COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.	One Ashburton Place – Room 503 Boston, MA 02108 (617)727-2293
KEON FINKLEA, *Appellant*	
v.	G1-15-70
BOSTON POLICE DEPARTMENT, *Respondent*	
Appearance for Appellant:	Pro se
Appearance for Respondent:	Meryum Khan, Esq. Peter M. Geraghty, Esq. Office of the Legal Advisor Boston Police Department One Schroeder Plaza Boston, MA 02120
Commissioner:	Cynthia A. Ittleman

DECISION

Keon Finklea (Mr. Finklea or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on April 13, 2015, under G.L. c. 31, § 2(b) challenging the decision of the Boston Police Department (Respondent or BPD), as a delegated authority, to bypass him for appointment to the position of full-time Police Officer. A prehearing conference was held in this regard on May 5, 2015 at the offices of the Commission. A hearing[1] was held on this appeal on June 25, 2015 at the Commission. The hearing was digitally recorded and the parties received a CD of the proceeding.[2] The Respondent submitted a post-hearing brief in the form of

[1] 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.
[2] 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

a proposed decision. The Appellant, pro se, did not submit a post-hearing brief. By email message dated August 10, 2015, the Appellant wrote, in response to my inquiry whether he would submit a brief, that he would look over the Respondent's brief and respond to it if he had any questions or comments. The Appellant provided no further response. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Five (5) exhibits were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Detective Richard E. Henshaw, Recruit Investigation Unit, BPD;
- Sergeant Detective Jose Lozano, Commander of Recruit Investigation Unit, BPD;

Called by Appellant:

- Keon Finklea, Appellant;

and taking administrative notice of all matters filed in the case; pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence; the Respondent's Exclusions and Timeframe Guidelines produced post-hearing in response to my request at the hearing; and the Roxbury District Court Criminal Docket and Complaint relating to the charge against the Appellant in 2001; a preponderance of the evidence establishes the following.

FINDINGS OF FACT

Appellant's Background

1. Mr. Finklea is an African American man who is married, has an infant child and resides in Hyde Park in Boston. At the time of the Commission hearing, the Appellant was

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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.

thirty-two (32) years old. Mr. Finklea lived most of his childhood in the Franklin Hill housing project and, subsequently, he lived in Roxbury and Hyde Park. (Testimony of Appellant; Exhs. 1, 3)

2. The Appellant graduated from South Boston High School in 2001. After high school, he attended Bentley College intermittently until 2004 but he did not graduate. At the time of the Commission hearing, the Appellant was attending Wentworth Institute of Technology and was in his last semester. He expected to graduate with a degree in project management in August 2015. (Testimony of Appellant; Exh. 1)
3. Near the end of the Appellant's senior year in high school, in 2001, his family home was auctioned off and he went to live with an uncle for a couple of months, until he could move into college early that summer. He remained on campus during the semester break. The Appellant's mailing address was in flux until his parents obtained a new home in the spring of 2002. At or about this time, the Appellant's mother became ill with cancer. When his mother passed away, the Appellant helped support his sister. (Testimony of Appellant; Exhs.1 and 3) (Testimony of Appellant)
4. At the time of the Commission hearing, the Appellant was a manager at TMobile, although he had recently accepted a project management position at a medical supply company. When the Appellant applied to the BPD, he was working full-time at a large bank as a personal banker, and part time at Best Buy. (Exh. 1) Mr. Finklea had also worked as a sales manager for Best Buy from April 2004 until November 2011. (Exh. 1; Testimony of Appellant)
5. For a considerable amount of time prior to applying to BPD, the Appellant drove an old Honda Civic that often needed repairs which, for example, were required to obtain an

inspection sticker, but the Appellant could not afford to make the required repairs. By 2011, the Appellant had received promotions while working at Best Buy so that he was able to replace the Honda with a 2008 Acura TSX, which was in far better condition than the Honda and required fewer repairs. He found that he was stopped less frequently when driving the Acura. With the promotions, the Appellant was also able to pay his student loans. (Exh. 1; Testimony of Appellant)

Appellant's Application for Employment at the Boston Police Department

6. Mr. Finklea took and passed the examination for Police Officer on June 15, 2013. In response to the Respondent's request, the state's Human Resources Division (HRD) sent the Respondent Certification 01903 on June 26, 2014 from which the Respondent was to select thirty-five (35) candidates to fill the position of Police Officer. The Appellant's name was ranked 44th on this Certification. (Stipulated Facts)
7. The Appellant went to the BPD to sign Certification 01903. Thereafter, the Appellant participated in an orientation meeting, where candidates were informed of the application process and were given employment applications to take home, fill out, and return to the Respondent. (Testimony of Henshaw)
8. On July 23, 2014, the Appellant submitted his completed employment application to the Department, providing detailed information about his background, including his education, residence, references, employment history, and driving and criminal record. Where the application asked if the applicant had been "convicted" of a felony, the Appellant wrote that he had not. (Exh. 1)
9. Subsequently, Detective Richard E. Henshaw, in the Respondent's Recruit Investigations Unit, conducted a background investigation on Mr. Finklea and drafted a Privileged and

Confidential Memorandum (PCM) with his findings. Det. Henshaw has been a member of the BPD for more than thirty (30) years and has been a Recruit Investigator off and on, most recently, for the previous four (4) years. He has worked in most of the BPD Districts, and in various Units of the BPD. (Testimony of Henshaw)

10. The Recruit Investigator called the Appellant after he received the Appellant's completed application to ask him about a criminal case in which he received a Continuance Without a Finding (CWOF); they did not discuss the Appellant's driving record. On another occasion, Det. Henshaw asked the Appellant for certain tax documents, which the Appellant delivered to him. Det. Henshaw and another member of the BPD conducted a 30 to 45 minute home visit with the Appellant and his wife near the end of the investigation process but he was not asked about his driving or criminal record. (Testimony of Appellant)
11. As head of the Recruit Investigations Unit, Sgt. Det. Jose Lozano supervised Recruit Investigators like Det. Henshaw. Sgt. Det. Lozano has been a member of the BPD for approximately twenty (20) years. He was appointed head of the Recruit Investigations Unit in March 2014. Recruit Investigators are told to look for criminal record information about candidates first because it may exclude them from further consideration, although the Recruit Investigators try to talk to such candidates. If the candidates have felonies in their records, the Recruit Investigators Unit may encourage the candidates to withdraw their applications. When the investigations are completed, either Sgt. Det. Lozano or Sgt. Reilly in the Recruit Investigations Unit will review the completed folder for each candidate, checking for grammatical errors and to see if the

investigation report is consistent with what the candidates say. Next, the PCM is given to the roundtable for consideration. (Testimony of Lozano)

