

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

CEDRIC CAVACO,
Appellant

v.

BOSTON POLICE DEPARTMENT,
Respondent

G1-17-203

Appearance for Appellant:

Kristopher S. Stefani, Esq.
Law Offices of Cahalane & Stefani, P.C.
478 Torrey Street, Suite 12
Brockton, MA 02301

Appearance for Respondent:

Devin T. Guimont, Esq.¹
Boston Police Department
Office of Labor Relations
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Cynthia A. Ittleman, Esq.

DECISION

Cedric Cavaco (Mr. Cavaco or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on October 5, 2017, under G.L. c. 31, § 2(b), challenging the decision of the Boston Police Department (Respondent or BPD) to bypass him for appointment to the position of fulltime Police Officer. A prehearing conference was held in this regard on October 31, 2017 at the offices of the Commission. A hearing² was held on this appeal on

¹¹ Devin Guimont is no longer employed with the Boston Police Department. The decision will be sent to David Fredette, Chief Legal Advisor for the Boston Police Department.

² The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. c. 31, or any Commission rules, taking precedence.

January 19, 2018 at the Commission. The hearing was digitally recorded and the parties received a CD of the proceeding.³ The parties filed post-hearing briefs. The Respondent filed a reply to the Appellant's brief and the Appellant filed a sur-reply. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Twelve (12) exhibits were entered into evidence at the hearing and one (1) was ordered produced at the hearing and was filed post-hearing, for a total of thirteen (13) exhibits.⁴ This included six (6) Joint Exhibits (Jt.Ex./s), five (5) Respondent's Exhibits (R.Ex./s) and two (2) Appellant's Exhibits (A.Ex./s). Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Detective Gloria Kinhead (Det. Kinhead), Recruit Investigations Unit (RIU)
- Nancy Driscoll, Director of Human Resources, BPD

Called by Appellant:

- Cedric Cavaco, Appellant;

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

1. The Appellant is an African American / Cape Verdean male who, at the time of the 2018 hearing, was in his late twenties. He speaks Cape Verdean Creole and some Portuguese.

The Appellant began dating his future wife in 2011. They were married in 2014 and have

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

a child. The Appellant has volunteered for a religious charity and for a Cape Verdean community organization. After struggling in college, the Appellant earned an Associate's degree in 2011 and then a Bachelor's degree in criminal justice in 2014. Between 2014 and when he applied to the BPD, the Appellant worked at a large bank in Quincy, where he had been promoted and had no record of discipline. While working at the bank, the Appellant sought employment at a number of law enforcement-related jobs. The Appellant obtained a license to carry a firearm in 2016, which license was issued by the BPD. He has taken a training course for reserve police officers. (Testimony of Appellant; Jt.Ex. 1)

2. The Appellant took and passed the 2015 police officer exam. The Appellant was ranked 75th among those who those willing to accept employment. The state's Human Resources Division (HRD) issued Certification 04401 to the BPD in February and March of 2017 with the names and ranks of the candidates who passed the exam. (Stipulation)
3. On March 26, 2017, the Appellant signed and submitted his written application to the BPD. (Jt.Ex. 1) Det. Kinkead was assigned to review the Appellant's application and perform the Appellant's background investigation. (R.Ex. 2; Testimony of Kinkead) Det. Kinkead has been a detective for twenty (20) years and a member of the BPD for thirty (30) years. Although she has conducted numerous investigations through her many years at the BPD, this is the first time she was assigned to conduct background investigations of a number of candidates, including the Appellant. (Testimony of Kinkead)
4. During the background investigation, Det. Kinkead reviewed the Appellant's application, driving history, criminal record, employment history, credit history, residency, and personal and professional references. (R.Ex. 2; Testimony of Kinkead) These are the

same or similar investigative steps that Det. Kinkead employed in conducting all of the recruit background investigations to which she was assigned. (Testimony of Kinkead)

Det. Kinkead also reviewed pertinent court records relating to the Appellant. (R.Exs. 2 and 3)

