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NOTIFY

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION
SUFFOLK, ss.

COMMONWEALTH OF MASSACHUSETTS

RECEIVED

SUPERIOR COURT
CIVIL ACTION
NO. 1784CV00999MA Off. of Attorney General
KEON FINKLEA
Administrative Law Division

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & another¹MEMORANDUM OF DECISION AND ORDER ON
THE PARTIES' CROSS MOTIONS FOR
JUDGMENT ON THE PLEADINGSNOTICE
Smt
2-13-18
B+G
DSGLCFCR
SLH
OSOAG
RLQOLA
PMG
CMB

The plaintiff filed this action seeking judicial review of the Civil Service Commission's ("the Commission") final decision to uphold the Boston Police Department's ("the Department") decision to bypass the plaintiff for appointment to the position of full-time police officer. The plaintiff moved for judgment on the pleadings, arguing that the Commission's final decision was arbitrary and capricious, not supported by substantial evidence, and based on an error of law. The Department (hereinafter "the defendant") cross moved for judgment on the pleadings. The defendant seeks affirmation of the Commission's decision insofar as it concludes that the defendant was reasonably justified in its decision to bypass the plaintiff based on his driving history but seeks reversal of the portion of the decision wherein the Commission concluded it was not reasonably justified in bypassing the plaintiff based on his Continuance Without a Finding ("CWOFF") on a felony charge. For the following reasons, the Plaintiff's Motion for Judgment on the Pleadings is ALLOWED in part as to the Commission's decision finding the CWOFF was not a reasonable justification for the bypass, and the defendant's Cross-Motion for

¹ Boston Police Department.

Judgment on the Pleadings is **DENIED**. The matter is **REMANDED** to the Commission for further explanation as to the driving history as the sole justification for the bypass.

BACKGROUND

The following facts are drawn from the administrative record.² The plaintiff is an African-American man who is married with an infant child and resides in Hyde Park. At the time of the hearing in 2015, the plaintiff was thirty-two years old and in his last semester at Wentworth Institute of Technology ("Wentworth Institute"). He expected to graduate in August 2015 with a degree in project management. He was also working as a manager for T-Mobile and as a personal banker at a bank. He testified at the hearing that he recently accepted a project management position at a medical supply company.

Prior to 2010, the plaintiff drove an old Honda Civic that required frequent repairs. The plaintiff was unable to afford many of the necessary repairs to obtain his inspection sticker. The plaintiff received a promotion while working at Best Buy, and he was able to replace the Honda with a 2008 Acura TSX, which was in much better condition and required fewer repairs than the Honda Civic.³ The promotion also enabled him to pay his student loans.

In June 2013, the plaintiff passed the examination for Police Officer. The defendant requested the Human Resources Division ("HRD") to send Certification 01903 ("the Certification") on June 26, 2014, and the defendant would select the first thirty-five candidates to fill the position of Police Officer. The plaintiff's name was ranked 44th on the Certification. The plaintiff signed the Certification to indicate his continued interest in the position. Thereafter, he

² The administrative record was not organized in a manner that facilitated judicial review. For instance, the defendant's Guideline Document is listed as being on page 219, but the bound volume ends on page 186 and the document was actually on page 92, and the Commission's Decision is listed at page 238 but was actually on page 143.

³ He worked at Best Buy as a sales manager from 2004 to 2011. He was let go in 2011 because his team didn't perform well enough, which his supervisor attributed partly due to the economic situation at the time.

participated in an orientation meeting. In the meeting, the candidates were informed of the application process and provided with an employment application.

On July 23, 2014 the plaintiff submitted his completed application, in which he provided detailed information about his background (education, residence, references, employment history, and driving and criminal records). Where the application asked if the applicant had been “convicted” of a felony, the plaintiff wrote that he had not. The plaintiff had a CWOFF for a felony charge of receiving stolen property, a tire, with a value of more than \$250.

Detective Richard E. Henshaw (“Detective Henshaw”) has been a Recruit Investigator for four years. Sergeant Detective Jose Lozano (“Sergeant Lozano”) has been the head of the Recruit Investigations Unit since March 2014, and he supervises Recruit Investigators.

