COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

MICHAEL R. GALLAGHER,
Appellant

v.

G1-07-63

CITY OF LEOMINSTER,
Respondent

Appellant's Attorney:	Brian E. Simoneau 161 Worcester Road, Suite 200 Framingham, MA 01701 508-881-1119 508-302-0212 (fax) Brian@Policelaborlaw.com
Respondent's Attorney:	Brian M. Maser Kopelman and Paige, P.C. 101 Arch Street, 12th Floor Boston, MA 02110 (617) 654-1725 (617) 654-1735 (fax) BMaser@k-plaw.com
Commissioner:	Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), Appellant, Michael R. Gallagher, (hereinafter "Gallagher" or Appellant") seeks review of the Personnel Administrator's decision to accept the reasons of the City of Leominster (hereinafter "Appointing Authority", "City" or "the Department") for bypassing him for original appointment to the position of Permanent Full Time Police Officer. A full hearing was held on October

31, 2007, at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. The hearing was stenographically recorded and the transcript (298 pages) was designated as the official record of the proceeding.

FINDINGS OF FACT

Twenty-two (22) exhibits were entered into evidence at the hearing, numbered Exhibit 1-22, (Exhibits 11-17 taken de bene) based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

1. Mr. Peter F. Roddy, Leominster Police Chief
2. Mr. Thomas McDermott, Leominster Police Detective
3. Mr. Patrick LaPointe, Leominster DPW Director

For the Appellant:

1. Mr. Michael R. Gallagher, the Appellant
2. Mr. Scott Vecchi

And the reasonable inferences there from, I make the following findings of fact:

1. The Appellant took and passed the permanent full-time municipal police officer civil service examination. (Stipulation of Facts at # 3).

2. As a result of the Appellant's examination score, he was placed at the top of the eligible list for Certification No.: 260719. (Stipulation of Facts at # 4).

3. The Appellant signed the eligible list, indicating his willingness to accept appointment to the position. (Stipulation of Facts at # 6).

4. The Respondent filled three positions from Certification No.: 260719. The names of the three candidates selected for appointment were ranked lower on the certification than the Appellant's name. (Stipulation of Facts at # 8).

5. On or about January 8, 2007, Police Chief Peter F. Roddy notified the Commonwealth's Human Resources Division ("HRD") he was bypassing the Appellant for appointment for the position of permanent full-time police officer for the City of Leominster. Chief Roddy bypassed the Appellant because his "background check reveals him an unsuitable person for the position of police officer." (Stipulation of Facts at # 9, Exhibit 5).

6. The City did not offer positive reasons for selecting the Appointees. However, Chief Roddy admitted in testimony that he had considered the Appellant's military record as a positive factor in evaluating his candidacy. (Stipulation of Facts at # 10, Exhibit 5, Testimony of Roddy).

7. HRD accepted the Department's reasons for bypassing the Appellant. (Stipulation of Facts at # 11).

8. The Appellant filed a timely appeal. (Stipulation of Facts at # 13).

9. The Appellant is employed as a heavy equipment operator for Newbrough Construction. He is 32 years old and is married. (Testimony of Appellant, Tr. 255-256).

10. The Appellant is also employed as a part-time firefighter / Emergency Medical Technician for the Town of Stow, Massachusetts. (Testimony of Appellant, Tr. 256).

11. In the early 1990s, the Appellant served as an infantryman with the United States Marine Corps. (Testimony of Appellant, Tr. 261). He then joined the Army National Guard, where he continues to serve. From the mid 1990s to approximately 2003, he served as a squad leader and team leader. During this time, he was deployed to

Yugoslavia. (Testimony of Appellant, Tr. 261). In 2006, he was deployed to Fallujah, Iraq, where he was part of a six man scout sniper team. (Testimony of Appellant, Tr. 262).

12. In connection with his public safety and military positions, the Appellant has undergone specialized training in such areas as emergency medicine and Enhanced 911 communications. (Testimony of Appellant, Tr. 256-257, Exhibits 18-19).

13. The Appellant has been awarded numerous commendations, medals, and certificates of appreciation by the U.S. Military. Documentation for these various commendations, certificates, medals and awards were submitted by the Appellant to the Department as part of his application packet. (Testimony of Appellant, Tr. 265-273, Exhibits 20-22).

14. In June 2001, the Appellant was awarded the Navy Achievement Medal for excellent performance. This medal was awarded by the Appellant's Lieutenant Colonel and Gunnery Sergeant. (Testimony of the Appellant, Tr. 268-272, Exhibits 21).

15. In May 2006, the Appellant's commanding officer awarded him a Citation for "superior performance as a corpsman." The Citation distinguished the Appellant for his assembly of "custom training package tailored to the needs of a sniper on the modern battlefield." The Citation also noted that the Appellant assembled this training package "on his own initiative and without anyone evens suggesting to do so." (Exhibit 22, Testimony of the Appellant, Tr. 272).

16. The background check referred to in Chief Roddy's letter to HRD was conducted by Detective Thomas McDermott. (Testimony of McDermott, Tr. 17, Exhibit 7).

