

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

Jeremiah J. Driscoll,
Appellant

v.

G1-06-70

Boston Police Department,
Respondent

Appellant's Attorney:

Robert Stewart, Esq.
Merrick, Louison & Costello, LLP
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Boston, MA 02110
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Respondent's Attorney:

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Commissioner:

Daniel M. Henderson, Esq.

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Jeremiah J. Driscoll (hereafter "Driscoll" or Appellant") seeks review of the Personnel Administrator's decision in accepting the reasons proffered by the Boston Police Department (hereafter "Appointing Authority", "Respondent" or "BPD"), bypassing him for original appointment to the position of permanent full-time police officer for the BPD. The

Personnel Administrator accepted the BPD's claim that the Appellant did not qualify for appointment to the position, for the following reasons: 1.) His "highly problematic" driving history; In September of 2003, he was charged by the State Police with: Operating Negligently, Leaving the Scene of Property Damage and Operating under the Influence of Alcohol. While these cases were continued without a finding, (CWOFF), by the Court, based an admission by the Appellant, to sufficient facts to warrant a finding of guilty, also referring to an attached State Police report relating the details of the stop and arrest on these offenses. 2.) He has been involved in three surchargeable accidents and has been charged with speeding violations on four occasions since 1991. 3.) He was terminated from an employment position with JC Hillary's when he failed to report for work after he was denied the opportunity to take that particular day off.

A full hearing was held on July 16, 2007 at the offices of the Civil Service Commission. Two tapes were made of the hearing.

FINDINGS OF FACT:

Based on the documents entered into evidence: Eighteen (18) exhibits, the testimony of Robin Hunt, Director of Human Resources for the BPD; Norman Hill, now Deputy Superintendent and then, at the time of this bypass, Commander of the Recruitment Unit for the BPD, and the Appellant, Jeremiah J. Driscoll, I make the following findings of fact:

1. The Appellant took an open examination for the position of police officer sometime in the Spring of 2003. A subsequent requisition to the Human Resources Division of

the Commonwealth (hereafter “HRD”) for a certified eligibility list for police officer, was made by the BPD (Exhibit 1, testimony)

2. The Appellant’s name appeared on Certification # 250537, in June, 2005, for the position of police officer for the Boston Police Department, for their 2005 class. (Exhibit 1 and testimony)
3. The Boston Police Department did fill police officer positions from Certification 250537. Some of the candidates selected for appointment were ranked below the Appellant on the above-referenced Certification. (Exhibit 1 and testimony)
4. On October 31, 2005, the BPD notified the state’s Human Resources Division (HRD) that it was bypassing the Appellant for appointment, for the following reasons: 1.) His “highly problematic” driving history; In September of 2003, he was charged by the State Police with: Operating Negligently, Leaving the Scene of Property Damage and Operating under the Influence of Alcohol. While these cases were continued without a finding, (CWO), by the Court, based on an admission by the Appellant, to sufficient facts to warrant a finding of guilty, also referring to an attached State Police report relating the details of the stop and arrest on these offenses. 2.) He has been involved in three surchargeable accidents and has been charged with speeding violations on four occasions since 1991. 3.) He was terminated from an employment position with JC Hillary’s when he failed to report for work after he was denied the opportunity to take that particular day off. (Exhibit 1 and testimony)
5. The Appellant took the civil service examination in the spring of 2003. On September 20, 2003 the Appellant was involved in an automobile accident, in Medford. Based on this accident, the Appellant was arrested and subsequently

charged criminally, with Operating Negligently, Leaving the Scene of Property Damage and Operating Under the Influence of Alcohol. Upon the Appellant's admission to sufficient facts, the Court continued the matters without a finding, (CWOFF) for at least one year, under probationary conditions and for the Appellant to complete an alcohol reeducation program. (Exhibits 3, 4, 5, 6, 8, 9 and testimony).