5. The BPD employment application asks candidates to provide information regarding any law enforcement jobs they have applied for and the results of their application. The Appellant listed a number of law enforcement jobs he applied to between 2014 and 2016, including his application to the Department in 2014. The Appellant indicated that he had not been hired by the law enforcement employers and that he failed the background check when he applied to the Department of Correction (DOC).⁵ (Jt.Ex. 1) Det. Kinkead obtained a copy of the DOC investigator's background report. Det. Kinkead relied on the report because it was written by a Corrections Officer, who is obliged to provide accurate reports as assigned. (Testimony of Kinkead) The DOC investigator's report indicates, in part, that she spoke directly with knowledgeable people who worked with the Appellant at a retail sporting goods store in 2009 and at a gas station in 2011 and that she obtained a police report relating to the Appellant in 2009. (R.Ex. 1)
6. The BPD employment application asks candidates for their employment history. The application also asks candidates if they have been terminated from employment. In response, the Appellant wrote that he had "shoplifted" a "few things" from his employer, a retail sporting goods store, where he worked from September to November in 2009, resulting in his termination. (R.Exs. 2 and 3; Jt.Ex. 1)

⁵ The Appellant appealed his bypass by the DOC to the Commission. The Commission adopted the findings of a recommended decision of the DALA Magistrate who conducted the hearing in the case and found that the DOC had reasonable justification to bypass the Appellant. Cavaco v Department of Correction, Docket No. G1-14-22.

7. On November 3, 2009, members of the local police department arrested the Appellant for shoplifting and larceny over \$250 for stealing retail items from his then-employer, the sporting goods store. (Jt.Ex. 3)
8. When confronted by the local police, the Appellant orally confessed to stealing from the sporting goods store. The Appellant provided a written confession later at the police station. The monetary value of the inventory Appellant had stolen was \$349.92. (Jt.Ex. 3)
9. The Appellant was subsequently charged in court with one count of shoplifting over \$100 in violation of G.L. c. 266, § 30A and one count of larceny over \$250 in violation of G.L. c. 266, § 30 (1), a felony. (Jt.Ex. 4) The shoplifting charge was dismissed at the request of the Commonwealth. (Jt.Ex. 5) The larceny charge was reduced to larceny under \$250, a misdemeanor. The Appellant admitted to sufficient facts in connection with the larceny charge, he was ordered to pay restitution, court costs and fines, and to stay away from the sporting goods store and the case was continued without a finding for six (6) months, ending in July 2010, following which the case was dismissed. (Jt.Ex. 5)
10. The Appellant was also terminated from a job at an athletic shoe company where he had worked from September 2015 to January 2016. In his application, the Appellant added,

Terminated for using an old Merchandise Gift Card that I obtained long before I started working at [the athletic shoe company] Used it Online in the Employee store, which I was not aware, could not be done until months later into my employment because I did not go through Orientation training and was not told it was not allowed to use a merchandise card as an employee (Id.)

Det. Kinkead contacted Ms. P at the athletic shoe store regarding the Appellant's employment there. (R.Ex. 2) Ms. P stated that company policy prevents her from

providing details of the Appellant's employment other than to state that the Appellant was involuntarily terminated. (R.Ex. 2; Testimony of Kinkead)

11. The Appellant worked at a gas station from May 2011 to December 2011. (Jt.Ex. 1)

When the Appellant applied for employment at the DOC, the gas station owner told the DOC investigator that the Appellant was a poor employee and alleged that the Appellant attempted to steal the laptop of a fellow employee. (R.Ex. 1) Det. Kinkead did not discuss these allegations with the Appellant. (Testimony of Kinkead) The Appellant credibly testified at the Commission hearing that this was the first time he has been told of this allegation and that he was not disciplined in this regard. (Testimony of Appellant)

12. The BPD application also asks candidates if they have been sued. The Appellant checked "yes" and provided the two (2) court docket numbers for the lawsuits filed in or about 2011 in which he was involved (one a civil action and one for supplementary process) and the case captions indicated that the plaintiff was an insurance company and the Appellant was the defendant. (Jt.Ex. 1) The Appellant did not disclose in his application that the plaintiff insurance company had insured the sporting goods store where the Appellant had worked and was fired for shoplifting, that the insurance company paid the store for its inventory losses and assumed the legal right to sue the Appellant to recoup the insurance company's loss. However, at the Commission hearing, the Appellant provided the dockets for the civil court litigation. The Appellant was represented by counsel in the civil litigation. The court dockets indicate that the plaintiff was the insurance company for the sporting goods store where the Appellant had worked, that the insurance company alleged it had sustained \$45,562 in damages and that in 2013 the

parties agreed to settle the case by having the Appellant pay the plaintiff \$7,500. (Jt.Ex. 1; A.Ex. 1) The litigation continued until the Appellant issued a check for \$5,175 to plaintiff's counsel on June 15, 2017, at which time the Appellant was applying for employment at BPD. (A.Ex. 1; R.Ex. 4 and Jt.Ex. 1)

