COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

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

KEVIN DAVIS,
Appellant

v.

BOSTON POLICE DEPARTMENT,
Respondent

G1-17-199

Appearance for Appellant:

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

Appearance for Respondent:

James MeGee, Esq.[1]
Assistant Corporation Counsel
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Cynthia Ittleman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), Mr. Kevin Davis (Appellant), appealed the decision of the Boston Police Department (Respondent or the BPD) to bypass him for original appointment to the position full-time police officer. The Appellant filed the instant appeal on September 29, 2017. The Civil Service Commission (Commission) held a prehearing conference in the case on October 24, 2017 at the Commission's office in Boston. The Commission conducted

[1] At the time of the hearing in this case, the Respondent was represented by Peter Geraghty, Esq., who has since left the Boston Police Department.

a full hearing[2] in the case at the same location on January 30, 2018. The witnesses were sequestered. The Appellant declined to testify. I asked Appellant's counsel if he had advised the Appellant about the possible repercussions for declining to testify. Counsel advised that he had done so. The Appellant offered no other witnesses. The hearing was digitally recorded and the parties were each sent a CD of the proceeding.[3] The parties submitted post-hearing briefs on May 18, 2018.[4] For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Twenty (20) exhibits were entered into evidence at the hearing: Respondent's Exhibits (R.Exs.) 1 through 18) and Appellant's Exhibits (A.Exs.) 19 and 20. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Detective (Dt.) Rafael Antunez
- Nancy Driscoll, Director of Human Resources, Boston Police Department

Called by the Appellant:

- None

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

[2] The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq*., apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.
[3] If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.
[4] The text of the Appellant's proposed in his brief reference certain documents in the record and/or the testimony of a named witness but do not contain formal citations.

Applicant's Background

1. In his application for employment as a police officer at the BPD, the Appellant wrote that he was born in Newton and raised in Westfield and Franklin, Massachusetts. He moved to Boston in September 2016. (R.Ex. 1)[5]
2. After high school, the Appellant attended Westfield State University from 2006 to 2010, obtaining a bachelor's degree in political science and a minor in criminal justice. The Appellant lived on or near campus in Westfield and in Franklin during the summer break. (R.Ex. 1)
3. On April 9, 2009, the Appellant and a friend were arrested and charged with various crimes. (R.Ex. 14; *see* section below regarding this arrest and associated charges)
4. Asked on the BPD application if he had received any "disciplinary action" during his education, the Appellant wrote, "Yes, at the 18th Airborne Corps NCO Academy I was counseled (sic) in writing by my NCOIC for failure to be in proper uniform." (R.Ex. 1)
5. The Appellant had no record of employee discipline. (R.Ex. 1)
6. From 2010 to 2013, the Appellant lived and worked in the Franklin area. During that period, the Appellant had worked full time for a telecommunications company for two (2) years and worked off and on as a golf club greens keeper and for a lawn care company. (R.Ex. 1)
7. The Appellant served in the U.S. Army from April 2013 to July 2016, he was honorably discharged as a non-commissioned officer (Sergeant), he had received a number of medals, decorations and citations while in the Army, he joined the National Guard upon

[5] Since the Appellant declined to testify at the Commission hearing, his background information is from his application.

his discharge from the Army and his Guard service ends October 2020. The Appellant was not deployed while in the Army. (R.Ex. 1)

8. In September 2016, the Appellant enrolled at the University of Massachusetts in Boston as a full-time student and was receiving unemployment benefits. (R.Ex. 1)
9. The Appellant has been in a long-term relationship with his girlfriend for five or six years. (R.Ex. 1)
10. Included in the Appellant's application are references from seven (7) people (not including the Appellant's girlfriend, who lives with him). Of the seven (7) references provided, four (4) references have known the Appellant three (3) years or less. All of the Appellant's references were positive. (R.Ex. 1) There is no information in the record indicating whether the Appellant's references were aware of his April 2009 criminal case. (Administrative Notice)
11. Of the three (3) references who knew the Appellant more than three (3) years, one, Mr. A, has known the Appellant most of his life in Franklin since his son and the Appellant grew up together, Mr. A coached the Appellant in certain sports as a child, he has stayed in touch with the Appellant and he is close friends with the Appellant's family. (R.Ex. 1) In response to the BPD reference form that asks for an example of the Appellant's good judgment, Mr. A wrote, in part, that the Appellant showed judgment,

> " … upon join (sic) the US Army. After graduating Westfield State College without a career path, Kevin worked misc jobs while hanging out with friends in the same situation and living back with his parents. Kevin realized his life was stalled. He came to me for advice and council (sic) and he decided to go in the military to find his compass heading." (R.Ex. 1)

Asked what improvements the candidate could make "to be a good public servant", Mr. A wrote,

> "Listening & Communication Skills – His military training provided an excellent foundation, but a focus to continuously improve on these will be a huge asset when dealing with people as a future Police Officer." (Id.)

