

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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

LUIS DIAZ,
Appellant

v.

G1-18-227

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Stephen J. Delamere, Esq.
839 Washington Street
Stoughton, MA 02072

Appearance for Respondent:

Tanya E. Dennis, Esq.
Assistant Corporation Counsel
Office of the Legal Advisor
Boston Police Department
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Cynthia A. Ittleman

DECISION

On November 21, 2018, the Appellant, Luis Diaz, acting pursuant to G.L c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from the decision of the Boston Police Department (BPD) to bypass him for original appointment to the position of Boston Police Officer. A pre-hearing was held on December 18, 2018, and a full evidentiary hearing was held on March 22, 2019, both at the Boston offices of the Commission.¹ The Respondent submitted ten exhibits (R. Exhs. 1-10) and the Appellant submitted six exhibits at hearing (App. Exhs. 1-6).

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

At the conclusion of the hearing, the Respondent submitted two additional post-hearing exhibits (R. PH Exhs. 1-2) and the Appellant submitted excerpts from the BPD's background investigation reports on 31 other candidates selected for hire in the same 2018 hiring cycle. (App. PH Exh. 1)² The hearing was digitally recorded, with copies provided to the parties.³ The witnesses (not including the Appellant) were sequestered. Both parties submitted proposed decisions. For the reasons stated below, Appellant's appeal is allowed.

FINDINGS OF FACT

Based on the exhibits entered into evidence, the testimony of the following witnesses:

Called by the Appointing Authority:

- Detective Lynette Praileau, Recruit Investigations Unit ("RIU"), BPD
- Mary Flaherty, Acting Director of Human Resources, BPD;

Called by the Appellant:

- Luis Diaz, Appellant;

and taking administrative notice of all documents logged in the case file, considering pertinent law, and drawing reasonable inferences from the credible evidence, a preponderance of the credible evidence establishes the following facts:

1. The Appellant, Luis Diaz (Appellant or Mr. Diaz), is a life-long resident of Boston who identifies as Black-Hispanic and is fluent in Spanish. (Appellant testimony; Respondent Exhibits 2, 4 and 8).

² The Appellant's post-hearing brief attached these 31 documents, as produced by the BPD in the unrelated case of *Marchionda v. Boston Police Dep't*, with a request that they be treated as supplemental exhibits in this case. As these are excerpts of official records, similarly categorizable as candidate records supplemental to the post-hearing exhibits filed by the Respondent, they are accepted as App. PH Exh. 1.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to use the copy of the recording to provide the court with a written transcript of this hearing to the extent that he or it wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

2. Mr. Diaz is a graduate of the University of Massachusetts at Boston (with a bachelor degree in Criminology and Criminal Justice) and has been employed since age 16 in a variety of positions, including customer service, salesperson, and (most recently) security officer at a major Level-1 trauma hospital in Boston. In his university days, he was well regarded as an intern in the Dorchester District Court. He was offered employment by the Massachusetts Trial Court as a Court Officer but, although he had passed a physical aptitude test on the first day of the Trial Court Academy, he was unable to satisfy certain physical standards developed by the Cooper Institute and so he was obliged to leave the academy. Later, the Appellant was again offered a seat in a subsequent Trial Court Academy session but he declined as he wished to pursue employment as a Boston police officer. (Appellant Exhibits 2 and 3 and Appellant testimony)
3. The Appellant took the entrance-level civil service examination for police officer candidates on March 25, 2017 and passed. He applied to be a police officer in the Boston Police Department during the 2017-2018 hiring cycle. (Stipulated Facts)
4. On March 12, 2018, the Human Resources Division (“HRD”), after having previously established an eligible list of Boston police officer candidates, issued Certification # 05194 to the BPD. The Appellant was ranked 20th on Certification # 05194 for consideration as a Boston police officer. (Stipulated Facts)
5. Eventually, the BPD bypassed the Appellant and selected five candidates ranked lower than Mr. Diaz for appointment to vacancies. (Stipulated Facts)
6. The BPD conducted a background investigation of the Appellant during the 2018 hiring process. On or around April 15, 2018, the Appellant submitted a complete, lengthy Student Officer Application (“Application”). Detective Praileau was assigned to review the

