

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss

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

ANTHONY CUNHA,  
Appellant

G1-19-021  
G1-19-232  
G1-20-071

v.

MASSACHUSETTS ENVIRONMENTAL  
POLICE,  
Respondent

Appearance for Appellant:

Anthony Cunha, Pro Se

Appearance for Respondent:

Thomas H. Costello, Esq.  
Director of Labor Relations  
Massachusetts Secretary of  
Energy and Environmental Affairs  
100 Cambridge St., Suite 900  
Boston, MA 02114

Commissioner:

Cynthia A. Ittleman

**DECISION**

On January 24, 2019, November 3, 2019 and April 19, 2020, the Appellant, Anthony Cunha (Appellant), pursuant to G.L. c. 31, s. 2(b) filed the instant appeals, , at the Civil Service Commission (Commission) contesting the decision of the Massachusetts Environmental Police (MEP) to bypass him for appointment to the position of Environmental Police Officer A/B (EPO A/B).

I held a full hearing regarding the first appeal on April 5, 2019.<sup>1</sup> The hearing was digitally recorded, and the parties were given CDs from the hearing.<sup>2</sup> The parties submitted post-hearing briefs on or about April 23, 2019. The parties agreed that the second and third bypass appeals, which involved the same bypass reasons, , would proceed without a hearing. The appeals were consolidated.

## **FINDINGS OF FACT**

Twenty-one (21) exhibits, thirteen (13) from MEP and eight (8) from the Appellant, were entered into evidence at the hearing and two (2) additional exhibits produced by t MEP at my request.. Based on the documents submitted, the testimony of the following witnesses:

### *For the Massachusetts Environmental Police*

- Lieutenant Michael Lees, Massachusetts Environmental Police
- Lieutenant Colonel Anthony Abdal-Khabir, Massachusetts Environmental Police

### *For the Appellant*

- Anthony Cunha

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

1. On or about September 17, 2016, the Appellant took the civil service examination for Environmental Police Officer and received a score of 87. (Stipulated Fact)

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

<sup>2</sup> 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 substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

2. In or about January 2017, the state's Human Resource Division (HRD) established a list of eligible candidates for Environmental Police Officer (EPO A/B). (Stipulated Fact)

3. On or about September 20, 2018, HRD, at the request of the Massachusetts Environmental Police, sent Certification No. 05821 to the Massachusetts Environmental Police. (Stipulated Fact)

4. The Appellant was ranked tied for seventh (7th) among those willing to accept employment. (Stipulated Fact)

5. Of the eleven (11) candidates selected for employment by the Massachusetts Environmental Police, three (3) were ranked below the Appellant. An additional three (3) candidates bypassed the Appellant on the second bypass and two (2) candidates bypassed him as part of the third bypass. (Stipulated Fact)

6. By letter dated December 19, 2018, Lieutenant Colonel Anthony Abdal-Khabir of the Massachusetts Environmental Police, the Appointing Authority, notified the Appellant that the MEP was bypassing him for appointment. (Respondent Ex. 13)

7. HRD accepted the following reasons for bypass:

...Specifically, as an Environmental Police Officer you must be able to safely operate motor vehicles in stressful situations. Further, Environmental Police Officers must not only abide by the laws of the Commonwealth they must enforce them. Given your driving history, the Department has concerns relative to your ability to do this. You have a record of multiple driving violations dating back to 2007 and two (2) license suspensions, one in 2007 and one (1) criminal violation in 2010. Violations include a marked lane violation and failure to stop/yield in 2007, as well as license suspension for failure to pay a fine and costs. In 2008, you were not issued an inspection sticker due to failure to pay fines and costs. You also received a speeding ticket and you were cited for operating a motor vehicle with modified height. In 2009, you had a surchargeable accident. In 2010, you had an accumulation of convictions or points, which resulted in your license being suspended. On February 23, 2010, you were criminally charged for operating your vehicle despite your suspension. In 2012, you had a driving incident for failure to keep/right lane. Lastly, you had a work related accident in 2016, while driving a state vehicle. Although you reported this to the police, you did not report it to your supervisor.

You have a history with the Massachusetts Environmental Police (MEP) of hunting waterfowl out of season and multiple taxidermist violations. In 2013, you were charged twice for deer/waterfowl hunting without a stamp. MEP seized two (2) wild wood ducks. In 2014, you were charged with failure to sign a migratory bird stamp. In 2015, you received a civil taxidermist violation, a civil hunting/fishing duplicate license violation, and a civil fish/wildlife hunting/fishing violation. In addition, in 2015, the environmental police seized three (3) carcasses from you and you received two (2) non-criminal citations and a written warning. In 2016, you received a citation for possession of beaver without salvage tags.