12. One (1) of the Appellant's references was provided by a police officer who worked near where the Appellant grew up and who had known the Appellant for ten (10) years (i.e. since 2007 approximately). The police officer had a landscaping business where the Appellant worked seasonally from 2010 through April 2013. (R.Ex. 1)

13. The last of the three (3) longer-term references was provided by a representative of the golf course where the Appellant worked seasonally from May 2009 (one month after the Appellant was arrested on April 9, 2009) to April 2013. (R.Ex. 1)

Appellant's April 9, 2009 Arrest

14. In the late evening of April 9, 2009, the Medway Police Department (MPD) received a call from a Chinese restaurant in Medway. MPD Officer M was one (1) of three (3) officers who responded to the restaurant's call. Officer M wrote a police report stating, in pertinent part,

> On April 9, 20009 (sic) was on patrol in … a marked Medway police cruiser, I was contacted by dispatch and asked to check a reported fight in progress at the [restaurant]. I arrived at the [restaurant] with … [Officer H] and [Sgt. B]. **I was met out in the parking lot by approximately 8 people. All the people were yelling that the people had just run around the right side of the building.** Officer [H] went to the side of the building to check for people. I then was approached by owner Joe [] ... Joe stated he was punched in the face by the two people that ran around the building. **Joe said the two men were acting angry in the bar. Joe said he asked the men to leave and they became aggressive and attacked him.** Joe stated the men hit and pushed him and two other workers Tommy and Paul. **Joe said his workers helped get the men out of the restaurant**. Paul [] said he would come to the police station to fill out a statement …
>
> **I was approached by numerous people reporting the incident stating the men were out of control. Numerous people stated the men were yelling racial slurs.** I asked those people to come back to the police station to fill out statements … [Sgt. B] **left the area to check for the people that ran**. [Sgt. B]

reported two young men walking by [street address]. I immediately left the [restaurant] parking lot and drove to his location. **I spoke with the two men later identified as [Mr. H][street address and date of birth] and Kevin Davis** [street address and date of birth]. I noticed both men were wearing sneakers that were full of mud. Both men had the bottom of their pants wet and muddy. I asked the men where they were coming from. [Mr. H] stated I can't lie we were at the [restaurant] and got into a fight. I [Mr. H] (sic) what had happened. [Mr. H] said the people in the bar were trying to beat us up. [Mr. H] was unsteady on his feet and had thick slurred speech. **I then asked Kevin what had happened. Kevin said "they just tried to beat us up".** I asked Kevin who he was talking about. Kevin said "the people that work there".

I explained to Kevin and [Mr. H] that we had received a different story from numerous people at the bar and that they were being placed under arrest… I had three people come to the station and fill out statements. Paul [owner] … [KH] …, and [AB] … See attached statements. **All the statements reported that [Mr. H] and Kevin were yelling racial slurs during the attack**.
[Mr. H] was charged with 3 counts of c265s39 A&B to intimidate for race/religion, c 272s53 disorderly conduct, c 272s53 disturbing the peace. Kevin Davis was charged with 3 counts c 265s39 A&B to intimidate for race/religion, c 272s53 disorderly conduct, c272s53 disturbing the peace." (R.Ex. 2)(emphasis added)[6]

15. Mr. AB's handwritten statement the night of the fight reported, in pertinent part,

> " …I see 2 individuals whom I recognized as [restaurant] staff (they were of Asian descent pinning down a white male individual with red hair [further physical description of Appellant] … As he was pinned a third staff member was punching him in the face. Once both got kicked out they started yelling racist remarks (i.e.: chinks) to the staff and trying to get them to come out so they … would fight them …." (R.Ex. 5)

16. Ms. KH's handwritten statement the night of the fight reported, in pertinent part,

> " … While I was [at the restaurant] I observed 2 gentlemen giving the bartender a very hard time. I was standing at the door while one of the larger gentlemen proceeded to tell 'Joe' (the owner' (sic) that he had paid for his drink. Joe told him to finish his drink and leave with his other friend. The shorter gentlemen (sic) proceeded to push Paul 'one of the waiters'. Joe jumped in trying to stop the altercation. The two gentlemen would not stop and had to be dragged out of the bar. Once outside I stood in front of the door and would not let them back in, so one of them spit on me. I still stood my ground and would not let them back in the bar. Finally they proceded (sic) to the back of the bar while yelling racial slurs (sic) at the bartenders like gook and Chinese m ….. f….." (R.Ex. 6)

[6] There is no evidence in the record regarding the result of the charges against Mr. H.