17. Detective McDermott has no specialized training in conducting recruit background investigations. (Testimony of McDermott, Tr. 27). He testified that he has conducted "one or two dozen" such investigations. (Testimony of McDermott, Tr. 27).

18. At no time did Detective McDermott interview or speak with the Appellant regarding his background or the results of the background investigation. (Testimony of McDermott, Tr. 30-31). McDermott agreed that "there are two sides to every story" and, with respect to the negative information he uncovered, he did not get the Appellants "side of the story." (Testimony of McDermott, Tr. 26-27, 31, 39, 88).

19. After Det. McDermott completed his background investigation and submitted it to Chief Roddy, the Chief specifically instructed Detective McDermott to interview DPW Director Patrick LaPointe. (Testimony of McDermott Tr. 48-49). Chief Roddy gave no such instructions with respect to the other witnesses. (Testimony of McDermott Tr. 48-49).

20. Chief Roddy testified that because officers are given a cruiser every day, an applicant's driving record and habits are of concern. (Testimony of Roddy, Tr. 162).

21. Chief Roddy submits, as a bypass reason, that the Appellant's "[d]rives (sic) history reveals six (6) infractions to include three (3) motor vehicle accidents." (Exhibit 5). However, Det. McDermott testified that the Appellant was not found responsible for *any* of the infractions and probably did not commit them. (Testimony of McDermott, Tr. 66) (Emphasis added). Indeed, Chief Roddy admitted the Appellant had never been found responsible for a civil motor vehicle infraction in his life. (Testimony of Roddy, Tr. 211).

22. Det. McDermott wrote in his report that the Appellant had been cited and found not responsible for the criminal offense of "failure to stop for a police officer." (Testimony of McDermott, Tr. 52, Exhibit 8). According to Chief Roddy, this is a serious violation that indicates a willful disregard for the law. (Testimony of Chief Roddy, Tr. 207). In fact, Chief Roddy testified the offense "was certainly a concern" and that "[i]n particular failing to stop for a police officer, that was a concern as well as some of the other violations." (Testimony of Roddy, Tr. 162).

23. However, Det. McDermott admitted on cross examination that the "failure to stop" was probably not the criminal offense of "failure to stop for a police officer," but rather, the less serious civil infraction of "failing to stop for a stop sign or red light." (Testimony of McDermott, Tr. 52-61.).

24. On cross examination, when it was pointed out to Chief Roddy that the Appellant was found not responsible for the less serious civil infraction of failure to stop for a stop sign, Roddy dismissed what he had previously characterized as a serious violation of particular concern, saying that "it didn't matter." (Testimony of Roddy, Tr. 209-210).

25. Another incident mentioned in Det. McDermott's report was that the Appellant left the scene of a property damage accident in Carlisle, Massachusetts on May 14, 1997. (Testimony of McDermott, Tr. 62, Exhibit 8). McDermott noted that the complaint was dropped and he undertook no effort to determine why. (Testimony of McDermott, Tr. 62-64).

26. Chief Roddy testified that he asked the Appellant about the Carlisle accident, but he could not recall the Appellant's explanation. (Testimony of Roddy, Tr. 212). The Appellant testified that he never appeared in court for the charge and he was not driving the vehicle involved. He had loaned his truck to a friend when the accident occurred. (Testimony of Appellant, Tr. 312, 317).

27. Chief Roddy admitted that in approximately 2005, he hired a candidate who had a driving record far more serious than the Appellant's record. (Testimony of Roddy, Tr. 215). The other candidate's license had been suspended indefinitely and he was found responsible for four speeding violations and a surchargeable accident. (Testimony of Roddy, Tr. 215, Exhibit 17).

28. Chief Roddy claimed as a bypass reason that the Appellant has "5 entries on his Board of Probation Report." (Exhibit 5). However, on cross examination, he

admitted that there were only 2 offenses listed and the other 3 items were civil G.L. c. 209A restraining orders. (Testimony of Roddy, Tr. 218).

29. The restraining orders were closed and would not prevent the Appellant from being appointed as a police officer. (Testimony of McDermott, Tr. 23, 67). In fact, the Leominster Police Department currently employs police officers with closed restraining orders. (Testimony of Roddy, Tr. 223-224).

30. The orders were issued on May 8, 1995, May 22, 1997, and February 1, 1999. (Exhibit 9). They were in effect for fourteen (14), eight (8), and three (3) days respectively. (Exhibit 9, Testimony of Roddy, Tr. 223).

31. Because "significant time had passed and they were expired," Det. McDermott did not investigate facts and circumstances which led to the issuance of the restraining orders. Neither he nor Chief Roddy made any attempt to speak with the individuals who sought them. (Testimony of McDermott, Tr. 23, 69-70, Testimony of Roddy, Tr. 225).

32. Chief Roddy testified the restraining orders themselves are not grounds for bypass. Any significance they may have would depend on the underlying facts and circumstances of the case. (Testimony of Roddy, Tr. 218). Other than the restraining orders, there is no evidence which suggests that the Appellant is prone to domestic abuse or has issues with interpersonal relationships. (Testimony of Roddy, Tr. 225).