Appellant's application and conduct a background investigation. (Respondent Exhibit 8 and Testimony of Detective Praileau)

7. The investigation consisted of, *inter alia*, a background check, including review of police incident reports, credit references, and Appellant's driving history; confirmation of employment; verification of educational background; neighbor and reference interviews and confirmation of Boston residency. (Testimony of Det. Praileau and acting HR Director Mary Flaherty).
8. Detective Praileau ran a query in the BPD's Incident Report database using the Appellant's name as a search criterion. The results returned a Boston Police Incident Report involving the theft of a cell phone putatively valued at \$399.00 that occurred in December 2007 at the Urban Sciences Academy in West Roxbury, Massachusetts. (Praileau testimony and Respondent Exhibit 2)
9. Detective Praileau suspected from reading the police report that the Appellant, at that time a 16-year-old sophomore at the Urban Sciences Academy, had orchestrated a plan with two other classmates to steal the cell phone of a fourth student just before the school's holiday break. Allegedly, the plan consisted of having Student no. 2 request to use the victim's phone and then the Appellant would distract the victim by talking to him while Student no. 3 would leave the school with the phone. (Praileau testimony, Appellant Exhibit 2, and Respondent Exhibit 2)
10. Detective Praileau learned from the police report that the Headmaster at the Urban Sciences Academy, Dr. Rasheed Meadows, had questioned the Appellant about the incident after the holiday break. Detective Praileau did not speak with Dr. Meadows, however, regarding the incident prior to the Appellant being bypassed. (Praileau testimony)

11. The January 4, 2008 police report indicates that the victim was interviewed, video surveillance was reviewed, and interviews were conducted of unidentified students. The author of this report, Detective Vincent DiFazio, does not state in his report that he interviewed the Appellant. Based on the information gathered, Detective DiFazio sought a Clerk Magistrate's hearing at West Roxbury District Court. (Respondent Exhibit 2)
12. As part of her 2018 background investigation of the Appellant, Detective Praileau did not follow up with Detective DiFazio about his investigation or the contents of his police report. (Praileau testimony)
13. After completing the Appellant's background investigation, Detective Praileau summarized her findings in the Privileged and Confidential Memorandum ("PCM") circulated on September 4, 2018. (Respondent Exhibit 4) Detective Praileau testified that the Appellant had no criminal charges on his record. His current and former employers furnished excellent recommendations. The detective also received sterling letters of reference from personal acquaintances of the Appellant and neighbors offered positive feedback upon inquiry. (Praileau and Flaherty testimony; Appellant's Exhibits 3-5)
14. In his capacity as a Security Officer at a major Boston hospital, the Appellant works side by side, almost on a daily basis, with Boston police officers also working at this Trauma Level-1 hospital on paid details. At hearing, the Appellant recounted many instances in which he received intelligence from Boston police officers regarding certain patients (typically gunshot victims) who might be vulnerable to retaliation from malevolent non-hospital individuals. The Appellant has been trained in, and praised for his skill in implementing, measures to de-escalate fraught situations, deal with patients who may be under a drug-altered mental state, and counteract active shooters. De-escalation is an important tool for police officers and the

Appellant's supervisor reported that he is very good at de-escalating tense situations.