12. The Respondent has a written document used by Recruit Investigators. (Testimony of Lozano) The document is entitled, "**Exclusions and Timeframe Guidelines**", and it states,

> - **"Felony conviction.**
> - **Not a US citizen (must be naturalized or born here).**
> - **High School Diploma or GED. GED school must be accredited.**
> - **CWOF to Felony (see Supervisor for confirmation).**
> - **NSC** [National Safety Council] **Class (bad driver class attended) within 5 years. NSC Class taken 3 surchargeable events in 2 years.**
> - **209A RO** [abuse prevention restraining order] **within last 10 years. One year RO as opposed to the 10 days, you want to check with Supervisor.**
> - **OUI within last 10 years. Unless Not Guilty, then depends on circumstances. Check with Supervisor.**
> - **209A involving documented violence (see Supervisor).**
> - **Residency-must have been a resident 1 year prior to taking civil service exam.**
>
> **There are specific military exceptions, see Supervisor.**
> This list is not exhaustive and is intended to provide a broad, general guideline. Moreover each scenario is taken on a case by case basis and may have extenuating circumstances which will need to be evaluated. Any of the above could exclude a person from the job. If they don't withdraw, there is a likelihood they may be bypassed.
> Revised: 7/28/14"
> (Exh. 3)(**emphasis** in original)

13. A Massachusetts Registry of Motor Vehicle (RMV) webpage provides information concerning the NSC classes, in part, as follows,

> "…The RMV may require an operator to attend the Massachusetts Driver Retraining Program. This program is sponsored by the National Safety Council and aims to change operator's behavior behind the wheel, as required by Massachusetts General Laws Chapter 175 Section 113B. Through this classroom course, operators learn why they continue to have driving-related problems and how they can take responsibility for their actions. …"

(Administrative Notice: https://www.massrmv.com/SuspensionsandHearings/ReinstatingYourLicense/RequiredClassesorPrograms.aspx)

14. On September 18, 2014, Det. Henshaw issued a PCM to then-Director of Human Resources, Devin Taylor and Sgt. Det. Lozano describing his background investigation of the Appellant. In the PCM, Det. Henshaw indicated that he spoke to the Appellant's supervisor at his full-time job at a bank at the time that the Appellant applied to the Respondent. The Appellant's supervisor told Det. Henshaw that the Appellant,

> "… is a great guy who works hard and has a nearly perfect attendance. He is one of the most reliable and personable employees in the Department…. He has matured and developed excellent professionalism. … [he] is dependable and actually goes beyond expectation in all tasks … He is critical to the successes and efficiency of the unit. He takes pride in his appearance, attitude, ethics and production. He is self-confident, although, sometimes that makes him take rushed decisions without considering the possible outcomes. He would be rehired." (Exh. 3)

15. Det. Henshaw also spoke to the Appellant's supervisor at a part-time job at Best Buy that the Appellant had at the time in addition to his full-time banking job. The PCM states that the supervisor stated, in part,

> " … the [Appellant] is very smart and able to think on his feet. He is always on time and comes to work ready to work. He works hard and is always approachable and available. … [he] is a great asset to the company as a result of his diligence and professionalism. … [he] has great leadership skills that enable him to effectively team-up with his colleagues to produce quality work. He is an effective member of the "leadership team". … [he] worked at Best Buy [from 2002 to 2011] but was let go because his "team" did not perform well enough to meet their projected sales goal. This was unfortunate because of the economic situation that existed at the time. Eventually, he was allowed to return to the company and is doing very well currently." (Exh. 3)

The Appellant disclosed his termination and subsequent rehiring by Best Buy in his employment application. (Exh. 1)

16. The PCM indicates that Det. Henshaw also spoke to the Appellant's former supervisor in the Boston Public Works Department where the Appellant had been a Co-op student from Wentworth Institute of Technology for six (6) months and that the supervisor said,

> "[the Appellant] … did a phenomenal job. He took the job very seriously and demonstrated maturity and idealism. He appeared to have a good head on his shoulders and made good decisions. He got along well with his co-workers and contributed more than his quota to the successful disposition of the task. He was quick to learn the work required of him and was sharp in execution of his part in the projects he worked on. He would be rehired because of his reliability, knowledge and strong work ethic."
> (Exh. 3)

17. All three (3) neighbors whose names the Appellant provided in his application told Det. Henshaw that they have known the Appellant between three (3) and fifteen (15) years and gave the Appellant very positive recommendations. The Appellant's three (3) personal references have known the Appellant for approximately thirteen (13) years since high school or college. They reported, for example, that the Appellant once found a wallet full of cash in the street and located the owner to return it to him; the Appellant is a member of a team who mentors and teaches Pop Warner Teams in the community; the Appellant helped care for his younger sister after their mother passed away; he is intelligent, conscientious and strives for excellence; he is an experienced manager; during difficult times he was able to keep his cool and figure out how to solve the problem; his friends and associates are honorable; he trusts the Appellant with his life, and the Appellant has a keen sense of right and wrong and the ability to recognize and de-escalate volatile situations. (Exh. 3)
18. The Appellant's credit rating is "excellent". (Exh. 3)
19. The Appellant was issued a license to carry a firearm in 2012 by the Chelsea Police Department. (Exh. 3)

