

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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Boston, MA 02108  
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LAURENE FLAHERTY  
and SHEILA McCARTHY,  
Appellants

G1-08-184  
G1-08-185

v.

HUMAN RESOURCES DIVISION  
and BOSTON POLICE DEPARTMENT,  
Respondents

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Commissioner:

Christopher C. Bowman  
*(for the minority)*  
Daniel M. Henderson  
*(for the majority)*

**DECISION ON MOTIONS FOR SUMMARY DECISION FILED BY BOSTON  
POLICE DEPARTMENT AND HUMAN RESOURCES DIVISION  
(Corrected Copy correctly listing first name of Appellant as Laurene)**

*Procedural Background*

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellants, Laurene Flaherty and Sheila McCarthy (hereinafter "Flaherty", "McCarthy" or "Appellants") filed an appeal in

which they asked the Civil Service Commission (hereinafter “Commission”) to exercise its equitable powers pursuant to Chapter 310 of the Acts of 1993 (hereinafter “310 Relief”) to order the Boston Police Department (hereinafter “BPD”) and the state’s Human Resources Division (hereinafter “HRD”) to begin immediately processing the Appellants off Certification No. 271116 for the position of police officer.

A pre-hearing conference was conducted at the offices of the Commission on September 4, 2008 and a status conference was conducted on September 18, 2008. Per agreement of the parties, BPD and HRD filed separate Motions for Summary Decision on October 29, 2008 and the Appellants filed an opposition on November 19, 2008. All parties agreed that the matter should be decided based on the briefs submitted.

*Summary of Issue*

On November 16, 2007, HRD certified a list of eligible persons to be considered for appointment to BPD’s Spring 2008 recruit class. Flaherty and McCarthy’s names were included on the Certification List in Band 10, indicating that both scored highly on the exam. BPD requested several “special certifications” from the Certification List, including a special certification for female candidates (hereinafter “the Female List”).<sup>1</sup> While Flaherty and McCarthy would not have been reached off of the Certification List, they were considered because they were included as part of the Female List. Inclusion on the Female List allows candidates to be “pulled up” from their position on the Certification List, and receive consideration prior to their position on the Certification List which results from their civil service test score. Flaherty’s and McCarthy’s applications were processed through the standard background screening process, and they

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<sup>1</sup> PAR 10 allows an Appointing Authority to request, and receive, special certification lists based on race, color, national origin or sex.

both received conditional offers of employment from the Department pending their successful completion of the PAT (Physical Abilities Test).<sup>2</sup> However, Flaherty and McCarthy both failed the required PAT after two attempts, and the conditional offers were rescinded.

After learning that the Spring 2008 class would not result in the desired number of Police Academy graduates, BPD requested that HRD extend the Certification List. HRD granted this extension and the BPD was allowed to continue on the Certification List, without having to requisition a new list, or go through those candidates who were bypassed for consideration for the Spring 2008 class. Flaherty and McCarthy filed this appeal stating they should have been reconsidered for the subsequent 2008 class, and the Department's failure to do so was in violation of civil service law.

#### *Factual Background*

On November 2, 2007, BPD requisitioned a list from HRD in the hopes of filling a Spring 2008 class with approximately eighty (80) new Boston Police Recruits. As part of the requisition process, BPD requested that HRD provide it with specialized certifications for Spanish, Haitian-Creole and Females in addition to the standard main certification list, as allowed by PAR 10. BPD received the Certified List containing well over five hundred (500) names of potential recruits. From this number of names, only a certain portion of them signed the certified list indicating they would like to be considered for appointment to the position of police officer. In addition to the lists above, BPD also

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<sup>2</sup> Pursuant to M.G.L. ch. 31§ 61A, the Commonwealth's Human Resource Division mandates that all candidates for public safety officer positions submit and pass state required medical, physical and psychological standards before working as a public safety officer. HRD administers the Physical Ability Test.

screened candidates from a Court Ordered settlement list <sup>3</sup>and the Reemployment list.<sup>4</sup> A number of candidates withdrew. BPD extended one hundred and twenty six (126) conditional offers to potential recruits. This process took approximately six (6) months to investigate the potential recruits, conduct medical and psychological screening, and administer the PAT.

Flaherty and McCarthy scored in Band 10 on the civil service examination, the highest scoring band, which is considered after disabled veterans, veterans, and all special certification lists. Flaherty and McCarthy received consideration prior to BPD reaching Band 10, as they were both included on the Female List. As a result, they were both considered for the spring 2008 class. Flaherty and McCarthy passed the background and prior employment investigations as well as the medical and psychological components of BPD's screening process. Subsequently, Flaherty and McCarthy were extended conditional offers of employment subject to each passing the PAT. Flaherty and McCarthy failed the PAT after two (2) attempts and were not extended final offers of employment.

After all screening and the administration of the PAT, sixty- two (62) recruits were admitted into the Academy. Currently, there are thirty-seven (37) recruits remaining in the Academy scheduled to graduate.<sup>5</sup> The high attrition rate from BPD's spring academy was unexpected, since the Department had hoped to fill eighty (80) vacancies for that academy. Based on the figures at the time of the May 27, 2008 Academy, the

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<sup>3</sup> The Court Ordered List also known as the "court ordered list" resulted from the Bradley case in which the court ordered the Department to consider 18 minority over three (3) hiring cycles which would mean six (6) individuals per class.

<sup>4</sup> The Re-employment list is a list consisting of any police officers laid off state wide

<sup>5</sup> If all the current recruits successfully completed the academy, a total of, thirty nine (39) officers will have resulted form the spring 2008 Academy. Two (2) recruits were graduates of a Municipal Police Training

Department had a 51% drop off rate from the one hundred and twenty six (126) conditional offers it had extended.

Realizing that BPD's current class fell well below expectations, BPD had two options:

1) requisition a new certification list from HRD or 2) request an extension of the

Certification List. BPD opted for option two: to ask for an extension per PAR 8.

Pursuant to PAR 8, the Human Resources Division Administrator can:

“use his/her discretion and may limit or extend the term of any certification, or ratify any appointment made from such certification; provided further, however, that any appointing authority requesting an extension must submit a written request setting forth sound and sufficient reasons as to why the appointment cannot be made within the time period set forth in this paragraph.”

Robin Hunt, the Director of Human Resources for the Boston Police Department (hereinafter “Hunt”) contacted Sally McNeely, Director of HRD's Organizational Development Group (hereinafter “McNeely”) and verbally received permission to extend the term of the Certification List and continue processing potential recruits not previously screened. McNeely stated to Hunt that BPD should not go back and re-process candidates already considered; instead BPD was to move forward through the list to those candidates who had signed, but were not yet considered by BPD. This permission was documented in a letter from Hunt to McNeely. McNeely did inform Hunt that BPD must include all recent military inserts when processing recruits from the extended certification.

