Decision mailed: 7/30/10
Civil Service Commission

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

ROBERT CHERMESINO
Appellant

v.

BOSTON POLICE DEPARTMENT
Respondent

Docket No.: G1-07-389

Appellant's Attorney:

Patrick Donovan, Atty.
Law Office Patrick Donovan
1266 Furnace Brook Pkwy St. 400
Quincy, MA 02169

Respondent's Attorney:

Tara L. Chisholm, Atty.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Daniel M. Henderson[1]

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Robert Chermesino (hereinafter "Appellant") seeks review of the Personnel Administrator's (hereinafter "HRD") decision to accept the reasons of the Boston Police Department (hereinafter "Appointing Authority" "BPD" or "Department"), bypassing him for original appointment to the position of permanent full

[1] The Commission acknowledges the assistance of Legal Intern Basannya Babumba in the preparation of this decision.

time police officer based on his prior criminal history, driving history, and employment history. A full hearing was held on May 12, 2008, at the offices of the Civil Service Commission (hereinafter "Commission"). Two (2) tapes were made of the hearing and are retained by the Commission.

FINDINGS OF FACT:

A stipulation of facts and nine (9) exhibits were entered into evidence, the HRD document packet being Ex. 9. No HRD representative appeared for this hearing. Based on these exhibits and the testimony of the following **witnesses:**

For the Appointing Authority:

- Robin Hunt, Director of Human Resources, Boston Police Department
- Detective Lanita Cullinane, Recruit Investigations, Boston Police Department

For the Appellant:

- Appellant, Robert Chermesino

I make the following findings of fact:

1. The Appellant is a married, thirty-two (32) year old male and a resident of Dedham. Since July, 2006, he has taught at the Universal Technical Institute. He is ASC certified, having attended Franklin Institute of Technology and one year at Northeastern University. He has had a Mass. License to carry a firearm, issued to him from the Town of Needham in 2002. He has never had any problem regarding this license. (Exhibit 5, testimony of Appellant)
2. In May of 2005, the Appellant took the examination for the position of police officer. (Stipulation of Facts)
3. The Appellant's name appeared on Certification #270048 for the position of permanent full-time police officer. The Appellant was bypassed for appointment by other candidates who appeared lower on this certification (Exhibits1 & 9, stipulation of facts, testimony of Hunt)

4. Robin Hunt, (hereinafter "Director Hunt"), the Director of Human Resources for the BPD, testified about the hiring process for becoming an officer. She explained that every candidate must first submit an application to the BPD. Once said application is submitted, detectives from the Recruit Investigation Unit (hereinafter referred to as ("RIU") conduct background investigations on each applicant. The information garnered in the investigation is later presented at the "roundtable" discussion. **Typically**, the "roundtable" discussion involves the Commander of Recruit Investigations Unit, the Director of Human Resources, a Deputy Superintendent from Internal Affairs, and an attorney from the Legal Advisor's Office. (Testimony of Director Hunt)
5. On February 7, 2007, the Appellant signed with his signature being notarized, his Student Officer Application and submitted it to the Department. (Exhibit 5)
6. The Appellant, as do all applicants for the position of police officer in the BPD, complete a detailed BPD Student Officer Application. The questionnaire form questions for the personal references and employer-supervisor and other sections contained in the voluminous BPD Student Officer Application are designed to secure detailed written information from familiar people regarding the Appellant's qualifications to be a Boston Police Officer. Additionally, the areas of inquiry directed at the applicant include the following: personal history, residences, relationships, protective court orders; c. 208, c. 209 & c. 209A , educational history, employment history-with details for 10 yr. period, employee discipline, sick days taken for 3 yr. period, licenses, military record, driver's license information including suspensions, written citations, auto crashes, operation while under influence of alcohol or drugs, financial background including property ownership and civil court actions, gaming and gambling, use of alcohol, drug use or experimentation, detailed personal declarations

regarding sex and other matters and lastly regarding a police record. The responses must be detailed and supported by explanations or documentation. The Applicant is required to sign a release of all information and waiver of confidentiality and an affirmation of the information provided with his/her signature being notarized. The written information provided by the candidate in this application is used as the basis of any follow-up investigation by the BPD Recruit Investigation Unit (RIU). It is noted here that only part of that extensive application has been included as exhibits here (Exhibits 4- 5 and part of Ex. 3 and administrative notice)

7. The BPD also requires each applicant to complete a detailed voluminous Health History Form, a medical questionnaire. This questionnaire is a preliminary step in the Department's medical-psychological screening process and requires the disclosure of any and all medical or psychological treatment, medication and hospitalization. The volume and detail of these questions have been outlined in a prior Commission appeal decision. See Ida Candreva v Boston Police Department G1-06-185, allowed, dated January 15, 2009. (administrative notice)
8. Following submission of the application, the Boston Police Recruit Investigations Unit (RIU) began an investigation into the Appellant's background. Detective Lanita Cullinane was assigned to the Appellant's investigation (Testimony of Director Hunt and Detective Cullinane)
9. The investigation involves a compilation of all of application related or required documentation. The Detective then sets date to meet the candidate. The Detective then speaks with references and gets more information and documentation, if needed. The Detective makes a home visit, and makes personal contact with three references and neighbors. There is a follow-up or verification of the relevant important background

information. Most if not all of this information is disclosed in the Application. (Testimony of Director Hunt and Detective Cullinane).