(Testimony of Appellant and Mary Flaherty)

15. On September 4, 2018, a BPD roundtable panel convened to review the Appellant's application and discuss his suitability for employment. The members of the roundtable panel included Deputy Superintendent Jeffrey Walcott; the BPD's Acting Director of Human Resources, Mary Flaherty; Sergeant Detective Gary Eblan; and, from the legal department, former BPD staff attorney Katherine Hoffman and Legal Advisor David Fredette ("the Roundtable"). Detective Praileau presented her findings from the background investigation to the Roundtable. (Respondent Exhibit 4; Praileau and Flaherty testimony)
16. At the conclusion of the September 4, 2018 roundtable meeting, the Appellant's candidacy was placed on hold to permit Detective Praileau to obtain more information. Specifically, the Roundtable requested a written explanation from the Appellant about the 2007 incident involving the larceny of the cell phone. The Roundtable instructed Detective Praileau to contact the victim of the cell phone theft; it also requested verification that the Appellant's candidacy for employment by the Massachusetts Trial Court did not proceed because he did not pass the so-called Cooper Institute Standards. (Testimony of Mary Flaherty)
17. Detective Praileau attempted to contact the victim, but never succeeded in speaking with the victim. Another BPD staffer spoke to the victim's mother and asked her to have the victim call Detective Praileau. The victim never called Detective Praileau, however. (Testimony of Detective Praileau)
18. Detective Praileau contacted the Appellant to request a written explanation regarding his role in the theft of the cell phone and she also requested information pertaining to the Appellant's performance in connection with the Cooper Institute Standards. In the Appellant's written

explanation about the larceny incident, he stated that his friend asked to use the victim's cell phone while he was talking to the victim at a school event. The Appellant wrote that "[he] had no knowledge that the cellphone was going to be stolen," but that he was questioned along with other students merely because he was talking to the victim when the phone was taken. Additionally, the Appellant stated that he attended a Clerk Magistrate's hearing at West Roxbury District Court "in which [he] took responsibility for [his] naïve actions . . . [because by then he had] concluded that [he] was an accessory to the student getting his phone taken." (Respondent Exhibit 3)

19. Detective Praileau updated her PCM to reflect the written explanation provided by the Appellant and she presented the Appellant's application package at a second roundtable on September 13, 2018. (Respondent Exhibit 4 and testimony of Detective Praileau)
20. The Roundtable requested further clarification from the Appellant regarding certain perceived conflicting statements in his written explanation. Specifically, the Roundtable wanted the Appellant to explain why, on the one hand, he wrote he was not aware of what was happening when the cell phone was stolen, and yet he also seemed to state that he took responsibility for his actions as the theft of the cell phone occurred. Detective Praileau spoke to the Appellant once again and asked him whether he had any prior knowledge that the phone would be stolen. The Appellant confirmed that his written statement of denial remained accurate. (Praileau testimony)
21. The Roundtable deemed the Appellant to be untruthful based on a perceived discrepancy between his August 2018 written statement and a short passage in Detective DiFazio's January 2008 incident report, which stated in pertinent part that the Academy's headmaster, Dr. Meadows, had "interviewed many unidentified students" and "was informed that in the

previous week [a student with the initials T.B.] and Luis Diaz had developed a plan to steal the T-Mobile cell phone from the victim.” The Appellant was to “act as a distraction and talk with the victim [while a third student with the initials D.C.] would then pass the cell phone to [T.B.]” Headmaster Meadows “spoke to suspects Luis Diaz and [D.C.] who admitted to him this plan and their role to steal the cell phone.” Detective DiFazio’s incident report is not crystal clear as to whether only D.C. made an admission to Headmaster Meadows or whether both he and Appellant Luis Diaz did so. (Respondent’s Exhibit 3)

22. The BPD did not speak to Detective DiFazio or BPD Sgt. Laura Cirino (who took a report from the victim and reviewed surveillance camera footage with the Headmaster and Dean of Discipline) regarding their investigation, and they made no attempt to retrieve the clerk-magistrate’s file on this matter, or to secure the audiotape from the hearing at West Roxbury District Court relating to the cell phone incident. (Flaherty testimony; Respondent’s Exhibit 2)
23. Although the Appellant was summonsed to West Roxbury District Court in early 2008, along with students T.B. and D.C., for this clerk-magistrate’s hearing, no charges were ever issued against the Appellant. (Testimony of Appellant and Detective Praileau)
24. The BPD’s Acting Director of Human Resources, Mary Flaherty, testified that truthfulness is important to the BPD because officers must be credible in order to testify effectively in court, and to earn the trust of the community the Department serves. Accordingly, the BPD has zero tolerance for untruthfulness in both candidates for employment and incumbent personnel. (Testimony of Mary Flaherty)
25. The Roundtable was concerned with the Appellant’s suitability to serve as a police officer (i.e., to uphold the law and maintain the public’s trust) if he had not been truthful regarding

his role in the 2007 larceny and if he had, in fact, engaged in criminal conduct then.