33. Det. McDermott testified that, in his experience as a police officer, it is likely that *ex parte* restraining orders, such as those issued against the Appellant, would be issued based on a claim of fear alone, in the absence of physical harm. (Testimony of McDermott, Tr. 95).

34. The February 1, 1999 a three day restraining order was issued without notice to the Appellant after he terminated his 6 month dating relationship with the plaintiff and

she appeared at his home in an intoxicated state. When she refused to leave, the Appellant called the police and she was taken into custody. (Testimony of Appellant, Tr. 285-288).

35. The order issued on February 1, 1999, did not prevent the Appellant from contacting the plaintiff or visiting her workplace. (Testimony of Roddy, Tr. 224, Exhibit 9).

36. At the hearing on the February 1, 1999 restraining order, the judge vacated the restraining order against the Appellant and *issued one against the plaintiff.* (Testimony of Appellant, Tr. 288-289). (Emphasis added).

37. While the February 1, 1999 order was in effect against the plaintiff, she falsely reported that the Appellant had contact with her. (Testimony of Appellant, Tr. 292-295).

38. With respect to the May 22, 1995 eight day restraining order, the Appellant testified that it was issued after he terminated his relationship with the plaintiff when he discovered that she was married with four children. (Testimony of Appellant, Tr. 296-298).

39. After the Appellant terminated his relationship with the plaintiff in the May 22, 1995 order, she left notes on his truck on several occasions and left a box of chocolates on the steps of his parent's house. (Testimony of Appellant, Tr. 298). However, at the restraining order hearing, she claimed that the Appellant was had been "stalking" her. (Testimony of Appellant, Tr. 299). As evidenced by the Judge vacating the order, he apparently credited the Appellant's testimony and did not believe the plaintiff.

40. The May 8, 1995 fourteen day restraining order was issued when the Appellant was 19 years old. (Exhibit 9, Testimony of Appellant, Tr. 303). It was issued as a result of damage done to the plaintiff's residence during a house party. (Testimony of Appellant, Tr. 304). The plaintiff made no allegations of abuse or fear of harm.

(Testimony of Appellant, Tr. 305). Like the other two orders, this order was vacated when the Appellant appeared in court to challenge it. (Testimony of Appellant, Tr. 305).

41. The Appellant had absolutely no advance knowledge of the issuance of any of these restraining orders or any ability to challenge their initial issuance. (Testimony of Appellant, Tr. 287-288, 306, Testimony of Chief Roddy, Tr. 240).

42. No order was ever continued after the hearings wherein both parties had the opportunity to present evidence and cross examine witnesses. (Testimony of Appellant, Tr. 288, 303, 305). These hearings were the first instance where the Appellant had an opportunity to contest the orders.

43. In addition to the aforementioned *ex parte* closed restraining orders, the Appellant's record reflects that on May 8, 1995, he was charged with malicious destruction of property. (Exhibit 9). Chief Roddy testified that he relied on this as a bypass reason, despite the fact that the incident occurred 12 years ago when the Appellant was only 19 years old. Moreover, the Chief admitted he knew nothing of the circumstances underlying the charge, no police report could be located, and the charge was ultimately dismissed. (Testimony of Roddy, Tr. 234-235, Testimony of McDermott, Tr. 75-76).

44. The Appellant's record also reflects the charge of Assault and Battery by Means of a Dangerous Weapon on August 25, 1994. This charge occurred 12 years prior to the Appellant's candidacy, when he was only 19 years old. (Exhibit 9). It was alleged that the Appellant beat an individual with a tire iron. (Testimony of McDermott, Tr. 21). Although Det. McDermott originally testified that the Appellant was arrested for this offense, he later admitted that the Appellant had not been arrested. (Testimony of McDermott, Tr. 79, 83). He further testified that, as a police officer, if he had probable cause to believe that someone beat another person with a tire iron, he would have arrested them. (Testimony of McDermott, Tr. 81-83).

45. The District Attorney's Office moved to dismiss the Assault and Battery by Means of a Dangerous Weapon charge as if it had never been brought. (Testimony of McDermott, Tr. 73). Det. McDermott characterized this disposition of *nolle prosequi* as rare. (Testimony of McDermott, Tr. 73-74).

46. Pursuant to Chief Roddy's instructions, Det. McDermott interviewed DPW Director Patrick LaPointe eighteen (18) days after he interviewed the other witnesses, all of whom were unanimously positive in their endorsements of the Appellant. (Testimony of McDermott Tr. 36-37, 48-49). This was the first time that Chief Roddy had ever specifically instructed Det. McDermott to interview a particular witness during a background investigation. (Testimony of McDermott, Tr. 49)

47. Of the numerous individuals who Det. McDermott interviewed, Mr. LaPointe was the only person who gave the Appellant a negative reference. (Testimony of McDermott, Tr. 36-37). The other individuals, who unanimously supplied positive references, were better acquainted with the Appellant as compared to Mr. LaPointe. (Testimony of McDermott, Tr. 37).

48. In 2005, Appellant was employed, for a period of approximately 60 work days, as a laborer with the City of Leominster Department of Public Works. (Testimony of LaPointe, Tr. 97, 107-108).