10. The Appellant was very if not overly cooperative with the BPD regarding full disclosure of information and production of documentation regarding his background. He fully disclosed and actually gave Detective Cullinane the copy of the Walpole Police Department report regarding the junk yard incident. He disclosed his employment and termination at Poly Esta's despite being an independent contractor-doorman and knowing that Poly Esta's was out of business at the time and would be difficult to track down. He disclosed a prior speeding citation in New Jersey on his application. He answered every question on the BPD application, fully and honestly. He provided numerous attached explanations with details, to the application questions, to be fully honest. He disputed the auto parts referenced in the Walpole Police report. He testified that there were only two (2) auto parts: a door window and a driver's [inside] door panel. He specifically denied that there were "2 dashes and other plastic misc. auto parts", thrown over the fence, as listed in the police report.(Testimony and demeanor of Appellant, Exhibits 2c, 3-5)
11. On July 12, 2007, Robin Hunt, of the BPD sent a **"bypass" letter** to HRD, stating its **"specific reasons"** for its request to bypass the Appellant for appointment as a police officer. The BPD stated the following three reasons: **1.) He "possesses an extensive registry of motor vehicles driving history." 2.) He "was charged with Larceny Over in 1993 and the disposition was continued without a finding (CWOF). He admitted to stealing auto parts from a junk yard." And 3.) He "was terminated from employment by Poly Esta's for failing to report for a scheduled shift."** (Exhibits 1& 9, testimony of Robin Hunt)

12. On September 17, 2007, HRD sent the Appellant a letter informing him that the BPD's stated reasons "are acceptable" for his bypass for appointment as a police officer. HRD attached a copy of Robin Hunt's July 12, 2007 letter. (Exhibit 9, testimony of Robin Hunt)
13. The Detective investigator runs a "criminal history" or "CORI check" and a "driver's history" check from the RMV on all candidates. Detective Cullinane thereby obtained the Docket sheet and found that the Appellant had been charged with larceny over $250 in Wrentham District Court. The Detective also obtained a copy of the Walpole Police incident report for this offense, dated 5/12/1993. He admitted to sufficient facts in court, the property having been retrieved. This testimony and the related exhibits, Exhibits 2a, b, c, were objected to by the Appellant. Detective Cullinane testified generally on the information contained in these Exhibits. This testimony and exhibits were admitted for the limited purpose: as information known and relied upon by the BPD, at the time of the bypass. However, it is not admitted for the truth or accuracy of its content. (Testimony of Detective Cullinane, Exhibits 2a, b, c)
14. It was alleged that the Appellant stole property in excess of $250 on the night of May 12, 1993. On June 16, 1993, the Appellant was arraigned by summons on the charge of Larceny Over $250 in the Wrentham District Court. The Appellant pled Not Guilty and the case was continued for conference to 8/09/1993. On that date the Appellant was found to be Not Indigent, (N/I) for appointed counsel and he waived his right to an Attorney. He admitted to sufficient facts and the matter was continued without a finding, (CWOF) for 6 months, until 2/09/1994 and Dismissed. However, there is no indication on the court docket that the Judge conducted the required colloquy regarding a waiver of alien or other rights, or the admission to each and every of the specific elements of the charged offense, beyond a reasonable doubt.

(Testimony of Director Hunt, Testimony of Detective Lanita Cullinane, and Exhibits 2a, 2b, & 2c, administrative notice)

15. The Appellant testified that he did not have an Attorney represent him. He did not tell his parents about the incident and subsequent court appearances. He did not have any family advice for this court matter. He admits now that it was poor judgment to not tell his parents then about the court appearance. He was only 17 years old at the time of the offense. The Appellant said he and the other two co-defendants were denied "free attorneys" on 8/09/1993. He did not know any of the elements of the charged offense, or "lesser included offenses" or any defenses. **The Prosecutor** approached them that day and asked them – **"How would you guys like to make this go away, today?"** They took the deal that was offered that day by the Prosecutor. (Testimony of Appellant)

16. Detective Cullinane and Director Hunt relied on the content of the police incident report for information regarding the charged offense. The **Walpole Police incident report** for this matter is dated 5/12/1993. It indicates that the Appellant was not the driver of the vehicle, being driven that night and for which the auto parts were intended. He was the youngest of the three charged persons. The auto parts had been thrown over a fence at the junk yard, earlier in the day time. There is an indication of an original intention to return at night and retrieve the parts. The three young men also gave **"conflicting stories".** However, they were noticed by someone near by and **"chickened out and decided not to go through with the crime."** There is no entry in the report of the so called **"Miranda rights"** being read to them or a determination by way of a specific agreement by each participant that they were each were participating in a **joint criminal enterprise**. The three were referred to in the report as, **"they"** Two of the police officers: "conferred and decided after the investigation that the

property was valued over $250.00, and that it was a great likelihood that if the three suspects had not been confronted by the Zion's employee, they would have finished committing the crime." It is noted that the Appellant might have asserted, among other possible **defenses**; the defense of **"withdrawal"** from the perceived joint enterprise criminal venture, based on this police incident report. (Detective Lanita Cullinane and Director Hunt, Exhibit 2c, reasonable inference)

17. On August 9, 1993, the Appellant admitted to sufficient facts. As a result, he was granted a Continued without a Finding (CWOF) for six (6) months. (Exhibits 2a, 2b, Testimony of Director Hunt, Testimony of Detective Lanita Cullinane, and Testimony of Appellant)
18. G.L. Chapter 266, § 30(1) proscribes the single criminal offense of **Larceny,** being **found guilty** of larceny of property if a firearm or if exceeding two hundred and fifty dollars in value, the convicted person is punished as if it were a **felony**; being found guilty of a larceny of property not a firearm or not exceeding two hundred and fifty dollars in value is punished as a **misdemeanor**. The detailed specific elements of this offense are also defined here. (administrative notice)
19. "A careful, grammatical reading of G. L. c. 266, Section 30(1), (supra, note 1) discloses that its opening clause assimilates what were earlier regarded as the separate and distinct offences of stealing, obtaining property by false pretenses and embezzlement into a single offence called "larceny"; it does so by proving that anyone who commits any of the three offences "shall be guilty of larceny." The value of the property taken in a Larceny comes into play, in the penalty or punishment phase, only after a conviction or a finding of guilty for the crime of larceny. "We think it is clear from the face of the statute that the value of the property, where material, is an element of the punishment but not an element of the offense of

larceny." Commonwealth v Scott Kelly 24 Mass. App. Ct. 181, 183 (1987) See Commonwealth v. McDonald, 187 Mass. 581, 584 (1905); Commonwealth v. King, 202 Mass. 379, 387-389 (1909). The assimilation was accomplished by St. 1899, c. 316 ("An Act to define the crime of larceny"), Section 1, which did not set out any punishment for the commission of a "larceny." Ibid *Kelly* at 184. The penalties, which could depend on whether the value of the property stolen did or did not exceed the threshold of [$ 250].