20. As a part of his investigation, Detective Henshaw obtained a copy of Mr. Finklea's Probation record. He also consulted Mr. Finklea's driving record obtained through the Criminal Justice Information System (CJIS). (Testimony of Henshaw; Exhs. 4 & 5)
21. The background check revealed that the Appellant had not been issued citations for any at-fault car accidents but that he had an extensive list of driving related incidents. (Testimony of Appellant) "The [Appellant] has attended 2 NSC courses in 2003 and 2007. His driving record was very bad until 2010. Since 2010, the applicant has had only 1 infraction, on 04/04/2013, for speeding in Framingham." (Exh. 3) The civil motor vehicle infractions included citations for a handful of other speeding tickets between 2001 and 2006, for which he was found responsible on all but one occasion. The infractions also included repeated civil motor vehicle infractions from 2001 to 2010 including seat belt violations, failure to keep in right lane, failure to display number plate, improper equipment (exhaust), not having an inspection sticker, and defaults and license suspensions for failing to pay fines on the underlying infractions. The Appellant was found responsible for approximately half of these civil motor vehicle infractions. In 2003, 2005 and 2007, the Appellant was charged criminally with operating a vehicle after his license had been suspended or revoked, although the charges against him were dismissed upon payment of fines. (Testimony of Henshaw; Exhs. 1, 3 & 5; Administrative Notice)
22. The background check also indicated that the Appellant had a criminal history. Specifically, the Appellant was charged with misdemeanors, including operating a vehicle after his license was suspended in 2002, 2004 and 2007, all of which were dismissed after payment of fines, although before the 2007 charge was dismissed, the

Appellant had defaulted and a warrant was issued for his arrest. (Testimony of Henshaw; Exhs. 1, 3, 4 & 5)

23. Mr. Finklea's criminal history also included a charge of knowingly receiving stolen property in November 2001 when the Appellant was approximately eighteen (18) years old. The property received was a tire, which he obtained from a friend. In a Roxbury District Court Criminal Complaint, the Appellant was charged with receiving stolen property with a value of more than $250, a felony. This criminal charge was disposed of as noted in the Roxbury District Court Criminal Docket form, which form indicates with a checkmark under "Disposition Method" that the matter was disposed of as follows: "Guilty Plea or Admission to Sufficient Facts accepted after colloquy and 278 §29D warning". This form also indicates, with a checkmark under "Sentence or Other Disposition", as follows: "Sufficient facts found but continued without guilty finding until", followed by a handwritten notation that the case was continued for six (6) months. On this form, under "Final Disposition", a checkmark appears next to box stating "Dismissed on recommendation of Probation Dept.", dated September 11, 2002. (Testimony of Appellant; Exhs. 3 & 4; Administrative Notice (emphasis added))
In this court disposition, the Appellant followed the advice of his court-appointed counsel, who told him there would be no further ramifications from the case. The Appellant did not realize that the 2001 charge was a felony. His court-appointed attorney said that the case would be closed when the Appellant paid the restitution ordered by the court. The Appellant was not informed that he could later seek to expunge or seal his record. (Testimony of Appellant)

24. There is no indication that Det. Henshaw saw his supervisor, Sgt. Det. Lozano, to obtain "confirmation" about the Appellant's felony CWOF pursuant to the Respondent's Exclusions and Timeframes Guidelines. (Administrative Notice)
25. A BPD roundtable convened to discuss the Appellant's qualifications, as it does for every candidate. The roundtable included Deputy Superintendent Jeffrey Wolcott, Sgt. Det. Lozano, Ms. Taylor, a representative of the Medical Unit and a representative of the Office of the Legal Advisor. (Testimony of Lozano) Det. Henshaw was also present at the roundtable discussion in order to present his findings. (Testimonies of Henshaw and Lozano) The roundtable voted to bypass Mr. Finklea because of his criminal record and driving record. (Testimony of Lozano) Det. Henshaw did not participate in the decision to bypass Mr. Finklea. (Testimony of Henshaw) The BPD Commissioner is the Appointing Authority in this matter. (Testimony of Lozano) There is no indication that the roundtable presented the information about Mr. Finklea to the BPD Commissioner or that the BPD Commissioner otherwise approved the roundtable's decision to bypass the Appellant. (Administrative Notice)
26. On February 26, 2015, Ms. Taylor sent Mr. Finklea a letter notifying him of the reasons for the bypass stating, in substance,

> "… The Department has concerns about your motor vehicle and criminal histories. Your motor vehicle history contains several infractions, most significantly that you were required to attend a National Safety Class (sic)in 2003 and 2007, and continued to accumulate motor vehicle infractions after these courses. Several of the infractions … are criminal infractions. In 2002, you took a CWOF plea to a charge of Knowingly Receiving Stolen Property, as the result of law enforcement finding a stolen tire on your motor vehicle.
> As you know, in addition to upholding the law, and specifically motor vehicle laws, one of the primary responsibilities of a police officer is driving a Department issued vehicle. …"
> (Exh. 2)

27. Five (5) candidates ranked below the Appellant were hired. (Administrative Notice: May 4, 2015 emailed report of the state's Human Resources Division sent to parties)

28. Thereafter, the Appellant filed the instant timely appeal. (Administrative Notice)

DISCUSSION

Applicable Law

Pursuant to G.L. c. 31, § 27, 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. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator. The administrator shall make such statement available for public inspection at the office of the department.
> (Id.)[3]

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 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. Such statement shall indicate all positive reasons for selection and/or negative reasons for bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass or selection of a candidate or candidates. No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. … The certification process will not proceed, and no appointments or promotions will be approved, unless and until the Personnel Administrator approves reasons for selection or bypass. …"
> (PAR.08(4))

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

[3] 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.

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)).

Therefore, 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).

G.L. c. 41, § 96A provides that "[n]o person who has been convicted of any felony shall be appointed as a police officer of a city, town or district." Id. (emphasis added) The crime of receiving stolen property can be a misdemeanor or a felony, as indicated in G.L. c. 266, § 60, in part,

> "Whoever buys, receives or aids in the concealment of stolen or embezzled property, knowing it to have been stolen or embezzled, or whoever with intent to defraud buys, receives or aides in the concealment of property, knowing it to have been obtained from a person by false pretense of carrying on a business … and who intends to deprive its rightful owner permanently of the use and enjoyment of said property shall be punished as follows: if the value of such property does not exceed $250, for a first offense by imprisonment in the ***house of correction*** for not more than 2 ½ years or by a fine of not more than $1,000; if the value of such property does not exceed $250, for a second or subsequent offense by imprisonment in the ***house of correction*** for not more than 2 ½ years ***or*** by imprisonment in the ***state prison*** for not more than 5 years or by a fine of not more than $5,000 or by both such fine and imprisonment; or if the value of such property exceeds $250 by imprisonment in the ***house of correction*** for not more than 2 ½ years ***or***