49. The Appellant did not work directly for or with LaPointe and spent no more than an hour, at the most, with him. (Testimony of LaPointe, Tr. 107-108).

50. Based on his telephone conversation with Patrick LaPointe, Det. McDermott reported to Chief Roddy that Mr. Gallagher had been "written up for leaving a job site without authorization." (Exhibit 7).

51. Det. McDermott made no attempt to obtain, from the City of Leominster, a copy of the "write up" or any written documentation regarding the alleged discipline, even though he had a signed release which would have enabled him to do so. (Testimony of McDermott, Tr. 38-39).

52. The sole source of this information was Mr. LaPointe. (Testimony of McDermott, Tr. 42). Det. McDermott conducted absolutely no investigation or inquiry into the facts and circumstances surrounding the above-described incident and he never asked Mr. LaPointe to explain what happened. (Testimony of McDermott, Tr. 42-43).

53. Detective McDermott interviewed Mr. LaPointe over the telephone, even though he admitted that an in-person interview would have been more reliable, as it would have allowed him to better assess LaPointe's credibility. (Testimony of McDermott, Tr. 35-36).

54. LaPointe testified that the Appellant "left work on two or three occasions. He left the jobsite without telling his foreman." (Testimony of LaPointe, Tr. 98.). LaPointe did not directly observe this, but he claimed that the Appellant's Foreman, Michael Booth, reported it to him.

55. According to Det. McDermott's report, Mr. Booth described the Appellant "as a pretty good guy who was quiet. He rated the job performance of Mr. Gallagher as being average, and reported no issues with sick time or tardiness. Mr. Booth stated that he would recommend Mr. Gallagher without reservation for the job of a police officer." (Exhibit 7). Noticeably absent in Booth's appraisal is any mention of the "unauthorized absence."

56. The Appellant testified that he left a job site to attend a medical appointment related to an occupational injury. (Testimony of Appellant, Tr. 279-280). He notified the dispatcher and Mr. Booth, his immediate supervisor. (Testimony of Appellant, Tr. 279-282). In fact, he notified Mr. Booth both on the day before the appointment and on day of the appointment. (Testimony of Appellant, Tr. 279-282). Mr. Booth

transported the Appellant from the worksite to his vehicle, which was parked at the DPW facility. (Testimony of Appellant, Tr. 281-282). Mr. Booth also separately transported the Appellant's car keys from the worksite to the DPW facility. (Testimony of Appellant, Tr. 282-283).

57. After attending his medical appointment, which took approximately an hour, the Appellant returned to work. (Testimony of Appellant, Tr. 283).

58. Mr. Booth, the Appellant's direct supervisor, did not impose any discipline on the Appellant for having left work without permission. (Testimony of Appellant, Tr. 283).

59. Mr. LaPointe handed the Appellant a disciplinary letter for his allegedly leaving the jobsite without permission. (Testimony of Appellant, Tr. 284). When the Appellant voiced his opposition to the discipline and tried to explain the situation, LaPointe told him that "there is really nothing you can do about it because you are on probation." (Testimony of Appellant, Tr. 284).

60. The City never asked the Appellant for his version of the events surrounding the aforementioned allegations and the first time he learned that the incident was being held against him was when he received the bypass letter. (Testimony of Appellant, Tr. 285).

61. When Det. McDermott asked Mr. LaPointe how well the Appellant would perform under pressure, McDermott claims that LaPointe stated, "not to well" (sic). (Testimony of McDermott, Tr. 45, Exhibit 7). However, LaPointe denied making this statement. (Testimony of LaPointe, Tr. 103, 115-116). Furthermore, McDermott knows of no examples of the Appellant not performing well under stress or pressure. (Testimony of McDermott, Tr. 45).

62. No other individual who Det. McDermott interviewed suggested that the Appellant had any difficulties performing under stress. (Testimony of McDermott, Tr. 47). In fact, the Appellant's background investigation indicates otherwise.

63. Plymouth, Massachusetts Police Sergeant Scott M. Vecchi, who has 13 years of police experience and 19 years of service in the U.S. Marine Corps, having last held the rank of Gunnery Sergeant, testified that the Appellant served as a corpsman in his Scout Sniper Platoon. (Testimony of Vecchi, Tr. 122-123). Sgt. Vecchi worked very closely with the Appellant and he personally observed the Appellant performing under stress and pressure. (Testimony of Vecchi, Tr. 128). For example, Vecchi mentioned that the Appellant performed well in immediate action drills, which are conducted with live ammunition in a "very stressful environment." (Testimony of Vecchi, Tr. 128).

64. Mr. LaPointe allegedly made numerous other negative and unsubstantiated statements regarding the Appellant. (Exhibit 7). For example, Mr. LaPointe claimed the Appellant "would stir things up at work and always questioned authority." (Exhibit 7, Testimony of McDermott, Tr. 40). However, McDermott never asked Mr. LaPointe to provide examples or explain his opinions in any way. (Testimony of McDermott Tr. 40-47).