Although Flaherty and McCarthy's names appeared on the main certification, they were not reconsidered because they were already processed in the spring 2008.

According to HRD, they do not permit candidates to be processed twice from the same

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Committee (MPTC) Certified Police Academy were able to enter modified academy. These two (2) officers have graduated and are currently Boston Police Officers.

certification list within the same hiring round. On August 4, 2008, Flaherty and McCarthy filed an appeal with the Commission, claiming they were aggrieved because BPD did not requisition a new list for the second academy.

*BPD's Argument in favor of Motion for Summary Decision*

In support of its Motion for Summary Decision, BPD argues that: 1) the action taken was allowed by the Personnel Administration Rules; 2) was based on sound and sufficient reasons; and 3) the Appellants are not aggrieved persons entitled to relief under the civil service law.

BPD argues that under PAR 8, an appointing authority can ask for an extension of the certification list from HRD. Specifically,

“the Administrator, in his discretion, may limit or extend the term of any certification, or ratify any appointment made from such certification; provided further, however, that any appointing authority requesting an extension must submit a written request setting forth sound and sufficient reasons as to why the appointment cannot be made within the time period set forth in this paragraph. The Administrator may, before or after an appointment has been made, cancel a certification if he finds that the certification was made in error, or that any person certified was placed on the eligible list through mistake or fraud; and, if a person has been appointed from such certification, the Administrator may revoke the appointment and order the person's discharge.”

BPD argues that there is no merit to the Appellants' argument that extending the Certification List is a violation of civil service law, because the civil service law requires only that “an appointing authority request to the administrator to certify names of persons for appointment to civil service positions,” when filling a class but does not require that each time an academy is held, a new list is required. According to BPD, PAR Rule 8 states that a certification list may be extended at the discretion of the Administrator, with no limitation as to when this may occur. Because the extension is permissible under

PAR Rule 8, and such action does not amount to a violation of civil service laws, BPD argues that the Appellants' claim must fail.

BPD also argues that they had sound and sufficient reasons to request an extension of the Certification List. Based on BPD's assessment, asking for an extension from the current certification to fill a limited number of vacancies for a second academy in 2008 was far less costly and time-consuming than requisitioning a new certification and processing a much larger group of people. By asking for an extension, BPD argues that it was able to work off a certification list it had already begun processing, saving them months of additional investigation and financial resources. Because of the extension, the BPD argues that it was able to get the number of officers needed in a much shorter period of time. In the interest of public safety and fiscal responsibility, BPD argues that it was clearly justified in asking for an extension of the certification list.

Finally, BPD argues that the Appellants are not "aggrieved" parties as defined by civil service law and therefore, their claims must fail. Flaherty and McCarthy contend that if a new certification had been established their names would have been reached for consideration. BPD contends that Flaherty and McCarthy are wrong in this assessment. Based on the numbers, BPD states that it was extending the list to fill approximately 30 vacancies from this extended list. Had a new certification been established, before they could reach the Band 10 applicants, BPD would have had to reconsider all the veterans, Court Ordered List and Reemployment List. Under 2n+1, HRD would have only certified veterans through band 8<sup>6</sup>. Based on these figures, Band 10, where Flaherty and McCarthy

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<sup>6</sup>Pursuant to PAR Rule 9, when names have been certified to an appointing authority under PAR.08 and the number of appointments actually to be made is n, the appointing authority may appoint only from among the first 2n + 1 persons named in the certification willing to accept appointment.

are listed would never have been reached and therefore they are not aggrieved according to BPD. Second, BPD argues that Flaherty and McCarthy already had an opportunity to be considered for the position of Boston Police Officer. For the spring 2008 class, BPD requested that HRD certify specialized lists for Spanish, Haitian-Creole and female candidates. By requisitioning the specialized lists, BPD argues that Flaherty and McCarthy were reached for consideration whereas they would not have been reached if BPD only considered applicants off the main certification. If BPD had not requisitioned specialized lists, McCarthy and Flaherty would be incorporated only on the main certification. Flaherty and McCarthy are not aggrieved parties, according to BPD, since they were already processed and considered. BPD contests the Appellants' argument that additional recruiting for a subsequent academy class warrants that a new list be requisitioned. Rather, BPD argues that all actions it took with respect to the supplemental academy class were in compliance with civil service law and PAR Rules. BPD argues that the Appellants have failed to establish that they are aggrieved by the extension of the Certification List, and therefore the Commission must dismiss their appeals.

*HRD's argument in support of Motion for Summary Decision*

HRD, in its companion Motion for Summary Decision, cites many of the same arguments as BPD, but also argues more broadly that HRD's decision to extend the general certification was in accordance with basic merit principles because all applicants were fairly considered. According to HRD, upon the determination to extend the general certification, HRD in an effort to ensure all applicants would receive an opportunity to be considered and no applicants would be unfairly denied such opportunity, sent BPD all



military make-ups and reemployment applicants added since the original certification. Second, it takes BPD on average about six to eight months to complete the processing and screening of applicants. When BPD requested an extension from HRD it had been approximately seven months. In light of the fact that on average BPD needs approximately six to eight months and accounting for the high attrition rate of applicants, it was not unreasonable, according to HRD, to allow BPD to extend the certification. An unreasonable amount of time had not elapsed and therefore basic merit principles were met.

*Appellants' Argument in Opposition to Motions for Summary Decision*

The Appellants argue that they have been harmed and are “aggrieved” persons under G.L. c. 31, § 2(b) for the following reasons. Their names appear on Certification No. 271116 which is currently being used by BPD to hire 30 additional police officers to attend a winter police academy. The Appellants have signed this Certification indicating their willingness to be hired for employment off such certification; the BPD has currently reached their names on this certification in connection with its winter 2008 police academy; and has “deliberately skipped over them refusing to process them.” According to the Appellants, BPD’s actions and HRD’s inactions are not permitted by law or by HRD’s PAR rules.

The Appellants argue that BPD and HRD have been unable to demonstrate any other instance where an individual who has been reached for selection for a new BPD academy class off a certification has been denied the chance to complete the hiring process solely by reason of a disqualification from a prior and different certification and prior BPD academy class.