6. The State Police arrest report for the September 20, 2003 incident, at 2:35 AM indicates that the Appellant admitted that he had been in an accident, that he had a "very strong odor of alcohol coming from him and inside his vehicle." The Appellant admitted that he had "a couple of beers". He performed poorly on the field sobriety tests, nearly falling over during the "one-leg stand" test. The Appellant testified that he did not perform the one-leg stand adequately, holding it only to a count of 4, instead of 10 as directed. At the State Police barracks, the Appellant refused to take the breathalyzer test. (Exhibits 3, 6 and testimony)
7. The Appellant testified that the accident occurred on Route 93 north when he, being in the middle lane, came over a rise and found another vehicle cutting in front of him, from the left-hand lane cutting diagonally in front of him toward the exit. He applied his breaks but hit the other vehicle anyway and the other vehicle did take that immediate exit off Route 93, exit 31. The Appellant claimed that he had no time to slow down and also take exit 31 to follow the other vehicle.(Testimony)
8. The Appellant testified that, after the accident occurred, he intended to drive to his parents' home and then report the accident, by telephone, to the State Police. The Appellant also admitted that, by not seeking a telephone nearer to the accident scene, he was at least partially motivated by a desire to avoid arrest. (Testimony)

9. The Appellant admitted that on the day of the accident, he was taking, by prescription, Tylenol with codeine, for an ankle injury, which he had suffered, sometime prior to the accident. (Testimony)
10. The Appellant admitted, under cross-examination that on the evening of the September 20, 2003 accident that he had been drinking and was under the influence of alcohol, when the collision occurred. The State Police report states that the Appellant admitted, at the time of the police stop that evening that he had “a couple of beers”. Yet, the Appellant testified at this hearing that he had 5 or 6 beers that evening at a bar from about 11:00 PM to closing at 2:00 AM. He also testified that at the time of the accident, he intended to drive to his parents home, to telephone the police and that his parents lived about 15 to 20 miles away. (Exhibit 3 and testimony)
11. For the September 20, 2003 accident and arrest, the Appellant did eventually appear in court, being charged with the offenses of Operating Negligently, Leaving the Scene after Property Damage and Operating Under the Influence of Alcohol. He admitted to sufficient facts to warrant a finding of guilty. However the Court by agreement continued the matters without a finding of guilty on the probationary condition that the Appellant complete an Alcohol Reeducation Program and pay certain costs. (Exhibit 8 and testimony)
12. The Appellant did eventually complete the 16 week, court alcohol reeducation program, paid all court-related costs and the matters were dismissed by the courts, in 2004 or January, 2005. (Exhibits 8, 9 and testimony).

13. The Appellant admitted in testimony at the Commission hearing that he had been in a one-car accident on October 23, 2001, when his car drifted on the road and struck a light pole, injuring his head and setting off the air bags. He was not criminally charged for this accident. (Testimony)
14. The Appellant also admitted in testimony at the Commission hearing that he had been involved in another one-car accident, on October 22, 2001, the day before the accident above, (Para 13.), when he fell asleep at the wheel, drifted and hit a mail box. He attributed this accident to exhaustion, since he had just driven up to Massachusetts from New Jersey. (Testimony)
15. The Appellant admitted in testimony, that he had been held in protective custody for alcohol consumption, at some time in the past. He also admitted that it had been poor judgment, on his part, for him to drive when he was exhausted and or when he was under the influence of alcohol. (Testimony)
16. The Appellant's driving record from the Registry of Motor Vehicles was entered into evidence without objection and the Appellant was examined on various aspects of that record. The record contained numerous entries, including the following;

8/25/99	Speeding
5/7/98	Speeding
10/4/93	Speeding
5/28/91	Speeding
9/20/03	Surchargeable accident
12/23/01	Surchargeable accident
2/8/98	Surchargeable accident