Recruit Investigators first examine an applicant’s criminal record because it may exclude the candidate from further consideration. If the candidate has a felony on his or her record, the Recruit Investigator talks to the candidate and may encourage withdrawal of the candidate’s application. The defendant provides a document entitled “Exclusions and Timeframe Guidelines” (“the Exclusion Guidelines”) to the Recruit Investigators, which provides guidelines for consideration of an applicant’s background. The Exclusion Guidelines list “felony conviction . . . (“CWOFF”) to a felony (see Supervisor for confirmation) . . . [and] any National Safety Council (“NSC”) Class (bad driver class attended) within 5 years. NSC Class taken 3 surchargeable events in 2 years”⁴ The Exclusion Guidelines also set forth, in relevant part:

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 likelihood they may be bypassed.

⁴ The Commission noted that the Massachusetts Registry of Motor Vehicles (“RMV”) may require an individual to attend a class sponsored by the NSC to adjust the individual’s driving behavior.

After receiving the plaintiff's completed application, Detective Henshaw contacted the plaintiff about his CWOFF. They did not then discuss the plaintiff's driving record. On another occasion, Detective Henshaw requested certain tax documents from the plaintiff, which he provided. Near the end of the investigation process, Detective Henshaw conducted a thirty to forty-five minute home visit with the plaintiff and his wife. During the visit, the plaintiff was not asked about his driving or criminal record.

After conducting background investigations, Detective Henshaw drafts a Privileged and Confidential Memorandum ("PCM") with his findings for each candidate. Sergeant Lozano then reviews the completed folder for each candidate, checks for grammatical errors, and determines if the PCM is consistent with what the candidates stated. Next, the PCM is given to the roundtable for consideration. The roundtable discusses the PCM and determines whether to bypass or proceed with the applicant.

On September 18, 2014, Detective Henshaw issued a PCM to then-Director of Human Resources Devin Taylor ("Taylor") and Sergeant Lozano, which described Detective Henshaw's background investigation of the plaintiff. The PCM provided that Detective Henshaw spoke with the plaintiff's supervisors at his full-time position at a bank, at Best Buy, and at the Boston Public Works Department, where the plaintiff was a co-op student for six months. All of his supervisors provided positive feedback about him. The plaintiff also provided recommendations from three neighbors, who gave him positive recommendations. The plaintiff's credit rating is "excellent." In 2012, the Chelsea Police Department issued a license to carry a firearm to the plaintiff.

Although the plaintiff's driving history revealed no at-fault car accidents, it listed several driving related infractions. Detective Henshaw testified at the hearing that the plaintiff:

[H]as attended 2 NSC courses in 2003 and 2007. The plaintiff's driving record included 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 failure to pay fines for the underlying infractions. Prior to 2010, he was found responsible for speeding in: (1) March 2003 in West Roxbury; (2) July 2002 in Dorchester; (3) January 2002 in West Roxbury; and (4) October 2001 in Walpole.⁵ On approximately half of all the infractions, the plaintiff was found responsible. Since 2010, the [plaintiff] has had only 1 infraction, on 04/04/2013, for speeding in Framingham.

The plaintiff's criminal history indicated that in 2001, the plaintiff was approximately eighteen years old when he was charged with a felony for knowingly receiving stolen property – a tire – from a friend. The matter was disposed of as “Guilty Plea or Admission to Sufficient Facts accepted after colloquy and 278 § 29D warning.” His sentence was noted as “Sufficient facts found but continued without guilty finding until” six months. On September 11, 2002, the charge was dismissed. The plaintiff testified that he disputed the charges, but he followed his counsel's advice to accept the CWO. He stated that his counsel informed him that upon paying the ordered restitution, the charge would have no further ramifications, and the case would be closed. The plaintiff also testified that he did not realize the charge was a felony. The plaintiff was unaware that he could seek to expunge or seal his record. His criminal record also indicated that in 2003, 2005, and 2007, he was criminally charged for operating a vehicle on a suspended or revoked license, but the charges were dismissed once he paid the fines.⁶ In 2002 and 2003, the plaintiff defaulted for nonpayment of fees and warrants were issued for his arrest.

⁵ Prior to 2010, the plaintiff also had three other speeding infractions on his record: (1) August 2006 in Dorchester but not prosecuted; (2) September 2005 in New Hampshire (out of state speeding); and (3) February 2001 in Randolph but found not responsible.

⁶ The Commission also indicated that he was charged with misdemeanors for operating a vehicle on a suspended license in 2002, 2004, and 2007, which were dismissed upon the plaintiff paying the fines.