13. After completing her background investigation, Det. Kinkead drafted a Privileged and Confidential Memorandum ("PCM") with her findings, which is standard practice for each applicant investigation. (Testimony of Kinkead; R.Ex. 2)

14. Det. Kinkead submitted her PCM for the Appellant to her Superior Officer, Sgt. Det. Lucas Taxter, who submitted it to the BPD Director of Human Resources, Nancy Driscoll. (Testimony of Kinkead and Driscoll)

15. Det. Kinkead presented her investigative findings and PCM at the Appellant's initial roundtable discussion, which included Dep. Supt. Walcott, Sgt. Det. Taxter, Diversity Officer Gaskins, Attorney Taub and Ms. Driscoll. (Testimony of Kinkead and Driscoll) The roundtable can advance a candidate in the appointment process, recommend that a candidate be bypassed, and, in some scenarios, request that the investigating detective obtain further information regarding a candidate. (Testimony of Driscoll)

16. Following the Appellant's initial roundtable, the roundtable asked Det. Kinkead to obtain further information regarding the 2009 theft incident at the sporting goods store where the Appellant had worked. (Id.) Det. Kinkead contacted the owner of the sporting goods store and the store manager. The owner who told Det. Kinkead that he noticed an "uptick in his merchandise loss for about 30 days", that "he and his manager [name redacted] started tracking the dates and times of the merchandise loss", they "devised a plan to have a managers (sic) meeting" during which the Appellant took items from the store and put

them in his car, the owner called the police and the Appellant was arrested, and the owner conducted a merchandise inventory analysis that indicated that the loss was approximately \$30,000. (Testimony of Driscoll and Kinkead; R.Ex. 3)

17. A second roundtable was held to consider the Appellant's candidacy in light of the additional information obtained by Det. Kinkead. (Testimony of Driscoll) After considering all aspects of Appellant's application, the roundtable recommended that the BPD bypass the Appellant because of concerns regarding the criminal and employment misconduct discovered in his background (Testimony of Driscoll; Jt.Ex. 6)
18. The BPD Recruit Investigations Unit, Standard Operating Procedures (SOP) include an attachment entitled "Exclusions and Timeframe Guidelines", which provides a list of nine (9) items that may exclude a candidate from being selected. This list includes, for example, a felony conviction; a felony CWOFF ("juvenile & adult. Check with supervisor"); an OUI within the last ten years; a 209A restraining order involving domestic violence ("check with supervisor"); and one year residency prior to the exam. (Respondent Post-Hearing Exhibit) The list states that it is not "exhaustive", that each candidate is to be assessed on a case by case basis, and that "[a]ny of the [listed factors] could exclude a person from the job. ...". (Respondent Post-Hearing Exhibit)
19. By letter dated August 31, 2017, Ms. Driscoll informed the Appellant that he had been bypassed. This letter stated, in part,

... the [BPD] has significant concern with your criminal and employment history. While employed at [the sporting goods store], you were suspected of taking merchandise from the company without paying. It was subsequently confirmed that you had taken over \$250.00 of inventory and you were placed under arrest and charged with shoplifting and larceny; however, when explaining this incident in your application you reported that you had shoplifted by 'taking a few things.' ... You were subsequently terminated from your position. ...

Furthermore, when you worked for [the athletic shoe store] from [September 2015 to January 2016] you were involuntarily terminated for using a gift card online in an employee discounted website in violation of company policy.

Police officers must behave in a manner consistent with the laws that they are sworn to enforce in order to gain and preserve public trust, maintain public confidence, and avoid an abuse of power by law enforcement officials. Police officers are required to provide sound judgment ... As a result, your inability to perform these job tasks deem you unsuitable for employment as a Boston police officer
(Jt.Ex. 6)

20. The BPD selected approximately 130 of the available candidates, six (6) of whom ranked below the Appellant. (Stipulation)

21. The Appellant timely filed the instant appeal. (Stipulation)

Applicable Law

Upon an appeal of a bypass by a candidate for employment, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Comm’rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971)(quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 189 (2010). In its review, the commission is to “find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). However, the commission’s work “is not to be

accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). Further, the commission does not ignore the previous decision of the appointing authority, but rather “decides whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” Id. at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

Therefore, in deciding an appeal, the commission “owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” for the bypass. Beverly, 78 Mass.App.Ct. at 188. The Commission should not substitute its own judgment for that of an appointing authority. Id. (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965)); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Boston v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)). Rather, the Commission is charged with ensuring that the system operates on “basic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001).