17. The above entries on the Appellant's driving record, taken together with the other entries on that record and the circumstances that the Appellant admitted to during his testimony, accurately reflect the events and concerns cited by the BPD, as reasons 1.) and 2.), in its letter dated October 31, 2005, for bypassing the Appellant, as being unqualified or unsuited for appointment as a police officer. The Appellant's driving history is clearly "highly problematic". (Exhibits 1, 9 and testimony)
18. The third reason claimed by the by the BPD and accepted by the Personnel Administrator for the bypass of the Appellant, as being unsuited for appointment is as follows: 3.) "He was terminated from an employment position with JC Hillary's when he failed to report for work after he was denied the opportunity to take that particular day off." This information apparently was garnered by the BPD from disclosures made by the Appellant in his Recruit Candidate Application. However the BPD did not include with this disclosure, the other relevant circumstances which explain and support the Appellant's decision to not report for work that day. These other relevant circumstances were also disclosed by the Appellant in his application, regarding this termination. (Exhibits 7, 10, 13 and testimony)
19. The BPD did not present any evidence to contradict the Appellant's version of the JC Hillary's termination, as disclosed in his application and his testimony. The Appellant's version of events as disclosed in his application and testimony is believed to be true and accurate. (Exhibits and testimony)
20. The Appellant was employed at JC Hilary's Restaurant from approximately 1989 to approximately September, 1994. He was terminated from his job there due to a one-

time failure to report for an assigned shift, despite his prior notice to the general manager that he would not appear at that shift, due to his planned attendance at a wedding.(Exhibit 10 and testimony)

21. The Appellant, at the time he was terminated, had become romantically involved with a female bartender, who also worked at JC Hilary's. He planned to attend the wedding with this woman and had notified the general manager of his plans. The wedding was to occur on a Sunday, a day that the Appellant was not normally scheduled to work; his shift was normally on Wednesday through Friday. The general manager then scheduled the Appellant to work on that particular Sunday and when (approximately 1 week before), the Appellant notified the general manager that he was planning to attend a wedding on that Sunday, the general manager refused to change the schedule. The general manager had previously dated the same woman attending the wedding with the Appellant. The general manager was unhappy over his break-up with the woman and her subsequent involvement with the Appellant. The general manager, being vindictive, attempted to block the Appellant's attendance at the wedding. He then used the missed shift as an excuse to terminate the Appellant from employment. (Exhibit 10 and testimony)
22. The Appellant did not have any prior missed shifts or any discipline, problem or incident while working for JC Hilary's. He had actually been awarded a commendation for outstanding performance from JC Hilary's in 1991. He had been a valued employee at JC Hilary's until he was terminated. It is outside the norm for an employee, with a good work history, to be terminated for a one-time event like

this, under these circumstances. The termination is the carrying out of a personal vendetta, on a pretext, by the general manager. (Exhibit 10, 13 and testimony)

23. The process of application for the position of police officer for the Boston Police Department initially begins with the completion and submission of a twenty (20) page notarized “Recruit Candidate Application”. The application covers in detail the areas: personal history, residences (10 yrs), educational history, driver history, employment history (10 yrs.), employee discipline, days missed work (3 yrs.), military record, police record, financial background, history of drug use or experimentation, use of alcohol, gaming/gambling, other personal declarations, parental responsibilities, (family) relatives, licenses, G. L. c. 208, 209 or 209A protective orders, real estate ownership/interest and civil litigation. The application ends with two signature pages, each with a separate oath of affirmation of the completeness and accuracy of the detailed information provided and the acknowledgement of the removal from the civil service eligibility list for any willfully withheld information or false statements. The Appellant attached numerous addendum pages to his application in further answer to the questions. (Exhibit 7 and testimony)
24. The BPD then uses the completed Recruit Candidate Application as a basis for an investigation of the candidates’ background. Each candidate’s application generates a separate file or folder to which is added a criminal record or CORI check and a Registry of Motor Vehicles “driver history”. Each candidate’s file is assigned to an Investigator or Detective for review, confirmation and investigation of any matters of concern. (Exhibits 7, 8, 9 and testimony)