> by imprisonment in the ***state prison*** for not more than 5 years or by a fine of not more than $5,000 or by both such fine and imprisonment. …"
> (Id.)(emphasis added)(*see also* Massachusetts Sentencing Commission publication of March 2013, Felony and Misdemeanor Master Crime List)

A continuance 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)(emphasis added)

The Parties' Positions

The Respondent asserts that the Commission must affirm its bypass decision because Mr. Finklea has a criminal history including felony CWOF, which, though not a "conviction" under G.L. c. 41, § 96A, involved felonious conduct. In addition, the Respondent argues, the Appellant has misdemeanor motor vehicle offenses and a lengthy list of driving infractions, including defaults, suspensions and warrants for his repeated failure to timely pay the fines incurred in the underlying offenses. The Department argues that police officers must be held to the highest standard of behavior and enforce the law and that the Appellant's driving and criminal record indicate that the Appellant does not meet this high standard and that he has not abided by the law. Therefore, the Respondent argues it had reasonable justification to bypass Mr. Finklea.

Mr. Finklea argues that the Department bypassed him without getting to know his current standing in the community or his present ability to perform the functions of a police officer. He asserts that in its investigation, the Department focused solely on his past infractions, many of which took place more than five years ago. Mr. Finklea argues that he was a product of a difficult environment, having grown up mostly in the Franklin Hill projects, and that he has had

to overcome many obstacles. Further, he avers that many of his driving infractions were related to his inability to pay for repairs needed in order to pass inspections. He asserts that he did not know that the 2001 criminal charge against him was a felony and that his court-appointed attorney in 2001 told him that after he paid restitution, there were no further ramifications related to the charge. Therefore, Mr. Finklea argues that the Respondent did not give sound and sufficient reasons to bypass him.

Analysis

The Respondent bypassed the Appellant based on his driving history and a fourteen (14)-year old felony CWOF. While the Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant based on his driving history, it did not do so with regard to the Appellant's CWOF.

The Appellant's driving history is lengthy and troublesome. Although the Appellant has not been issued citations for any at-fault accidents, he has had so many citations that he was required not once, but twice to attend the National Safety Council safe driving program for drivers who repeatedly receive citations. Between 2001 and 2010, the Appellant repeatedly received citations, for example, for seat belt violations, failure to keep in the right lane, failure to display his license plate number, improper equipment, not having an inspection sticker, and not having a registration and/or license while driving. The Appellant was found responsible for approximately half of these civil motor vehicle infractions. In addition, the Appellant was repeatedly defaulted and his license was repeatedly suspended for failure to pay fines for his underlying driving infractions, warrants were issued for his arrest for failure to pay his fines, and court hearings were scheduled to address his failure to pay the fines. The civil motor vehicle infractions included citations for a number of speeding tickets between 2001 and 2006, for which

he was found responsible on all but one occasion. In 2003, 2005 and 2007, the Appellant was charged criminally with operating a vehicle after his license had been revoked, although the charges against him were dismissed upon payment of fines. The Appellant's driving history improved in 2010, at around the time he was able to purchase a more recent vehicle that required fewer repairs. However, in 2013, the Appellant was found responsible for speeding again. Police are regularly required to drive police department vehicles, often in emergency situations and enforce the law, including the operation of a motor vehicle as required by law. The Respondent had reasonable justification to be concerned that the Appellant's driving history indicated that he would not responsibly drive and care for department vehicles as required by law and to bypass him therefor.

The Respondent did not establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant for the fourteen (14)-year old felony CWOF. As noted in the facts found herein, the Roxbury District Court Criminal Docket and Complaint indicate that the Appellant was charged in 2001with receiving stolen property worth in excess of $250, a felony. However, as also indicated in the facts herein, the "Sentence or Other Disposition" of this case was "Sufficient facts found but continued without a guilty finding" until six (6) months after the Appellant was charged and the case was ultimately dismissed. Thus, the Appellant was not "convicted", pursuant to G.L. c. 41, § 96A, and the Appellant should not have been bypassed and/or disqualified on that basis. Det. Henshaw called the Appellant and asked him about the CWOF but did not give the Appellant the opportunity to discuss it in an interview. In Ortiz v. Boston Police Department, G1-12-107, another bypass appeal involving a felony CWOF, the Commission allowed the appeal based on errors in the Respondent's consideration of Mr. Ortiz' application for employment. After his bypass, Mr. Ortiz requested a new trial on the

felony charges underlying his CWOF, the case was dismissed and the Respondent hired Mr. Ortiz.[4] Like Mr. Ortiz, the felony case against Mr. Finklea was ultimately dismissed. In addition, the Appellant should also be given the opportunity to seek any further remedy from the court regarding his record. If the Appellant takes another exam, scores high enough to be included in an eligible list for the position of police officer, and applies to the Department, the Respondent should also consider that the felony CWOF occurred when the Appellant was approximately eighteen (18) years old, nearly half his lifetime ago, and whether he has repeated such conduct more recently. In considering the Appellant's qualifications in the future, the Respondent should conduct a reasonably thorough review of the Appellant's updated record, including more than a review of the candidate's CORI print-out, and afford him an interview.

After the hearing in the instant case and the deadline for submission of post-hearing briefs had passed, the Respondent submitted for consideration the decision of the Supreme Judicial Court in Alfredo Tirado v. Board of Appeal on Motor Vehicle Liability Policies and Bonds, 472 Mass. 333 (2015) to aver that the Appellant's CWOF in 2001 to the felony charge qualifies as an admission to sufficient facts to warrant a finding of guilty because a CWOF indicates that a person "'has violated or failed to comply with the law' within the meaning of 'conviction' as that term appears in G.L. c. 90F, § 1." Id. at 336. Chapter 90F provides for the licensing of commercial drivers. Mr. Tirado was a commercial driver who was charged with operating a commercial vehicle while under the influence of intoxicating liquor and admitted to sufficient facts to warrant a finding of guilty and whose case was continued without a finding. The trial court that conducted Mr. Tirado's OUI trial entered a notation in its record that his CWOF constituted a conviction and suspended his commercial driver's license. Mr. Tirado