Your taxidermist violations include an admitted lack of record keeping. An environmental police officer inspects your taxidermy business, and you stated that you do not keep records for your taxidermy business. You could not explain or remember where several species originated, which resulted in the seizure of some of your products. A return inspection produced another instance where you had no permit for a beaver in your possession.... (Respondent Ex. 13)

8. The Massachusetts Environmental Police are sworn to uphold all of the laws of the Commonwealth of Massachusetts, with a focus on the environmental laws. (Testimony of Abdal-Khabir). MEP officers are tasked with conservation law enforcement, fish and game laws, hunting, trapping, fishing, ATV and boating laws, taxidermy checks, and market inspections. MEP officers are uniformed, carry a weapon, and drive marked vehicles with lights and sirens. (Testimony of Lees)

9. Lieutenant Colonel Anthony Abdal-Khabir became Acting Colonel of the MEP in September 2018. He was named Lieutenant Colonel in August 2018. He began as an Officer with the MEP twenty-four (24) years ago and moved up the ranks as a sergeant and a captain during his tenure. (Testimony of Abdal-Khabir)

10. The MEP has an internal hiring board which undertakes an initial pre-screening of a candidate after the candidate has taken the civil service examination. This involves the Lieutenant Colonel and the Human Resources-civilian component. This prescreening is undertaken before a background investigator is assigned to investigate each candidate. A bypass could occur at this step. The next step in the process is the background investigation by a field officer. That field officer makes a recommendation to management as to whether the officer

recommends a candidate or not. The next layer of the process are the interviews with higher level management, a board of four people. Lt. Colonel Abdal-Khabir indicated that “it is a very self-filtering process.” (Testimony of Abdal-Khabir)

11. The Appellant completed a written application to become a member of the MEP on or about November 1, 2018.<sup>3</sup> (Appellant’s Written Application, provided to Commission post-hearing by MEP)

12. Lieutenant Michael Lees (Lt. Lees) has been employed by the MEP for fourteen (14) years. He began as an officer and moved up the ranks to sergeant and ultimately to his current rank as lieutenant. Lt. Lees was assigned to investigate the Appellant’s background in October/November 2018 by Captain Forsyth. Lt. Lees was trained by the MA State Police to conduct a background investigation. (Respondent Ex. 1)

13. Lt. Lees initially ran the Appellant’s information through numerous databases to ascertain his criminal and driver histories. Specifically, Lt. Lees did a CORI check, a Board of Probation Check, and an in-house MEP database check for a criminal history and a Registry of Motor Vehicle check, to ascertain any driver history. (Respondent Ex. 2 and Testimony of Lt. Lees). MEP officers drive a marked vehicle with lights and sirens and are able to pursue motor vehicles and make motor vehicle stops. Lt. Lees indicated that it is important to be a safe drive because the goal is to protect the public. (Testimony of Lees)

14. After an initial phone call, Lt. Lees met with the Appellant on two (2) separate occasions relative to his candidacy. The first such meeting was a pre-investigation meeting at the Athol Police Department, wherein Lt. Lees took the Appellant’s fingerprints and the two sat down and

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<sup>3</sup> The Appellant’s written application was submitted post-hearing on April 11, 2019, pursuant to the Commission’s order of April 5, 2019. In addition to the Appellant’s written application, the MEP submitted the driving history and the MEP in-house history and/or contact of the eleven (11) candidates who the MEP appointment, pursuant to the Commission’s order.

discussed, among other things, the stressors of the job, the stress the job puts on the entire family, the requirements of the job, and the various location of the police academy. The second meeting, which lasted approximately two (2) hours, between the Appellant and Lt. Lees took place at the Appellant's residence, along with the Appellant's significant other. (Testimony of Lees and Respondent Ex. 12).

*Background of Appellant*

15. Anthony Cunha has lived in Massachusetts his entire life and has been an avid hunter and fisherman since he was eighteen (18) years old. He joined the United States Air Force in 2009, having been deployed several times. He rose to the rank of Non-Commissioned Staff Sergeant in 2014. (Appellant Ex. 3 and Testimony of Appellant). He won the *Department of the Air Force Achievement Medal* for his meritorious service from 2009 to 2015 and the *Iraq Campaign Medal* from September 2011 to November 2011 for outstanding service in support of Operation NEW DAWN. (Appellant Ex. 5 & 6). He was an honor grad at boot camp, graduating in the top ten (10) percent of his class. He feels that he excelled in the military and always went above and beyond what was expected of him. (Testimony of Appellant)

