI had occurred about nine years previously. (Testimony, Hunt.)
10. Mr. Buckley was bypassed in accordance with the BPD policy not to entertain a candidate who had a CWOF for OUI within the previous ten years. (Testimony, Hunt.)

11. By letter of January 23, 2012, Ms. Hunt informed Mr. Buckley that he was being bypassed for appointment based on his OUI arrest in 2002, and two other alcohol related charges of minor in possession in 1997, that demonstrate a "question of a pattern of behavior involving alcohol." (Ex. 8.)

CONCLUSION AND RECOMMENDATION

The Civil Service Commission, under M.G.L. c. 31, s. 2(b), is required "to find whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." *City of Cambridge v. Civil Service Commission,* 43 Mass. App. Ct. 300, 303 (1997). Justified means "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced min, guided by common sense and by correct rules of law." *Id.,* at 304. If the Commission finds by a preponderance of evidence that there was just cause for an action against the Appellant, the Commission shall affirm the action of the Appointing Authority. *Town of Falmouth v. Civil Service Commission,* 61 Mass. App. Ct. 796, 800 (2004). The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision" *Watertown v. Arria,* 16 Mass. App. Ct. 331, 334 (1983).

The Commission's role, while important, is relatively narrow in scope; reviewing the legitimacy and reasonableness of the appointing authority's actions. *City of Beverly v. Civil Service Commission,* 78 Mass. App. Ct. 182, 187 (2010).

Bypass cases must be determined by a preponderance of the evidence. A "preponderance of the evidence requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an appellant were more probably than not sound and sufficient." *Mayor of Revere v. Civil Service Commission,* 31 Mass. App. Ct. 315 (1991).

In order to prevail in a bypass case, the Appellant must demonstrate that the reasons offered by the Appointing Authority were untrue, apply equally to the selected candidate and the bypassed candidate, are incapable of substantiation, or are a pretext for other, impermissible reasons. *Borelli v. MBTA,* G-1160, 1 MCSR 6.

I conclude that the BPD had reasonable justification for bypassing John S. Buckley, Jr. for original appointment as a police officer based on its uniformly enforced policy not to entertain the application of a candidate who had a CWOF for OUI within the previous ten years. It is undisputed that the Appellant's CWOF for OUI occurred nine years before he was bypassed at the roundtable in October 2011.

This is not an unreasonable policy in view of the fact that police officers drive police cruisers. If a city is unwilling to bear the risk of hiring a specific candidate, "[a]bsent proof that the city acted unreasonably … the commission is bound to defer to the city's exercise of its judgment." *City of Beverly,* 78 Mass App. Ct. at 190-191.

The Appellant has not demonstrated that the reason offered by the BPD for his bypass was untrue, applies equally to the selected and bypassed candidate, is incapable of substantiation or is a pretext for other impermissible reasons. The BPD has met its burden of proving by a preponderance of the evidence that it has reasonable justification for its bypass of the Appellant for the position of police officer. I recommend that the Appellant's appeal be dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Maria A. Imparato

Maria A. Imparato
Administrative Magistrate

Dated: MAR 1 3 2013