17. The April 10, 2009 handwritten statement of Paul, the restaurant owner who was working at the restaurant that night, states, in pertinent part,

> " …And they [the Appellant and his friend] both got real upset about been (sic) 'cut off'. They are acting even worse and enough to get Joe [] & Tommy[]'s attention. Joe and Tommy try (sic) to ask them to leave. One of them pushed Tommy on the floor and I went out of the bar and pulled him off Tommy, and pushed his (sic) out of the restaurant. He was physically refused (sic) to leave, try to push and throwing punches. But the worse (sic) is saying discrimination (sic) words such as "you chin" (sic) "you egg roll". …." (R.Ex. 7)

18. The Appellant was prosecuted for the charges against him. His attorney in those matters retained the services of an investigator who obtained the typed, notarized statements of the three (3) restaurant victims on the investigator's stationery on January 29, 2010. In his January 29, 2010 typed statement, Paul, (the only brother to submit a handwritten statement to the police on April 10, 2009; *supra*), confirmed information in the MPD police report that the Appellant and his friend sat at a restaurant table and bought alcoholic beverages, that two (2) young women with the Appellant and his friend were asked to leave because they were underage, that the Appellant and his friend were angry the women had to leave, that the Appellant and his friend became aggressive, that the Appellant and his friend moved to the bar, that they were asked to leave, that they refused to leave, that a physical struggle ensued, that the three (3) restaurant staff victims had to push the Appellant and his friend to leave, and that the Appellant and his friend both yelled racist slurs at the staff members. However, in the January 29, 2010 typed statement that he signed, Paul denied that he was physically hurt at the incident, contrary to what his brother Joe told police on April 9, 2009 and added that he did not want to go to court to press charges but he wanted a no trespass notice against the Appellant and his friend. (R.Ex. 20)

19. On January 29, 2010, Tommy (another of the three (3) restaurant victims) also signed a typed notarized statement on the investigator's stationery confirming the MPD report that he saw that his brothers were having problems with the Appellant and his friend, that they were getting loud, that he went to help out, that one of the people at the bar pushed him and a scuffle ensued and Tommy and his brothers brought the Appellant and his friend outside. Tommy's typed statement added that he was not injured during the scuffle and that he did not want to press criminal charges. (A.Ex. 19)

20. Joe (the third restaurant victim) also signed a typed, notarized and detailed statement on the investigator's stationery on January 29, 2010, confirming the police report, noting that the Appellant and his friend were angry at the bar, that the bartender denied them further alcoholic beverages, that they became aggressive and attacked the owners, and that it required all three (3) victims to push the Appellant and his friend out of the restaurant, and adding significant detail. For example, Joe's typed statement stated that the Appellant and has friend came into the restaurant, ordered a scorpion bowl, two (2) young women came in and sat with the Appellant and his friend, the staff checked the women's IDs and asked them to leave because they were underage, that the Appellant and his friend became angry and sat at the bar, that when the bartender refused to serve them any more alcoholic beverages they grew more angry, that they were asked to leave and that Joe and his two (2) brothers had to push the Appellant and his friend to leave while the Appellant and his friend yelled racist slurs. Joe added to the typed statement that he and his brothers were not injured, they did not want to press charges and that he and his brothers just wanted the Appellant and his friend to stay away from the restaurant. (R.Ex. 8)

21. In March 2010, the Appellant admitted to sufficient facts (that such facts could establish a guilty finding) to the charge of assault (a reduction of one (1) charge of assault and battery to intimidate), which was continued without a finding (CWOF) for six (6) months and the Appellant was ordered to perform thirty-two (32) hours of community service, write a letter of apology to the victims and permanently stay away from the restaurant. The remaining charges were dismissed. (R.Exs. 11, 12, 13, 14 and 15).

22. The Appellant's letter of apology is undated but it was date-stamped by the Court April 6, 2010. The letter stated,

> "To the owners of the Medway [] Restaurant:
> In April of 2009 myself, and a friend of mine were involved in an altercation with the bar of your establishment. The altercation has recently been resolved by the Norfolk District Court in which I was told by the Court to reach you through a letter of apology. I am sorry for what occurred that Thursday night in April a year ago. It disturbed your place of business, and disturbed the other customers that were enjoying your establishment. Both my friend and I feel deeply sorry for the trouble that occurred between not only you, but your other customers that you were servicing that night. I will respect the decision that you have made for my friend and I to remain off the Medway [] Restaurant property. Again I am deeply sorry for the actions I took during the incident that occurred at your established place of business.
> Sincerely,
> []
> Kevin Davis"
> (R.Ex. 16)

Appellant's Application for Employment at BPD

23. The Appellant took and passed the 2015 civil service examination for police officer. (Administrative Notice: information provided by the state's Human Resources Division (HRD)

24. In or around February 2017, the Appellant's name appeared on Certification # 04401 for consideration for the position of Boston police officer. (Testimony of Driscoll; R.Ex. 18)

25. Pursuant to the BPD's usual process, after the Appellant signed the list indicating his interest in the position of Boston police officer, he attended an orientation session at which applicants receive the police officer application package to complete. *(*Testimony of Driscoll and Antunez)

26. On March 4, 2017, the Appellant appeared for orientation where Det. Antunez conducted his standard orientation presentation explaining the application and emphasizing truthfulness. *(*Testimony of Antunez*)*

27. The "Student Officer Application Instructions" of the application, informed candidates that "all information must be true and accurate. Supplying false or misleading information or omitting information will result in rejection of your application and dismissal from employment." *(*R.Ex. 1*)*

28. On March 18, 2017, the Appellant signed, initialed, or printed his name in multiple sections on the notarized form indicating that every answer is "full, true, and correct in every respect[]" (R.Ex. 1) and affirmed that he was aware that "willfully withholding information … will be the basis of rejection of my application or dismissal from the [BPD] and removal from the Civil Service List of eligibility." (Id.)