16. The Appellant received an Associate Degree in Science having completed the requirements of the course of study in National Resources Technology Curriculum at Mount Wachusett Community College in 2017. (Appellant Ex. 2). He has been employed seasonally at the MA Department of Conservation and Recreation in the past, as well having been employed in construction. He volunteers as a "hunter education" teacher at a local fish and game club, where he teaches children the basics of hunting. The Appellant provided the MEP with positive personal references to include former employers, Air Force supervisors, friends, and two police officers. (Testimony of Appellant and Respondent Ex. 12)

*Driver History*

17. The Appellant's driver history reveals the following citations:

Marked Lane Violation (R)	July 26, 2007
Failure to Stop/Yield (R)	August 17, 2007
Sus., Failed to Pay Fines/Costs	August 31, 2007
Sus., Failure to Pay Fines/Costs	September 24, 2007
Speeding (R)	March 5, 2008
No Inspection Sticker (R)	March 5, 2008
Operating MV with Modified Height (R)	March 10, 2008
No Inspection Sticker (R)	March 10, 2008
Surchargeable Accident	November 13, 2009
Rein. -Accum of Convictions or Points	December 31, 2009
Rein. - Accum of Convictions or Points	February 19, 2010
Operating MV with License Suspended	February 14, 2010
Failure to Keep in Right Lane(NR) (Respondent Ex. 3)	April 24, 2012

18. Lt. Lees spoke to the Appellant at length about the Appellant's driver history at their first meeting. Relative to the February 14, 2010-Operating an MV with Suspended License, the Appellant indicated that he, indeed, knew the license was suspended but he had to get his wife something for Valentine's Day, so he drove anyways. (Respondent Ex. 12). This was of concern to Lt. Lees because the Appellant knew it was suspended, yet chose to break the law anyways. The Lt. saw a pattern of driving issues on the Appellant's driver history, such as a prior suspension for failure to pay fines/costs and then a subsequent arrest for driving with a suspended license. The history revealed repeat violations and Lt. Lees was concerned about whether this pattern would continue with the Appellant. (Testimony of Lees)

19. Additionally, Lt. Lees was also troubled with the facts surrounding a motor vehicle accident the Appellant was involved in on July 21, 2016. The Appellant stated that there was no damage to his vehicle, but he did break a telephone pole. The Appellant was on-duty at work at the time of the accident, yet he never told his supervisor about the incident. He alerted the police, however. Lt. Lees was unsettled by this incident because the Appellant was on-duty at work at

the time of the accident and did not alert his supervisor. Lt. Lees felt it was “a matter of being honest and trying to avoid being accused of wrongdoing.” (Testimony of Lees and Respondent Exs. 4 and 12)

20. As part of his background investigation, Lt. Lees spoke with the Appellant’s former work supervisor on or about November 14, 2018 about the July 21, 2016 motor vehicle accident. She confirmed that the Appellant was involved in the accident in Leominster, MA, and never reported it to her. She confirmed that he did report it to the police, who then reported it to the supervisor. Lt. Lees obtained an accident report from the Leominster Police Department, confirming that the Appellant was in an accident on July 21, 2016. (Respondent Exs. 4 and 12)

*Encounters with Massachusetts Environmental Police*

21. In addition to the driver history, Lt. Lees reviewed what he believed was a concerning pattern of misconduct with the Massachusetts Environmental Police itself. After checking the MEP’s in-house database, which would confirm any instance the Appellant was listed in any reports, citations, arrest reports, written or verbal warnings, or encounters with officers in the field, it revealed that the Appellant was involved in multiple enforcement actions by the MEP. The history revealed the Appellant received non-criminal, civil citations from the MEP in the autumn of 2013, 2014, 2015, and 2016. (Respondent Exs. 5-10)

22. On October 14, 2013, the Appellant was found to be hunting waterfowl in a closed waterfowl zone without a valid federal waterfowl stamp. A MEP officer cited the Appellant civilly for hunting waterfowl in a closed season and for having an invalid federal waterfowl stamp. (Respondent Ex. 6.) The Appellant admitted to this violation during the bypass appeal hearing, and stated that he was unaware that he was in a closed hunting zone. (Testimony of Appellant)



23. The following year, on November 4, 2014, a MEP officer issued a written warning to the Appellant for failing to sign his federal migratory bird stamp. (Respondent Ex. 7 and Testimony of Lees). It is essential that hunters sign the stamp across the face of the stamp in order to prevent transfer of the stamp to other parties for their own use. (Testimony of Lees). The Appellant admitted to not knowing where on the stamp he was supposed to sign. He had signed on the back of the stamp. (Testimony of Appellant)