The deference that the Commission owes to the appointing authority is “especially appropriate” in respect to the hiring of police officers. Beverly, 78 Mass.App.Ct. at 188. The Commission is mindful of the standard of conduct expected of officers of the law. *See* Dumeus v. Boston Police Dep’t, 24 MCSR 124 (2014) (finding that a police officer must be a model of good citizenship). An officer of the law “carries the burden of being expected to comport himself or herself in an exemplary fashion.” Mclsaac v. Civil Serv. Comm’n, 38 Mass. App. Ct. 473, 474 (1995). Police officers “voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

Therefore, the appointing authority can give some weight to an applicant's criminal record when making its hiring decisions. Thames v. Boston Police Dep't, 7 MCSR 125, 127 (2004).

G.L. c. 41, § 96A provides that “[n]o person who has been convicted of any felony shall be appointed as a police officer of a city, town or district.” Id. The charge of larceny can be a misdemeanor or larceny depending on the dollar value of the items taken. G.L. c. 266, s.30. In 2009, the theft of items valued less than \$250 constituted a misdemeanor. A continuance of a criminal case without a finding (CWOFF) is defined by the Massachusetts Court System Glossary as follows,

In a criminal case, if a judge finds there is enough evidence to support a finding of guilt, he or she can continue the case for a period of time without making a guilty finding. The charges will be dismissed without a finding of guilt at the end of that period if the defendant complies with any conditions imposed. ...
(Id., Administrative Notice, <http://www.mass.gov/courts/selfhelp/court-basics/glossary.html>, 1/30/17)

Analysis

The BPD has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant in connection with the events on which the BPD relied except that it did not establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant for allegedly taking the laptop of a co-worker at the gas station where he had worked in 2011 since there is no indication that the Appellant was disciplined therefor, he continued to work at the gas station thereafter, the investigator did not afford the Appellant the opportunity to address the allegation, and the Appellant credibly stated that he had not been told about such allegation previously.

The BPD bypass letter to the Appellant in this regard was based on both his criminal record and his employment history. A police department may consider a candidate's criminal record since the community places its trust in police officers to adhere to the law themselves and

uphold the laws the officer enforces. The position of a police officer is one of “special public trust.” Police Comm’r of Boston v. Civil Serv. Comm’n, 22 Mass. App. Ct. 364, 372 (1986). In seeking employment by the public, “[police officer candidates] implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” Id. at 370-71. “Prior misconduct has frequently been a ground for not hiring or retaining a police officer.” City of Cambridge v Civil Service Commission, 43 Mass.App.Ct. at 305. “Such is the level of public trust placed in a police officer that nearly any public indiscretion could be regarded as conduct unbecoming a police officer.” Thames v. Boston Police Dep’t, Docket No. G-02-82 (2004) (*citing* School Comm. of Brockton v. Civil Serv. Comm’n, 43 Mass.App.Ct. 486, 491-92 (1997)). In view of the trust placed in a police officer, the BPD was justifiably concerned that the Appellant repeatedly admitted to police that he stole merchandise from his employer and was ultimately charged with larceny under \$250, a misdemeanor.

When considering criminal conduct short of a felony conviction, an appointing authority must consider candidates by taking account of “... the amount of time that has passed since the misconduct occurred, the nature of the offense, and evidence of the candidate’s subsequent record” Hardnett v. Town of Ludlow, Docket No. G1-11-239 (2012). With respect to the passage of time since the occurrence of prior misconduct, the Commission has stated that, depending on circumstance, “it [is] within the [Appointing Authority’s] discretion to find that the Appellant’s improvements, while laudable, do not outweigh his earlier transgressions, at least at [the time of the application].” Lancaster v. Boston Police Dep’t, Docket No. G1-15-72 (2015). The Appellant was previously bypassed for a law enforcement position with the DOC in 2013 based, in part, on the same criminal misconduct at issue in the instant case. Cavaco v. Dep’t of Correction, Docket No. G1-14-22 (2014). In addition to the 2009 criminal misconduct, the DOC

also cited Appellant's poor driving record in support of its decision to bypass Appellant. Id. The Commission upheld Appellant's bypass. With respect to Appellant's 2009 criminal misconduct, the Commission's decision stated,