[4] On August 1, 2016, the Boston Police Department responded to inquiries from the Commission in I-16-106 concerning the BPD's recent bypass of a number of candidates, including Mr. Ortiz. The BPD's August 1, 2016 response described its subsequent decision to hire Mr. Ortiz.

appealed, arguing that the CWOF was not a conviction. The SJC determined that Mr. Tirado's admission and CWOF constituted a conviction under G.L. c. 90F, which statute was enacted to "ensure uniformity in the application" of the Federal Commercial Motor Vehicle Safety Act of 1986, title XII of Pub. L. No. 99-570, codified at 49 U.S.C. §§ 30301 et seq, (Federal law). Tirado, *supra*. The Federal law requires federal highway funds to be withheld if a state fails to comply with its requirements, such as suspending the license of a truck driver charged with an OUI. Id. Tirado, *supra*, addresses the definition of "conviction" in the Federal law, stating that,

> "'Conviction' is defined very broadly in the [related] Federal regulation to include not only an 'adjudication of guilt' but also a determination by an appropriate authority, judicial or administrative, that 'a person has violated or failed to comply with the law'" Id. (citing 49 C.F.R. § 383.5 (2013) … Under this definition of 'conviction,' a person 'referred to a remedial program as a substitute for the imposition of a penalty, fine, or other sanction' would be subject to a CDL suspension."
> Tirado, *supra*, at 335(other citations omitted).

In 1999, Congress enacted the Motor Carrier Safety Improvement Act, Pub. L. No. 106-159, 113 Stat. 1748 (1999 Act). This statute,

> "… increased the range of offenses that could disqualify a person from maintaining a CDL. For example, before 1999 only convictions of operating commercial vehicles while under the influence of alcohol resulted in disqualification … Under the 1999 act, convictions of operating noncommercial motor vehicles under the influence of alcohol are now included.
> Tirado at 335-36(citations omitted).

Tirado is distinguishable from the instant appeal. The instant appeal does not involve a civilian motor vehicle operator, an OUI, the safety of trucks and buses on the road, or a Massachusetts law enacted to conform to a federal law with financial penalties for nonconforming states. In addition, it is unclear if Tirado is to be applied to a felony CWOF made fourteen (14) years earlier as in the instant appeal. *See, e.g.*, News Group Boston, Inc. v. Commonwealth and Others, 409 Mass. 627, 630 (1991)(citing Commonwealth v. Greenberg, 339 Mass. 557, 578-

79)(1959)(laws relating to a remedy or procedure, not affecting substantive rights, generally operate retroactively).

The SJC noted in Tirado that in 2012, it had considered whether an admission to sufficient facts and CWOF constituted a "conviction" for the purpose of G.L. c. 90, § 24(1)(f)(1)(concerning consent to breath or alcohol testing of drivers suspected of driving their cars under the influence of alcohol in excess of the legal limit). Souza v Registry of Motor Vehicles, 462 Mass. 227 (2012). In Souza, the SJC decided that,

> "… [u]nder the terms of the version of [G.L. c. 90, § 24(1)(d)] at issue …, 'a person shall be deemed to have been convicted if he pleaded guilty or nolo contendere or was found or adjudged guilty by a court of competent jurisdiction, whether or not he was placed on probation without sentence or under a suspended sentence or the case was place on file.'" Tirado at 337 (citing Souza).

The Souza Court went on to decide that G.L. c. 90, § 24(1)(d) did not include in the definition of "convicted" an admission to sufficient facts because it did not refer to an admission to sufficient facts, although the Legislature had specifically included that term in other places in the same statute. Tirado, at 337. The Tirado Court reached a different conclusion about whether a CWOF is a conviction based on the facts and the different applicable law therein. Specifically, the SJC found in Tirado that,

> "If a judge can enter a finding of guilty and impose sentence without taking any further evidence of the underlying offense after a violation of the conditions of a CWOF, it follows that an implicit determination has been made that the defendant 'has violated or failed to comply with the law.' We therefore conclude that a CWOF falls within the definition of 'conviction,' as that term is used in G.L. c. 90F, § 1."
> Tirado at 339 (emphasis added).

Therefore, the definition of "convicted" or "conviction" has depended upon the context in which it is used. Moreover, the wording of G.L. c. 41, § 96A is quite plain stating, in its entirety, only that, " [n]o person who has been convicted of any felony shall be appointed as a police officer of

a city, town or district." Id. It does not add any variations to the word "convicted". Without more, efforts at attempting to expand the meaning of the word in that context are unwarranted.

Whether a CWOF constitutes a conviction has been addressed by the courts in other contexts. In City of Boston v Boston Police Patrolmen's Association, 443 Mass. 813 (2005)(hereinafter Boston v BPPA (2005)), the SJC found that an arbitrator determined, *inter alia*, that Police Officer DiSciullo, who had no prior discipline, was harsh and derisive toward a couple in a double-parked car, he falsely arrested them for misdemeanor and felony charges, and he repeatedly lied about these matters over a two (2)-year period, alleging the couple assaulted him, which he knew was not true. The charges against the couple were eventually dismissed on a nolle prosequi. The Department discharged DiSciullo after an investigation and hearing and he grieved his termination. The arbitrator found DiSciullo's testimony was "implausible," "unconvincing," "deliberately distorted," and "totally disingenuous" but changed DiSciullo's discipline from termination to a one-year suspension. Id. at 816. Boston filed suit to reverse the arbitrator's decision, asserting that the arbitrator exceeded her authority "by construing the collective bargaining agreement in a manner that violated public policy", pursuant to G.L. c. 150C, § 11(a)(3). There is no indication that DiSciullo was criminally charged for his actions. The SJC wrote, in part,

> "When parties agree to arbitrate a dispute, courts accord their election great weight. The strong public policy favoring arbitration requires us to uphold an arbitrator's decision even where it is wrong on the facts or the law, and whether it is wise or foolish, clear or ambiguous. (citations omitted) …. [T]he Legislature has severely limited the grounds for vacating arbitration awards. But … [w]e do not permit an arbitrator to order a party to engage in an action that offends strong public policy. … We apply a stringent, three-part analysis to establish whether the narrow public policy exception requires us to vacate the arbitrator's decision:
>
> '… the public policy 'must be well defined and dominant … [, the] disfavored conduct … is *integral to the performance of employment duties*[, and] reinstating the employee violates public policy to such an extent that the employee's conduct would have required dismissal.'…"