Shortly after Detective Henshaw submitted his PCM on the plaintiff, a roundtable convened to discuss the plaintiff's application. The roundtable included Deputy Superintendent Jeffrey Walcott, Sergeant Lozano, Taylor, Ian McKenzie, who is a representative of the Medical Unit, and Detective Henshaw. The roundtable voted to bypass the plaintiff. Detective Henshaw presented his findings to the roundtable but did not participate in the bypass decision. The Police Commissioner is the appointed authority for decisions to bypass. There was no evidence that the Police Commissioner approved the roundtable's bypass decision. Five candidates who ranked below the plaintiff were hired.⁷

On February 26, 2015, Taylor sent the plaintiff a letter to notify him of the reasons for bypassing him. The letter stated, in relevant part:

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 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 CWOFF 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

On April 13, 2015, the plaintiff timely appealed the Department's decision to bypass him to the Commission. On June 25, 2015, the Commission held a hearing. The plaintiff represented himself at the hearing. At the hearing, the plaintiff, Detective Henshaw, and Sergeant Lozano testified. Neither Detective Henshaw nor Sergeant Lozano testified that Detective Henshaw

⁷ Neither party presented evidence of the other candidates' driving or criminal histories to the Commission.

discussed the plaintiff's felony CWOFF with Sergeant Lozano in accordance with the Exclusion Guidelines.⁸

On February 16, 2017, the Commission voted to uphold the Department's decision to bypass the plaintiff based upon his driving history but not based upon his CWOFF. On March 2, 2017, the Commission issued a final written decision. On March 31, 2017, the plaintiff sought judicial review of the Commission's decision. On September 29, 2017, the parties cross-moved for judgment on the pleadings.

DISCUSSION

I. Standard of Review

Pursuant to G. L. c. 31, § 44, the court has the authority to review the Commission's decision.⁹ "When reviewing the commission's interpretation of the civil service law that it is charged with enforcing, 'we must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.'" *Worcester v. Civil Serv. Comm'n*, 87 Mass. App. Ct. 120, 122 (2015). The court gives due weight to "the experience, technical competence, and specialized knowledge of the agency . . . [and] [its] discretionary authority[.]" G.L. c. 30A, § 14. The party appealing the administrative decision bears the burden of demonstrating the decision's invalidity. *Merisme v. Board of Appeals of Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989).

⁸ Neither Detective Henshaw nor Sergeant Lozano spoke with the plaintiff about withdrawing his application because of his CWOFF and driving history.

⁹ The statute provides, in relevant part: "Any party aggrieved by a final order or decision of the commission following a hearing . . . may institute proceedings for judicial review in the superior court within thirty days after receipt of such order or decision . . ." G. L. c. 31, § 44.

Where the court reviews an agency determination for substantial evidence, there need only be “such evidence as a reasonable mind might accept as adequate to support a conclusion.” G.L. c. 30A, § 1(6). “Under the substantial evidence test, a reviewing court is not empowered to determine the facts anew, or to judge credibility, or to draw different inferences from the facts found” by the agency. *Gnerre v. Massachusetts Comm’n Against Discrimination*, 402 Mass. 502, 509 (1988). “The standard is highly deferential to the agency on questions of fact and reasonable inferences therefrom.” *Brackett v. Civil Serv. Comm’n*, 447 Mass. 233, 242 (2006), quoting *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992) (internal quotations removed). Courts, however, “must consider anything in the record that fairly detracts from the weight of evidence supporting the [agency’s] determination.” *Salem v. Massachusetts Comm’n Against Discrimination*, 44 Mass. App. Ct. 627, 641 (1998).

II. Analysis

The Commission determines “whether . . . the appointing authority has sustained its burden of proving [by preponderance of the evidence] that there was reasonable justification for the action taken by the appointing authority.” *Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 303 (1997); *Cherismo v. Boston Police Dep’t*, 23 MCSR 408, 412 (2010). The Commission may “evaluate the legal basis of the appointing authority’s action, even if based on a rational ground.” *Cambridge*, 43 Mass. App. Ct. at 304. An action is “justified” if it was “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *Id.*, quoting *Selectman of Wakefield v. Judge of First Dist. Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928).