20. The Appellant here was **not found guilty** or "convicted" of violation of G. L. c. 266, Section 30(1), Larceny. Therefore, the Appellant never was subject to the second phase; the punishment or penalty phase. The valuation of the property was not addressed by the court. The colloquy was not undertaken by the court regarding the specific elements of the charged offense. The Appellant did not admit to sufficient facts to a felony, since the value of the property is not an element of the "offense of larceny." It is noted that this was used property taken from a junk yard and no reference to any contact with the alleged owner of the property is mentioned in the record. The police officers conferred and arbitrarily determined, without explanation that the value of the property exceeded $250 for the complaint. (Exhibits and testimony, administrative notice)

21. On or about 12/05/2007, the Appellant hired an attorney and filed a Motion for a New Trial in Wrentham District Court on the original complaint, Docket No. 9357CR 1563. The basis for the motion was that the Appellant's original plea in 1993 had not been "knowingly, intelligently and voluntarily made." On January 18, 2008, the motion was allowed by the Court. On March 18, 2008 the Court dismissed the complaint, without a plea, by agreement upon the payment of costs of court. (Exhibits 6-8, testimony of Appellant)

22. G.L.Chapter 31, §50 prohibits the employment of any person in a civil service position who is "habitually using intoxicating liquors to excess" or who has been "convicted of any crime" within one year (except for certain misdemeanors or other offenses where the fine imposes is not more than $100 or the incarceration is less than six months, in which case the appointing authority may, in its discretion, employ such person). (Administrative notice)

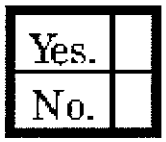
23. G.L.Chapter.41, §96A provides *"No person who has been convicted of any felony shall be appointed as a police officer* of a city town or district." (administrative notice)

24. G.L. Chapter 31: § 20. Applications for examination or registration; fees; requests for information. Section 20. "Each application for examination or registration pursuant to the civil service law and rules shall be made under the penalties of perjury and shall contain requests for such information as the administrator deems necessary. Each such application for a non-promotional examination shall include a fee, not exceeding ten dollars, which may be waived by the administrator, subject to the rules adopted pursuant to section four.

No applicant shall be required to furnish any information in such application with regard to: any act of waywardness or delinquency or any offense committed before the applicant reached the age of seventeen years; any arrest for a misdemeanor or felony which did not result in a court appearance, unless court action is pending; any complaint which was dismissed for lack of prosecution or which resulted in a finding or verdict of not guilty; or any arrest for or disposition of any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violation, affray, or disturbance of the peace if disposition thereof occurred five years or more prior to the filing of the application.

Notwithstanding the foregoing provisions, an application for examination or registration shall contain the following question:

"Have you been convicted of a criminal offense other than drunkenness, simple assault, speeding, traffic violation, affray, or disturbance of the peace?



If yes, please indicate the date, court, offense charged and the penalty imposed." Each applicant shall answer such question, subject to the provisions of sections one hundred A, one hundred B and one hundred C of chapter two hundred and seventy-six." (Administrative notice)

25. The Civil Service Commission recognizes that there are applicable laws that govern the: access to , compilation and use by state and municipal appointing authorities in making civil service appointments and promotions such as: (1) M.G.L. c.6, § 167-178 and related laws and regulations pertaining to CORI (Criminal Offender Record Information), CJIS (Criminal Justice Information System), NCIC (National Crime Information Center) and other and other records containing information about the criminal history of an applicant for civil service appointment or promotion; (2) various laws governing the "sealing" and "expungement" of criminal records; (3) the obligations imposed under Mass.G.L.c.151B, §4(9) that limit the extent to which appointing authorities, as employers, are permitted to inquire about or use an applicant's criminal history in making employment decisions;(4) and the specific provisions within the Civil Service Law itself that are applicable. The use of "sealed records" is covered under the Sealed Records Law, M.G.L. c. 276, §§ 100A-C. The Commission also recognizes that the foregoing is not a complete list of the applicable laws, rules and regulations. (administrative notice)

26. M.G.L.c. 151B proscribes discrimination in employment, housing and credit services transactions, and is enforced by the Massachusetts Commission Against Discrimination

(MCAD). M.G.L.151B, §4(9) provides: It shall be an unlawful practice. . .[f]or an employer,[2] himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records. (Administrative notice)

[2] M.G.L.c.151B, §1: The term "person" includes . . .the commonwealth and all political subdivisions, boards, and commission thereof. . . .The term "employer" . . . shall include the commonwealth and all political subdivisions, boards, departments and commissions thereof. . . . .