29. Det. Antunez was assigned to conduct the Appellant's background investigation. (Testimony of Driscoll) When the Appellant returned to the BPD to be interviewed by Det. Antunez, they reviewed the Appellant's application in depth. *(*Testimony of Antunez)

30. After the interview, Det. Antunez conducted a background investigation of the Appellant, which included a criminal record check for the State of Massachusetts, an out of state criminal record check, a search for police reports in and outside of Boston, and a review

of the Appellant's driver history and credit report. (Testimony of Antunez; R.Exs. 14 and 15) In the course of conducting this background investigation, Det. Antunez found out about the Appellant's arrest in 2009. (Testimony of Antunez; R.Exs. 4, 13, 14 and 15) Id.)

31. Det. Antunez obtained a copy of the MPD police report regarding the events on April 9, 2009 and handwritten witness statements submitted to the police on April 10, 2009. (R.Exs. 4 and 14)
32. In reviewing the Appellant's application, Det. Antunez noted that in response to question one (1) on page 34 of 46 "have you ever been involved in a physical altercation after consuming alcohol?" , the Appellant checked the box labeled "yes." (R.Ex. 1)
33. Det. Antunez also noted that the Appellant also answered "yes" in response to question 3 on page 34 of the application, "have you ever been taken into protective custody?" (R.Ex. 1) Near the bottom of page 34, the applicant is instructed "if you answered 'yes' to any question, explain the incident(s) below or on a separate sheet of paper." (Id.)
34. In a combined response to both questions 1 and 3, the Appellant wrote in his application, "[i]n April 2009, I was involved in a bar fight with a friend at Medway. After the altercation, me and my friend were walking home, at which time a Medway police officer stopped me and my friend and placed us under arrest. We were later released on bail later that night." (R.Ex. 1)
35. On March 30, 2017, Det. Antunez spoke to MPD Officer H, who was involved with Officers M and B in responding to the restaurant's call on April 9, 2009. MPD Officers M and B had since retired. Officer M was the reporting officer. Officer H told Det. Antunez that he vaguely recalled taking witnesses' statements on the night of the April 9,

2009 incident. On March 31, 2017, Officer H sent Det. Antunez supporting documents from the MPD. (R.Ex. 14)

36. Noticing that the Appellant's initial explanation on page 34 of the application lacked many of the details provided in the MPD police documents, Det. Antunez asked the Appellant to provide an updated, more thorough explanation of the events on April 9, 2009. (R.Exs. 1 and 4; Testimony of Antunez)

37. Det. Antunez wrote in his April 20, 2017 Privileged and Confidential Memorandum (PCM) about the Appellant, in part,

> "The numerous [witness] statements described the applicant and his friend as verbally and physically abusive (yelling racial slurs as well as punching and spitting). The statements also quoted some of the racial slurs used such as 'Chink, Gook and Egg Roll.' In addition to the facts described in the police report, the hand written statements gave more details.
> The applicant and his friend arrived to the restaurant with two underage girls. Once carded by staff, the girls were asked to leave. The girls did leave and the applicant and his friend remained. One witness stated they believed this initiated both men's anger.
> After consuming a couple of drinks, and because the men's anger appeared to escalate, they were asked to leave. At this point, the physical altercation took place. During the physical altercation, both men were forced outside and the Medway Police were contacted. Both men initially remained outside challenging staff to another physical altercation while using racial slurs. They later left prior to police arrival, but were eventually arrested." (R.Ex. 14)

Det. Antunez also obtained the Wrentham District Court docket information indicating that the Appellant had accepted a plea bargain reducing the criminal charges to a simple assault which was continued without a finding for six (6) months and the remaining charges were dismissed. On March 31, 2017, Det. Antunez contacted the Appellant and asked him to produce an added written explanation with the information the Appellant had omitted regarding his use of racial slurs and his arrest for assault and battery for intimidation based on race. (Id.)