Further, the Appellants argue that BPD's claim that its current processing round to hire 30 additional police officers to attend its winter police academy is nothing more than a continuation of their previous 6 month hiring round which began in November of 2007 and resulted in their decision to hire 62 police officers to attend a spring police academy is without merit. Other than the fact that BPD is using the same general certification, Certification No. 271116, to hire candidates the 2 BPD Academies – Spring 2008 and December 2008- the Appellants argument that the separate processing leading up to them have nothing in common and BPD's and HRD's attempts to merge the two as one hiring round is "disingenuous, at best."<sup>7</sup>

Even if the Commission were to determine that BPD's processing leading up to and resulting in the spring police academy and its current processing leading up to the winter police academy are the same "hiring round," the Appellants' argument that BPD and HRD still cannot prevail for the following reasons. Certification No. 271116 was first issued in November 2007 to hire 20 police officers. 22 candidates were appointed this certification for the spring police academy. Thus, according to the Appellants, BPD hired 2 more candidates than the 20 which it originally requisitioned for on this certification. In July of 2008, the Certification was extended to hire an additional 30 police officers. Flaherty and McCarty have signed Certification No. 271116 and, according to them, have not been "reached, processed, removed or bypassed of such certification." Thus, they

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<sup>7</sup> The Appellants concede that BPD's and HRD's argument that veterans names who appear on Certification No. 27116 and were fully processed and bypassed of such certification in connection with the Spring 2008 BPD Academy may have some merit given that there is no basis under G.L. c. 31 or HRD's PAR Rules to permits an appointing authority to process a candidate twice off one certification. However, whether or not this Commission deems the Spring 2008 BPD Academy and the December 2008 BPD Academy as part of the "same hiring round," the Appellants argue that the fact still remains that there is nothing under G.L. c. 31 or HRD's PAR Rules that permits an appointing authority to skip over a candidates' name on a certification where such candidate has signed such certification willing to accept employment and where such candidate has otherwise not been processed, removed or bypassed off such certification.

argue that they have the right under G.L. c. 31 and HRD's PAR rules to be processed off this certification.

The Appellants argue that the fact that they were processed and bypassed 1 year ago off a special female PAR10 certification to hire 20 female officers, can not now strip them of their rights "lest the Civil Service Commission go down the slippery slope of rewriting G.L. c. 31 and HRD's PAR rules."

According to the Appellants, BPD's actions and HRD's inactions are "clearly in violation of basic merit principles" as they argue that BPD, with HRD's authorization, is not only skipping over all females on its current Certification No. 271116 (whose names appeared on a now expired special female PAR10 certification in connection with its spring police academy) but is also skipping over all Spanish speaking candidates whose names also appeared on a now expired PAR10 Spanish speaking list in connection with its spring police academy, and all Haitian Creole speaking candidates whose names also appeared on a now expired PAR10 Haitian Creole list in connection with its spring police academy. The Appellants argue that, "notwithstanding BPD's and HRD's claims to the contrary, arbitrarily skipping over individuals on a certification particularly where such individuals are minorities and members of a protected class, like women, does not comport with basic merit hiring principles."

***CONCLUSION OF THE MINORITY (BOWMAN, STEIN)***

HRD did not violate the civil service law or the Personnel Administration Rules when it allowed the Boston Police Department's request to extend an existing Certification, as opposed to requisitioning a new Certification.

As correctly argued by BPD and HRD, the civil service law requires only that “an appointing authority request to the administrator to certify names of persons for appointment to civil service positions,” when filling a class but do not require that each time an academy is held, a new list is required. PAR Rule 8 states that a certification list may be extended at the discretion of the Administrator for sound and sufficient reasons.

After a careful review of all the evidence in this case, the minority has concluded that HRD was justified in determining that BPD had sound and sufficient reasons for requesting an extension in this case and their decision to grant the request was not an abuse of the discretion allowed to them.

For all the reasons cited by BPD, the minority concludes that BPD provided sound and sufficient reasons for requesting the extension. Further, the practical effect of HRD’s decision allowed a greater number of candidates to be considered than would have been the case if BPD were forced to request a new requisition. The fact that this decision did not allow the Appellants to be considered for a second time, before other candidates could even be considered once, does not make the Appellants aggrieved persons under G.L. c. 31, § 2(b). Finally, the minority concludes that that Appellants’ argument that the actions of HRD and BPD were discriminatory against women and minorities is not supported by the record. As the record makes clear, the Boston Police Department through which many women and minorities, including the Appellants, were fully considered before others listed on the larger, general certification. The minority concludes Boston Police Department provided sound and sufficient reasons for seeking the extension in question and HRD’s decision to approve the request was consistent with basic merit principles, the civil service law and the Personnel Administration Rules.

***CONCLUSION OF THE MAJORITY (HENDERSON, TAYLOR, MARQUIS)***

The above majority adopts as its own: the Introduction, Facts, Statements, Argument and Conclusions (I through VI) as contained in the Appellant' Memorandum of Law in Support of its Motion for Summary Decision.

For the reasons listed in the majority conclusion, HRD and the City's Motions for Summary Decision are denied; the Appellants' appeals under Docket Nos. G1-08-184 & G1-08-185 are hereby *allowed*.

Pursuant to Chapter 310 of the Acts of 1993, the Commission hereby orders HRD and the BPD to take the following action:

The BPD and HRD are to begin immediate processing Flaherty and McCarthy off of Certification No. 271116 for the current police academy class with expeditious haste and reasonable accommodation and flexibility. If that goal or a similar goal is not attainable, as agreed upon by the parties; then HRD is hereby ordered to place their names at the top of the eligibility list for appointment to the position of police officer, so that their names appear at the top of the existing certification and/or the next certification that the Boston Police Department shall request from HRD, so the Appellants' names shall appear at the top of said certification. Therefore this certification shall be used for the next appointment to the position of police officer in the Boston Police Department, which shall be made by the Appointing Authority and the Appellants shall receive at least one opportunity for consideration for the position of police officer in the Boston Police Department

Civil Service Commission

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Daniel M. Henderson

Commission

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman - No; Henderson, Commissioner – Yes; Marquis, Commissioner – Yes; Stein, Commissioner, - No and Taylor, Commissioner, - Yes on January 29, 2009)

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. The motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:

Leah Barrault, Esq. (for Appellants)

Suzanne Faigel, Esq. (for HRD)

Sheila Gallagher, Esq. (for Appointing Authority)

**COMMONWEALTH OF MASSACHUSETTS  
BEFORE THE CIVIL SERVICE COMMISSION**

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FLAHERTY AND MCCARTHY, ) )  
Appellants ) )  
and ) ) **Case No. G1-08-184 & 185**  
BOSTON POLICE DEPARTMENT, ) )  
HUMAN RESOURCES DIVISION ) )  
Respondents. ) )

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**APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION  
FOR SUMMARY DECISION**

**I. INTRODUCTION.**

In November of 2007, Appellants Flaherty and McCarthy, were reached and processed for hire by the Boston Police Department (“BPD”) through a special PAR10 female police officer certification, Certification No. 271118, for a recruit class set to attend a police academy in the spring of 2008. They passed all aspects of the hiring process, but were informed that they did not pass the Human Resource Division’s physical agility test (“PAT”) and thus were bypassed and not sent to the spring police academy.<sup>8</sup> In June of 2008, McCarthy and Flaherty were reached through a general certification, Certification No. 271116, for a new recruit class going to a police academy some time in the winter of 2008. This time, both McCarthy and Flaherty were reached by reason of their high score on the civil service exam, and not by a PAR10 list. However, to their utter shock and surprise, each was informed by BPD that they would not be

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<sup>8</sup> Flaherty believes that she did, in fact, pass those parts of the agility test given to her, but she was informed that she had missed the pull down by a couple seconds. In any event, Flaherty and McCarthy were informed that they should not be concerned, and that since they had received the highest score, a Band 10, on the civil service entry level police exam, they would be reached again shortly when hirings were

processed any further off that certification solely by reason of the fact that they had failed the PAT and had been bypassed for the spring police academy.