27. The Appellant's Registry of Motor Vehicles driver's history (CJIS web printout), a secondary source, showed that he had not had a moving violation since 2001, although he did have a number of moving violations prior to this date. Between 1992 and 2001 he had 7 moving violations, mostly speeding, including "5 surchargeable events". It is noted that page 2 of the (CJIS web printout) is a duplicate of page1 and that at on a cursory review, it might appear that his driver's history is twice its actual length. The Appellant testified credibly that he never had his driver's license suspended to his knowledge. He also testified credibly that he only had 3 surchargeable events on his driver's record and he was notified of this by the Registry of Motor Vehicles when he was required to complete the Safe Driver program, which he successfully completed. He also testified credibly that for the speeding incident in Norwood in 1992, he was given a warning and not a citation for which he had been found responsible as indicated in the (CJIS web printout). Any indication otherwise, regarding these matters: Norwood speeding, surchargeable events and his license suspension, on the (CJIS web printout) is not attributed any accuracy or weight. (Exhibit 3, testimony and demeanor of Appellant, reasonable inference)
28. The Appellant fully admitted in his application that he was terminated in March, 1997, from a job at Poly Esta's in Framingham for calling in sick for a shift. He was actually sick for the shift he called in for. He found out he had been terminated when he reported for his next scheduled shift. (Exhibit 4 and Testimony of Appellant)
29. Detective Cullinane admitted that the Appellant disclosed the circumstances of his termination from Poly Esta's in his BPD Application. It does not appear that the Appellant was anyway at fault for this termination since it is obviously against the employment laws to terminate someone for being sick. She also testified that she was unable to contact anyone at

Poly Esta's, to follow up on this. However, she testified that all of his prior employers that she contacted gave him high praise. The Appellant was wrongfully terminated here and it is therefore not a negative incident on his employment record. His previous employers gave him positive references. (Exhibit 4,Testimony of Cullinane, reasonable inference)

30. The results of the investigation were presented to the Department hiring committee during a "roundtable" discussion. (Testimony of Director Hunt).

31. During the roundtable discussion, Director Hunt explained that the Department considers a candidate's entire background, including but not limited to the applicant's criminal history, RMV driver history, and employment history. Ms. Hunt testified that the Department considers each candidate on their own merit, on a case by case basis. The roundtable looks at the candidate's profile "as a whole" or "the totality of the circumstances." (Testimony of Director Hunt)

32. The BPD does not have any written or published standards or guidelines on which it bases its evaluation of each candidate's qualification in the areas of: prior employment, criminal record or driver's history. (Exhibits, testimony and testimony of Director Hunt, administrative notice)

33. All members of the roundtable discussion agreed that the totality of the circumstances surrounding the Appellant's criminal history, RMV driver history, and his termination from a prior job rendered the Appellant unsuitable to be a police officer. The roundtable was concerned about Appellant's criminal history, driving history and a termination from a prior job. (Testimony of Director Hunt)

34. The Appellant testified in a straight forward and unhesitant manner. He was dressed properly for this hearing and comported himself professionally. His body language and facial

expressions were consistent with someone speaking honestly and truthfully. His answers, in language and tone rang true. His description of and answers regarding the 1993 incident and resulting court disposition was delivered with sincerity and conviction, reflecting his youth and immaturity at the time of the incident. His testimony was consistent and not modified on cross-examination. He stated and acted like he is deeply committed to disclosing and answering every question fully and honestly. He took the instructions he received at the BPD candidates' orientation very seriously. He did not pick and choose what to disclose and what to omit. He actually gave the Walpole Police report to Detective Cullinane, obviously knowing that it might be used against him. He divulged his employment and termination from Poly Esta's despite knowing that it was out of business and unlikely to be tracked down. He divulged other information against his self interest, which was unlikely to be discovered by the BPD. His presentation, demeanor and testimony at this hearing mirrored that of a person, who is almost honest to a fault. I find the Appellant's testimony to be very credible and reliable. (Exhibits and testimony, testimony and demeanor of Appellant)

MINORITY CONCLUSION
(HENDERSON, STEIN)

In a bypass appeal, the Commission must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. E.g., Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (Commission may not substitute its judgment for a "valid" exercise of appointing authority discretion, but the Civil Service Law "gives the Commission some scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground."). See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001) ("The [Civil Service] commission

properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles . . . . the commission acted well within its discretion."); MacHenry v. Civil Serv. Comm'n; 40 Mass.App.Ct. 632, 635 (1995), rev.den., 423 Mass. 1106 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to "review, and not merely formally to receive bypass reasons" and evaluate them "in accordance with basic merit principles"); Mayor of Revere v. Civil Serv. Comm'n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) ("presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce 'sound and sufficient' reasons to justify his action"). *See also,* Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission "sufficient to satisfy due process")

It is well settled that reasonable justification requires that the Appointing Authority's actions be based on "sound and sufficient" reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. See Commissioners of Civil Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). All candidates must be adequately and fairly considered. The Commission has been clear that it will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988).

A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Serv. Comm'n, 31 Mass. App. Ct. 315, 321 (1991).

The greater amount of credible evidence must in the mind of the judge be to the effect that such action 'was justified,' in order that he may make the necessary finding. If the court is unable to make such affirmative finding, that is, *if on all the evidence his mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined.* The present statute is different in phrase and in meaning and effect from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, 'unless it shall appear that it was made without proper cause or in bad faith.'

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (*emphasis added*)

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)**Appointing Authorities** are charged with the responsibility of exercising **sound discretion[3] and good faith** when choosing individuals from a certified list of eligible candidates on a civil service list. The courts have addressed this issue and stated the following: "On a further issue we may now usefully state our views. The appointing authority, in circumstances such as those before us, may not be required to appoint any person to a vacant post. He may

[3] The commission regularly receives proposed decisions from parties, which rely on the oft-cited precedent for such alleged wide discretion and purportedly limited commission oversight found in City of Cambridge, 43 Mass.App.Ct. at 304-05, quoting from Callanan v. Personnel Adm'r, 400 Mass. 597, 601 (1987). The quotation from the Callanan opinion, however, was made in the entirely different context of considering the statutory discretion of the *Personnel Administrator [HRD]* to *establish* eligible lists, and had nothing to do with the standard applicable to bypass decisions by appointing authorities from those lists. This quotation, actually dicta, must be taken in context with the established requirements for "sound and sufficient" reasons that must be provided to "justify" a "valid" bypass, acknowledged by the rest of the opinion in City of Cambridge and the other authority it cites (especially the "sound and sufficient reasons" in the Mayor of Revere case, which was a bypass appeal), and which are described elsewhere in this Decision. This erroneous reference to the appointing authority's "wide" or "broad" discretion in the place of the correct, "sound" or "valid" discretion in hiring or promotional selection has subsequently infected numerous commission and superior court decisions and at least one Appeals Court decision. For an example of erroneous citation of "broad discretion" through City of Cambridge *See* Town of Burlington & another vs. James McCarthy, 60 Mass. App. Ct. 914, (2004) For an example of accurate citation of "sound discretion" *See* Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971) and *Goldblatt* cited in Charles W. Flynn & others vs. Civil Service Commission & others 15 Mass. App. Ct. 206, 209 (1983)