The Appellant admitted at hearing that he committed the crimes of shoplifting and larceny by stealing merchandise from his employer's store. Although the larceny case was continued without a finding and both cases were ultimately dismissed, the fact that the Appellant would steal from an employer is especially troubling. It calls into question the Appellant's ability to conform his behavior to the law and reflects immaturity, and bad judgment. (Id.)

In the present instance, the BPD was similarly justified in bypassing Appellant based on his prior criminal misconduct.

The evidence in this instance indicates that Appellant admitted, at the time of the incident and at the Commission hearing, to stealing merchandise from his employer in 2009. The value of the stolen merchandise found in Appellant's car at the scene of the arrest was nearly \$350. The Appellant was charged criminally with shoplifting and larceny in an amount over \$250, the latter constituting a felony. *See, e.g., Public Employee Retirement Admin. Comm'n v. Bettencourt*, 474 Mass. 60, 75, fn. 25, (2016). Although the Appellant was not convicted of a felony, and each charge was eventually dismissed (the larceny charge was reduced to larceny under \$250, he admitted to sufficient facts and the criminal case was continued without a finding before dismissal), the Appellant repeatedly admitted to the theft. The BPD considered the conduct underlying criminal charges to be significant and it may do so even where the charges are later continued without a finding and dismissed. As the Commission's decision noted with respect to the exact criminal misconduct at issue here, the BPD considered "the fact that the Appellant would steal from an employer . . . especially troubling. It call[ed] into question the Appellant's ability to conform his behavior to the law and reflect[ed] immaturity, and bad judgment." Cavaco v Department of Correction, Docket No. G1-14-22.

The Commission has held that an admission to sufficient facts on a felony charge, on its own, is not a sufficient reason to bypass an individual for employment as a police officer. Finklea v. Boston Police Dep't, G1-15-70 (2017). Although the criminal charge against the Appellant in the present case began as a felony, it concluded as a misdemeanor larceny, to which the Appellant admitted to sufficient findings for a guilty finding and was continued without a finding for six (6) months and then dismissed. The Superior Court in Finklea upheld the Commission's determination regarding an admission to sufficient facts. Finklea v. Massachusetts Civil Service Comm'n, Sup. Ct. No. 1784CV00999 (Fahey, J., Feb. 9, 2018). Finklea is distinguishable from the instant appeal. First, the Superior Court noted that at the time of the continuance without a finding, Finklea "disputed the charges" brought against him, but accepted the continuance anyway. Id. There is no such indication here as the Appellant admitted to the criminal conduct at the scene of the arrest, subsequently in writing, and at the Commission hearing. Secondly, the court considered the Finklea incident "stale" at fourteen-years old (id.) while in the present instance, the Appellant's theft was just over seven years old at the time of his application, making it more probative of law-abiding character. Third, the Finklea court noted that the Department did not undertake a "reasonably thorough review of the circumstances" surrounding the incident in question. Id. In the present instance, the BPD requested further investigation of Appellant's 2009 thefts at an initial roundtable. Det. Kinhead followed up with the owner of the sporting goods store, who had personal knowledge of the thefts at issue and provided further details about the events, including that he had noticed a thirty (30)-day merchandise loss about that time, he noted the date and time of the losses, and that the merchandise loss was approximately \$30,000. Based on the information gleaned from reliable

documents and personal accounts gathered by Det. Kinkead, there was no doubt that Appellant had engaged in criminal misconduct at the time the BPD decided to bypass him.