(Flaherty testimony)

26. On November 7, 2018, the BPD issued notice to the Appellant advising that he had been bypassed for allegedly providing untruthful statements during the background investigation and for exhibiting poor judgment in connection with the theft of the cell phone. (Respondent Exhibit 5)

27. The Respondent's bypass letter states: "The incident report indicates that you admitted to the Headmaster of the Urban Science Academy that you and your friends devised a plan to steal another classmate's cell phone." Further, that "in your response to the Boston Police Department during your background investigation, you indicated that "[you] had no knowledge that the phone was going to be stolen. You exercised unreasonable judgment in violation of Massachusetts General Laws by engaging in a criminal joint enterprise to illegally take another individual's phone. Specifically, your actions constitute the criminal offense of Larceny Over \$250, which was considered a felony offense in 2007."

(Appellant's Exhibit 1)

28. Apart from what was stated in the bypass letter, Detective Praileau's background investigation identified no other issues of concern in terms of the Appellant's suitability to serve as a police officer. (Praileau testimony)

29. No evidence was ever presented, at the time of the clerk-magistrate's hearing, or any time thereafter, including during this Commission hearing, as to the actual (likely depreciated) value of the purloined cell phone. (Flaherty testimony) Nor is there any evidence, anywhere in this record, as to the age or condition of the victim's stolen property, or whether it

remained unrecovered more than four or five school days after it was taken by someone other than the Appellant.

30. On an unspecified date (but, according to Mary Flaherty's testimony, after the BPD's bypass letter issued), the Boston Police Department's Office of Legal Advisor contacted Dr. Rasheed Meadows, the former Headmaster of the Urban Science Academy (USA) in Boston, regarding Mr. Diaz's alleged role in the theft of a student's cell phone in 2007. In a subsequently executed sworn affidavit, Dr. Meadows stated that he possesses a Bachelor's degree from Yale University, and then earned a Master's degree and a Doctorate from Harvard University. After being employed in various capacities within the Boston Public School system, Dr. Meadows recited his current position as Vice President of TNTIP, Inc., a company that works with school districts on developing and implementing academic strategies. (Appellant's Exhibit 6)
31. In his affidavit, Dr. Meadows states that he recalled the cell phone theft incident at USA and was made privy to Mr. Diaz's August 2018 statement about it. Dr. Meadows averred: "Based on my memory of the incident, Mr. Diaz's statement is truthful. Mr. Diaz did not admit at any time to me that he knew the cell phone was to be stolen. I pressed Mr. Diaz on this point and used my training and experience to see if he would admit or provide information on the [th]eft. Mr. Diaz was adamant that he had no role in planning the theft and was not aware of a plan to take the phone. He was consistent with this account during and after my questioning." (Appellant's Exhibit 6)
32. Dr. Meadows advised the BPD's Office of Legal Advisor that he would not testify on its behalf as Mr. Diaz's statement to them was truthful. Instead, Dr. Meadows agreed to testify on Mr. Diaz's behalf. In swearing out his affidavit the day before this Commissioner

originally was scheduled to conduct the evidentiary hearing in this case, Dr. Meadows further stated, however, that his schedule did not permit him to attend the hearing the next day. Dr. Meadows asked if this hearing could be postponed as he viewed it as very important that testimony be taken in person regarding the consistency of Mr. Diaz's statement and what he recalled of the 2007 cell phone incident. (Appellant's Exhibit 6)