HRD and BPD grossly misstate the grounds for Appellants' appeal which is clearly laid out in their August 4, 2008 appeal letter to this Commission. Appellants' names appear on a general certification, Certification No. 271116, which is currently being used by BPD to hire police officers to attend a winter police academy. The Human Resources Division ("HRD") issued this certification to BPD back in December of 2007 and, upon BPD's request in June of 2008, HRD extended the life of this certification beyond the normal 12 week shelf life for certifications. Appellants have signed Certification No. 271116 indicating their willingness to be hired for employment off this certification and to date BPD has not reached, fully processed, removed or bypassed Flaherty or McCarthy off this certification. Notwithstanding, BPD, with HRD's authorization, has skipped over Flaherty's and McCarthy's names on Certification No. 271116 and has refused to process them as part its current hiring round for the winter police academy.

Flaherty's and McCarthy's names now appear on Certification No. 271116, they have each signed this certification willing to accept employment, they have never been reached, processed, removed or bypassed off this certification, and BPD has now reached their names on this certification and has deliberately skipped over their names refusing to process them off such certification for its upcoming winter police academy. BPD's actions, as well as HRD's inactions, in denying Flaherty and McCarthy the right to be processed for employment where they have both been reached off the current certification

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made from a general certification, and they would be able to pass the PAT at that time. *See* Affidavits of Flaherty & McCarthy attached hereto as Exhibits L & M.



being used by BPD for its winter police academy are in clear violation of the Civil Service Laws, G.L. c. 31 et. al, as well as HRD's own Personnel Rules ("PAR Rules") which govern the processing of candidate for employment off certifications. Put simply, there is no provision within G.L. c. 31 or within HRD's PAR Rules that permits BPD to skip over a candidate's name on a certification where that candidate has signed willing to accept employment off such certification and where that candidate has not otherwise been reached, processed, removed or bypassed off that certification.

BPD's and HRD's only stated grounds for its actions (or inactions) are that Flaherty and McCarthy were reached, processed and bypassed nearly 1 year ago off a different and now expired PAR10 female certification in connection with a spring police academy which is now nearly at its conclusion. Importantly, Flaherty and McCarthy passed all aspects of BPD's hiring round including an extensive background check, drug test, medical examination and psychological examination. Flaherty's and McCarthy's bypass was based upon their failure to pass one small portion of HRD's PAT, a test which has long been thought to discriminate against women. Thus, BPD's actions and HRD's inactions in now skipping over Flaherty's and McCarthy's names on Certification No. 271116 are egregious not only in that both candidates have signed this certification and have not been reached, processed, removed or bypassed off this certification but also because they are being punished twice for a prior bypass which was grounded in their failure to purportedly pass HRD's discriminatory PAT, and was off a now expired special female certification used solely in connection with the processing and hiring for the now nearly completed spring police academy.

Worse, as detailed below, BPD, with HRD's authorization, is not only skipping over all females on its current Certification No. 271116 whose names also appeared on a now expired special PAR10 female certification in connection with its spring police academy but BPD is also skipping over all Spanish speaking candidates whose names also appeared on a now expired PAR10 Spanish speaking certification in connection with its spring academy, and all Haitian Creole speaking candidates whose names also appeared on a now expired PAR10 Haitian Creole certification in connection with its spring academy.<sup>9</sup> Arbitrarily skipping over individuals on a certification particularly where such individuals are minorities and members of a protected class, like women, clearly does not comport with basic merit hiring principles

For these reasons, as detailed below, this Commission must grant Appellants' Motion for Summary Decision and order BPD and HRD to begin immediately processing Flaherty and McCarthy off Certification No. 271116 for their winter police academy.

## **II. FACTS.**

On November 7, 2007, the BPD requisitioned several certifications<sup>10</sup> from HRD to hire approximately 73 new police officers. BPD requisitioned a special PAR 10 certification from HRD's open competitive list<sup>11</sup> from which to hire 20 female officers *See Exhibit A; see also HRD PAR10.* BPD requisitioned a special PAR10 certification

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<sup>9</sup> Additionally, BPD is skipping over all of the veterans on its current Certification No. 271116 on the grounds that such individuals were already reached, fully processed and bypassed off this certification in connection with BPD's spring police academy. *See* fnte 9.

<sup>10</sup> A certification is the designation to the appointing authority by the administrator of sufficient names from an eligible list or register for consideration of the applicants' qualifications for appointment pursuant to the Personnel Administration Rules. *See* HRD's Personnel Administration Rules ("PAR"), PAR.02.

<sup>11</sup> The open competitive list is comprised of those individuals who took HRD's open competitive examination for an original appointment to the position of Boston police officer. *Id.* This list would include females, Spanish speakers, and Haitian Creole speakers.

from HRD's open competitive list from which to hire 20 Spanish speaking officers. *See* Exhibit B; *see also* HRD PA10. BPD requisitioned a special PAR10 certification from HRD's open competitive list from which to hire 13 Haitian Creole speaking officers. *See* Exhibit C; *see also* HRD PAR10. Lastly, BPD requisitioned a certification from HRD's open competitive list HRD from which to hire 20 additional police officers. *See* Exhibit D.

On November 16, 2007, HRD issued Certification No. 271118 to hire 20 female officers. *See* Exhibit E. **Appellants Flaherty and McCarthy appeared on this certification and both Flaherty and McCarthy signed such certification indicating their willingness to be hired off this certification for 20 female police officers. *Id.***

That same day, HRD issued Certification Nos. 271117 and No. 271119 to hire 20 Spanish speaking 13 Haitian-Creole speaking officers respectively. *See* Exhibits F & G.

On November 16, 2007 and December 13, 2007 HRD issued Certification No. 271116 ("general certification") to hire 20 police officers off the open competitive list. *See* Exhibit H. Initially, Certification No. 271116, the general certification, was comprised of veterans. *See* Exhibit H; HRD's motion, Jennifer Murphy Affidavit, ¶6. Certification No. 271116 was later amended to include civilians who on the open competitive examination scored in Band 10. *See* Exhibit I; HRD's motion, Jennifer Murphy Affidavit ¶7. **Appellants Flaherty and McCarthy appeared on the amended Certification No. 271116 with the other Band 10 candidates and both Flaherty and McCarthy signed this certification indicating their willingness to be hired off this certification for 20 police officers.**<sup>12</sup> *See* Exhibit I.