65. Sgt. Vecchi directly contradicted LaPointe's characterizations of the Appellant. (Testimony of Vecchi, Tr. 126). He further testified that, based on his knowledge of the Appellant, (Has Known Appellant for 4-5 years, serving in Iraq as his supervisor) it would be highly unlikely for the Appellant to have left a worksite without permission. (Testimony of Vecchi, Tr. 126-127).

66. Sgt. Vecchi had served in the Plymouth Police Department for 14 years and also served in the Marine Corps reserves for 19 years. He answered questions with out hesitation or equivocation. He found that the Appellant was very respectful of authority, otherwise you get people killed. His assessment of the Appellant's

character appears to be solid and well founded. He made direct eye contact. His presentation was appropriate and military in bearing. I find him to be a reliable and credible witness. (Testimony and demeanor of Vecchi)

67. The Appellant presented to the Commission as friendly, polite, respectful and neat of appearance. He answered questions during examination and cross-examination appropriately and without hesitation or equivocation. He exhibited responsibility and maturity in his bearing. His military, personal and professional experience is obvious in his presentation. He adequately and reliably explained in detail all of his past experiences when called to do so. He is a credible witness. (Testimony and demeanor of Appellant)

68. Sergeant Vecchi and the Appellant appeared to be very credible. Both witnesses made good eye contact, were clear and concise, exhibited positive body language, and were able to clearly recall the events in question, and did not hesitate in their answers. Throughout their testimony, they appeared sincere and truthful. Vecchi and the Appellant corroborated each other's testimony on the key factors exhibiting the Appellant's character; doing well under pressure and stress, respect for authority, obeying rules and being responsible by properly notifying superiors of leaving the job site or taking time of from work. On the Contrary, Chief Roddy based on information contained in the investigation report and Patrick Lapointe's testimony seemed to be contradictory, on each of these key factors underlying the character of the Appellant. Three of the five reasons stated by Roddy for the bypass of the Appellant, he attributed to Appointee as the source of information, (Unsatisfactory review from prior employer; Documented improper use of time off; and Violations of policies relative to unauthorized leaving jobsite). However, Lapointe under cross-examination either denied making the statement or attributed that information to the Appellant's supervisor, Michael Booth. There was no reliable evidence presented, substantiating Booth as the originator of this information, despite the City being given an opportunity to produce Booth as a witness or some other reliable evidence. (

administrative notice, evidence, testimony and demeanor of Vecchi, Appellant, Roddy and Lapointe)

69. Further, I do not find Patrick LaPointe's testimony consistent with his statements to Det. McDermott. His characterization of the Appellant was based on very limited interaction. Indeed, Mr. LaPointe admitted that he never spent more than an hour with the Appellant. (Testimony of LaPointe, Tr. 108). Cross examination of Mr. LaPointe also revealed inconsistencies in his communications regarding the Appellant. First, Det. McDermott's investigatory notes indicated that Mr. LaPointe stated there were "National Guard problem with dates, tried to get days off for days he was not eligible for." Exhibit 8. When confronted with this statement on cross-examination, Mr. LaPointe admitted that the issue was "whether [the Appellant] was [eligible to be] compensated for attending a weekend drill" and it was "not as if Mr. Gallagher took time off to which he was not entitled." (Testimony of LaPointe, Tr. 110-111). His testimony differs significantly from Det. McDermott's notes.

70. Second, Mr. LaPointe's testimony was not consistent with respect to the Appellant's alleged unauthorized leave. His testimony and statement to Det. McDermott that the Appellant left a jobsite without authorization differs remarkably from Appellant's testimony. The Appellant testified credibly and emphatically that he not only had authorization to go to a medical appointment for an on the job injury, but that Michael Booth, his immediate supervisor, drove him to the DPW garage where his personal vehicle was parked, so that he could drive to the appointment. (Testimony of Appellant, Tr. 279-282). Mr. Booth made a second trip to separately transport the Appellant's car keys from the worksite to the DPW facility. (Testimony of Appellant, Tr. 282-283). Finally, as discussed in more detail below, the City was given ample opportunity to provide Mr. Booth's testimony on these events to the Commission. It failed to do so. This failure casts further doubt on Mr. LaPointe's credibility with respect to this very important issue. Thus, I must credit the Appellant's detailed testimony with respect to these events and find LaPointe's testimony entirely unreliable.

71. Additionally, it became apparent that there was some previous friction between the Appellant and Mr. LaPointe, such that LaPointe may be biased against him. Specifically, the Appellant testified credibly that LaPointe induced him to leave his higher paying position with the Maynard DPW by assuring him that he would be promoted to the position of heavy equipment operator. (Testimony of Appellant, Tr. 273-274). He did not waiver from this testimony on cross examination. (Testimony of Appellant, Tr. 324). Mr. Booth supports the Appellant's position as it is noted on the reference which he provided that the Appellant "has been promised things that didn't happen." (Exhibit 8). In direct contrast to the Appellant's testimony and the supporting reference form, LaPointe denied that he ever gave the Appellant any assurances regarding the heavy equipment operator's position. (Testimony of LaPointe, Tr. 105). Because of the Appellant's sincere and forthright demeanor, as well as the corroborating reference form, I find that the Appellant testified credibly on this point and that Mr. LaPointe did not.