select, in the exercise of **a sound discretion**, among persons eligible for promotion or may decline to make any appointment. (Emphasis added) See the following line of cases as quoted in Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971); Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv.348 Mass. 184, 187-193 (1964). See also Corliss v. Civil Serv. Commrs.242 Mass. 61, 65; (1922) Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431 (1969). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572 (1940). A judicial judgment should "not be substituted for that of . . . [a] public officer" who acts in good faith in the performance of a duty. See M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272."

On July 12, 2007, Robin Hunt, of the BPD sent a **"bypass" letter** to HRD, stating its **"specific reasons"** for its request to bypass the Appellant for appointment as a police officer. The BPD stated the following three reasons: **1.) He "possesses an extensive registry of motor vehicles driving history." 2.) He "was charged with Larceny Over in 1993 and the disposition was continued without a finding (CWOF). He admitted to stealing auto parts from a junk yard." And 3.) He "was terminated from employment by Poly Esta's for failing to report for a scheduled shift."**

Applying these applicable standards in the circumstances of the present case, I find that the Department's bypass of Appellant for appointment to the position of Boston police officer does not comport with basic merit principles and has resulted in harm to his employment status through no fault of his own. **The Department has failed to meet its burden of production, persuasion and proof by a preponderance of the credible evidence in the record to support any of these three stated reasons.**

The Department has not sustained its burden of proving the reasons proffered for the by-pass and approved by HRD. The reasons as presented by the Department do not justify its decision to bypass appellant. The Department placed an inappropriate interpretation and emphasis upon the disposition of the criminal charge of larceny against Appellant by "admission to sufficient facts" and disposition by "continuance with out a finding" (CWOF). The Department clearly equated an admission to sufficient facts here, to a finding of guilty or a "conviction". The Department also wrongly interpreted and emphasized this admission to larceny to be an admission to a felony, over $250, in contravention of both the law and the practical surrounding circumstances. This incident of participating in a group of taking used auto parts from a junk yard could better be described as a misguided, youthful escapade; the Appellant at age 17 was the youngest of the group and not the driver of the car, who benefited from the auto parts. The incident occurred nearly 14 years prior to the bypass decision. The Appellant appeared in court without the benefit of an attorney or his family and acquiesced to the prosecutor's offer of a deal to "make it go away today". The Department also failed to comply with the statutory scheme intended to protect prospective employees from the improper inquiry into and use of certain court information for their disqualification from employment. The Department's decision to bypass the Appellant on these grounds is in contravention of the law, arbitrary as a matter of law and not supported by a preponderance of the credible evidence in the record. "To illustrate, while it might be rational for an appointing authority to consider a candidate's twelve year old conviction of assault and battery, it would not be proper consideration if a statute or regulation existed that prohibited consideration by public employers of a conviction that occurred more than ten years prior to the time of the appointment decision." Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 303-304, (1997)

The termination from Poly Esta's is another reason the Appointing Authority cited in bypassing the Appellant. This employment can only be categorized as part-time employment. The Appellant was terminated for calling in sick which resulted in him missing one (1) shift. The Appellant was improperly terminated from his employment at Poly Esta's. The employer was wrong in this instance not the Appellant. There is nothing in Appellant's extensive employment history to show that he was anything but a responsible employee. In fact, the investigator testified that he received positive reviews from all of Appellant's previous employers.

It is not disputed that being a safe driver is critical to being an effective police officer. Yet there is nothing in Appellant's recent history to suggest he is not a safe driver. The Appellant's last moving violation occurred approximately seven years ago, (2001). Appellant testified candidly that he was careless as a teen and young adult. In the last six (6) years prior to the bypass, the only infraction incurred was an inspection sticker violation. In the previous approximately nine (9) years from May, 1992 to April, 2001; the Appellant had seven (7) moving violations, including "5 surchargeable events", or less than one per year, on average. Appellant's license had been suspended twice by the RMV, each time the matter was quickly resolved. It is also noted that page 2 of the CJIS web printout, (Exhibit 3) is a duplicate of page1 and that at a cursory review; it might appear that his driver's history is twice its actual length.

Ms. Hunt testified that the Department considers each candidate on their own merit, on a case by case basis. The roundtable looks at the candidate's profile "as a whole" or "the totality of the circumstances." All members of the roundtable discussion agreed that the totality of the circumstances surrounding the Appellant's criminal history, RMV driver history, and his termination from a prior job rendered the Appellant unsuitable to be a police officer. The roundtable was concerned about Appellant's criminal history, driving history and a termination

from a prior job. Applying the Department's own standard here; on the totality of the circumstances, by sound and sufficient reasons, the stated reasons for bypass have not been proven by a preponderance of the credible evidence in the record. This is especially so given the Department's mistaken emphasis and interpretation of the Appellant's admission to be the equivalent of a conviction on a felony charge, and its belief that his termination from Poly Esta's to have been justified. The Department gave undue focus and weight to these two mistaken reasons for its bypass of the Appellant.

Applying these applicable standards in the circumstances of the present case, the Commission concludes that Department's bypass of the Appellant for appointment to the position of Boston police officer does not comport with basic merit principles and has resulted in harm to his employment status through no fault of his own. The BPD has not sustained its burden to prove the reasons proffered for the by-pass and approved by HRD are justified on this record. The Commission reaches this conclusion because it finds the BPD placed an inappropriate emphasis and interpretation upon the disposition of the criminal charges against the Appellant by "admission to sufficient facts", which renders the BPD decision to bypass him on those grounds arbitrary as a matter of law and not supported by a preponderance of substantial evidence.