24. The following year, on October 14, 2015, the MEP conducted a taxidermy inspection of the Appellant's residence. During the inspection, the sergeant on scene found an unused and unsigned Massachusetts Bear Permit. The Appellant admitted to the sergeant that he had already harvested (hunted and killed) a bear that season. His permit, however, did not reveal that he had already hunted and killed one bear.<sup>4</sup> The Appellant further admitted to the sergeant that he does not keep records for his taxidermy business. The MEP sergeant found other animals that were not properly tagged - a second bear, a migratory bird species (wood duck), and a fisher cat. The Appellant could not identify who gave him those animals. The sergeant gave the Appellant two (2) non-criminal citations: one for a taxidermist violation and another for a duplicate license violation. The sergeant also issued a warning for possession of the migratory bird species carcass. (Respondent Exs. 8 and 9 and Testimony of Lees)

25. The Appellant had taken a taxidermy course in New York and he assumed the laws were the same in Massachusetts. He does not recall telling the sergeant that he did not keep records. He did not keep the records required by law, but he did keep handwritten receipts. (Testimony of Appellant)

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<sup>4</sup> Lt. Lees testified that a hunter is only allowed to harvest one bear per season. The tag was still on the Appellant's permit so there was a concern that an extra bear could have been taken due to the improper documentation. (Testimony of Lt. Lees)

26. The lack of documentation kept in the course of the Appellant's taxidermy business was a concern to Lt. Lees because, as a police officer, one is required to document everything going on. For the Appellant to say that "he doesn't keep records as a taxidermist," was quite concerning to Lt. Lees. Additionally, the duplicate license and not tagging a bear were also concerning to Lt. Lees because the Appellant was required to adhere to the law. (Testimony of Lees and Respondent Ex. 12)

27. The following year, on October 20, 2016, a MEP officer conducted a taxidermy inspection at the Appellant's home. The MEP officer found several unlabeled animals in the freezer, among them, a "road-kill" beaver. The MEP officer issued a non-criminal citation for not having a salvage tag on the beaver. The MEP officer further noted that the Appellant had been warned for a similar violation during the *last* inspection. (Respondent's Ex. 10 and Testimony of Lees). It is important to know where an animal came from and the need to report the animal, even if it is roadkill, since it prevents the sale and trade of a species so the species doesn't dwindle away. It prevents the sale of the animal as a commodity. The MEP has the discretion to issue either a civil violation or a criminal violation when on-scene. All of the Appellant's violations were civil violations since the responding officers chose to issue that type of violation. The MEP takes an educational approach in order to prevent further incidents. (Respondent's Ex. 10 and Testimony of Lees)

29. Following his investigation of the Appellant's candidacy for the MEP, Lt. Lees concluded that he had concerns "at every level" to include his "driver history, in-house history, and employment history." Lt. Lees noted a pattern of someone having trouble correcting issues he's had in the past. Lt. Lees concluded that the Appellant "didn't quite fit the bill" and many red

flags arose in many portions of the investigation. He did not recommend the Appellant for the position of MEP. (Respondent Ex. 11 and Testimony of Lees)

30. On or about November 28, 2018, Lt. Lees signed an internal document, I-2, in which he did not recommend the Appellant for hire by the MEP. In his explanation, Lt. Lees cited the Appellant's multiple hunting and taxidermy violations, as well as his driving history. (Respondent Ex. 11 and 12)

*Other Candidates' Driver History and/or Encounters with the MEP*

31. The Respondent provided the Commission with evidence relative to the eleven (11) candidates chosen for appointment to the position. The candidates were numbered one through eleven (1-11). (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

32. Candidates 1, 2 and 9 had no negative driving history and no history with the MEP. (Respondent's Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

34. Candidate 3 had no negative driving history. His involvement with the MEP involved receiving a verbal warning for motor vehicle trespass in a state forest. Additionally, a passenger in his vehicle had an outstanding warrant. (Respondent's Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

35. Candidate 4 had the following motor vehicle citations: Possession of Alcohol Under the Age of 21 and Failure to Wear Seatbelt, both in June 2007; Equipment Violation and Unregistered MV in September 2008; and Speeding in April 2016. As for involvement with the MEP, Candidate 4 was cited in August 2006 for Possession of an Undersized Lobster and

Possession of a V Notch Lobster; and for Failing to Have a Throwable Portable Flotation Device and Visual Distress Signal in May 2009. (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

36. Candidate 5's driver history revealed a Speeding citation in 1999; Speeding in April 2000, a Warrant in May 2008, and a Surchargeable Accident in March 2018. Candidate 5 had no history with the MEP. (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

37. Candidate 6 had a surchargeable accident in November 2014 and another in June 2015. Candidate 6 had no history of involvement with the MEP. (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

38. Candidate 7's driver history revealed: Speeding and Failure to Stop/Yield in April 2000; Speeding in November 2000; Violation of State Highway Signal in December 2000; and Unlicensed Operation, Operating with a Suspended Registration, and Uninsured Motor Vehicle in June 2006. Candidate 7 had no history of involvement with the MEP. (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