The Appellant testified that his theft from the sporting goods store was an isolated incident. In addition, in his application to the BPD the Appellant downplayed the significance of the event, stating that he had just “taken a few things” from the store. In fact, the store owner informed the police on the day of Appellant’s arrest that, based on the patterns of shrinkage, he had suspected the Appellant of stealing merchandise while unsupervised for some time. (Jt.Ex. 3). The owner’s statements in this regard remained consistent in his description of these events several years later when speaking with Detective Kinkead during her background investigation. The court dockets in the record, offered by the Appellant, show that in 2011, after the Appellant was criminally charged and admitted to sufficient facts regarding his theft at the sporting goods store, the store’s insurance company civilly sued the Appellant for the losses it incurred in covering the lost merchandise, alleging that the Appellant was responsible for a loss of \$45,562.84. The civil suits (the initial case, followed by supplementary process) remained open, as the Appellant noted on his BPD application, until he filled out the application. The court dockets also indicate that the matter was settled for \$7,500 and the case was finally closed in June 2017. The record also includes a copy of the June 15, 2017 check from the Appellant’s attorney to the insurance company’s attorney resolving the matter. Although this undermines that BPD’s contention that the value of the store’s loss attributable to the Appellant was \$30,000, it also indicates that the Appellant’s misconduct and its ramifications are not stale.

The Appellant avers that the theft was a youthful mistake and that the BPD failed to take adequate account of the passage of time since the incident and intervening behavior indicating a reformed character. However, the Department performed a reasonably thorough review of the

Appellant, considering both the favorable and unfavorable aspects of his background before reaching its decision to bypass him. Furthermore, the BPD Department has the discretion to find that Appellant's prior serious transgressions were not outweighed by any claimed improvements in character in the intervening time. *See Lancaster*, Docket No. G1-15-72. The BPD had serious concerns about Appellant's fitness for appointment based on his previous criminal conduct, irrespective of claimed indications of an improved character.

The Appellant's personal history following the 2009 sporting goods store theft is not uniformly marked by improvement. As recently as 2016, the Appellant was terminated from his employment at an athletic shoe company for violating company policy. While this misconduct was not criminal, it shows further poor judgment and justification that the BPD was allowed to determine was conduct unbecoming a police officer, despite the passage of time and intervening life events. The BPD also based its decision to bypass the Appellant on the allegations of the owner of a gas station where the Appellant worked that the Appellant stole the laptop of a coworker. Det. Kinkead did not ask the Appellant about this alleged incident. In addition, the Appellant expressed credible surprise at this assertion at the Commission hearing, stating that he had never heard such an allegation and that he was not disciplined for the alleged misconduct. As a result, the allegation that the Appellant stole the coworker's laptop has not be established by a preponderance of the evidence.

The BPD also had reasonable justification to bypass the Appellant in regard to his employment history. The Appellant was terminated from both the sporting goods store in 2009 and the athletic shoe company in 2016. An appointing authority is entitled to consider negative aspects of a candidate's employment history in reaching its decision as to whether to appoint that candidate. *See City of Beverly*, 78 Mass. App. Ct. at 189-90 (2010); *see also Henderson v. Civil*

Serv. Comm'n, 2016 Mass.App.Ct. Unpub. LEXIS 695 (“[W]ork history is . . . indisputably a proper consideration in evaluating applications [for public safety positions].”). This is the case even where the Applicant has been entirely candid about, and taken responsibility for, the employment misconduct at issue. *See, e.g., Desmaris v. Dep’t of Correction*, CSC No. G1-12-41 (2012). Here, the Appellant admitted that he was fired from the sporting goods store for theft but he did not accept responsibility for his termination from the athletic shoe company in 2016.

Finally, the Appellant avers that the BPD bypass violates the BPD’s Recruit Investigations Unit, Standard Operating Procedures Guidelines since his conduct is not among those listed as possible reasons for bypass. The Guidelines are just that – Guidelines – as the text of the document states. They are not intended to be a finite list or a list indicating that a candidate with one of the background problems on the list is to be automatically bypassed in every instance and that determinations in this regard are to be determined on a case by case basis. Just because a candidate’s misconduct is not specifically mentioned on the list does not mean that any other misconduct may not be considered by the BPD. For these reasons, the Appellant’s argument in this regard lacks merit.

Conclusion

For all the reasons stated herein, the appeal of Mr. Cavaco, Docket No. G1-17-203, is hereby ***denied***.

However, for the compelling public policy arguments in favor of giving more weight to the Appellant’s more recent years of being a good citizen, as cited in the Concurring Opinion, the Commission is making this decision effective sixty days from the date of issue. (See [Golden v. Dep’t of Correction](#), G1-19-198 (2020)) As in [Golden](#), if the BPD ultimately decides that the

Appellant, at a minimum, deserves a second look in a subsequent hiring cycle, the Commission would grant the appropriate relief to facilitate that reconsideration.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 16, 2020.