25. The investigation and review process is time consuming and detailed. After investigation and review process is completed, the bulk of the candidates' files, receive "a green light"; which means they are cleared and determined to be qualified or "suitable" for appointment and therefore left on the certification or eligibility list. (Testimony)
26. After investigation and review, some candidates' files are determined to be "of concern" and "kicked back" for further review and investigation. The determination that the Appellant's file was of concern and kicked back for further review and investigation was made by Norman Hill, then Commander of the Recruitment Unit for the BPD and now a Deputy Superintendent for the BPD. Hill reviewed the Appellant's file including: the Appellant's criminal record, driver record and the September 20, 2003 related reports and documents. The significant factors considered by Hill in making this "of concern" determination were; the Appellant's lengthy driver record, including numerous speeding and surchargeable accidents, the September 20, 2003 arrest for: Negligent Operation, Leaving the Scene of Property Damage, and Operation Under the Influence of Alcohol and the Appellant's termination from employment at JC Hillary's restaurant. Hill considered the additional circumstances of the Appellant's Sept. 20, 2003 incident and arrest to be of concern to him, including; a strong odor of alcohol emanating from the Appellant and his vehicle, the 2:35 AM after bar closing time, a collision, leaving the scene without identifying himself and the Appellant's age at the time, being in his early thirties and therefore not a matter of youthful indiscretion. (Exhibits 3, 4, 5, 6, 7, 8, 9, and testimony)

27. Hill's job duties at the time of this bypass included making a verbal presentation to the "Round Table" review committee, on each file that he determined to be "of concern" after investigation and review. Hill did make a verbal presentation to the "Round Table" Review committee on the Appellant's file. The Round Table Review Committee is made up of several of the BPD's staff, including Robin W. Hunt, BPD's Director of Human Resources. After the verbal presentation by Deputy Superintendent Hill, on the Appellant's file, the Round Table Review Committee voted unanimously to designate the Appellant as unqualified or unsuited for appointment as a police officer, and therefore bypassing him by other candidates lower on the Certification #25037, eligibility list. The Appellant was thus bypassed for appointment by the BPD. (Exhibit 1 and testimony)
28. Robin W. Hunt, Director of Human Resources for the BPD, was a member of the Round Table Review Committee and reviewed the Appellant's file and application in this matter. She testified as a witness in this matter and confirmed the unanimous vote by the Committee to designate the Appellant as unqualified or unsuited for appointment as a police officer for the BPD. (Exhibit 1 and testimony)
29. Robin Hunt described what is generally looked for in determining a candidate's unqualification or unsuitability for appointment as a police officer for the BPD. This included criminal record, driving record, job performance (including troubling patterns of sick leave abuse, like calling in sick on Fridays and Mondays). She found the Appellant's driving record and criminal record on the September 20, 2003 incident to be troubling. Even a CWOFF is "significant", since it is premised on an admission to sufficient to warrant a finding of guilty. She believed that the

Appellant's driving record and criminal record, which both contained serious charges, and the relevant circumstances contained in the related Police reports, rendered the Appellant unsuitable, due to repeated acts of poor judgment, showing a lack of sufficient personal integrity. She also considered the Appellant's termination from employment by JC Hillary's, for failure to appear at a scheduled shift, to be significant. She believed that it was significant, in part, due to the fact that the BPD required regular "mandatory over-time or mandatory shifts" and failure to show for a shift would be irresponsible and disruptive. (Exhibit 1, 4, 5, 6, 7, 8, 9, 10 and testimony)

30. Robin Hunt has been Director of Human Relations for 2 and 1/2 years and with the BPD since 1999. She admitted that other candidates for appointment, in the past, have been determined to be suitable candidates despite a CWOFF on Operating Under the Influence offense or other similar charges on their record but it would depend on other factors involved. She could not estimate the number or the percent of candidates with CWOFF's, who had been determined to be qualified for appointment. She stated clearly that a CWOFF on an OUI charge was "not automatic disqualification but that it was considered on a case by case basis". (Exhibit 2 and testimony)