38. On March 31, 2017, the Appellant submitted to Det. Antunez an updated explanation of the April 9, 2009 incident stating,

> On the night of April 9, 2009 I was involved in a fight at the Medway [restaurant] in Medway, MA along with one of my friends. **We had been with a larger group of people at first who I had walked out to their cars** with, and when I came back from outside the restaurant I went to go get the friend I had come with, **I began to see an altercation between my friend and the bartender**. **A fight ensued with the gentlemen (sic) behind the bar and the other restaurant workers and owners. My friend and I pushed our way out into the parking lot. We left the scene and started to walk our way home**. While walking home we were stopped by patrolman [M] of the Medway Police Department, and he asked us what had happened at the Medway [restaurant], and we explained what had happened. He placed us under arrest and I was charged with three counts of assault and battery for race/religion, one charge of disorderly conduct, and one charge of disturbing the peace. He explained to us the reason as to why we were being charged with the assault and battery for race/religion was due to us using racial slurs during the altercation. The case was heard at Wrentham District Court. The charges of assault and battery for race/religion were reduced to assault, disorderly conduct, and disturbing the peace. I plead (sic) to sufficient facts of the assault, disorderly conduct, and disturbing the peace. I received six months (sic) probation, never return to the Medway [restaurant], thirty-two hours of community service, and wrote a letter of apology to the Medway [restaurant]. I also was ordered to pay a fifty dollar fine for each month of probation. I completed all terms of my probation, and the case was dismissed as of September 21, 2010." (R.Ex. 3)(emphasis added)

39. Detective Antunez presented the facts of his investigation to the BPD hiring Roundtable on April 20, 2017, along with a copy of his PCM that contained the facts he had uncovered. (Testimony of Antunez; R.Ex. 14)

40. The Roundtable directed Det. Antunez to attempt to obtain a copy of the apology letter the Appellant had been ordered by the Court to write to the restaurant victims and to attempt to locate and speak to additional witnesses who had made statements to police regarding the April 9, 2009 incident. (Testimony of Antunez, R.Ex. 15)

41. Det. Antunez obtained a copy of the apology letter with the Appellant's assistance. (Testimony of Antunez, R.Exs. 15 and 16)

42. One of the three (3) brothers working at the Medway restaurant told Det. Antunez that he never received the Appellant's written apology, that he did not recall the details of the April 9, 2009 events, he had "forgiven" the Appellant and he asked that the BPD "not allow the matter to negatively affect Kevin Davis's chances." (R.Ex. 15) Det. Antunez was unable to get in touch with additional witnesses. (Id.)

43. On April 27, 2017, Det. Antunez presented to the Roundtable the facts found as a result of his additional investigation and his updated PCM. (Testimony of Antunez, R.Exs. 15 and 16)

44. The Roundtable was concerned about the Appellant's aggressive actions on April 9, 2009 because police officers must be able to deescalate tense situations and also because of the racial slurs attributed to him. Boston is a diverse community and officers must be free of bias and be able to treat all members of the community consistently, in a fair manner. (Testimony of Driscoll)

45. In a letter dated August 31, 2017, Ms. Driscoll informed the Appellant of the decision to bypass him for original appointment stating, in pertinent part,

> " …As detailed herein, the [BPD] has significant concern with your violent and offensive conduct on April 9, 2009, which resulted in criminal charges against you. In addition, the [BPD] is concerned with your reporting of the April 9, 2009 incident on your application.
>
> On April 9, 2009, while at a Chinese restaurant in Medway with a friend, you engaged in criminal conduct. Witnesses informed the responding Medway police officers, that you and your friend arrived at the restaurant with two (2) underage females. The underage females were asked to leave the establishment. After consuming a few alcoholic beverages, you and your friend became out of control, angry, and aggressive. You and your friend punched the owner and two (2) employees and were spitting at people. You and your friend yelled a number of offensive racial slurs while attacking restaurant staff. After being forced out of the establishment, you remained outside with your friend for a short period of time challenging staff to another physical altercation while using racial slurs. After leaving the scene with your friend, you were located and placed under arrest

> … and charged with five (5) criminal offenses. You admitted to sufficient facts with respect to the criminal charge of Assault and received a six (6) month continuance without a finding.
>
> … the [BPD] believes that you provided incomplete and inaccurate information regarding your April 9, 2009 conduct to downplay the egregiousness of your actions. This is concerning because truthfulness is an essential job requirement for a police officer. This is concerning because truthfulness is an essential job requirement for a police officer. When an officer is found to be untruthful, it damages the officer's ability to testify in future court proceedings. … As a result, the untruthfulness identified in your application, as well as the other concerns detailed herein, deems you unsuitable for employment as a Boston police officer. …." (R.Ex. 18)

46. The BPD selected 130 candidates in the hiring cycle involved in this case, 110 of whom were ranked below the Appellant on the pertinent Certification. (Stipulation)

47. The Appellant filed the instant appeal. (Administrative Notice)

48. The Appellant did not testify on his own behalf at the hearing in this matter. (Administrative Notice)[7]

Applicable Law

G.L. c. 31, § 27 states, in pertinent part, that a bypass occurs,

> … [i]f an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest ….
> (Id.)[8]

The HRD Personnel Administrator Rules (PAR) address bypasses, providing, in part,

> … Upon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule .02, an appointing authority shall, immediately upon making such determination, send to the Personnel Administrator, in writing, a full and complete

[7] At the pre-hearing conference, the Appellant, appearing pro se, admitted to making racially insensitive remarks during the April 9, 2009 incident.