39. Candidate 8's driver history revealed: Speeding in March 1999; Speeding and Failure to Pay Costs in May 1999; Failure to Stop/Yield and Failure to Pay Fine in July 1999; Unregistered Motor Vehicle in November 2000; Speeding, Failure to Wear Seatbelt, and Failure to Pay Fines in May 2002; and a Surchargeable Accident in October 2013. Candidate 8 had no history of

involvement with the MEP. (Respondent's Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

41. Candidate 10 had the following motor vehicle citations: Speeding in April 1993, Failure to Stop/Yield in November 1997, Speeding in January 1998, Failure to Drive Right Lane and Speeding in February 2000, Surchargeable Accident in January 2006, and Failure to Drive Right Lane in March 2018. Candidate 10 had no history of involvement with the MEP. (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

42. Candidate 11's driver history reveals a Surchargeable Accident in April 2008 and no history with the MEP. (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

52. The three (3) candidates who bypassed the Appellant during the second bypass were all investigated by the MEP, just as the Appellant's background was. Counsel for the MEP has provided the Commission with redacted background summaries relative to each candidate, pursuant to a Procedural Order by the Commission. (November 26, 2019 Procedural Order of Commission). Candidate 1 is a veteran of the US Coast Guard. He had numerous positive personal and employment references and had no criminal history, no history with the MEP noted, and one verbal warning for speeding out of New Hampshire. Candidate 2 is a veteran of the US Army and the National Guard. He had positive personal and employment references and had no criminal history, no MEP history noted, and only a 2004 infraction on his driver history. Candidate #3 is a veteran of the US Marines. He also had positive personal and employment references. There was no mention of any criminal, MEP, or driver history in the investigator's

summary. All three investigators each recommended their particular candidate for appointment.  
(Investigative Summaries of Three (3) Candidates provided to Commission by Respondent)

*Applicable Law*

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L.c.31, §1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); MacHenry v. Civil Serv. Comm'n, 40 Mass.App.Ct. 632, 635 (1995), *rev.den.*, 423 Mass.1106 (1996). Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons – positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4).

A person may appeal a bypass decision under G.L. c.31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and

qualifications bearing on the candidate's present fitness to perform the duties of the position. Boston Police Dep't v. Civil Service Comm'n, 483 Mass. 474-78 (2019); Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003). "Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law'". Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. *See also* Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321 (1991)(bypass reasons "more probably than not sound and sufficient").

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The commission ". . . cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority" but, when there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, *rev.den.*, 428 Mass. 1102 (1997)(emphasis added). The governing statute, G.L. c.31, § 2(b), gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary for the Commission to find that the appointing authority acted "arbitrarily and capriciously." Id.

The Commission's role, while important, is relatively narrow in scope: to review the legitimacy and reasonableness of the appointing authority's actions. *See* Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 824-26 (2006). In doing so, the Commission owes substantial

deference to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. City of Beverly v. Civil Serv. Comm'n, 78 Mass.App.Ct. 182,188 (2010). The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the acts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

Disputed facts regarding alleged prior misconduct of an applicant must be considered under the "preponderance of the evidence" standard of review as set forth in the SJC's recent decision in Boston Police Dep't v. Civil Service Comm'n, 483 Mass. 461 (2019), which upheld the Commission's decision to overturn the bypass of a police candidate, expressly rejecting the lower standard espoused by the police department. Id., 483 Mass. at 333-36. The SJC reaffirmed that, once the 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. Id.

### *Analysis*

The Appellant was bypassed for identical reasons for three (3) separate hiring rounds with the Massachusetts Environmental Police and received an identical bypass letter for each instance of bypass. In all three letters, the MEP contends that the Appellant's driving history, as well as his hunting and taxidermist violations "do not reflect an ability to enforce laws which



represent the core mission of the department.” Based on those reasons, the MEP bypassed the Appellant for appointment.

Lieutenant Michael Lees of the Massachusetts Environmental Police undertook a thorough investigation of the Appellant’s relevant background history. Lt. Lees noted that the Appellant is a disabled veteran who served honorably in the United States Air Force and reported multiple positive references made by neighbors, friends, colleagues, employers, military supervisors, and two local police officers. Lt. Lees met with the Appellant on two (2) occasions to educate the Appellant on what would be expected of an MEP officer and to interview the Appellant relative to what his background investigation revealed. Lt. Lees has provided the Commission with his background investigative notes, his summaries, all relevant police incident reports, and his final report not to recommend the Appellant for appointment.