31. I find that both Robin Hunt and Norman Hill are credible witnesses. They are professional, thoughtful, responsive and deliberate in their answers. Their demeanor is professional and appropriate. They did not exceed the scope of the questions, in their answers, even if it might be facilely done and advantageous to them. (Exhibits, testimony and demeanor)

32. The decision of the Round Table Review Committee on a candidate's suitability for appointment as a police officer is made on a "case by case" basis. After review and discussion of each candidate's file, a vote is taken, but apparently unrecorded. Although all of the information in each file is considered, some categories of information carry more weight with the committee members than others. The obvious serious weight categories are: criminal record, criminal activity, driving record, past job performance and any other fact that might relate to dishonesty, lack of integrity or irresponsibility. All these stated categories of information have a rational relationship to the tasks and duties performed by a police officer. However, there is not a clearly stated quantitative or qualitative standard for this evaluation process. It is the committee members' individual subjective judgment, tallied in a vote that determines suitability for appointment. Statistics are not collected or compiled by the BPD, even by category of factors, for the sake of comparison among the candidates, to qualitatively or quantitatively determine their suitability for appointment. The collection of statistics on individual or categorical factors, events or considerations in the suitability determination process, would require access and a case by case analysis. (Exhibits and testimony)
33. The sheer volume and detail of the information required, to effectively complete the Recruit Candidate Application for the BPD, creates a burdensome administrative and evaluatory process for the BPD; especially given the large number of candidates and the relative, comparative and subjective nature of the process. A problematic issue therefore might arise, on a close case of subjective determination of disqualification for appointment versus another determination of qualification, on the same

certification, among candidates with similar background information. (Exhibits and testimony)

34. The appellant, Jeremiah Driscoll is 35 years old. He is single. He graduated from High School and has taken some college level courses. He has worked for IBM for 7 years. He served approximately 12 years in the Army National Guard, achieving the rank of Sergeant when he was honorably discharged. He has a class A (CDL), commercial driver's license to drive tractor trailers. His father is a retired Boston Police Detective, retiring in 1984, after 33 years on the job. (Exhibits and testimony)
35. The Appellant is a straight-forward, no-nonsense military type with a shaved head and athletic physique. He is honest to the point, on occasion, to his own detriment. He did not try to shirk responsibility for his past misadventures, even though it could negatively affect his chances of getting on the BPD. He certainly tried to explain those missteps from his own perspective. He admitted that, on September 20, 2003, at least part of his motivation, in not stopping at a nearer telephone to report the collision, was his desire to avoid arrest. Many people would have acted the way he did but not admit the motivation. He is responsible and reliable, as his long military and employment history indicated. He is the type of person that you would want on your side, in a tough situation; you know he wouldn't run, when the going got rough. He seems solid, resilient and likeable.(Exhibits, demeanor and testimony)
36. I find the Appellant's testimony to be credible. He was dressed in a suit and his bearing and demeanor were direct and military-like, but not overbearing. His answers were direct and responsive; even under cross-examination when he was required to admit unpleasant facts. His responses to questioning were never

combative but admirably appropriate and professional, in all respects. Composure seems his dominant personality trait. His palpably strong desire to win this appeal and become a Boston Police Officer did not affect his testimony in any perceptible way. (Exhibits, demeanor and testimony)

37. The three letters of recommendations for the Appellant, submitted into evidence are strong and definite statements of the Appellant's high character, good judgment, reliability, generosity, loyalty and problem solving ability, among other traits. It is obvious that the three authors of these letters knew the Appellant well and relished the opportunity to give testament to his high character. I especially note the love, respect and concern he held for his Father, a retired Boston Police Detective.(Exhibit 18, Exhibits and testimony)

CONCLUSION:

The role of the Civil Service Commission is to determine "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 Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, s. 2(b) requires that bypass cases be determined by a preponderance of the evidence. A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the

Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). ; G.L. c. 31, s. 43.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The issue for the commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. City of Cambridge, 43 Mass. App. Ct. at 304.