The Commission “must focus on the fundamental purposes of the civil service system—to guard against political considerations, favoritism, and bias in governmental employment decisions” *Id.* While the Commission may intervene when personnel decisions have “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy,” it may not “substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” *Id.* The appointing authority is “charged with the responsibility of exercising sound discretion and good faith when choosing individuals from a certified list of eligible candidates on a civil service list.” *Cherismo*, 23 MCSR at 412. “All candidates must be adequately and fairly considered.” *Id.*

Deference is “especially appropriate” when reviewing hiring decisions as to police officers. *Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 188 (2010). A police officer “carries the burden of being expected to comport himself or herself in an exemplary fashion.” *McIsaac v. Civil Serv. Comm’n*, 38 Mass. App. Ct. 473, 475 (1995).

The plaintiff argues that the Commission correctly found that the plaintiff’s CWOFF could not support a bypass. However, he argues that the Commission erred when it held that his driving record, alone, justified the bypass. On the other hand, the defendant contends that the Commission correctly upheld the bypass based upon the plaintiff’s driving history, but the Commission exceeded its authority and committed an error of law when it found that the bypass was not reasonably justified by the plaintiff’s CWOFF. This court addresses each issue in turn.

A. Continued Without a Finding (CWOFF)

The Commission found that the defendant “did not establish by a preponderance of the evidence that it had reasonable justification to bypass the [plaintiff] for the fourteen (14)-year old felony CWOFF.” The Commission found that the CWOFF was “a single, stale offense that [did]

not suggest a pattern of misconduct” The Commission noted that Detective Henshaw inquired with the plaintiff about the CWOFF but did not provide the plaintiff an opportunity to discuss it in an interview. It is evident that the Commission’s decision thoroughly and appropriately considered the bypass decision and found that the CWOFF was not reasonable justification to bypass the plaintiff.

The defendant contends the Commission has previously held that it is reasonable for the Department to consider a candidate’s criminal history when determining whether to bypass or hire an individual. Neither the Commission nor this court disagrees. The Commission’s decision explicitly acknowledged that “the appointing authority can give *some* weight to an applicant’s criminal record when making its hiring decision.” *Thames v. Boston Police Dep’t*, 7 MCSR 125, 127 (2004) (emphasis added). However, the Commission determined that: (1) the CWOFF was not a conviction under G. L. c. 41, §96A; (2) the CWOFF was stale; and (3) the plaintiff was not given an opportunity to discuss it in an interview.

General Laws 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” (emphasis added). There is no specific statute defining “conviction” for purposes of disqualifying individuals from appointment as a police officer. However, “[a]t common law, no ‘conviction’ can occur unless a judgment of guilt has been entered upon a jury verdict, trial court finding, or guilty plea.” *Wardell v. Director of Div. of Employment Sec.*, 397 Mass. 433, 436 (1986).

The defendant cites several cases for the proposition that its consideration of the plaintiff’s CWOFF was reasonably justified. However, the Commission adequately addressed and distinguished those cases. First, as the Commission thoroughly discussed, *Tirado v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds* is distinguishable. 472 Mass. 333, 339-340

(2015). In *Tirado*, the statute governing licensing for commercial drivers defined “conviction” “beyond its ordinary meaning.” *Id.* at 339.¹⁰ “‘Conviction’ [was] defined very broadly in the Federal regulations 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.* at 335, quoting 49 Code Fed. Regs. § 383.5 (2013); see also G. L. c. 90F, § 1. Therefore, as the Commission determined, *Tirado* concerned a specific statutory definition that was broader than what is usually considered a “conviction.” Moreover, *Tirado* cites *Souza v. Registry of Motor Vehicles*, 462 Mass. 227, 229-230 (2012) in which the Supreme Judicial Court (“SJC”) determined that a “conviction” under G. L. c. 90F, § 24(1)(d) did not include an admission to sufficient facts. *Id.* at 335. Thus, *Tirado* concerned a specific statutory definition for “conviction” and did not determine that any “conviction” necessarily included an admission to sufficient facts.

Here, there is no such statutory definition in Massachusetts under which a CWOFF would be considered a conviction. Further, the CWOFF was dismissed without a guilty plea or finding. It is not a conviction under common law or the statutory scheme of G. L. c. 41, § 96A. See, e.g., *Commonwealth v. Bartos*, 57 Mass. App. Ct. 751, 756 (2003) (CWOFF is not a conviction under Massachusetts law); *Fire Chief of East Bridgewater v. Plymouth Cnty. Ret. Bd.*, 47 Mass. App. Ct. 66, 71 (1999) (finding the board correctly determined that admission to sufficient facts is “not akin to a guilty plea” and that after completion of probationary period without violating the terms, the charges would be dismissed and no criminal conviction on his record); *Cherismo*, 23 MCSR at 413 (the Department incorrectly equated admission to sufficient facts and CWOFF to

¹⁰ General Laws c. 90F is part of a federal statutory scheme governing federal highway funds and state compliance with funding requirements. *Id.* at 335-336.

finding of guilty or a conviction).¹¹ Therefore, the Commission neither exceeded its statutory authority nor committed an error of law in determining that the CWOFF is not a conviction for the purposes of G. L. c. 41, § 96A.