(Id. at 819)(citations omitted; emphasis in original)

Since the parties did not dispute that the first and second parts of the three-part test were met, the SJC addressed the third part of the test, i.e. whether DiSciullo's conduct was grounds for dismissal "and that a lesser sanction would frustrate public policy." (Id.) To that end, the Court decided,

> "A police officer who uses his position of authority to make false arrests and to file false charges and then shrouds his own misconduct in an extended web of lies and perjured testimony corrodes the public's confidence in its police force. There is no dearth of positive law expressing the Legislature's strong instruction that such individuals not be entrusted with the formidable authority of police officers. General Laws c. 41, § 96A, for example, provides, 'No person who has been convicted of a felony shall be appointed as a police officer of a city, town or district' . *See* G.L. c. 268, § 1 (criminal offense of perjury, which in this case applies to DiSciullo's swearing to false criminal charges and testifying falsely under oath … **That DiSciullo has not been convicted of any felony … [is] … beside the point. There is no question that DiSciullo lied under oath, in the criminal complaints against [the couple] and at the arbitration hearing … It is the felonious misconduct, not a conviction of it, that is determinative. For an arbitration award to violate public policy, it need not violate the letter of a statute.** … **The Legislature has forbidden persons found to have engaged in such conduct from becoming police officers and, by implication, from remaining police officers. Here, DiSciullo's misconduct could not have been committed but for the authority vested in him as a police officer** ….
> (Id. at 821)(emphasis added)

At first glance, the Court's conclusion in Boston v BPPA (2005), *supra*, would appear to provide that any misconduct can preclude someone from becoming an officer or remaining employed as a police officer, not just if he or she has been convicted of a crime. The context of the decision, however, indicates otherwise. First, the unique issue before the Court in Boston v BPPA, (2005) was whether the arbitrator's award should be upheld or vacated according to the well-established law that arbitration awards are to be vacated in very limited circumstances, not whether civil service law had been applied appropriately in DiSciullo's termination. Second, the decision required a determination as to whether there were any specific laws that established an applicable public policy exception to the limited circumstances in which an arbitration award

may be vacated. This led the Court to identify several statutes that establish an applicable public policy. Included among the statutes that the Court identified was G.L. c. 41, § 96A, which bars anyone with a felony conviction from being appointed as a police officer, although DiSciullo was already employed as a police officer and he had not been charged, let alone convicted of any crime, including a felony. None of the issues unique to an arbitration case are present in the instant case before the Commission. The Appellant is a candidate, not an employee, and his means of redress are at the Commission, not before an arbitrator. Further, in Boston v BPPA (2005) the Court was not applying G.L. c. 41, § 96A per se but referring to it as one of a number of laws showing that there is a viable public policy exception permitting vacating of the arbitration award. For these reasons, I find that Boston v BPPA (2005) is inapposite here.

A number of cases decided after Boston v BPPA (2005) followed its precedent in cases similarly involving arbitration awards following termination of employment. *See, e.g.*, Sheriff of Suffolk v. Jail Officers and Employees of Suffolk County, 452 Mass. 698 (2008); City of Boston v. Boston Police Patrolmen's Association, 74 Mass.App.Ct. 379 (2009); O'Brien (as Worcester City Manager) v. New England Police Benevolent Association, Local 911, 83 Mass.App.Ct. 376 (2013); and City of Springfield v. United Public Service Employees Union, 89 Mass.App.Ct. 255 (2016). However, Boston v BPPA (2005) was also cited in an unpublished opinion involving the Commission. Boston Police Department v. David Suppa and Civil Service Commission, 79 Mass.App.Ct. 1121 (2011). Since the opinion is unpublished, it is not binding precedent under Appeals Court Rule 1:28. Nonetheless, analysis of the case is warranted to determine its applicability here. In that case, Mr. Suppa had applied for appointment as a Boston Police Officer and was bypassed. The bypass was based on a review of Mr. Suppa's background, in which the Police Department found there were criminal charges against Mr.

Suppa seven (7) years prior to his application for employment. Mr. Suppa stated that his actions were taken in self-defense. However, a police report indicated that multiple witnesses reported that Suppa brutally beat a man until he was unconscious. Suppa had admitted to sufficient facts and received a CWOF for assault and battery with a dangerous weapon; a charge of assault with intent to maim was subsequently dismissed. Suppa appealed his bypass to the Commission. The Commission's majority granted the appeal and the Department sought judicial review. The Superior Court reversed the Commission's decision. The Appeals Court's unpublished opinion affirmed the Superior Court's ruling, finding that the appointing authority's decision to bypass Suppa was supported by substantial evidence. However, the unpublished opinion also states,

> "General Laws c. 41, § 96A …, states that '[n]o person who has been convicted of any felony shall be appointed as a police officer ….' For purposes of this analysis, '[i]t is the felonious misconduct, not a conviction of it, that is determinative.' Boston v. Boston Police Patrolmen's Assn., 443 Mass. 813, 820 … (2005)."
> Boston Police Department v Suppa and CSC, 79 Mass.App.Ct. 1121 (2011).

As indicated above, Boston v BPPA (2005) and cases cited above that follow it involve judicial review of arbitrators' awards wherein employees terminated for misconduct (not convictions) were returned to work or their terminations were reduced to a suspension and whether public policy permitted vacating of such arbitration awards as violative of established public policy. Those decisions do not involve civil service bypasses of police officer candidates with a CWOF. For this reason, in combination with its status as an unpublished decision, I find Boston v BPPA (2005) is inapposite and not applicable here.[5]

[5] In another unpublished decision involving the Commission, the Appeals Court also relied on Boston v BPPA (2005). Town of Randolph v. Civil Service Commission and Woolf, 81 Mass.App.Ct. 1123 (2012). In Randolph, the Appeals Court opined that the Commission had improperly substituted its judgment for that of the appointing authority and that the appellant's "lack of candor", not his guilt, concerning his violation of a domestic abuse prevention order two (2) decades earlier was a valid reason for his bypass. Given the arbitration context of Boston v BPPA (2005), the civil service context in Randolph, and the unpublished status of Randolph, I find that Randolph is also inapposite and not applicable here.