There is considerable confusion, both among laypersons as well as in the case law, as to the precise meaning and effect of a criminal defendant's "admission to sufficient facts" followed by a CWOF. Some case law holds that, prior to accepting any "admission to sufficient facts", a judge must give the appropriate "colloquy" under G.L.c.278, §29D warning, inter alia, of possible consequences such as deportation because, according to federal immigration rules, a conviction after "admission to sufficient facts" puts the defendant "in the same posture as if he had pleaded guilty" and is, therefore, the "functional equivalent" of a guilty plea, at least for

purposes of determining federal immigration status. See, e.g., Commonwealth v. Casimir, 68 Mass.App.Ct. 257n1, 861 N.E.2d 497, 498 (2007) (defendant found guilty after admitting facts); Commonwealth v. Mahadeo, 397 Mass. 314, 316-17, 491 N.E.2d 601, 602-03 (1986) (same).

In other circumstances, however, especially in cases involving administrative review of agency decisions concerning the use of a CWOF in an employment context, an "admission to sufficient facts" that is followed by a CWOF and later dismissed without any guilty plea or finding is explicitly held "not the entry of a formal guilty plea and is, therefore, not a conviction",[4] specifically, distinguishing the G.L.c.278, §29D line of cases. 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).

Thus, in the Fire Chief of East Bridgewater case, the Appeals Court states:

> [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

---

[4] This Decision does not question the use of true prior convictions as disqualifiers. The BPD stands on clear footing to disqualify a candidate who *was* convicted of a serious crime. The Commission notes that police officers may, in the course of their duties, be called to testify in court, where a felony *conviction* could be used to impeach the officer's testimony. See, e.g.., Commonwealth v. Fano, 400 Mass. 296, 302-303, 508 N.E.2d 859, 863-64 (1987) ("earlier disregard for the law may suggest to the fact-finder similar disregard for the courtroom oath"); Brillante v. R.W. Granger & Sons, Inc., 55 Mass. App.Ct. 542, 545, 772 N.E.2d 74, 77 (2002) ("one who has been convicted of crime is presumed to be less worthy of belief that one who has not been so convicted') As discussed in this Decision, however, these policy reasons do not apply where the disposition does not amount to a conviction. See Commonwealth v. Jackson 45 Mass.App.Ct. 666, 670, 700 N.E.2d 848 (1998) (admission to sufficient facts not a conviction for purposes of statute allowing impeachment by prior conviction); Commonwealth v. Petros, 20 Mass.L.Rptr. 664, 2006 WL 1084092*4n3 (2006) (same)

> 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")

This hearing officer recognizes that there are another handful of appellate cases which have held that an "admission to sufficient facts" may be introduced as a "testimonial admission" in a collateral civil case, citing language that such disposition is the "functional equivalent of a guilty plea", but those cases also appear to involve situations in which the defendant actually did plead guilty or was found guilty, as opposed to CWOF cases that were later dismissed without any guilty plea or finding. See, e.g., Peabody Properties, Inc. v. Sherman. 418 Mass. 603, 604-606, 638 N.E.2d 906, 907-909 (1994) (defendant admitted to sufficient facts, found guilty of drug charges and sentenced to six months in prison; "plea-taking colloquy admissible" as evidence of "current" drug use); Hopkins v. Medeiros, 48 Mass.App.Ct. 600, 612-13, 724 N.E.2d 336, 345-4 (2000) (unclear whether defendant pleaded guilty but court refers to a "conviction"); Davis v. Allard, 37 Mass.App.Ct. 508, 510-11, 641, N.E.2d 121, 122-23 (1994), rev'd other grounds sub nom Davis v. Westwood Group, 420 Mass. 739, 652 N.E.2d 567) (admitted documents that "substantiated the facts of Allard's admissions and the subsequent entry of convictions")

I do not read these impeachment cases to sweep away public policy that presumes innocence until proven guilty and predicts that, if the precise issue came before the Supreme Judicial Court, the court would distinguish the impeachment line of cases and affirm its position that an admission of sufficient facts, in the absence of a guilty plea or conviction, is not substantial evidence of the facts "admitted" or of a defendant's "consciousness of guilt". cf. 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."); Commonwealth v. Bartos, 57 Mass.App.Ct. 751,n 754-757, 785 N.E.2d 1279, 1283-84, rev.den., 439 Mass. 1106, 790 N.E.2d 1089 (2003) (noting that cases "conflating of admission to facts with guilty plea [and] occasional characterization of admission as 'functional equivalent' of a guilty plea . . . should be read as shorthand for admission followed by finding and sentence for breach of the conditions of continuance"). Compare Mass.G.L.c.278,§18 and Mass.R.Crim.P. 12 (c) (allowing defendant to "tender a plea of guilty together with a request for a specific disposition" which may include that "the case be continued without a finding to a specific date thereupon to be dismissed") with Mass.R.Civ.P.12(a)(2) ("a defendant, may, after a plea of not guilty, admit to sufficient facts to warrant a finding of guilty")[5]

This appeal is not a case in which the BPD was presented with an applicant whose background investigation revealed an undisclosed prior criminal record or contained other

[5] The criminal record does not indicate under which provision of the law the appellant's admission to sufficient facts was taken, or which specific "facts" out of the conflicting evidence he supposedly admitted to in court. (*Exhs.2b, 2c*) This lack of specificity is further reason to discount the weight given to such generic "admissions". cf. Commonwealth v. Duquette, 386 Mass. 834, 845, 438 N.E.2d 334, 341-42 (1982) (urging that "whenever an admission to sufficient facts is used . . . those facts should be formalized in written stipulations which can then be filed with the papers in the case" for future reference to what exactly was admitted)

credible, corroborating evidence that inferred a "patterns" of criminal or other unsuitable traits or behavior. cf. Henrick v. City of Methuen, 20 MCSR 215 (2007) (failure to disclose prior charge); Tracy v. Cambridge Police Dep't, 18 MCSR 221 (2005) (multiple charges exhibits "patterns of behavior"); Thames v. Boston Police Dep't, 17 MCSR 125 (2004) (improper to bypass based on pending charges, but bypass upheld based on long history of arrests and applicant's own testimony); Soares v. Brockton Police Dep't, 14 MCSR 109 (2001) (numerous criminal charges and motor vehicle violations); Lavaud v. Boston Police Dep't, 12 MCSR 236 (1999) (five prior criminal charges); Brooks v. Boston Police Dep't, 12 MCSR 19 (1999) ("considerable criminal history").