Through the course of the two (2) interviews, Lt. Lees afforded the Appellant the opportunity to dispute any findings in his background investigation, most especially the civil violations noted in his history with the MEP and his driver history. Lt. Lees procured the MEP incident reports relative to his civil violations with the MEP, the Appellant’s driver history, and the accident report for the July 21, 2016 accident in Leominster, MA. The Lieutenant also contacted the Appellant’s former work supervisor to discuss the 2016 motor vehicle accident. The Lieutenant took the commendable step of allowing the Appellant to address allegations of prior misconduct, as found in his investigative notes provided to the Commission. I find that Lt. Lees conducted a “reasonably thorough” review of the Appellant’s background and allegations of misconduct found therein.

*Misconduct Cited by Massachusetts Environmental Police*

In its three (3) bypass letters, the MEP indicated that the Appellant's history of misconduct found in the MEP's in-house database relative to taxidermy and hunting violations, *in conjunction* with the Appellant's driver history, is justification for all three of the MEP's decision to bypass the Appellant for appointment. Any "misconduct" referred to regarding the Appellant's history with the MEP is for the numerous civil citations<sup>5</sup> he received from 2013-2016.<sup>6</sup> The background investigation by the MEP revealed that Appellant was non-criminally cited by the MEP four (4) years in a row, almost to the day, for violations of law, in 2013, 2014, 2015, and 2016. The Appellant was given the opportunity to address negative findings about him as part of two interviews the Appellant had with Lieutenant Lees, the second of which lasted approximately two (2) hours in his own home.

Regarding the October 2013 incident where he was civilly cited by the MEP for hunting waterfowl in a closed waterfowl zone without a valid Federal Waterfowl Stamp, the Appellant admitted at the hearing of this matter to this violation and stated that he was unaware that he was in a closed hunting zone. Regarding the November 2014 written warning that was issued to him for failing to sign his federal migratory bird stamp, the Appellant admitted that the stamp was not signed across the front, as required.

In 2015, the Appellant was issued two non-criminal citations, one for a taxidermist violation and the other for a duplicate license violation. He was also issued a warning for possession of a migratory bird carcass. The police incident report states that the Appellant

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<sup>5</sup> Lt. Lees testified as to the discretion a MEP officer is given to either issue a civil violation or a criminal citation in most instances of misconduct relative to the environmental laws. The goal is education so that offenders do not repeat the same violations.

<sup>6</sup> The only criminal charge referenced in the Appellant's history was for Operating a Motor Vehicle with a Suspended License in 2010. That charge was Dismissed by the court. I find that Lt. Lees gave the Appellant the opportunity to address this alleged criminal misconduct in their two interviews and made a reasonably thorough review of the allegations.

admitted to the sergeant on-scene that he did not keep records for his business. At the hearing of this matter, the Appellant indicated that he only kept handwritten receipts, disputing that he ever said that “he didn’t keep any records.” In his bypass appeal testimony, he stated that he had taken a course in taxidermy in New York and mistakenly thought the laws in Massachusetts were the same. In 2016, a second inspection of the taxidermy business took place by the MEP. Again, similar issues were found – i.e. unlabeled animals in the freezer. He was issued a non-criminal citation for not having a salvage tag on a beaver he possessed.

At the hearing of this appeal, the Appellant stated that, since he left the military, the only laws he has broken are those that he was not aware of or those that he misunderstood. In his testimony, I found that the Appellant attributed his driving record and the MEP citations to either not knowing the law, stating that he does not repeat the same mistakes twice, adding that “they” don’t give you the information about the requirements of the MEP-related licenses, and that “you have to learn them as you go.” The Appellant did not appear to willingly take responsibility for his actions.

Lt. Lees, who was clearly knowledgeable about the MEP’s jurisdiction and applying the law, explained the civil versus criminal aspects of a MEP officer’s duties and the use of officer discretion. He was also familiar with the Appellant’s specific MEP citations and carefully explained the nature of the Appellant’s violations. Lt. Lees testified that the lack of documentation kept in the course of the Appellant’s taxidermy business was of concern to him, since police officers are required document most everything they do. He was also concerned about the violations of law relative to the civil citations the Appellant received from the MEP because of his concern for the animals the Appellant continued to fail to document, to include beaver, wood ducks, a bear, and a fisher cat. He told the Commission that it is imperative to

document these instances where someone takes control of an animal for the protection of the species itself – to prevent the species from dwindling away. He also felt that the repetitive nature of the violations was a red flag for him. The Commission finds that the Massachusetts Environmental Police, the Appointing Authority, has proved by a preponderance of the evidence, that the Appellant, engaged in aforesaid misconduct.