33. Regrettably, Dr. Meadows was also not available to testify on a date in mid-April of 2019 selected by the parties for a further evidentiary hearing. The BPD urges me to draw a negative inference from Dr. Meadows's inability to appear for in-person testimony. I choose to construe Appellant's counsel's representation to me, in an email dated April 10, 2019, that "[Dr. Meadows] has changed positions and due to his schedule has indicated he is unable to attend a hearing," as meaning that Dr. Meadows had recently assumed a new employment position and could not sacrifice precious hours to attend an in-person hearing. This is bolstered by Appellant counsel's further representation that "[Dr. Meadows] did reiterate to me that he stands by his affidavit on this matter." (Administrative Notice) However, I must also consider that the BPD's legal counsel has been deprived of the opportunity to cross-examine Dr. Meadows and adjust the weight I place on the Meadows Affidavit accordingly.

34. Nevertheless, when testifying before me in 2019, the BPD's Acting Director of Human Resources, after being shown Dr. Meadow's affidavit, stated that it would have been important to the Roundtable considering the Appellant's candidacy to ascertain whether Dr. Meadows's recollection of the 2007 cell phone incident and his later questioning of Mr. Diaz differed in any material respect from the statements contained in Detective DiFazio's January 2008 incident report. Especially important would have been evidence, now contained in the

Meadows affidavit, that Mr. Diaz denied to Dr. Meadows in late 2007 or early 2008 knowledge of a plot to steal the victim's cell phone. (Flaherty testimony)

35. Indeed, I construe Director Flaherty's testimony to signify that the Roundtable, on which she sat, would not have had any valid reason to bypass the Appellant had it learned of Dr. Meadows's affidavit testimony. Ms. Flaherty testified that besides the cell phone incident, and perceived differences between the Appellant's statement and the DiFazio incident report, there were no other reasons to bypass the Appellant for the position of BPD police officer; to the contrary, he has good attributes for the position of police officer. (Flaherty testimony)
36. In his sworn testimony before the Commission, the Appellant affirmed that he was at school on December 21, 2007, and attended a holiday function/event in one of the school's rooms. While in the room and having some food, he engaged in conversation with another student (the victim). While speaking with the victim, another student that he knew (Student 2), asked to borrow the victim's cell phone. The Appellant was then told by yet a different student that they had to go back to class. At the time the Appellant left the function room to go back to class, Student 2 had not yet returned the victim's phone to him. Apparently, Student 2 passed the phone off to another student, Student 3. At no time did Appellant ever request to use the victim's cell phone and nor did he ever have possession of that cell phone. Several days later, Headmaster Meadows called the Appellant about the fact that the victim's cell phone had been taken and not returned. The Appellant then stated to Dr. Meadows that he had no knowledge that Student 2 was not going to return Student 1's cell phone. The Appellant subsequently understood that Student 2 could have used the Appellant's speaking to the victim as a distraction to cover Student 2's surreptitious passing of the cell phone to

Student 3, but it was not the Appellant's intention to participate in a larceny plot. (Testimony of Appellant; Affidavit of Dr. Meadows, Appellant's Exhibit 6)

37. Based on the Appellant's sworn credible testimony, and acknowledging its consistency with the sworn affidavit of Dr. Meadows, I find that the Appellant was not involved in the use of, or failure to return, the victim's cell phone.

38. In a post-hearing filing, the Appellant submitted evidence regarding numerous candidates conditionally offered employment by the BPD notwithstanding alcohol-related charges on the candidates' records. App. PH Exh. 1. Two candidates had operating vehicles under the influence of alcohol (OUI) convictions or pleas on their records. (Respondent's post-hearing Exhibit 2 and App. PH Exh. 1) As the BPD's acting HR director, Mary Flaherty, testified, the BPD recognizes that drinking alcohol and then driving places the public, and police officers, at considerable risk. A conviction or a continuance without a finding (CWOFF) for Operating Under the Influence within the last ten years will bar a candidate from receiving an offer of employment, but if the conviction or CWOFF happened more than ten years ago, the BPD will consider an applicant's candidacy. Ms. Flaherty testified that such a candidate conceivably might have denied operating under the influence but then have been found guilty of an OUI charge or have admitted to sufficient facts for a guilty conviction under a CWOFF plea – which, as the Appellant argues, would mean that the candidate's initial statement to arresting police officers was untruthful. (Flaherty testimony; Respondent's Exhibit 9)