The Appellant here is a likeable, reliable, responsible and upstanding person and he is a person in my estimation who would make a reliable and upstanding police officer, if given the opportunity. He has the motivation to succeed in his endeavor, partly to follow in his father's footsteps, a man he holds great respect for.

However the Appellant also has a "highly problematic" driving history as claimed by the Appointing Authority and accepted by the Personnel Administrator as one of the reasons why he did not qualify for appointment to the position of police officer. The Appellant was judged to be unqualified or unsuited for appointment for the following

reasons: 1.) His “highly problematic” driving history; In September of 2003, he was charged by the State Police with: Operating Negligently, Leaving the Scene of Property Damage and Operating under the Influence of Alcohol. While these cases were continued without a finding, (CWOFF), by the Court, based an admission by the Appellant, to sufficient facts to warrant a finding of guilty, also referring to an attached State Police report relating the details of the stop and arrest on these offenses. 2.) He has been involved in three surchargeable accidents and has been charged with speeding violations on four occasions since 1991. 3.) He was terminated from an employment position with JC Hillary’s when he failed to report for work after he was denied the opportunity to take that particular day off.

The Appellant’s driving record from the Registry of Motor Vehicles was entered into evidence without objection (Exhibit 9) and the Appellant was examined on various aspects of that record. The record contained numerous entries, including the following;

8/25/99	Speeding
5/7/98	Speeding
10/4/93	Speeding
5/28/91	Speeding
9/20/03	Surchargeable accident
12/23/01	Surchargeable accident
2/8/98	Surchargeable accident
1/12/98	Surchargeable accident

The Appellant’s complete driving record, taken with the related testimony and exhibits pertaining to the light-pole collision of October 23, 2001, the mail box collision

of October 22, 2001 and the rear-end collision of September 20, 2003, on Route 93N in Medford, provided ample substantiation of the BPD's claim of a "highly problematic" driving record.

The September 20, 2003, rear-end collision on Route 93N which resulted in criminal charges may be the most substantial and significant event of the Appellant's several driving misadventures.

The Appellant admitted, under cross-examination that on the evening of the September 20, 2003 accident that he had been drinking and was under the influence of alcohol when the collision occurred. The State Police report states that the Appellant admitted, at the time of the police stop that evening, that he had "a couple of beers". Yet, the Appellant testified at this hearing that he had 5 or 6 beers that evening at a bar from about 11:00 PM to closing at 2:00 AM. He also testified that at the time of the accident, that he intended to drive to his parents home to telephone the police and that his parents lived about 15 to 20 miles away.

For the September 20, 2003 accident and arrest, the Appellant did eventually appear in court, being charged with the offenses of: Operating Negligently, Leaving the Scene after Property Damage and Operating Under the Influence of Alcohol. He admitted to sufficient facts to warrant a finding of guilty. However the Court, by agreement, continued the matters without a finding of guilty on the probationary condition that the Appellant complete an Alcohol Reeducation Program and pay certain costs. These are serious criminal charges which were supported by the police reports and investigation of the incident. The Appellant's own testimony confirmed the underlying facts to support these criminal charges.

The Appellant admitted that he had exercised poor judgment by driving an automobile that evening, under the influence of alcohol. He also admitted that he had exercised poor judgment when he drove into a light-pole and then a mail box on the consecutive dates of October 22 and October 23, 2001. He attributed these accidents to exhaustion, after driving to Massachusetts from New Jersey.

At least two other factors existed, relating to the September 20, 2003 collision and arrest, which were considered to be significant by the Appointing Authority. They are the Appellant's age at the time (early thirties), therefore not attributable to youthful indiscretion and the nearness in time to the taking of the civil service examination for police officer (Spring, 2003).