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<sup>12</sup> Though not requested, HRD issued to BPD 2 additional certifications, a re-employment certification and a Court Ordered certification, from which to hire police officers. *See* Exhibits K & J.

BPD conducted drug tests and extensive background investigations of the nearly 500 candidates certified by HRD and, after 6 months, BPD issued conditional offers of employment to 126 candidates. *See* BPD's Motion, Exhibit C, Affidavit of Robin Hunt. Those 126 candidates underwent a medical, psychological and HRD's PAT and of those candidates 62 were hired and sent to the spring police academy. *Id.* **22 candidates where hired or "appointed" off general certification No. 271116.** *See* Exhibits I, & V. **Thus, BPD hired 2 more candidates than the 20 which it originally requisitioned for on this certification.** *See* Exhibits D, I & V. Of those 62 candidates hired and currently attending the spring police academy, 25 candidates have since dropped/failed out and 37 candidates remain and are set to graduate and join the ranks of BPD in December of 2008.<sup>13</sup> *See* BPD's motion, Affidavit of Robin Hunt, Exhibit C.

Appellants Flaherty and McCarthy were processed off Certification No. 271118, the special PAR10 female certification, and received conditional offers of employment to attend the spring police academy off such certification. *See* Exhibits L & M, Affidavits of Flaherty & McCarthy; *see also* Exhibits O & P . BPD correctly points out that Flaherty and McCarthy were not reached or fully processed off the general certification, Certification No. 271116, Exhibit I, in connection with the spring police academy. *See* BPD's Motion p. 2 ("While Flaherty and McCarthy would not be reached off [271116], they were considered because they were included as part of the Female List."); p. 4 ("Flaherty and McCarthy received consideration prior to the Department reached Band 10, as they were both included on the Female list.")

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<sup>13</sup> Under the Civil Service law, G.L. c. 31, § 61, police officers must "actually perform the duties of such position on a full-time basis for a probationary period of 12 months before he shall be considered a full-time tenured employee in such position. *See Leominster v. Internl Bhd., Local 338*, 33 Mass.App.Ct. 121, 127 (1992).

HRD's motion misstates Appellants' position as it relates to candidates who have signed multiple certified lists. *See* HRD's Motion, ¶ 21-22, p. 6. HRD has long held that in the instance where a candidate is reached on multiple certified lists and signs all such lists the appointing authority must ultimately decide which list from which to process that candidate. *See* Exhibit N. Here, BPD chose to process Flaherty and McCarthy off the special PAR10 female certification, Certification No. 271118, and not the general certification, Certification No. 271116, in connection with their spring police academy. *See* Exhibits O & P. Appellants Flaherty & McCarthy were given conditional offers of employment and passed the medical and psychological examinations, however, each failed one small portion of the PAT and were consequently bypassed off Certification No. 271118, the female certification, and thus not hired and sent to spring academy.<sup>14</sup> *Id.*

On or about July 14, 2008, BPD made the decision because of the "attrition rate at the Academy" to hire 30 additional police officers and seat a winter police academy. *See* BPD's Motion, Exhibit C, Affidavit of Robin Hunt, ¶11. BPD wrote to HRD and requested that HRD pursuant to HRD PAR.08(2)(c) extend Certification No. 271116, the general certification. *See* Exhibit S. BPD did not request to extend Certification Nos. No. 271118, female certification, No. 271117, Spanish speaking certification, Certification No. 271119, Haitian-Creole speaking officers, or the re-employment certification and a Court Ordered certification, from which to hire police officers and

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<sup>14</sup> HRD has confirmed that Certification No. 271118, the special PAR10 female certification, was not extended and has expired. *See* Exhibit Q. Candidates with scores lower than Flaherty and McCarthy were hired off Certification No. 271118. *See* Exhibits I, & V. Thus, both candidates were "bypassed" and have appeal rights with this Commission. To date, Flaherty and McCarthy have not received letters from HRD approving BPD's bypass. *See* Exhibits L, M, O & P. However, HRD has begun sending out bypass letters to candidates off Certification No. 271117, the Spanish speaker PAR210 certification, which was also not

those lists have expired. *See* HRD Par.08(2)(c); *see also* fnte 7. As grounds, BPD explained to HRD that the civilian Band 10 candidates on Certification No. 271116, the general certification, Exhibit I, had not been processed for the spring academy beyond submitting their recruit applications, that the Band 10 candidates on that certification had been “placed on hold,” and that the “hiring process would be delayed and unnecessarily burdensome if the Department had to requisition a new certification.” *See* Exhibit S; BPD Motion, Affidavit of Robin Hunt, Exhibit C, ¶11.

Appellants Flaherty’s and McCarthy’s names appear on Certification No. 271116, the general certification, Exhibit I, because they performed well on the civil service examination and received a score in the highest band, Band 10. *See* Exhibits I, L & M. Flaherty and McCarthy signed this Certification back in December of 2007 indicating their willingness to be hired off this certification, however, they were not reached off this certification in connection with the spring police academy. *See* Exhibits I, L & M; *see also* BPD’s motion, pp. 2 and 4. Flaherty and McCarthy were reached, processed and bypassed off Certification No. 271118, the female PAR10 certification, and thus excluded from the spring police academy. *See* Exhibits L & M. Notwithstanding that Flaherty and McCarthy’s names appear on Certification No. 271116, and notwithstanding that both Flaherty and McCarthy signed such certification indicating their willingness to be hired off such certification, BPD has recently reached their names in connection with its winter police academy and has skipped over their names and has refused to process them off this certification. As grounds, BPD cites to Flaherty’s and McCarthy’s earlier processing off a special PAR10 female certification, Certification No. 271118, bypass

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extended and expired and appeals are pending before this Commission related to such expired certifications. *See* Exhibit R; *see also* *Chaves v. BPD*, G1-08-151, now pending before this Commission.

and denial of entry into the spring police academy. *See* BPD's Motion, Affidavit of Robin Hunt, Exhibit C, ¶¶ 11-18.

The Band 10 candidates on Certification No. 271116, Exhibit I, were only "partially processed" off this certification in connection with the spring police academy and did not undergo a medical, psychological or physical exam. *See* BPD's motion, p. 5 ("the Department...when screening candidates for the Spring 2008 class, had already begun partially processing the remaining Band 10 candidates. As part of this processing, the Department had held an orientation for the Band 10 candidates, received all the candidate's applications, fingerprinted, drug tested and interviewed these candidates.") Both Flaherty and McCarthy have completed a recruit application and background investigation, have already undergone a finger-printing, have already undergone and passed a drug test, and have also already undergone and passed a medical examination. *See* Exhibits L & M.