Prior to Tirado, Souza and Boston v. BPPA (2005), a number of decisions expounded upon the status of a CWOF. Under Massachusetts law, an "admission to sufficient facts" that is followed by a CWOF and later dismissed without any guilty plea or finding of guilt is explicitly not treated as a conviction.[6] *E.g.*, Fire Chief of East Bridgewater v. Plymouth Co. Ret. Bd., 47 Mass.App.Ct. 66, 71 n.13 (1999) *citing* Commonwealth v. Jackson, 45 Mass.App.Ct. 666 (1998), as follows,

> [T]he [retirement] board rejected Chief Pratt's assertion that Smith's admissions to sufficient facts rose to the level of conduct unbecoming because it was equivalent to his pleading guilty. The board correctly determined that Smith's admission was not akin to a guilty plea and, further, that if Smith completed his probationary period without violating the terms of his probation or committing another offense, all charges against him would then be dismissed and he would have no criminal conviction on his record."

Id. 47 Mass.App.Ct. at 71 (emphasis added). In Wardell v. Director of Div. of Empl. Sec., 397 Mass. 433, 436-37 (1986), the Supreme Judicial Court went even further:

> "An admission to sufficient facts, absent a subsequent finding of guilt, does not constitute substantial evidence from which a finder of fact in a collateral civil proceeding can determine that the alleged misconduct has indeed occurred. Factors other than consciousness of guilt – including expedience or avoidance of publicity – may motivate a defendant to admit to sufficient facts in exchange for a continuance and eventual dismissal. Criminal charges not resulting in conviction do not provide adequate or reliable evidence that the alleged crime was committed. To the extent that . . . the board refers to the alleged criminal act of the employee, there was no substantial evidence on the record to warrant his disqualification [from receiving unemployment benefits]."
> (Id.)(emphasis added)

[6] I do not question the use of true prior convictions as disqualifiers as G.L. c. 41, § 96A expressly prohibits a person who has been convicted of a felony from serving as a police officer. There is good reason to distinguish such a person with a conviction from one who simply has a criminal record because police officers may, in the course of their duties, be called to testify in court, where a felony conviction could be used to impeach the officer's testimony. *See, e.g.*, Commonwealth v. Fano, 400 Mass. 296, 302-303 (1987) ("earlier disregard for the law may suggest to the fact-finder similar disregard for the courtroom oath"); Brillante v. R.W. Granger & Sons, Inc., 55 Mass.App.Ct. 542, 545 (2002)("one who has been convicted of a crime is presumed to be less worthy of belief that one who has not been so convicted"). These impeachment policy reasons do not apply where the disposition does not amount to a conviction. *See* Commonwealth v. Jackson 45 Mass.App.Ct. 666, 670 (1998)(admission to sufficient facts not a conviction for purposes of statute allowing impeachment by prior conviction); Commonwealth v. Petros, 20 Mass.L.Rptr. 664, 2006 WL 1084092*4 n.3 (2006)(same).

See Burns v. Commonwealth, 430 Mass. 444, 449-451 (1999)(State Police trial board's discipline based on CWOF reversed as legal error); Santos v. Director of Div. of Empl. Sec., 398 Mass. 471, 474 (1986)("the plaintiff . . . may have admitted to sufficient facts to avoid the expense, publicity, and notoriety which a full trial might engender") *cf.* Commonwealth v. Angelo Todesca Corp., 446 Mass. 128, 154 n.20 (2006)(Cordy, J. dissenting in 4-3 decision, favorably citing Wardell for proposition that "admission to sufficient facts, absent a subsequent finding of guilt, does not constitute substantial evidence from which a finder of fact . . . can determine that the alleged misconduct has indeed occurred."); Commonwealth v. Bartos, 57 Mass.App.Ct. 751, 754-57, *rev.den.*, 439 Mass. 1106 (2003)(cases "conflating of admission to facts with guilty plea . . . as 'functional equivalent' of a guilty plea . . . should be read as shorthand for admission followed by . . . breach of the conditions of continuance")(emphasis added).

More generally, use of a criminal record, without a reasonably thorough review of the circumstances behind the criminal record print-out, particularly a single, stale offense that does not suggest a pattern of misconduct, is a problematic reason to bypass an otherwise qualified candidate, both in terms of basic merit principles under civil service law and with respect to sweeping changes in the CORI law in 2010. Specifically, on May 4, 2010, Chapter 6 of the General Laws was amended by Chapter 256 of the Acts of 2010:

> "In connection with any decision regarding employment … a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession … prior to questioning the applicant about his criminal history… . If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession … .
>
> A person who annually conducts 5 or more criminal background investigations, whether criminal offender record information is obtained from the department or any other source, shall maintain a written criminal offender record information policy providing that, in addition to any obligations required by the

> commissioner by regulation, it will: (i) notify the applicant of the potential adverse decision based on the criminal offender record information; (ii) provide a copy of the criminal offender record information and the policy to the applicant; and (iii) provide information concerning the process for correcting a criminal record."

G.L.c.6, §171A, St. 2010, c. 256.

803 CMR 2.00 (issued pursuant to G.L.c.6, §§167A, 172 and G.L.c.30A) promulgates procedures for accessing CORI for evaluating applicants for employment or professional licensing, as well as CORI complaint procedures, including the iCORI system, the internet-based system used in the Commonwealth to access CORI and to obtain self-audits, in order to access criminal records. 803 CMR 2.00 applies to *all* users of the iCORI system including employers, governmental licensing authorities, and individuals with a criminal history. The steps for a "reasonably thorough review" are included in 803 CMR 2.17, Adverse Employment Decision Based on Criminal Offender Record Information (CORI),

> "Before taking adverse action on an employment applicant's application for employment based on the employment applicant's CORI, an employer shall:
> (1) comply with applicable federal and state laws and regulations;
> (2) notify the employment applicant in person, by telephone, fax, or electronic or hard copy correspondence of the potential adverse employment action;
> (3) provide a copy of the employment applicant's CORI to the employment applicant;
> (4) provide a copy of the employer's CORI Policy, if applicable;
> (5) identify the information in the employment applicant's CORI that is the basis for the potential adverse action;
> (6) provide the employment applicant with the opportunity to dispute the accuracy of the information contained in the CORI;
> (7) provide the employment applicant with a copy of DCJIS information regarding the process for correcting CORI; and
> (8) document all steps taken to comply with 803 CMR 2.17." (Id.)