Rather, the Appellant's youthful encounter with the law, fourteen years earlier, was an isolated incident completely out-of-character in an otherwise positive record. He was forthcoming about the incident to the BPD and to the Commission. The BPD relies solely on the act of his "admission to sufficient facts" as its justification for this reason for bypass and to validate selected hearsay statements attributed to certain witnesses contained in an unsigned, police report, despite the clear statement in that report that the three young men gave **"conflicting stories" and** had **withdrawn** from the perceived joint criminal enterprise prior to its completion: **"they chickened out and decided not to go through with the crime."** The Appellant testified credibly that the elements of the offense, including joint enterprise, and defenses to it had not been explained to him at any time prior to or at the court hearing for the admission. The totality of the circumstances regarding his court appearance indicate that he was a naïve, uninformed and unadvised young man trying to make a bad situation "go away", that day. His "admission" was motivated by reasons other than "consciousness of guilt". But for his ambiguous "admission", no other substantial evidence or circumstances stand in the record to

permit the Department reasonably to have concluded that the Appellant had knowingly, intelligently and voluntarily admitted to sufficient fact to warrant a finding of guilty on each and every element of the charged(as believed) offense, including joint enterprise, beyond a reasonable doubt.

The original 1993 criminal complaint was later resolved by the Appellant with a more favorable disposition, a dismissal without a plea or admission. On or about 12/05/2007, the Appellant hired an attorney and filed a Motion for a New Trial in Wrentham District Court on the original complaint, Docket No. 9357CR 1563. The basis for the motion was that the Appellant's original plea in 1993 had not been "knowingly, intelligently and voluntarily made." On January 18, 2008, the motion was allowed by the Court. On March 18, 2008 the Court dismissed the complaint, without a plea, by agreement upon the payment of costs of court.

The police report together with his "admission", constitute the "substantial evidence" presented by the BPD to meet its burden to establish "sound and sufficient" reasons for the bypass the Appellant. The "admission" becomes the lynch-pin of the BPD's case, because the police report, especially one containing ambiguous, unclear, exculpatory and/or mitigating circumstances, standing alone, cannot constitute such substantial evidence, in the absence of some further corroborating testimony or circumstantial evidence that justifies treating "totem pole" hearsay assertions to **"they"** in such a report as reliable and worthy of weight as for the proposition they are proffered to support. See Doe v. Sex Offender Reg. Bd., 70 Mass.App.Ct. 309, 312-313, 873 N.E.2d 1194, 1196-97 (2007) and cases cited, rev.den., 450 Mass. 1110, 881 N.E.2d 1142 (2008) (providing examples of the corroborating circumstances necessary to permit an administrative agency to accept hearsay statements in a police report as "substantial evidence")

The BPD should be well-positioned to gather the corroborating information needed to assess a candidate who "admitted sufficient facts" but was never found guilty. In the rare case where the background investigation reveals such a history, the BPD might access the judicial transcript or other record of the "admissions" actually made in court (which likely may differ materially from what an initial police report contains) and make such diligent inquiry of the candidate and other relevant circumstance that would justify giving due weight to the "admissions" and/or the police report in any particular case. [6]

The problem, here, is that the BPD did not inquire further, but simply stopped at the paper record, which public policy, as expressed in the case law, clearly precludes from being used as determinative. Thus, by drawing an impermissible inference of "consciousness of guilt" from the Appellant's "admission" alone, or in conjunction with an unclear or ambiguous police report, contrary to the clear precedent that warns against such arbitrary inferences. The Department's decision violates the merit principle, its justification for the bypass is arbitrary, it is not based on "substantial evidence" and it may not stand. See Cesso v. City of Revere, 9 MCSR 13 (1996) (applicant's prior "admission to sufficient facts" stemming from an assault and battery on a police officer while attending a college party insufficient to justify bypass of otherwise exemplary candidate)

This hearing officer is convinced that the Appellant presented a credible claim that the original criminal disposition of his case in 1993 was likely based on his uninformed and involuntary decisions in circumstances that question his judgment in proceeding in court, with

[6] The Commission recognizes that passage of time may be a factor in assaying the circumstances of an applicant's "admissions" in a long-past dismissed matter. However, if underlying circumstances are as stale as to be incapable of the appropriate quantum of reasonable corroboration, that fact, alone, may invite discounting the incident entirely. See, Ramirez v. Springfield Police Dep't, Case No. G-3568, 10 MCSR 256 (1997) (denied bypass for criminal record, but appointing authority may be required to provide additional reasons in future by-pass to rebut appellant's claim of rehabilitation); Radley v. Brookline Police Dep't, Case No. G-3414(B), 10 MCSR 289 (1997) (noting appellant's "redeeming factors must be given added weight" and "past indiscretions should play a lessened role")

out the benefit of legal representation or the advice of his family. The Appellant has subsequently remedied that original disposition. See, e.g., Commonwealth v. Estrada, 69 Mass.App.Ct. 514, 868 N.E.2d 1259 (2007) (challenged admission to sufficient facts and effectiveness of counsel three years later); Commonwealth v. Casimir, 68 Mass.App.Ct. 257, 861 N.E.2d 497 (2007) (suggesting motion to withdraw admission to sufficient fact possible even more than 18 years later); Commonwealth v. Jones, 417 Mass. 661, 632 N.E.2d 408 (1994) (allowing withdrawal of admission to sufficient facts made 11 years earlier)

The point of the public policy that prevents undue inferences from a defendant's "admission to sufficient facts", assumes that the admissions may be "voluntary", but, as noted above, warns that there are often concomitant reasons for a defendant to make even "voluntary" admissions wholly without any inference of a "consciousness of guilt". The Department's misstep here is not in treating an "admission" as voluntary, but in giving the admission improper weight in the circumstances beyond the limits that the law fairly allows them to bear.