BPD, with HRD's authorization, has also skipped over and has refused to process, hire, and send to its winter police academy the following candidates: a) all females whose names appear on Certification No. 271116, Exhibit I, if they also appeared on Certification No. 271118, the female certification (now expired and closed), Exhibit E, and; b) all Spanish and Haitian Creole speaking men and women whose names appear Certification no. 271116, Exhibit I, if they also appeared on Certification Nos. 271117 and No. 271119, the Spanish and Haitian Creole speaker special certifications (now

expired and closed), Exhibits F & G. *See* Exhibit Q; *see also* BPD's Motion, Affidavit of Robin Hunt, Exhibit C; HRD's Motion, Affidavit of Jennifer Murphy, Exhibit C.<sup>15</sup>

Flaherty and McCarthy filed this appeal. *See* Exhibits T & U. As grounds, Counsel for the Appellants argued in the appeal letter:

On behalf of Laurene Flaherty and Sheila McCarthy I hereby appeal the actions or inactions of the Massachusetts Human Resources Division and the Boston Police Department **in denying Ms. Flaherty and Ms. McCarthy the right to get processed for the new recruit class going to the Academy in the late fall/early winter of 2008 despite the fact that both of their names were reached off the certification (Certification No. 027116).....**

...Both HRD and the BPD have informed Ms. Flaherty and Ms. McCarthy that despite their band ten scores, and **despite their being reached on the current certification being used by the BPD** to fill their upcoming recruit class, neither would be processed by reason of the fact that they had been previously processed this spring (2008) but had failed the physical agility test....

...BPD' actions, as well as HRD's inactions, **in denying Ms. Flaherty and McCarthy the right to be processed for employment where they were both reached off the current certification used by BPD for their upcoming recruit class** are in clear violation of G.L. c. 31, et. al, as well as HRD's own Personnel Rules which governs the processing of candidate for employments off certifications...

*See* Exhibits T & U. (emphasis added).

At Pre-Trial and Status Conference, this Commission asked how many other female, Spanish Speaking and Haitian Creole Speaking candidates are in the same position as Appellants and would benefit from an affirmative ruling by this Commission in this case. Specifically, the Commission inquired as to how many female candidates Spanish speaking candidates, and Haitian-Creole speaking candidates signed Certification No. 271116 back in December of 2007, Exhibit I, and have now been reached and skipped over on such certification by BPD during its present hiring round for

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<sup>15</sup> Additionally, BPD is skipping over all of the veterans on its current Certification No. 271116 on the grounds that such individuals were reached and fully processed off this certification in connection with BPD's spring police academy. *See* fnte 9.



its winter police academy on the grounds that such candidates were processed and bypassed off expired Certification Nos. 271118 (female list), Nos. 271117 (Spanish speaking) and No. 271119 (Haitian-Creole speaking) in connection with its spring police academy.

There are a total eight **8** individuals in the same situation as Flaherty and McCarthy: Walter Ace, Jennifer Crosby, Jessie Harvey, Lorece Hawkins, David Mercado, Aristidez Perez, Manuel Roberto, and Carmen Smith. *See* Exhibits V (Authorization of Employment Form 14) & W.

**III. BPD'S ACTIONS AND HRD'S INACTIONS IN SKIPPING OVER AND REFUSING TO PROCESS FLAHERTY AND MCCARTHY'S NAMES ON CERTIFICATION NO. 271116 WHERE BOTH HAVE SIGNED INDICATING THEIR WILLINGNESS TO BE HIRED OFF SUCH CERTIFICATION AND WHERE NEITHER TO DATE HAVE BEEN REACHED, PROCESSED, REMOVED OR BYPASSED OFF SUCH CERTIFICATION VIOLATES G.L. C. 31 AND HRD'S PAR RULES**

Notwithstanding BPD's and HRD's assertions to the contrary, Flaherty and McCarthy have been harmed and are "aggrieved" persons under G.L. c. 31, §2(b). HRD and BPD have grossly misstated and utterly ignore the grounds for Appellants' appeal which is clearly laid out in their August 4, 2008 appeal letter to this Commission. Appellants' names appear on a general certification, Certification No. 271116, Exhibit I, which is currently being used by BPD to hire 30 additional police officers to attend a winter police academy. HRD issued this certification to BPD in December of 2007 and, upon BPD's request in July of 2008, HRD extended the life of this certification beyond its normal 12 week shelf life. *See* HRD's PAR.08(2)(c). Appellants have signed the general Certification No. 271116 indicating their willingness to be hired for employment

off such certification and to date BPD has not reached, processed, removed or bypassed the Appellants off this certification. Notwithstanding, BPD, with HRD's authorization, has now reached Appellants' names on this certification in connection with its winter police academy and have skipped over and refused to process them off this certification.

To become a police officer in a municipality where the civil service law applies, an individual must first pass a statewide civil service examination. *See* Mass. Gen. Laws ch. 31, §§ 6, 59. Based on the examination results, the HRD Administrator ranks the names of those who pass on the "eligible list." *Id.* §§ 25, 26. To hire for a police officer vacancy, a municipality's appointing authority submits a request to the HRD Administrator, who then certifies "from the eligible list sufficient names of persons for consideration" in rank order.<sup>16</sup> *Id.* § 6. Once the HRD certifies a list to a municipality, each candidate must sign the certified list and express a willingness to accept employment in order to be considered for appointment. Mass. Gen. Laws ch. 31, § 25. According to the HRD's PAR Rules, the appointing authorities for a municipality "may appoint only from among the first  $2n + 1$  persons named in the certification willing to accept appointment," where "n" is the number of vacancies.<sup>17</sup> *See* HRD PAR Rule 9(1).

It is well settled that an appointing authority must proceed in strict numerical or rank order on the certification issued to it by HRD in making its hiring decisions, selecting those who scored highest on the exam downward until the desired number of applicants are made. *See Cotter v. City of Boston*, 193 F.Supp.2d (D. Mass 2002); *Bradley v. City of Lynn*, 443 F.Supp.2d 145 (D. Mass. 2006); *see also*

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<sup>16</sup> In addition to the statutory priority, the appointing authority may have HRD rank residents ahead of non-residents, *see id.* § 58, and may request special certification lists for candidates with certain qualifications, such as a woman or a candidate with Spanish-language abilities. *See* HRD PAR Rule 8(4).

<sup>17</sup> For 5 vacancies, for example, a municipality may only appoint from the first eleven named in the certification willing to accept.

*MacHenry v. Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, (Mass. App. Ct. 1996).