I believe that there are at least two examples of the Appellant's honesty, in the face of adverse consequences, which he exhibited during his testimony. The first example is when he had been stopped by the State Trooper on September 20, 2003 and asked how many drinks he had, he replied "a couple of beers". This a well-known minimalist term used to cover an indeterminate number range. Yet when he was asked the same question at this hearing, during cross examination, he promptly answered "5 or 6 beers". He didn't try to be consistent with his prior reply in the Trooper's report, or be evasive in any way. The second example is when he testified here under cross examination, he was asked if part of his thinking that night, after the collision, when he decided to drive the 15 to 20 miles to his parents home to report the collision, rather than attempt to find a nearer telephone, was to avoid arrest; he admitted that it was part of his thinking.

The Appellant was employed at JC Hilary's Restaurant from approximately 1989 to approximately September, 1994. He was terminated from his job there due to a one-time

failure to report for an assigned shift, despite his prior notice to the general manager that he would not appear at that shift, due to his planned attendance at a wedding.

The Appellant, at the time he was terminated, had become romantically involved with a female bartender, who also worked at JC Hilary's. He planned to attend the wedding with this woman and had notified the general manager of his plans. The wedding was to occur on a Sunday, a day that the Appellant was not normally scheduled to work (his shifts were normally on Wednesday through Friday). The general manager then scheduled the Appellant to work on that particular Sunday, knowing the Appellant intended on being at the wedding. When the Appellant notified the general manager, approximately one week earlier that he was planning to attend the wedding on that Sunday, the general manager refused to change the schedule. The general manager had previously dated the woman attending the wedding with the Appellant. The general manager was unhappy over his break-up with the woman and her subsequent involvement with the Appellant. The general manager, being vindictive, attempted to block the Appellant's attendance at the wedding. He then used the missed shift as an excuse to terminate the Appellant from employment.

Therefore I conclude that the BPD did not meet its burden, on reason 3.) JC Hilary's employment termination; by failing to establish, by a preponderance of the credible and competent evidence in the record, that the Appellant's termination was justified, as due to his own dereliction. However, the BPD did meet its burden on the first two of the three reasons stated as justification for the bypass. Those two reasons which were established are substantial and sufficient standing alone to justify the bypass. Those two reasons are

rationality related to and may properly be used to gauge the applicant's fitness to perform the duties and responsibilities of the position of police officer.

Even though this Hearing Officer might make a different decision regarding the Appellant's candidacy, it is not within the authority of the Commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority. School Comm. of Salem v. Civil Serv. Commn., 348 Mass. 696, 698-699 (1965). Debnam v. Belmont, 388 Mass. 632, 635 (1983). Commissioner of Health & Hosps. of Boston v. Civil Serv. Commn., 23 Mass App. Ct. 410, 413 (1987).

I conclude that the BPD had reasonable concern about the Appellant's suitability for appointment as a police officer. The BPD had sufficient facts and information available at the time of the bypass determination to support at least two of the three reasons contained in the bypass letter dated October 31, 2005. I also conclude that the BPD did meet its burden of showing that the bypassing of the Appellant for appointment was justified, based upon a preponderance of the credible and competent evidence in the record

After consideration of all of the competent and credible evidence in the record and stated in the findings and conclusions above, the Boston Police Department was justified in its decision to bypass the Appellant for appointment as a police officer. The Boston Police Department did establish that its action was done upon adequate reasons, sufficiently supported by credible evidence in the record.

For all of the above reasons, the appeal, Docket No. G1-06-70 is hereby *dismissed*.

Civil Service Commission,

Daniel M. Henderson, Esq.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Guerin, Henderson, Taylor and Marquis, Commissioners), on July 26, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice:

Robert A. Stewart, Esq.
Tara L. Chisholm, Esq.
John Marra, Esq.