72. Chief Roddy's testimony exhibited a conflict with his original concerns, beliefs and assumptions which formed the basis for his reasons for bypassing the Appellant. Chief Roddy readily admitted those prior mistakes and misunderstandings of the data, when confronted on the witness stand. He relied on the accuracy of the information provided to him in Detective McDermott's report in making his recommendation for bypass. For example, he testified that "[m]ainly because we give officers a cruiser every day and that their driving record and driving habits are areas of concern and we reviewed his record. In particular, failing to stop for a police officer that was a concern as well as some of the other violations." (Testimony of Roddy, Tr. 162). He further stated that the alleged failure to stop for a police officer offense, for which the Appellant had been found not responsible, "was certainly a concern." (Testimony of Roddy, Tr. 162). Testimony revealed, however, that both Det. McDermott and Chief Roddy's characterization of this charge was erroneous. In fact, the charge was a civil "failure to stop" for a stop light or a stop sign. It was not the more serious criminal offense of "failure to stop for a police officer." (Testimony of McDermott, Tr. 52-61;

Testimony of Roddy, Tr. 207, Testimony of Appellant, Tr. 312).[1] When this mischaracterization was pointed out on cross examination, Roddy dismissed what he previously characterized as serious violation of particular concern, saying that "it [the failure to stop charge] didn't matter." Chief Roddy's testimony showed the lack of substantiation for the facts and circumstances upon which he relied, at the time of his decision to bypass the Appellant. I find Chief Roddy to be a credible witness. (Testimony of Roddy, Tr. 209-210).

73. Also, Chief Roddy readily admitted his prior acts which were not consistent with his emphasis on the importance of clean driving records. Chief Roddy admitted to having hired an officer who had a driving record much worse than the Appellant's record. (Testimony of Roddy, Tr. 215). Finally, Chief Roddy was hesitant in some of his answers and was unable to recall some important details, but I do not attribute this to evasiveness or deception. For example, he was unable to recall much of the Appellant's interview, including his statements regarding his driving record. (Testimony of Roddy, Tr. 162-163). Chief Roddy also claimed a lack of memory regarding the Appellant's explanations regarding two of the three restraining orders, upon which the City relies in bypassing the Appellant. (Testimony of Roddy, Tr. 166). Likewise, Chief Roddy could not recall whether he discussed references or the Appellant's references with him. I attribute this testimony to a failure of recollection. I find Chief Roddy to be a credible witness, but mistaken in some areas. (Testimony of Roddy, Tr. 167).

74. Neither Detective McDermott nor Patrick LaPointe was substantially consistent with the other's testimony regarding conversations and important relevant information received by Detective McDermott from LaPointe. Detective McDermott testified that he does take written notes of his interviews with references or witnesses. His notes and testimony were at odds with LaPointe's testimony. I am unable to resolve this

[1] The disposition of "Not Responsible," abbreviated NR on the Appellant's driving record, proves that the Appellant was not charged with the crime of Refusal to Submit to a Police Officer. Such is the case because the disposition of NR is only available for civil and not criminal infractions. See G.L. c. 90C § 3.

conflict in favor of either of these two witnesses. The inconsistency between these two witnesses is a factor in appraising the weight and probity of their testimony and other evidence. In the least it does diminish the reliability of the information passed on to Chief Roddy in McDermott's report, from LaPointe. In any event it appears that the mistaken information regarding the Appellant's employment with the DPW, originated with LaPointe. (Testimony of Roddy and LaPointe)

75. The Appellant, prior to the hearing did file and serve a Request for Production, for documents which included the background investigation files on each of the three Appointees, who bypassed the Appellant for appointment. The Appellant followed that with a Motion to Compel production, which was addressed at this hearing. The Appellant objected at the hearing to the City's introduction of Exhibits 14, 15&16, which were claimed to be the documents on the Appointees' criminal and driving background. Those documents, other than the summary for each Appointee were illegible. The City was given an opportunity after the hearing to submit legible copies as substitutes and a further opportunity for the Appellant to respond. The three Exhibits were marked for identification at the hearing, taken de bene subject to later written argument by the parties. Subsequent to the hearing, the City filed substitute documents for Exhibits 14, 15 &16. However, these documents were also illegible and were unusable. I am not striking these exhibits, yet I am unable to attribute any weight or probity to them. (administrative notice, case file, Exhibits 14, 15 &16)

CONCLUSION

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge *v.* Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by

correct rules of law. Selectmen of Wakefield *v.* Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service *v.* Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). General Laws c. 31, § 2(b) requires that bypass cases be decided by a preponderance of the evidence. A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere *v.* CivilService Commission, 31 Mass. App. Ct. 315 (1991).