#### *Driver History*

A candidate for the position of police officer should “demonstrate the ability to uphold the laws and requirements regarding the operation of a motor vehicle.” Modig v. Worcester Police Department, 21 MSCR 78 (2008). “The position of police officer requires the operation of a motor vehicle and a need to show adherence to the laws of operating a motor vehicle.” Mazzola v. City of Worcester, 22 MSCR 428 (2009). In its three (3) bypass letters, the MEP indicated that the driver history, *in conjunction* with the history of misconduct found in the MEP’s in-house database relative to taxidermy and hunting violations, is justification for all three of the MEP’s decisions to bypass the Appellant for appointment. Relative to the Appellant’s driver history, the MEP notes the following in each bypass letter:

... as an Environmental Police Officer you must be able to safely operate motor vehicles in stressful situations. Further, Environmental Police Officers must not only abide by the laws of the Commonwealth they must enforce them. Given your driving history, the Department has concerns relative to your ability to do this. You have a record of multiple driving violations dating back to 2007 and two (2) license suspensions, one in 2007 and one (1) criminal violation in 2010. Violations include a marked lane violation and failure to stop/yield in 2007, as well as license suspension for failure to pay a fine and costs. In 2008, you were not issued an inspection sticker due to failure to pay fines and costs. You also received a speeding ticket and you were cited for operating a motor vehicle with modified height. In 2009, you had a surchargeable accident. In 2010, you had an accumulation of convictions or points, which resulted in your license being suspended. On February 23, 2010, you were criminally charged for operating your vehicle despite your suspension. In 2012, you had a driving incident for failure to keep/right lane. Lastly, you had a work related accident in 2016, while driving a state vehicle. Although you reported this to the police, you did not report it to your supervisor.”

The Commission owes the appointing authority substantial deference in determining whether a candidate's driving record is problematic enough to justify his non-selection. The appointing authority, however, "must show that the reason is valid, and reasonable, and not arbitrary and capricious." Stylien v. Boston Police Dept., G1-17-194 (April 12, 2018). In reviewing such cases, the Commission places an emphasis on the more recent driving infractions as opposed to stale or non-moving violations that are not necessarily reflective of a candidate's ability to effectively drive a motor vehicle. Stylien v. Boston Police Dept., G1-17-194 (April 12, 2018). In recent years, the Commission has limited its review of a driver history for the ten (10) years prior to the Appellant's name appearing on the certification list, with greater weight to those entries in the most recent five (5) years. Akim Dorn, G1-17-77. The Commission has given more weight to at-fault accidents and other moving violations where the Appellant was found "responsible" and less weight to those which may be attributable to socio-economic factors, such as an expired registration or no inspection sticker violation. Id.

Lieutenant Lees produced a printout of the Appellant's driver history as evidence of the reason for bypass of the Appellant in all three (3) bypass appeals. The Appellant's driver history reveals three (3) incidents in 2007 which fall just outside of the typical ten-year lookback by the Commission (although one of those 2007 entries shows a pattern of behavior with regards to Suspending License, which occurred again in 2010), a March 5, 2008 Speeding and No Inspection Sticker violation – both found Responsible; five days later, on March 10, 2008, a repeat citation for No Inspection Sticker and Operating a Vehicle with Modified Height - both found Responsible. In 2009, the Appellant was involved in a Surchargeable Accident and had his License Suspended for accumulation of points. In 2010, the Appellant was criminally charged with Operating a Vehicle with a Suspended License (Dismissed by the Court), which also

appeared on his driver history as a License Suspension. In 2012, the Appellant was cited for Failure to Keep in Right Lane - found Not Responsible. The Appellant was found Responsible for every citation on his driver history except the final entry in 2012.

Lt. Lees discussed the Appellant's driver history at length with him during his interviews. The Lieutenant saw a pattern of driving issues on the Appellant's driver history, such as a prior suspension for failure to pay fines/costs in 2007 and then a subsequent criminal arraignment for driving with a suspended license in 2010. Lt. Lees testified that the pattern on the Appellant's history revealed repeat violations and he was concerned about whether this pattern would continue with the Appellant. The Appellant confirmed that there were many *responsible findings* on his driver history and that, if he was a little more aware of the process, he would have challenged those violations that he received. The Appellant admitted to Lt. Lees that he knew his driver's license was suspended on the day he was charged with Driving with a Suspended Licensed (February 14, 2010) but he drove anyway since, as he put it, he needed to get his wife a Valentine gift. Lt. Lees spoke with the Appellant and his former work supervisor regarding his 2016 motor vehicle accident, of which he failed to inform his supervisor. Lt. Lees also procured the incident report of the accident from the Leominster Police Department, confirming the facts of the case.