All candidates must be adequately and fairly considered. The Commission has made it clear that it will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988).

This appeal is not a case in which the Department was presented with an applicant whose background investigation revealed an undisclosed prior criminal record or contained other credible corroborating evidence that inferred "patterns" of criminal or other unsuitable traits or behavior. cf. Henrick v. Methuen, 20 MCSR 215 (2007) (failure to disclose prior charge); Tracy v. Cambridge Police Dep't, 18 MCSR 221 (2005) (multiple charges exhibits "patterns of

behavior"); Thames v. Boston Police Dep't, 17 MCSR 125 (2004) (improper to bypass based on pending charges, but bypass upheld based on long history of arrests and applicant's own testimony); Soares v. Brockton Police Dep't, 14 MCSR 109 (2001) (numerous criminal charges and motor vehicle violations); Lavaud v. Boston Police Dep't, 12 MCSR 236 (1999) (five prior criminal charges); Brooks v. Boston Police Dep't, 12 MCSR 19 (1999) ("considerable criminal history"). Rather, Appellant's brush with the law was an isolated incident completely out-of-character in an otherwise positive record. He was forthcoming about the incident to the BPD and to the Commission.

The Appellant admitted to sufficient facts in the Wrentham District Court in 1993. He acted without guidance from an attorney or his parents; therefore, he was unable to make an intelligent, knowing and voluntary admission. It was alleged that the Appellant and his friends took some used auto parts from a junk yard. Appellant testified that on that night he went with some friends to a junk yard to retrieve the parts. He was not the driver of the vehicle, but was a passenger in the car and the youngest of the group of three, at age seventeen. There also were clear statements in the police report to indicate that the three young men had **"conflicting stories"** yet had **withdrawn** from the perceived venture before the completion of a crime. Although, the Department cannot now take advantage of hindsight to rectify its decision, it is clear that there was inadequate inquiry into the totality of the circumstances of this incident. Given the Appellant's age lack of counsel and other factors, this incident should not have been a critical factor in deciding his future.

The Department has failed to meet it burden of production, persuasion and proof, by a preponderance of the credible evidence in the record to support any of the stated reasons for bypass.

The Department has failed to meet it burden of production, persuasion and proof, by a preponderance of the credible evidence in the record to support any of the stated reasons for bypass.

For all the reasons stated above, the Appellant's appeal filed under Docket No. G1-07-389 is hereby ***allowed.***

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs HRD to place the name of the Appellant, Robert Chermesino at the top of the eligibility list for original appointment to the position of permanent full-time Police Officer so that his name appears at the top of any current certification and list and/or the next certification and list from which the next original appointment to the position of permanent full-time Police Officer in the Boston Police Department shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as a BPD police officer. The Commission further directs that, if and when Robert Chermesino is selected for appointment and commences employment as a BPD police officer, his civil service records shall be retroactively adjusted to show, for seniority purposes, as his starting date, the earliest Employment Date of the other persons employed from Certification #270048, Finally, the Commission directs that the BPD may not use the same reasons for bypass in any subsequent consideration opportunity.

Civil Service Commission,

Daniel M. Henderson,
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman -No; Henderson -Yes, Marquis -No, McDowell -Yes, and, Stein -Yes, Commissioners) on July 29, 2010.

A true record. Attest:

Commissioner

CONCURRING OPINION OF COMMISSIONER McDOWELL

I concur with the conclusion of the hearing officer, but I join Commissioners Bowman and Marquis and respectfully dispute various statements of the hearing officer as incorrect as a matter of law.

I disagree with the hearing officer's statement in footnote 2 on page 23, which effectively states that the Appeals Court of Massachusetts has been misled into falsely believing that Appointing Authorities have "broad discretion" when choosing individuals from a certified list of eligible candidates on a civil service list. Years of precedent-setting judicial decisions and countless decisions issued by this Commission do not support the hearing officer's statement.

I also disagree with the hearing officer's statement on page 19 that the BPD "failed to comply with the statutory scheme intended to protect prospective employees from the improper inquiry into use and certain court information for their disqualification form employment." Appointing Authorities may conduct background checks, including a query of all applicants' criminal histories, as part of a vetting process to determine who should be selected as a police officer, issued a badge and firearm, and all the responsibility that comes with that.

Finally, I disagree with the hearing officer's conclusion that Appointing Authorities have been "misinterpreting" the "precise meaning and effect of a criminal defendant's 'admission to sufficient facts' followed by a CWOF." The hearing officer's sweeping conclusions of law on this matter are virtually identical to those contained in Suppa v. Boston Police Department, 21 MCSR 614 (2008). The hearing officer fails to note, however, that the Commission's (majority) decision in Suppa was *overturned* on January

4, 2010. (See Boston Police Dep't v. David Suppa & another, No. 08-5237, Suffolk Super. Court (2010). The Appellant has filed an appeal of that decision with the Appeals Court.

Notwithstanding my disagreement with the above-referenced statements included in the hearing officer's decision, I concur with his conclusion to allow the Appellant's appeal. Even when the correct standard of law is applied (i.e. – giving the Appointing Authorities broad discretion in hiring decisions), I believe the hearing officer's findings support his conclusion to allow the Appellant's appeal.

Ellaina McDowell, Commissioner
July 29, 2010