[8] In 2009, the state's Human Resources Division (HRD) delegated to certain municipalities, including Boston, a number of hiring functions that it previously performed. As a result, the delegated municipalities are required to maintain appropriate records of their bypasses.

> statement of the reason or reasons for bypassing a person or persons more highly ranked, or of the reason or reasons for selecting another person or persons, lower in score or preference category. … (PAR.08(4))

Effective 2009, HRD has delegated pertinent parts of this function to the vast majority of appointing authorities, including Boston.

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

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. *See* City of Beverly v. Civil Serv. Comm'n, 78 Mass.App.Ct. 182, 189 (2010). In its review, the commission is to "find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority." Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). However, the commission's work "is not to be accomplished on a wholly blank slate." Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). Further, the commission does not ignore the previous decision of the appointing authority, but rather "decides whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." Id. at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

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

The deference that the Commission owes to the appointing authority is "especially appropriate" in respect to the hiring of police officers. Beverly, 78 Mass.App.Ct. at 188. The Commission is mindful of the standard of conduct expected of officers of the law. *See* Dumeus v. Boston Police Dep't, 24 MCSR 124 (2014) (finding that a police officer must be a model of good citizenship). An officer of the law "carries the burden of being expected to comport himself or herself in an exemplary fashion." Mclsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 474 (1995). Police officers "voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens." Attorney General v. McHatton, 428 Mass. 790, 793 (1999). Therefore, the appointing authority can give some weight to an applicant's criminal record when making its hiring decisions. Thames v. Boston Police Dep't, 7 MCSR 125, 127 (2004).

A court's continuance of a criminal case without a finding (CWOF) is defined by the Massachusetts Court System Glossary as follows,

> In a criminal case, if a judge finds there is enough evidence to support a finding of guilt, he or she can continue the case for a period of time without making a guilty finding. The charges will be dismissed without a finding of guilt at the end of that period if the defendant complies with any conditions imposed. …

(Id., Administrative Notice, http://www.mass.gov/courts/selfhelp/court-basics/glossary.html, 1/30/17)

The role of the Commission, while very important, is limited in scope to deciding whether "the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the Appointing Authority." City of Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 303 (1997); *see also* City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 408, 411 (2000); McIsaac v. Civil Serv. Comm'n, 38 Mass.App.Ct. 473, 476 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 332, 334 (1983). An action is "justified" when it is "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." City of Cambridge, 43 Mass.App.Ct. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 262 Mass. 477, 482 (1928); *see also* Comm'rs of Civil Serv. v. Mun. Court of the City of Boston, 359 Mass. 211, 214 (1971). The Commission's role is not to substitute its judgment for that of the Appointing Authority. City of Cambridge, 43 Mass.App.Ct., at 305; Sch. Comm. of Salem v. Civil Serv. Comm'n, 348 Mass. 696, 699 (1965).

In making its decision, the Commission must focus on the fundamental purposes of the civil service system: guarding against political considerations, favoritism, and bias in governmental employee decisions. City of Cambridge, 43 Mass.App.Ct., at 304-305 (citations omitted).

The question before the Commission is not whether it would have acted as the Appointing Authority did under the circumstances, but rather if the Appointing Authority had reasonable justification for the action it took. City of Attleboro v. Civil Serv. Comm'n, 84 Mass.

App. Ct. 1130, 1134 (2014); Arria, 16 Mass.App.Ct., at 334; Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003). A bypass decision is reasonably justified when it is made with adequate reasons sufficiently supported by credible evidence. Henderson v. Civil Serv. Comm'n, 89 Mass. App. Ct. 1131, 1134 (2016); *see also* Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241 (2006); Selectmen of Wakefield, 262 Mass., at 482.

"The Commission is permitted, but not required, to draw an adverse inference against an appellant who fails to testify at the hearing before the appointing authority (or before the Commission). Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006)." Clark v. Boston Housing Authority, 24 MCSR 193 (2011), Clark v. Boston Housing Authority, Suffolk Superior Court, C.A. No. SUCV2011- 2554E, aff'd (Feb. 13, 2015). Where the opposing party has established a case adverse to the party invoking the privilege, the invoking party should be subject to a negative inference by the Commission. Town of Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 826-27 (2006); *See also* Gould v. North Attleborough, 31 MCSR 186 (2018); Quintal v. Commissioner of the Dep't of Employment & Training, 418 Mass. 855, 861; Custody of Two Minors, 396 Mass. 610, 616 (1986).

Analysis

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. The BPD bypassed the Appellant for two (2) reasons: 1) his violent and offensive conduct on April 9, 2009; and 2) his untruthfulness during the application process. R.Ex. 18.