Lt. Lees testified that an MEP officer drives a police pickup truck, marked with lights and sirens and has the authority to make motor vehicle stops. He was concerned with the pattern he saw on the Appellant's history of license suspensions, coupled with the decision to drive with a suspended license. He was also concerned with the fact that the Appellant received a citation multiple years in a row. I find that Lt. Lees conducted an appropriate review of the Appellant's driver history and gave the Appellant ample opportunity to dispute everything alleged.

### *Comparison to Other Candidates*

The Respondent provided the background investigation of the eleven (11) candidates hired by the MEP, with notes regarding each of their driver histories and any instances of misconduct noted in the MEP's database. For instance, Candidates 1, 2 and 9 have no driver history and no negative history of involvement with the MEP. Candidate 3 has no driver history and only one MEP warning for trespass in a state forest. Candidate 4 has three (3) entries on his driver history – 2007 (Possession of Alcohol Under 21/Failure to Wear Seatbelt) - which is stale; 2008 (Equipment Violation and Unregistered MV); and 2016 (Speeding), along with two negative involvements with the MEP - the first in 2006 for possession of an undersized, v-notch lobster and the second in 2009 for failing to have a portable personal flotation device (PFD) and a visual distress signal.

Candidate 5 has only two (2) instances on his driver history since 2008 (with two others from 1999 and 2000 -18 and 19 years ago) and no involvement with the MEP in his history. Candidate 6 only has two (2) entries on his driver history and no negative involvement with the MEP. Candidate 7 has stale entries on his driver history from 2000 (18 years ago), and no negative history with the MEP. Candidate 8 has stale entries (16-21 years ago) on his driver history from 1999, 2000, and 2002. He has one current entry from 2013 on his driver history and no negative involvement with the MEP. Candidate 10 has stale entries on his driver history from 1993-2006 (12-25 years ago) and one current entry from 2018, but no negative history with the MEP. Candidate 11 has one entry on his driver history from 2008 and no negative history with the MEP.<sup>7</sup>

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<sup>7</sup> The Commission reviewed documents produced by the Respondent relative to the three (3) candidates chosen for appointment over the Appellant in Docket G1-19-232. After carefully reviewing those documents, I note that none of the three (3) candidates' histories compare to the history of the Appellant's driver history and history of negative

After careful review of the other eleven (11) candidates chosen for the position, the MEP has sufficiently distinguished the other candidates' background histories relative to misconduct with the MEP, evaluated in conjunction with their driver histories, from that of the Appellant's. Three (3) of the aforementioned candidates have no driver history and no MEP history. Many candidates have stale negative driver histories, with citations dating back from twelve (12) to over twenty-five (25) years ago. Any other candidate with both a recent negative driver history and an MEP misconduct-history does not quite compare to the repetitive nature of the Appellant's histories or with regards to the number of incidents of misconduct evidenced. None of the other candidates had any taxidermy violations, either.

I carefully considered whether a fair, thorough, and impartial review process has been undertaken by the MEP, and whether the MEP has shown, by a preponderance of the evidence, that there was reasonable justification to bypass. The Commission owes the Appointing Authority substantial deference in determining whether a candidate's driver history is problematic enough to justify non-selection. Stylien v. Boston Police Department, G1-17-194.

Standing alone, the Appointing Authority has not shown that the driver history provides a reasonable and valid reason for bypass, since the most recent entry was six (6) years ago, in 2012, and the three-2007 entries on the history are arguably stale - although the MEP did use one of the 2007 entries (Suspended License) to show a pattern of behavior that continued in 2010. The Appointing Authority, however, did not bypass the Appellant on his driver history alone. On the basis of the driver history, taken *in conjunction* with the Appellant's concerning, repetitive taxidermist and hunting violations, the Appointing Authority has proven that it had reasonable

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involvement with the MEP. Candidate 1 had no driver history and no negative involvement with the MEP. Candidate 2 had one (1) citation in his driver history from 2004 and no negative MEP history. Lastly, Candidate 3 had no negative driver history or negative history with the MEP noted in the summary provided to the Commission.



justification to bypass the Appellant in G1-19-021, G1-19-232, and G1-20-071. The MEP has “shown that the reason is valid, and reasonable, and not arbitrary and capricious.” Stylien v. Boston Police Department, G1-17-194 (2017).

For all of the above reasons, Anthony Cunha’s three (3) bypass appeals docketed under G1-19-021, G1-19-232, and G1-20-071 are hereby *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman  
Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 8, 2021.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission’s 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission’s 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 Ma Mass. R. Civ. P. 4(d).

Notice to:

Anthony Cunha, Pro Se ( Appellant)  
Thomas Costello, Esq. (for Respondent)  
James McDonogh, Esq. (for Respondent)  
Julia O’Leary, Esq. (for Respondent)