By statute, to skip over and/or not hire an individual's name on a certified list a municipality must submit a written statement to the HRD Administrator a request a PAR 03 removal, a PAR09 removal or a bypass. *See* HRD PAR.03 (failure to prove qualifications established by the administrator may be grounds for removal from an eligible list...); PAR.09 (if an appointing authority concludes the appointment of a person whose name has been certified to it would be detrimental to the public interest, it may submit to the administrator a written statement giving in detail the specific reasons substantiating such a conclusion...); Mass Gen. Laws ch. 31, § 27.

This Commission must give deference to the plain meaning of the Civil Service Statue as well as HRD's PAR rules which interpret them. *See Weinburgh v. City of Haverhill*, 07-P-1692 Appeals Court (2008), attached hereto as Exhibit X.

Putting aside whether HRD's extension of Certification No. 271116 beyond its normal 12 week shelf life was proper, and putting aside whether had such extension been denied Flaherty and McCarthy would have been reached and processed for BPD's winter police academy off a new certification, the fact of the matter is that Flaherty's and McCarthy's names now appear on Certification No. 271116, Exhibit I, they each signed this certification willing to accept employment, they have never been reached, processed, removed or bypassed off this certification, and BPD has currently reached their names on this certification in connection with its winter 2008 police academy and has deliberately skipped over them refusing to process them. BPD's actions and HRD's inactions are simply not permitted by law or by HRD's PAR rules.

The only grounds cited by BPD in support of its skipping over Flaherty's McCarthy's names on Certification No. 271116, Exhibit I, is the fact that 1 year ago today they were processed and bypassed off a now expired special PAR10 female certification used in a hiring round for the now nearly completed spring police academy. Again, Flaherty and McCarthy passed all aspects of BPD's hiring round including an extensive background check, drug test, medical examination and psychological examination. Flaherty's and McCarthy's bypass was based upon their failure to pass one small portion of HRD's PAT, a test which, as detailed below, has long been thought to be discriminatory against women.

Though asked by this Commission, BPD and HRD have utterly failed to demonstrate 1 instance in the history of BPD hiring where an individual who has been reached for selection for a new BPD academy class off a certification has been denied the chance to complete the hiring process solely by reason of a disqualification from a prior and different certification and prior BPD academy class. BPD's and HRD's actions are truly without precedent and as detailed above are not grounded in any provision under the Civil Service law or under HRD's PAR Rules.

Moreover, and in any event, BPD's claim to this Commission that its current processing round to hire 30 additional police officers to attend its winter police academy is nothing more than a continuation of their previous 6 month hiring round which began in November of 2007 and resulted in their decision to hire 62 police officers to attend a spring police academy is without merit. In November of 2007, HRD gave BPD nearly 500 candidates to process and hire for entry into its Spring 2008 BPD Academy. Of those 500 candidates, BPD gave conditional offers of employment to 126 candidates and

62 of those candidates passed BPD's stringent vetting process and were hired and sent to the spring police academy.<sup>18</sup> Despite its original purported intent to hire approximately 80 police officers, BPD made the decision to end its processing round on or about June 10, 2008 at 62 candidates and begin its spring police academy. See Exhibit V

(Authorization of Employment Form 14). As detailed above, **22 candidates were hired or "appointed" off general certification No. 271116 for the spring police academy.** See Exhibits I, & V. **Thus, BPD hired 2 more candidates than the 20 which it originally requisitioned for on this certification.** See Exhibits D, I & V. Female, Spanish, and Haitian Creole special PAR 10 certifications subsequently expired and candidates bypassed off those certifications like Appellants in this case have filed and will continue to fill bypass appeals with this Commission. See Exhibits O, P, Q & R.

Unfortunately, 1 month into the spring academy, 12 candidates dropped or failed out and only 37 candidates remain and are set to graduate and join the ranks of BPD in December of 2008. Accordingly, on or about July 14, 2008, BPD made the decision because of the "attrition rate at the Academy" to hire 30 additional police officers and seat a new winter police academy. BPD requested an extension on Certification 271116 because it had not fully processed the Band 10 candidates on that certification and BPD wanted to avoid having to take the time to get a new certification issued from HRD and the expense of re-processing all of the candidates. BPD's current processing will result in the hiring of 30 new police officers who will attend the 7-month winter police academy and who will graduate with different seniority dates and status than those who were hired earlier this year and attended the spring police academy. Other than the fact that BPD is using the same general certification, Certification No. 271116, to hire

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<sup>18</sup> This Commission has raised concerns regarding BPD's intense psychological exam. See Exhibit Y.

candidates the 2 BPD Academies – Spring 2008 and December 2008- and the intensive and separate processing leading up to them have nothing in common and BPD's and HRD's attempts to merge the two as "one hiring round" is disingenuous, at best.<sup>19</sup>

Even if this Commission was to determine that BPD's processing leading up to and resulting in the spring police academy and its current processing leading up to the winter police academy are the same "hiring round," BPD and HRD still cannot prevail. Certification No. 271116 was first issued in November of 2007 to hire 20 police officers. See Exhibit I. As detailed above, **22 candidates were hired or "appointed" off general certification No. 271116 for the spring police academy.** See Exhibits I, & V. **Thus, BPD hired 2 more candidates than the 20 which it originally requisitioned for on this certification.** In July of 2008 it was extended to hire an additional 30 police officers. See Exhibit S. Flaherty's and McCarthy's names appear on Certification No. 271116 because they studied hard and scored the highest possible civil service score, Band 10. See Exhibits L & M. Flaherty and McCarty have signed Certification No. 271116 and have not been reached, processed, removed or bypassed of such certification. Thus, they have the right under G.L. c. 31 and HRD's PAR rules to be processed off this certification and to compete for employment against other male and minority candidates who also scored in Band 10. The fact that Flaherty and McCarthy were processed and bypassed 1 year ago off a special female PAR10 certification to hire 20 female officers, a

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<sup>19</sup> BPD's and HRD's argument that veterans names who appear on Certification No. 27116 and were fully processed and bypassed of such certification in connection with the Spring 2008 BPD Academy may have some merit given that there is no basis under G.L. c. 31 or HRD's PAR Rules to permits an appointing authority to process a candidate twice off one certification. However, whether or not this Commission deems the Spring 2008 BPD Academy and the December 2008 BPD Academy as part of the "same hiring round," the fact still remains that there is nothing under G.L. c. 31 or HRD's PAR Rules that permits an appointing authority to skip over a candidates' name on a certification where such candidate has signed such certification willing to accept employment and where such candidate has otherwise not been processed, removed or bypassed off such certification.

certification which is now expired and was used only in connection with the spring police academy which is now nearly concluded, cannot now strip Flaherty and McCarthy of their rights lest the Civil Service Commission go down the slippery slope of rewriting G.L. c. 31 and HRD's PAR rules.