The BPD's case was based on the documentary evidence as well as the testimony of Det. Antunez and then BPD Human Resources Director Nancy Driscoll. I find that Det. Antunez testified credibly about his process in investigating the Appellant's background, his recollection

about the Roundtable's concerns, the additional information the Roundtable requested, the information about the Appellant that he was able to obtain as well as the information that he sought but that was not available. His testimony was consistent overall and he responded calmly and directly to questioning. I find that Director Driscoll testified credibly about the hiring process involving the Appellant as well as the concerns of the Roundtable relating to the Appellant's candidacy and the additional information the Roundtable requested and received from Det. Antunez. In addition, Director Driscoll credibly explained the BPD's need to serve all of the diverse citizens of the city, regardless of race, and that Boston police must be impartial and treat everyone consistently, fairly and without bias. Combining the testimony of Det. Antunez and Director Driscoll with the documentary evidence in the record, I find that the BPD conducted a reasonably thorough review of the Appellant's candidacy. The Appellant refused to testify and offered no witnesses.

Although the Appellant attempted to minimize his violent actions on the night of April 9, 2009, deflect responsibility to the friend who was with him at the restaurant and undermine the statements of multiple percipient witnesses that night, his own conduct that night was abhorrent. The Appellant ordered alcoholic beverages and had two (2) underage women join him and his friend at a table at the restaurant. When the restaurant staff checked the young women's identification, they determined that the young women were underage and asked them to leave. After the young women left, the Appellant and his friend approached the bar and ordered more alcoholic beverages, becoming noisy and unruly. When they tried to order additional alcoholic beverages, the bartender denied their requests. This angered the Appellant and his friend further and the bartender asked them to leave. They refused. The bartender and his two brothers, also working at the restaurant, attempted to remove the Appellant and his friend from the restaurant

and a struggle ensued. Eventually, the three brothers were able to move the Appellant and his friend outside. The Appellant and his friend attempted to get back into the restaurant, challenging the restaurant staff to fight, yelling racist epithets. The restaurant staff called the Medway police and the Appellant and his friend ran away. The police arrived at the restaurant and no less than eight (8) witnesses told the police what they observed. The police subsequently found and arrested the Appellant and his friend. Three (3) of the witnesses, including one of the restaurant staff, hand wrote statements that night, confirming the violent behavior of the Appellant and his friend. There is no exhibit, and no statement by the Appellant on the record, since he did not testify, in which he outright denies engaging in violent on the night of April 9, 2009.

The Appellant and his friend were each charged with five (5) crimes that night – three (3) charges of assault and battery to intimidate (based on race) for each of the three (3) restaurant victims, and disturbing the peace and disorderly conduct. The Appellant's attorney at the time retained an investigator who contacted the three (3) restaurant victims (brothers Paul, Joe and Tommy) to ask them about their recollections nine (9) months after the events. Of the three, only Paul had submitted a handwritten witness report to police on the night of April 9, 2009 stating, among other things, that he and his brothers had been injured that night. The typed, notarized statement on the investigator's stationery dated January 29, 2010 that Paul signed reiterated much of what he had written in his statement to the police but said that he was not injured that night and did not want to go to court to press charges against the Appellant. The typed, notarized statements on the investigator's stationery signed by Paul's brothers Joe and Tommy also provided information about the events on the night of April 9, 2009 that was similar to the police report but added that they were not injured, they did not want to press charges

against the Appellant in court, and that they just wanted the Appellant banned from returning to the restaurant. Subsequently, the assault and battery with intimidation charges were reduced to simple assault, which charge was continued without a finding for six (6) months after the Appellant admitted to sufficient facts of a guilty finding and the court ordered the Appellant to perform thirty-two (32) hours of community service, to stay away from the restaurant and to send an apology letter to the victims. The rest of the charges were dismissed. Det. Antunez called Joe, one of the victims, in 2017 to ask if he had any added information to provide about the night of April 9, 2009. Joe informed Det. Antunez that he never received an apology from the Appellant but asked that the BPD "not allow the matter to negatively affect Kevin Davis' chances". R.Ex. 15.

In addition to his aggressive behavior, the Appellant directed racial slurs at the three (3) restaurant staff members on the night of April 9, 2009. Although the Appellant entered a plea of admission to sufficient facts in court to assault and not the initial charge of assault and battery via intimidation (based on race), the bulk of the evidence here indicates against the Appellant yelled racist statements at the three (3) brothers working in the restaurant. Specifically, as noted in the police report, numerous people at the restaurant told the police when they arrived at the restaurant that the Appellant and his friend had been aggressive and called the restaurant staff racist names. In addition, all three (3) of the people who hand wrote witness statements that night confirmed that the Appellant and his friend had yelled racist statements at the restaurant staff. Further, two (2) of the three (3) restaurant staff who signed typed statements notarized by an investigator assisting the Appellant's attorney in the criminal charges against the Appellant in January 2010 indicated that the Appellant and his friend had yelled racist slurs at them. Absent the victims' agreement to sign the typed and notarized statements, the Appellant may well have