39. Indeed, the records with respect to at least three BPD applicants conditionally offered employment in the 2018 hiring cycle appear to confirm instances of candidates lying about or omitting disclosure of criminal activity. See the following post-hearing records, all collected in App. PH Exhibit 1: (1) a 2018 BPD Recruit Investigations Unit Privileged and

Confidential Memorandum (“RIU-PCM”) regarding Applicant no. 17 (“while at Stonehill College in his Jr. year [Applicant] was suspended from living on campus for 8 months due to being intoxicated to the point of not remembering what he did. Applicant . . . hit a female on her butt area and ripped her shirt popping off 3 buttons”; same applicant previously disciplined twice for underage drinking and giving a false name to college employee); (2) 2018 RIU-PCM re: Applicant 19 (arrested in 2011 for OUI as a minor, taken into protective custody after lying to police officer about his actions, later admitted to sufficient facts to prove reckless operation of motor vehicle and minor in possession of alcohol charges; same recruit had been taken into custody six months earlier for being a minor in possession of alcohol when police observed a bottle of alcohol on his vehicle and applicant refused to disclose location of car keys); (3) 2018 RIU-PCM re Applicant 28 (recruit arrested by university police officers on “minor in possession of alcohol” charge; failed to disclose in his BPD police officer application disciplinary action taken by his university).

40. A Caucasian candidate was offered employment by the BPD who, at age 19 in 2014, was found guilty of a misdemeanor larceny charge (listed as “Shoplifting Concealment Goods”) in Onslow County District Court in North Carolina. This candidate was sentenced to 12 months of probation and was ordered to pay what appears to amount to over \$500 in restitution, fines, fees, and court costs. (Respondent’s Post-hearing Exhibit 1)

Applicable Civil Service Law

This appeal involves a bypass for original appointment to a permanent civil service position of police officer. This process is governed by G.L. c. 31, Section 27, which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall

immediately file . . . a written statement of his reasons for appointing the person whose name was not highest.”

Pursuant to the Personnel Administration Rules (PAR) promulgated by HRD, the statement of reasons must be specific and complete:

“Upon determining that any candidate on a certification is to be bypassed . . . an appointing authority shall, immediately upon making such determination, send . . . a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked. . . . Such statement shall indicate all . . . reasons for bypass on which the appointing authority intends to rely or might, in the future, rely to justify the bypass. . . . No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed . . . shall later be admissible as reasons for selection or bypass in any proceeding before the . . . Civil Service Commission.” PAR.08(4)

The Commission determines whether, by a preponderance of the evidence, the decision to bypass a candidate was made after an “impartial and reasonably thorough review” and that there was “reasonable justification” for the decision. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Brackett v. Civil Service Comm’n, 447 Mass. 233, 241 (2006), citing G.L. c. 31, § 2(b); City of Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182, 187 (2010). See also Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321 (1991) (appointing authority must establish, by a preponderance of evidence, that the reasons assigned to justify the bypass were “more probably than not sound and sufficient”); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

“Reasonable justification in this context 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.’” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited; Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

In selecting public employees of skill and integrity, appointing authorities are vested with a certain degree of discretion. City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). In deciding “whether there was reasonable justification” shown for an appointing authority’s exercise of discretion, the Commission's primary concern is to ensure that the action comports with “[b]asic merit principles,” as defined in G.L. c. 31, § 1. See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); City of Beverly v. Civil Service Comm'n, 78 Mass. App. Ct. 182, 188 (2010); City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997); MacHenry v. Civil Serv. Comm'n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996); Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321 n.11, 326 (1991). “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration.” G.L. c. 31, § 1.