Appointing Authorities are expected to exercise sound discretion, under the particular circumstances of the case when choosing individuals from a certified list of eligible candidates on a civil service list. The SJC stated the following: "On a further issue we may now usefully state our views. The appointing authority, in circumstances such as those before us, may not be required to appoint any person to a vacant post. He may select, in the exercise of a ***sound discretion***, among persons eligible for promotion or may decline to make any appointment. (Emphasis added) See Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv.348 Mass 184, 187-193 (1964). See also Corliss v. Civil Serv. Commrs. 242 Mass. 61, 65; Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356; Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431. Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572. A judicial judgment should "not be substituted for that of . . . [a] public officer" who acts in good faith in the performance of a duty. See M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272." Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971)

In a bypass appeal, the CSC must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

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

In addition to determining whether the Appointing Authority has sustained its burden, as described above, it is also the Commission's role, as the administrative agency conducting the hearing, to determine what degree of credibility should be attached to a witness' testimony. School Committee of Wellesley *v.* Labor Relations Commission, 376

Mass. 112, 120 (1978); Doherty *v.* Retirement Board of Medicine, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v. Board of Registration in Medicine, 420 Mass. 154, 165 (1995). In the present case, the Commission finds the testimony of both Sergeant Vecchi and the Appellant to be highly credible. Both witnesses made good eye contact, were clear and concise, exhibited positive body language, and were able to clearly recall the events in question, and did not hesitate in their answers. Throughout their testimony, they appeared sincere and truthful.

Chief Roddy's credible testimony pointed out his own lack of accurate information and the mistaken assumptions he had at the time of his bypass recommendation. For example, he testified that "[m]ainly because we give officers a cruiser every day and that their driving record and driving habits are areas of concern and we reviewed his record. In particular, failing to stop for a police officer that was a concern as well as some of the other violations." (Testimony of Roddy, Tr. 162). He further stated that the alleged failure to stop for a police officer offense, for which the Appellant had been found not responsible, "was certainly a concern." (Testimony of Roddy, Tr. 162). Testimony revealed, however, that both Det. McDermott and Chief Roddy's characterization of this charge was erroneous. In fact, the charge was a civil "failure to stop" for a stop light or a stop sign. It was not the more serious criminal offense of "failure to stop for a police officer." (Testimony of McDermott, Tr. 52-61; Testimony of Roddy, Tr. 207, Testimony of Appellant, Tr. 312).[2] When this

[2] The disposition of "Not Responsible," abbreviated NR on the Appellant's driving record, proves that the Appellant was not charged with the crime of Refusal to Submit to

mischaracterization was pointed out on cross examination, Roddy dismissed what he previously characterized as serious violation of particular concern, saying that "it [the failure to stop charge] didn't matter." (Testimony of Roddy, Tr. 209-210).

Also, Chief Roddy was not consistent when he emphasized the importance of clean driving records. Chief Roddy contradicted this statement when he admitted to having hired an officer who had a driving record much worse than the Appellant's record. (Testimony of Roddy, Tr. 215). Finally, Chief Roddy was hesitant in some of his answers and was unable to recall important details. For example, he was unable to recall much of the Appellant's interview, including his statements regarding his driving record. (Testimony of Roddy, Tr. 162-163). Chief Roddy also claimed a lack of memory regarding the Appellant's explanations regarding two of the three restraining orders, upon which the City relies in bypassing the Appellant. (Testimony of Roddy, Tr. 166). Likewise, Chief Roddy could not recall whether he discussed references the Appellant's references with him. However it has been found that this testimony was attributed to a failed memory not evasiveness. (Testimony of Roddy, Tr. 167). Chief Roddy relied on accuracy and substantiation of the facts and circumstances contained in McDermott's report. However, that report contained significant facts that were inadequately investigated and corroborated.

Further, I do not find Patrick LaPointe's testimony to be reliable as unsubstantiated hearsay or otherwise unsubstantiated. His alleged characterization of the Appellant was based on very limited interaction. Indeed, Mr. LaPointe admitted that he never spent more than an hour with the Appellant. (Testimony of LaPointe, Tr. 108).

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a Police Officer. Such is the case because the disposition of NR is only available for civil and not criminal infractions. See G.L. c. 90C § 3.

Cross examination of Mr. LaPointe also revealed inconsistencies in his communications regarding the Appellant. First, Det. McDermott's investigatory notes indicated that Mr. LaPointe stated there were "National Guard problem with dates, tried to get days off for days he was not eligible for." Exhibit 8. When confronted with this statement on cross-examination, Mr. LaPointe admitted that the issue was "whether [the Appellant] was [eligible to be] compensated for attending a weekend drill" and it was "not as if Mr. Gallagher took time off to which he was not entitled." (Testimony of LaPointe, Tr. 110-111). His testimony differs significantly from Det. McDermott's notes.

Second, Mr. LaPointe's testimony was not consistent or reliable with respect to the Appellant's alleged unauthorized leave. His testimony and statement to Det. McDermott that the Appellant left a jobsite without authorization differs remarkably from Appellant's testimony. The Appellant testified credibly and emphatically that he not only had authorization to go to a medical appointment for an on the job injury, but that Michael Booth, his immediate supervisor, drove him to the DPW garage where his personal vehicle was parked, so that he could drive to the appointment. (Testimony of Appellant, Tr. 279-282). Mr. Booth made a second trip to separately transport the Appellant's car keys from the worksite to the DPW facility. (Testimony of Appellant, Tr. 282-283). Finally, as discussed in more detail below, the City was given ample opportunity to provide Mr. Booth's testimony on these events to the Commission. It failed to do so. This failure casts further doubt on Mr. LaPointe's credibility with respect to this very important issue. Thus, I must credit the Appellant's detailed testimony with respect to these events.