faced a different outcome in regard to the three (3) charges against him for assault and battery intimidation based on race. In addition, since the Appellant refused to testify at the Commission hearing, he has not denied that he yelled racist slurs at the victims, nor did he condemn his actions or express remorse therefor. In Desmarais v. Department of Correction 25 MCSR 575 (2012), the appellant in that case was bypassed based on a racist incident not involving violence in which the appellant was involved at work twelve (12) years prior to applying to the DOC for employment. Mr. Desmarais testified at the Commission hearing on his appeal that he had worked hard since then to establish positive employment references and he expressed remorse for the incident. The Commission found that just as the DOC can fire a Corrections Officer for such conduct, the same conduct provided reasonable justification for a bypass. Given that the instant appeal involves the Appellant's violence in addition to his racist slurs, that only eight (8) years had passed since the April 9, 2009 events occurred and that the Appellant did not testify to admit, deny or condemn his conduct or express remorse for his conduct, this appeal warrants the same result as in Desmarais. Moreover, Boston is a multicultural city and its police officers are required to protect and serve every citizen. The Appellant's conduct on April 9, 2009 clearly calls into question his ability to be fair and impartial with people of Chinese descent. The BPD had reasonable justification to conclude that providing a badge, gun, and the power of arrest to someone who has exhibited such animus toward a specific ethnic group is unacceptable.

The second reason the BPD offered for bypassing the Appellant is that he was untruthful regarding information he failed to provide in his application concerning the events of April 9, 2009 and the related criminal charges. As detailed above, the Appellant, on two (2) separate occasions, provided an incomplete, self-serving explanation of the events leading to his arrest on April 9, 2009. First, in his application, the Appellant simply noted that he was "involved in a bar

fight with a friend at Medway." R.Ex. 1 (p.34). Missing from the Appellant's initial explanation in his application in connection with the April 9, 2009 events was significant information contained in the police report and the supporting witnesses' written statements, such as the racist slurs he called the restaurant victims, that the Appellant was asked to leave the restaurant bar, that he refused to leave and had to be forced out of the restaurant, that the fight was with restaurant personnel, that the Appellant ran away from the restaurant, that the police had to search for the Appellant in order to arrest him, that he was charged with multiple counts of assault and battery intimidation (for his racist statements), disturbing the peace and disorderly conduct, that he admitted to sufficient facts to a reduced charge (assault) and that he was ordered to stay away from the Medway restaurant permanently, perform community service and send a written apology to the restaurant. Administrative Notice: R.Exs. 4, 5, 6 and 7.

The Appellant was given an opportunity to fully disclose the events related to his arrest on April 9, 2009 when Detective Antunez asked him for a more detailed explanation. The Appellant submitted additional information to Detective Antunez on March 31, 2017. R.Ex. 3. However, at the same time, he also alleged that it was only his friend who was fighting with the bartender, ignoring his own involvement, as indicated by the police reports corroborated by the multiple witness statements; he asserted that he and his friend pushed themselves out of the restaurant which is illogical and the evidence shows that the restaurant staff had asked them to leave and they did not leave until the restaurant staff removed them; he failed to report that they attempted to escalate the conflict once they were outside the restaurant; he asserted that he and his friend casually departed from the restaurant although multiple witnesses indicated that they ran away after attempting to escalate the conflict; he asserted that when the police found him and his friend, the police asked them what happened and the Appellant told them what happened

when, in fact, the corroborated police report indicates that they told the police that the restaurant staff tried to beat them up, instead of disclosing that it was their own aggressive behavior that lead the restaurant staff to ask them to leave. Having twice failed to fully disclose the events related to his arrest on April 9, 2009, in addition to his violent and offensive conduct on April 9, 2009, the BPD had reasonable justification to bypass the Appellant.

Truthfulness is an essential characteristic of a police officer. The BPD has a strict policy with respect to truthfulness for police officers. R.Ex. 17. When an officer is untruthful it can damage the officer's ability to testify in court proceedings, a fundamental job requirement for a police officer. R.Exs. 17 and 18. To that end, the BPD reminds recruit applicants at orientation that they must be fully forthcoming with details as requested in the application and by investigators. The applicants are made aware that a factual omission can be considered untruthfulness. Testimony of Antunez; R.Ex. 1. Therefore, before submitting his application, the Appellant was put on notice of the need to fully disclose details in his application. Since the Appellant refused to testify at the Commission hearing, he did not offer an explanation for his failure to disclose such information.

I find no bias or other inappropriate motive in the record concerning the BPD decision to bypass the Appellant.

C*onclusion*

For all of the foregoing reasons, the Appellant's appeal, docketed G1-17-199, is hereby ***denied***.

Civil Service Commission
/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on November 5, 2020.

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

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

Notice to:
John J. Greene, Esq. (for Appellant)
James MeGee, Esq. (for Respondent)
Patrick Butler, Esq. (HRD)