The Commission, however, is not required to find that the appointing authority acted “arbitrarily and capriciously.” Rather, the governing statute, G.L. c. 31, § 2(b), gives the Commission broad “scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground.” City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). Although it is not within the authority of the Commission “to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority”, 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.” Id.

Analysis

The BPD's primary reason for bypassing the Appellant was concern about the Appellant's truthfulness in recounting his role in the theft of a cell phone eleven years earlier when the Appellant was a 16-year-old high school sophomore. This concern is not justified based on the evidence of record. Indeed, as I conclude in Finding no. 37, supra, a preponderance of the evidence shows that the Appellant was not responsible for the theft of the victim's cell phone. The 2008 police incident reports do not establish conclusively that the Appellant ever admitted to criminal activity or otherwise made an admission contrary to his 2018 written statement about the cell phone theft incident. At best, one report contains hearsay implicating the Appellant. Simply put, although the BPD could have uncovered more probative information through greater diligence, the appointing authority lacked adequate evidence to conclude that candidate Luis Diaz had been untruthful prior to the Roundtable reaching its bypass decision.

The BPD never spoke with any one of a multitude of individuals identified in the 2008 incident reports – not the victim; nor the other two student suspects identified *inter alia* by name, address, and date of birth; nor the school headmaster, Dr. Meadows, who questioned the students shortly after the theft, or the dean of discipline; nor the two BPD officers who investigated the theft. No effort was made to obtain potential evidence from the West Roxbury District Court. Detective Praileau did not interview the Appellant's mother, who accompanied him to the clerk-magistrate hearing and presumably would have been privy to any admission of culpability the Appellant might have made at the time. In view of the fact that nobody from the BPD even spoke to the Appellant again once becoming apprised of the Roundtable's concern about a possible discrepancy *within* his own 2018 written statement, I cannot, and do not, conclude that the BPD had "sound and sufficient" reasons, after conducting a "reasonably thorough

investigation,” for bypassing the Appellant. See Police Dep’t of Boston v. Kavaleski, 463 Mass. at 688-89; Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. at 321. Branding as untruthful an otherwise stellar candidate—who has a laudable educational and employment track record, and has demonstrated on-the-job skills, training, and attributes easily transferrable to police service—based on eleven-year-old hearsay (subsequently disproven through a sworn affidavit) is plainly not fair or reasonable.⁴

It follows from the above that the BPD also did not establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant based on the second reason stated in its bypass letter—namely, alleged “illegal felonious conduct” and “engaging in a criminal joint enterprise” associated with the 2007 cell phone theft. Quite simply, the school’s video footage and the paucity of probative evidence in this record belie the overblown terminology employed in this bypass letter. As the Supreme Judicial Court recently has emphasized, the burden lay with the BPD to prove actual misconduct via a preponderance of record evidence. Boston Police Dep’t v. Civil Serv. Comm’n, 483 Mass. at 462, 469, 478.

It is undisputed that the Appellant never asked for, nor had possession of, the victim’s cell phone. Before me, the BPD never furnished any testimonial or other admissible evidence of a conspiracy to commit a felony or any “criminal joint enterprise.” As the BPD’s acting HR director acknowledged under cross-examination, the BPD never amassed and presented any evidence, at the time of the clerk-magistrate’s hearing or at any time thereafter, including during

⁴ As this Commission has previously observed: “an allegation of untruthfulness, particularly when made against a law enforcement officer or candidate, should be made with an appropriate level of seriousness and due diligence.” Morley v. Boston Police Dep’t, 29 MCSR 456 (2016). Although “a police department should have the discretion to determine whether it is willing to risk hiring an applicant who has engaged in prior misconduct (including one who has done so and subsequently lied about it) . . . where, as here, the alleged misconduct is disputed, an appointing authority is entitled to such discretion only if it demonstrates that the misconduct occurred by a preponderance of the evidence.” Boston Police Dep’t v. Civil Serv. Comm’n, 483 Mass. 461, 477 (2019) (emphasis in original). Accord id. at 474 n.24.

this Commission hearing, establishing the actual (likely depreciated) value of the purloined cell phone. (See Mary Flaherty's testimony.) Accordingly, I could not find, even if it were proven that the Appellant had criminal intent in conjunction with his role in the cell phone incident (which I do not find), that Mr. Diaz ever engaged in felonious misconduct.