Moreover, as detailed above, **re-screening Flaherty and McCarthy for the winter police academy would not have eliminated the possibility of BPD adding additional officers in 2008, and would not have been costly to the Department.** The Band 10 candidates on Certification No. 271116, Exhibit I, were only “partially processed” off this certification in connection with the spring police academy and had not undergone a medical, psychological or physical exam. *See* BPD's motion, p. 5 (“the Department...when screening candidates for the Spring 2008 class, had already begun partially processing the remaining Band 10 candidates. As part of this processing, the Department had held an orientation for the Band 10 candidates, received all the candidate's applications, fingerprinted, drug tested and interviewed these candidates.”) Both Flaherty and McCarthy have completed a recruit application and background investigation, have already undergone a finger-printing, have already undergone and passed a drug test, and have also already undergone and passed a medical examination. *See* Exhibits L & M. Thus, BPD's goal in extending Certification No. 271116 to avoid “eliminating the possibility of additional officers in 2008” and “to avoid “extreme costs” would not have and is not thwarted by their having to process Flaherty and McCarthy off Certification, No. 271116.

For these reasons, this Commission must grant Appellants' Motion for Summary Decision.

**IV. BPD'S ACTIONS AND HRD'S INACTIONS IN SKIPPING OVER FEMALE AS WELL AS SPANISH AND HAITIAN CREOLE CANDIDATES WHO HAVE SIGNED 271116 INDICATING THEIR WILLINGNESS TO BE HIRED OFF SUCH CERTIFICATION ARE ARBITRARY AND DO NOT COMPORT WITH BASIC MERIT PRINCIPLES**

As detailed above, the only grounds cited by BPD in support of its skipping over Flaherty's McCarthy's names on Certification No. 271116 is the fact that 1 year ago today they were processed and bypassed off a now expired special female PAR10 certification used in a hiring round for the now nearly completed spring police academy. Again, Flaherty and McCarthy passed all aspects of BPD's hiring round including an extensive background check, drug test, medical examination and psychological examination. Flaherty's and McCarthy's bypass was based upon their purported failure to pass one small portion of HRD's PAT. In any event, Flaherty believes that she did, in fact, pass those parts of the agility test given to her, but she was informed that she had missed the pull down by a couple seconds. *See* Exhibit L. Flaherty and McCarthy were informed that they should not be concerned, and that since they had received the highest score, a Band 10, on the police exam, they would be reached again shortly when hirings were made from a regular certification, and they would be able to pass it at that time. *See* Exhibits L & M.

HRD's PAT has long been thought to be discriminatory against women. Indeed, on March 10, 2006, there was an article in the Boston Globe entitled "Leaders Calling for Review of Physical Part of Police Test." *See* Exhibit Z. In that article the Commissioner of the Boston Police Department and the Chief of the Worcester Police Department argued that the physical agility test is discriminating against women "at a time when



chief's are trying to increase the number of women on the force.” The article went on to point out that in the past seven months “64% of female candidates have failed” the physical agility test, while less than 8% of men have failed. *Id.* It is striking that of the 100+ females on the special female certification, Certification No. 271118, approximately 10 were actually hired and permitted entry into BPD's spring police academy. *See Exhibits I, & V.*

Thus, BPD's actions, and HRD's inactions, in skipping over Flaherty's and McCarthy's names on Certification No. 271116 are egregious not only in that both candidates have signed such certification and have not been reached, processed, removed or bypassed off such certification but also because they are being punished twice for a prior bypass which was grounded in their failure to purportedly pass HRD's PAT, a test which has long been thought to discriminate against women, and was off a now expired special female certification used solely in connection with the processing and hiring for the now nearly completed spring police academy. BPD's actions and HRD's inactions are clearly in violation of basic merit principles. Basic merit principles, as defined in the Massachusetts Civil Service laws, M.G. L. c. 31, §1, require that applicants be selected and advanced on the basis of their relative ability, knowledge and skills, assured fair and equal treatment in all aspects of personnel administration, and that they be protected from arbitrary and capricious action. *Flynn v. Civil Service Commission*, 15 Mass. App. Ct. 206, 444 N.E.2d 407 (1983).

Worse, detailed above, BPD, with HRD's authorization, is not only skipping over all females on its current Certification No. 271116 whose names appeared on a now expired special female PAR10 certification in connection with its spring police academy

but BPD is also skipping over all Spanish speaking candidates whose names also appeared on a now expired PAR10 Spanish speaking list in connection with its spring police academy, and all Haitian Creole speaking candidates whose names also appeared on a now expired PAR10 Haitian Creole list in connection with its spring police academy.<sup>20</sup> Notwithstanding BPD's and HRD's claims to the contrary, arbitrarily skipping over individuals on a certification particularly where such individuals are minorities and members of a protected class, like women, does not comport with basic merit hiring principles

For these reasons, this Commission must grant Appellants' Motion for Summary Decision.

**V. SHOULD THIS COMMISSION FIND IN APPELLANT'S FAVOR THE REMEDIAL IMPACT ON CANDIDATES NOT PART OF THIS CASE IS MINOR WHERE ONLY 8 INDIVIDUALS ARE IN A SIMILAR PLACE TO THAT OF APPELLANTS AND WOULD BENEFIT FROM AN AFFIRMATIVE RULING FROM THE COMMISSION IN THIS CASE**

At Pre-Trial and Status Conference, this Commission asked how many other female, Spanish Speaking and Haitian Creole Speaking candidates are in the same position as Appellants and would benefit from an affirmative ruling by this Commission in this case. Specifically, the Commission inquired as to how many female candidates Spanish speaking candidates, and Haitian-Creole speaking candidates signed Certification No. 271116 back in December of 2007 and are now being skipped over on such certification by BPD during its present hiring round for its winter police academy on the grounds that such candidates' were reached, processed and bypassed off expired

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<sup>20</sup> Additionally, BPD is skipping over all of the veterans on its current Certification No. 271116 on the grounds that such individuals were reached and fully processed off this certification in connection with BPD's spring police academy. See fnte 9.

Certification Nos. 271118 (female list), Nos. 271117 (Spanish speaking) and No. 271119 (Haitian-Creole speaking).

There are a total **8** individuals in the same situation as Flaherty and McCarthy:

[REDACTED]

[REDACTED]. See Exhibits V & W. Thus, should this

Commission find for the Appellants the remedial impact on Similarly situated individuals not currently part of this case is minor and manageable.

## **VI. CONCLUSION.**

For these reasons, as detailed above, this Commission must grant Appellants' Motion for Summary Decision and order BPD and HRD to begin immediately processing Flaherty and McCarthy off Certification No. 271116 for their winter police academy.

Respectfully submitted,

**FLAHERTY & MCCARTHY**

By their counsel,

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Dated: November 19, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on November 19, 2008 a copy of the foregoing document was served by facsimile and first class mail to counsel of record.

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Leah Marie Barrault, Esq.