Finally, the Commission noted that 803 Code Mass. Regs. § 2.00 applied to *all* users, including the defendant, regarding access to an individual's criminal offender record information ("CORI") for employment applications. The Commission noted that using a criminal record, especially one as old and stale as the plaintiff's, without a reasonably thorough review of the circumstances was problematic. This is further bolstered by Sergeant Lozano's own testimony that the roundtable examined the totality of the individual's circumstances for certain patterns of behavior, whether certain incidents were "age appropriate," and whether someone outgrew the inappropriate behavior and "matured." However, there was no evidence before the Commission that Detective Henshaw spoke with the plaintiff during his home visit or in an interview about the CWOFF or sought "confirmation" from Sergeant Lozano about the CWOFF as outlined in the Exclusion Guidelines. When Detective Henshaw initially asked the plaintiff about the CWOFF, he was not evasive or disingenuous and did not distort information about it. See *Boston v. Boston Police Patrolmen's Ass'n*, 443 Mass. 813, 821 (2005) (*BPPA*).

To the extent that the defendant contends that it is the underlying felonious conduct that is determinative, such argument is unavailing. *Id.* at 820. The Commission noted that the unique issue presented in *BPPA* concerned the limited circumstances in which an arbitrator's award would be vacated. *Id.* at 821. *BPPA* did not involve whether civil service law had been applied appropriately to the officer's termination. *Id.* The Commission's decision also pointed out that

¹¹ There is testimony from Detective Henshaw and Sergeant Lozano that they believed and equated an admission to sufficient facts, a subsequent CWOFF, and dismissal to mean that had the plaintiff gone to trial, he would have been convicted.

BPPA identified statutes establishing an applicable public policy that was violated by the arbitrator's construction of the collective bargaining agreement.¹² Moreover, the SJC found that an *arbitration award* need not "violate the letter of a statute" to violate public policy. *Id.* at 820.

Furthermore, *Labriola v. Civil Serv. Comm'n* is also distinguishable. 25 MCSR 36 (2012). In *Labriola*, the two arrests were *recent* (within two years) of the individual's application to the Department. *Id.* at 38. The applicant's explanations of the incidents were "evasive and inconsistent with [police] reports." *Id.* There was evidence that the applicant resisted arrest, which required four officers to control him, failed a field sobriety test, admitted to consuming a "couple beers," refused a Breathalyzer Test, and presented his Sheriff's ID card to the state trooper. *Id.* In this case, there is no similar misconduct related to the plaintiff's CWO. Accordingly, the Commission did not exceed its authority or otherwise commit an error of law in deciding that the CWO was not a reasonable justification for the defendant's bypass decision.

B. Driving History

Now turning to the remaining justification in the record, the Commission found the plaintiff's driving history to be "lengthy and troublesome."¹³ From 2001 to 2013, the plaintiff has been cited numerous times for various motor vehicle infractions, including: speeding, illegal operation, no inspection sticker, unregistered/improper equipment, and seat belt violations. Further, his license has been suspended on multiple occasions for nonpayment of fees in relation

¹² Further, this court notes that in *BPPA*, the arbitrator found that the officer's testimony was "implausible," "deliberately distorted," and "totally disingenuous," and there was evidence that the officer lied under oath on multiple occasions concerning his misconduct. The SJC stated that "[w]e fail to see how exoneration of some felonious conduct cleanses or mitigates other felonious conduct." *Id.* at 821 (emphasis added).

¹³ Notwithstanding the length of the plaintiff's driving history, 19 years by the time of the hearing, this court notes that his only moving violations were: (1) seven speeding tickets, for which he was only found responsible on four of them; (2) one failure to stop, for which it indicates "NA" i.e., not applicable; and (3) one keep in right lane, for which he was not prosecuted. Further, this court notes that there are no at-fault accidents in the plaintiff's driving history.

to the underlying infractions and two warrants were issued for failure to pay fines. Since 2010, his driving record improved, and the plaintiff attributed such improvement to the purchase of a newer car. The plaintiff testified that he lacked the financial resources to maintain and repair his prior vehicle for registration and pay the fees violations. The plaintiff was forthright and forthcoming about the driving issues in his application. Detective Henshaw did not discuss the plaintiff's driving history with him at any point during the application process.