Moreover, the BPD has not established by a preponderance of the evidence that, even if the Appellant had consciously played an accessory role in the theft of the victim's cell phone, that his actions over ten years earlier, when he was only 16 years old, would necessarily serve as a justifiable basis for a bypass. In the case of Finklea v. Mass. Civil Service Commission, the Superior Court held that an admission to a Larceny Over \$250 (charge CWO'ed) some 14 years earlier did not constitute a suitable reason for bypassing a BPD police officer candidate. 2018 Mass. Super. Lexis 26, 34 Mass. L. Rep. 657 (2018). See also Stylien v. Boston Police Dep't, 2018 WL 2182485 (CSC held: stale felonious conduct does not justify bypass). Here, of course, no criminal charge ever issued against the Appellant, never mind an adverse disposition.

I reviewed BPD Recruit Investigations Unit records to determine whether there was bias or a lack of consistency in the selection of candidates in the 2018 hiring cycle. I accept and credit the testimony of the BPD's chief human resources officer to the effect that the Roundtable recognizes that sometimes otherwise very promising officer-recruits stumble as youths and accrue a criminal record and yet are not necessarily barred from appointment as police officers. Here, however, the Appellant has proffered evidence of a possible double standard when it comes to favorable consideration of non-urban recruit candidates who have demonstrably lied to public safety officers, or dissembled about their past brushes with law enforcement, or have actually been found guilty by a court of law of a theft equivalent to that of a student's cell phone. But, as it turns out, adjudication of this case does not oblige me to pursue this line of

comparative analysis any further.

During the hearing I conducted, the person who signed the Respondent's bypass letter, Acting Director of Human Resources Mary Flaherty, testified that, based on the affidavit of Dr. Meadows confirming that the Appellant's written statements regarding the 2007 incident were accurate, the Roundtable on which she served would not have had, to her knowledge as of the hearing date, a valid reason to bypass the Appellant. (See Testimony of Mary Flaherty)⁵ Now that the Department has received information confirming that the Appellant's written statement was truthful, and he has never been found guilty of "illegal felonious conduct," its reasons for bypass have been refuted. Accordingly, the Appellant's name should be placed at the top of the next certification and he should be considered for the very next police academy class barring any evidence of unsuitability unrelated to matters previously assessed by the BPD RIU and Roundtable.

Conclusion

For the above reasons, the Appellant's appeal under Docket No. G1-18-227 is hereby ***allowed.***

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

1. HRD, or the Boston Police Department in its delegated capacity, shall place the name of the Appellant at the top of the current or any future certifications for Boston Police Officer until the Appellant has been appointed or bypassed.
2. The BPD shall not use any reasons for bypass deemed invalid in this Decision.

⁵ On cross-examination, Ms. Flaherty was asked: "Based on the information in Dr. Meadows's affidavit, do you believe that the BPD still has a valid basis to bypass Luis Diaz?" Her response was: "I don't know that it would have a valid reason to bypass Mr. Diaz."

3. If the Appellant is appointed as a Boston Police Officer, he shall receive a civil service seniority date the same as those candidates appointed from Certification No. 05194. This retroactive date is for civil service purposes only and does not entitle the Appellant to any additional pay or benefits, including creditable service toward retirement.

Civil Service Commission

/s/ Cynthia Ittleman

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on August 26, 2021.

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:

Stephen Delamere, Esq. (for Appellant)
Tanya Dennis, Esq. (for Respondent)
Patrick Butler, Esq. (HRD)
Regina Caggiano (HRD)