The Commission has addressed this issue in numerous recent bypass decisions involving the Department of Correction *See, e.g.*, Gore v. Department of Correction, 27 MCSR 582 (2014), citing, Conner v. Department of Correction, 27 MCSR 556 (2014)(DALA Magistrate's decision, adopted by the Commission); Teixeira v. Department of Correction, 27 MCSR 471 (2014)("The

wisdom of looking behind a CORI report was on full display. . . . DOC failed to conduct the type of thorough review that is required here [and] relied on a stale CORI report. . . .") *See also* Camacho v. Department of Environmental Police, 28 MCSR 18 (2015); Rousseau v. Department of Correction, 27 MCSR 457 (2014); Rolle v. Department of Correction, 27 MCSR 254 (2014); Moreira v. Department of Correction, 27 MCSR 251 (2014); Marino v. Department of Correction, 27 MCSR 247 (2014); Machnick v. Department of Correction, 26 MCSR 21 (2013); Rodrigues v. Department of Correction, 26 MCSR 574 (2013); Leguerre v. Springfield Fire Dep't, 25 MCSR 549 (2012); Hardnett v. Town of Ludlow, 25 MCSR 286 (2012). *See generally* Monagle v. City of Medford, 23 MCSR 275 (2010) and cases cited (discussing parameters that distinguish justified reliance on a pattern of continuing misconduct evidenced by a recent incident, from unjustified reliance on "past indiscretions" that are outweighed by "redeeming factors [that] must be given added weight"). Given the state of the applicable law, the Respondent did not have reasonable justification to bypass the Appellant based alone on the criminal record list indicating his solitary fourteen (14)-year old felony CWOF, nor was the Appellant disqualified therefor under G.L. c. 41, § 96A.

Conclusion

For the foregoing reasons, the Appellant's appeal, docketed as G1-15-70, 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 February 16, 2017.

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:
Keon Finklea (Appellant)
Meryum Khan, Esq. (for Respondent)
Peter M. Geraghty, Esq. (for Respondent)
John Marra, Esq. (for HRD)

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place - Room 503
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KEON FINKLEA,
Appellant
v.
BOSTON POLICE DEPARTMENT,
Respondent

CASE NO: G1-15-70

DISSENTING OPINION OF COMMISSIONER STEIN

I respectfully dissent. I conclude that, on this record, neither the CWOF nor the driving record provides sound and sufficient reasons that could justify bypassing Mr. Finklea.

Basic merit principles of civil service law require, among other things, consideration of qualified applicants for civil service positions based on assessment of their current "ability, knowledge and skills". G.L.c.31,§1. Disqualification is "reasonably justified" only after "impartial and reasonably thorough independent review" by the Appointing Authority of all facets of a candidate's credentials bearing on his or her present fitness to serve as a police officer

While I acknowledge that the Commission must rightly give some "deference" to a judgment that a particular candidate is an unacceptable risk to serve as a BPD police officer, I believe that, in cases such as this one, that deference is appropriate only when the judgment is the product of a thorough review, weighing of ALL of a candidate's credentials, and confirmation of that judgment at the highest level, i.e., the Appointing Authority himself, which, in this case would be the Police Commissioner. Without that level of review, rote disqualification of otherwise well-qualified young men and women, such as Mr. Finklea, for appointment to what is often their "dream job" as a sworn police officer, based entirely on hearsay evidence of a BPD's "roundtable" review of paper records of a 14-year old CWOF, and a driving record that is equally as stale, cannot be squared with the core principles of civil service law described above.

As to the CWOF, Mr. Finklea, then a teenager, was caught in 2001 with a stolen tire on his car and, as a result, he was charged with the felony of Receiving Stolen Property (Over $250 in Value). After "admitting to sufficient facts", the charge was "continued without guilty finding" (CWOF) and dismissed in 2002. It also bears notice that this case is quite different from one in which a candidate's underlying conduct was thoroughly investigated and disclosed admission to specific, recent behavior that might rationally be construed as a continuing problematic "risk", such as a record of domestic violence or OUI. Mr. Finklea's CWOF falls well outside the 10-year look-back window that even BPD's own guidelines apply to such far more serious offenses. (See Exh. 3) In addition, the record contains no percipient evidence (save for Mr. Finklea's own candid testimony) to show that the value of the property involved made this a felony offense. It is unlawful, here, to have relied simply on the fact of such stale CWOF to disqualify him.[7]

[7] I concur with the Commission majority that Tirado is inapposite. That case turned on specific statutory language that compelled the Commonwealth to treat an admission to an OUI as a conviction within the meaning of applicable federal law. See also, Commonwealth v. Casimir, 68 Mass.App.Ct. 257n.1 (2007) (CWOF treated as a conviction as defined in federal immigrations statutes); Commonwealth v. Mahadeo, 397 Mass. 314, 316-17 (1986) (same). As the

I depart from the Commission majority, however, on the issue of the driving record. BPD's "concern" about Mr. Finklea's driving history also disregards even its own guidelines. He had only one speeding ticket within the five years prior to the bypass. After parsing the many other entries in the driving history, the only additional driving violations, even with a 10-year look-back, are two speeding violations, eight years apart (2005 & 2013), three inspection sticker violations (the last in 2009) and two illegal operation violations (in 2006 and 2007, which he claimed was due to a faulty muffler). All other entries reflect infractions for which he was found "Not Responsible" or suspensions for failure to pay fines promptly. I find nothing in this record, and the BPD did not argue, that such a driver history, alone, would be disqualifying.

In sum, with all of the positive attributes that commended him, and no lawful reason for his bypass, basic merit principles require that Mr. Finklea receive another consideration for appointment, after a full, thorough and fair review of his suitability by the BPD Police Commissioner. Accordingly, I would allow this appeal and order Mr. Finklea be placed at the top of the next certification for BPD Police Officer so that he receives such further consideration.

/s/ Paul M. Stein
Commissioner

Commission majority explains interpretation of Massachusetts civil service and CORI law, however, in cases concerning the use of a CWOF in an employment context, presents an entirely distinct legal issue.