The Commission determined that the bypass was not reasonably justified by the stale CWOFF. However, concerning plaintiff's driving history, the Commission provided little in the brief analysis from which this court may determine how the Department neutrally applied or deviated from the guidelines.¹⁴ The Commission discussed the staleness of the fourteen year old CWOFF but provided no insight as to portions of the plaintiff's driving record that were equally as stale, that there were few moving violations, no violations for running red lights or stop signs, and that there were no at-fault accidents.¹⁵ The plaintiff's driving history from 2001-2003 was more than ten years old and consisted of at least some infractions for which the plaintiff was found "Not Responsible."¹⁶ See *Pacini v. Medford Fire Dep't*, 18 MCSR 351, 352 (2005) (the Commission did not consider infraction beyond ten years or infraction for which applicant was found "Not Responsible"); see also *Conroy v. Worcester*, No. G1-07-187 1, 9 (2009) (29 violations in eight years "mitigated when taking into consideration subsequent substantiated

¹⁴ This court merely seeks further explanation based upon the Commission's findings of fact and analysis whether or not the guidelines sufficiently guarded against bias, favoritism, or political considerations in the defendant's employment decisions. *Cambridge*, 43 Mass. App. Ct. at 304.

¹⁵ In terms of a candidate's driving history, the Exclusions Guidelines reference only NSC classes and OUI's, nothing more specific to other driving infractions.

¹⁶ From 2001-2003, the plaintiff was found responsible for twelve of the fifty-seven infractions, which included violations for seat belt, inspection sticker, speeding, improper equipment, and no license or registration in possession. He also received several license suspensions for failure to pay the fees for the underlying infractions.

rehabilitation and the amount of time that had lapsed from . . . last motor vehicle incident"). The Commission's decision did not indicate how the Commission considered infractions that were "Not Prosecuted," "Not Responsible," or "Responsible" in the plaintiff's driving history. See *Conroy*, No. G1-07-187 1, 9 (Commission cited witness testimony that "not responsible" did not mean not guilty but rather could mean the citing police officer did not appear in court or judge determined there was insufficient evidence).

Moreover, the Commission mentioned the plaintiff's two NSC courses in 2003 and 2007 but did not discuss how the two classes aligned with the Exclusion Guidelines.¹⁷ Further, the Exclusion Guidelines give the Department broad discretion in evaluating every candidate but provide little actual guidance as to how Recruit Investigators are to weigh the various scenarios or within what parameters they could deviate from the guidelines. This court notes that the Recruit Investigator drafts the PCM, the basis of which may or may not have deviated from the guidelines. Moreover, it is unclear when deviations or extenuating circumstances are included in the PCM.¹⁸

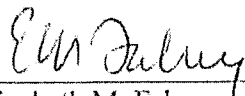
In light of the Commission's finding that the CWOFF was not a reasonable justification to bypass the plaintiff and the decision's brief discussion regarding the driving history, this court remands the matter back to the Commission for further explanation of whether and how the plaintiff's driving record alone can support the bypass.

¹⁷ This court notes that the defendant's Exclusion Guidelines indicated consideration of NSC courses within five years; the plaintiff's NSC courses were in 2007 and 2003, which were, respectively, seven and eleven years prior to his application.

¹⁸ The PCM for the plaintiff did not cite the Exclusion Guidelines and did not highlight any deviations therefrom.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Defendant's Cross-Motion for Judgment on the Pleadings is **DENIED**. It is hereby further **ORDERED** that the Plaintiff's Motion for Judgment on the Pleadings is **ALLOWED** in part as to the Commission's decision finding the CWOFF was not a reasonable justification for the bypass. The matter is **REMANDED** to the Commission for further explanation ^{within (Emf)} when 30 days as to the plaintiff's driving history alone as the sole justification for the bypass. This court reserves judgment on the remainder of the Plaintiff's Motion for Judgment on the Pleadings until further action by the Commission consistent with this Order. As soon as counsel receives the Commission's Supplemental Decision and Order, they shall provide it to this court and indicate whether they shall file any additional pleadings and/or seek further hearing.


Elizabeth M. Fahey
Justice of the Superior Court

February 9, 2018