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:

Kristopher S. Stefani, Esq. (for Appellant)
David Fredette, Esq. (for Respondent)
Michele Heffernan, Esq. (for HRD)

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 979-1900

CEDRIC CAVACO,
Appellant

v.

G1-17-203

BOSTON POLICE DEPARTMENT,
Respondent

CONCURRING OPINION OF COMMISSIONER BOWMAN

I concur with the conclusion here, but for different reasons.

To me, the record shows that Mr. Cavaco is currently a model citizen. After struggling academically at Dean College, he was placed on academic probation. Refusing to accept this setback, he enrolled at a local community college, successfully improved his grades and *re-enrolled* at Dean College, eventually earning an associate's degree. He then enrolled at Bridgewater State University and obtained a bachelor's degree in criminal justice.

Mr. Cavaco has been employed by a local financial institution for several years, where he has received multiple promotions and currently holds a position which requires a high degree of maturity and responsibility. He participates in company-sponsored volunteer events, including clean-up activities around Neponset River and Thompson Island in Quincy. Outside of work, he volunteers his time for the Catholic Charities of Massachusetts, serving as a mentor for youth. Mr. Cavaco, who is bilingual and speaks Cape Verdean Creole, also spends time helping organize the local Cape Verdean parade each year.

Mr. Cavaco speaks poignantly about his family, including his wife and young child, explaining that being married and having a child has served as a turning point in his life. To provide for his family, he supplements his income by driving for Uber and Lyft part-time. Finally, the Boston Police Department has concluded that Mr. Cavaco is responsible enough to be issued a license to carry a firearm.

Mr. Cavaco acknowledges, however, that, approximately *ten years ago*, he made a serious mistake. At or around the time that he had been put on academic probation at Dean College, he became employed at a sporting goods store, where he admits to stealing: two pairs of cleats; four pairs of spandex and two jerseys. He was arrested; criminally charged; and ultimately admitted to sufficient facts to Larceny under \$250. He describes that time period as the lowest point in his life, having disappointed himself and his parents. Although Mr. Cavaco agreed to settle a civil suit brought by the insurance company of the sporting goods store, that settlement, to me, does not establish, by a preponderance of the evidence, that Mr. Cavaco stole more than the items referenced above.

In regard to a subsequent termination at another sporting goods store, Mr. Cavaco offered a credible explanation that he was unaware that, when making employee purchases online, employees were not permitted to make those purchases with gift cards, leading to the end of his short tenure.

The Commission, in Kodhimaj v. DOC, 32 MCSR 377 (2019), previously concluded that a criminal justice agencies may rely on criminal records not available to non-criminal justice employers, stating in part:

“[A criminal justice agency]’s ability to receive all of the Appellant’s CORI information from CJIS appears to be derived from that section of the state’s CORI Law (G.L. c. 6, § 172) which states in relevant part:

‘ ... Criminal justice agencies may obtain all criminal offender record information, including sealed records, for the actual performance of their criminal justice duties ...’

That turns to whether the Appellant’s criminal conduct is a *valid* reason for bypass here.

In its recent decision in Boston Police v. Civ. Serv. Comm’n and Gannon, the SJC confirmed that an Appointing Authority must prove, by a preponderance of the evidence, that the Appellant actually engaged in the alleged misconduct used as a reason for bypass. However, the Court also *reaffirmed* that, once that burden of proof *regarding the prior misconduct* has been satisfied, it is for the appointing authority, not the Commission, to determine whether the appointing authority is willing to risk hiring the applicant. Specifically, the SJC stated in relevant part:

“a police department should have the discretion to determine whether it is willing to risk hiring an applicant who has engaged in prior misconduct ... However, where, as here, the alleged misconduct is disputed, an appointing authority is entitled to such discretion only if it demonstrates that the misconduct occurred by a preponderance of the evidence. See Cambridge, 43 Mass. App. Ct. at 305; G. L. c. 31 § 2 (b).

In Cambridge, *supra* at 305, the Appeals Court held that where an applicant has engaged in past misconduct, it is for the appointing authority, not the commission, to determine whether the appointing authority is willing to risk hiring the applicant. However, the misconduct in Cambridge was undisputed by the applicant. Here, in contrast, the question whether Gannon engaged in past misconduct was the single issue brought before the commission. Because the failed drug test was the department's proof that Gannon ingested cocaine and was the sole reason for the bypass, it was the department's burden to prove by a preponderance of the evidence that the test reliably demonstrated that Gannon had ingested cocaine. To the extent that the dissent suggests that there are occasions when an appointing authority need not demonstrate reasonable justification by a preponderance of the evidence as required by G. L. c. 31, § 2 (b), we disagree.

In Beverly, 78 Mass. App. Ct. at 190, the Appeals Court concluded that the commission erred as a matter of law when it required the city to prove that the candidate committed the misconduct for which he was fired from a previous job. In so doing, the Appeals Court articulated a different standard of proof to be applied in cases where an applicant's misconduct is in dispute, i.e., an appointing authority need only demonstrate "a sufficient quantum of evidence to substantiate its legitimate concerns." *Id.* at 188. See 0. L. c. 31, § 2 (b).[30] It is error to apply any standard other than a preponderance of the evidence in this context. See Anthony's Pier Four Inc. v. HBC Assocs., 411 Mass. 451, 465 (1991), quoting Commonwealth v. Hawkesworth, 405 Mass. 664, 669 n.5 (1989) ("an appellate court 'carefully scrutinizes the record, but does not change the standard of review' ").

Citing to Cambridge, 43 Mass. App. Ct. at 305, the court in Beverly, 78 Mass. App. Ct. at 190, further suggested that to require an appointing authority to prove a candidate's alleged misconduct "would force the city to bear undue risks." However, the "risk" discussed in Cambridge pertained to risk that the candidate might engage in future misconduct, not risk that the candidate engaged in past misconduct.

For these reasons, the department may not rely on demonstrating a "sufficient quantum of evidence" to substantiate its "legitimate concerns" about the risk of a candidate's misconduct. Beverly, 78 Mass. App. Ct. at 188. Instead, it must, as required by G. L. c. 31, § 2 (b), demonstrate reasonable justification for the bypass by a preponderance of the evidence.”

There are strong public policy arguments suggesting that the reason for bypass here is *not* valid. Leaders across the political spectrum in Massachusetts have stressed the need to avoid looking at a snapshot of who a candidate was many years ago, but, rather, to look at who that candidate is today, as defined primarily by the intervening years since the misconduct occurred. That is particularly true when the non-appointment of a candidate, as here, stymies the Appointing Authority’s stated goal of enhancing the diversity of the police force. In short, the Appellant has a years-long record of being a good citizen which would appear to be the best predictor of whether he has the characteristics needed to serve as a police officer.

The Commission reached a somewhat similar conclusion in Laguerre v. Springfield Fire Department, 25 MCSR 549 (2012). In Laguerre, the Appellant had pled “no contest” to a charge of assault and battery with a dangerous weapon (a felony) 15 years prior to seeking appointment as a firefighter. The Commission questioned the reasonableness and legitimacy of relying on this criminal misconduct, particularly given that Mr. Laguerre, similar to Mr. Cavaco, had been a model citizen for the intervening years. In Laguerre, however, the Springfield Fire Department failed to even *consider* the intervening 15 years, discontinuing the review process after learning of Laguerre’s criminal record.

Here, as referenced in Commissioner Ittleman’s well-reasoned decision, the BPD did consider the intervening years since Mr. Cavaco engaged in criminal behavior and the BPD *did* give Mr.

Cavaco the opportunity to address his criminal history. After what appears to be careful review and consideration, the BPD's Roundtable, after weighing all factors, concluded that it would be too great of a risk to appoint Mr. Cavaco as a police officer. To me, that conclusion stretches the bounds of reasonableness, commonsense and equity. However, given that the criminal misconduct is undisputed; given that the BPD did the type of thorough review required, which included a consideration of the Appellant's entire history; and given that the BPD has articulated specific reasons supporting their conclusion that the Appellant's appointment could, arguably, create too high of a risk, I see no basis upon which the Commission can overturn the BPD's discretionary decision here. For those reasons, I reluctantly concur with the decision to deny the Appellant's bypass appeal and join the majority in allowing the BPD the opportunity to reconsider Mr. Cavaco's candidacy, should they wish to exercise that discretion.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman
July 16, 2020