Additionally, it became apparent that there was some previous friction between the Appellant and Mr. LaPointe, such that LaPointe may be biased against him. Specifically, the Appellant testified credibly that LaPointe induced him to leave his higher paying position with the Maynard DPW by assuring him that he would be promoted to the position of heavy equipment operator. (Testimony of Appellant, Tr. 273-274). He did not waiver from this testimony on cross examination. (Testimony of Appellant, Tr. 324). Mr. Booth supports the Appellant's position as it is noted on the reference which he provided that the Appellant "has been promised things that didn't happen." (Exhibit 8). In direct contrast to the Appellant's testimony and the supporting reference form, LaPointe denied that he ever gave the Appellant any assurances regarding the heavy equipment operator's position. (Testimony of LaPointe, Tr. 105). Because of the Appellant's sincere and forthright demeanor, as well as the corroborating reference form, I find that the Appellant testified credibly on this point and that Mr. LaPointe did not testify convincingly.

In addition to these credibility or reliability evidentiary issues, the City's justification for bypass contains several other troubling defects, as noted below.

1. <u>The Selection Process was Flawed</u>

The selection process utilized in this case was seriously flawed for several reasons. First, the background investigator had no specialized training in conducting recruit background investigations. (Testimony of McDermott, Tr. 27). Second, the investigation was superficial at best. McDermott simply recorded the facts presented to him and undertook no effort to investigate, corroborate, confirm, or substantiate them. (Testimony of McDermott, Tr. 27, 64-64). He interviewed Mr. LaPointe, the sole individual who provided negative information over the telephone, even though he

admitted that an in-person interview would have been more reliable, as it would have allowed him to better assess credibility. (Testimony of McDermott, Tr. 35-36). He relied on LaPointe's subjective opinion of the Appellant and did not review the Appellant's Leominster DPW personnel file or performance reviews, even though he could have easily done so. (Testimony of McDermott, Tr. 34, 38-39). McDermott admitted that LaPointe's characterization of the Appellant is inconsistent with those provided by everyone else who he interviewed, including prior employers, coworkers, supervisors, and other police officers. (Testimony of McDermott, Tr. 35-37). Det. McDermott took LaPointe's statements at "face value" and did not ask him to provide specific examples or otherwise substantiate his conclusory opinions. (Testimony of McDermott, Tr. 40-41, 45, 47). Not one other witness who Det. McDermott interviewed supported LaPointe's opinions. (Testimony of McDermott, Tr. 47). Such unsubstantiated opinions cannot serve as legitimate bypass reasons. See Connelly v. Boston Police Department, Docket No.: G1-07-110 (2008), quoting Borelli v. MBTA, 1 MCSR 6 (1987) (Reasons which are untrue or incapable of substantiation are insufficient to support a bypass).

Furthermore, Detective McDermott interviewed Mr. LaPointe approximately 18 days after he completed and submitted his background investigation report. (Testimony of Booth, Tr. 48). He interviewed Mr. LaPointe, not on his own, in the ordinary course of the background investigation, but only because Chief Roddy had explicitly instructed him to do so. (Testimony of McDermott, Tr. 48-49). This was the first time that Chief Roddy had ever specifically instructed Det. McDermott to interview a particular witness during a background investigation. (Testimony of McDermott, Tr. 49). This further calls into question the fairness of the selection process and the validity of LaPointe's opinion.

Finally, although Det. McDermott agreed that "there are two sides to every story" he never got the Appellant's "side of the story," with respect to the negative information he uncovered. (Testimony of McDermott, Tr. 26-27, 31, 39, 88). Thus, Det. McDermott's admitted "search for the truth" did not include the Appellant—the *only focus* of his investigation. The lack of an adequate investigation led to false and unsupported statements being taken as true. The City then relied upon these false statements as bypass reasons. This one sided "investigation" undermines the most fundamental due process considerations and those basic merit principles which this Commission is mandated to enforce. For the aforementioned reasons, and those specified herein, I find that the selection process was irretrievably damaged. By conducting such a superficial and flawed background investigation, the City violated basic merit principles as defined by G.L.c. 31 § 1. "These principles require that employees 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 are protected from arbitrary and capricious actions." See Tallman v. City of Holyoke, et al., Docket No.: G-2134. Indeed, this Commission has previously overturned bypasses due to flawed background investigations. See Gaudette v. Town of Oxford, Case No.: G-02-298 (2005); Hamilton v. Boston Police Dept., 11 MCSR 16 (1998) (Like here, appointing authority bypassed candidate because of allegations later proven to be unfounded.); Reilly v. Lawrence Police Dept., 13 MCSR 144 (2000) (bypass overturned because of inadequate background investigation); Gaul v. City of Quincy, Docket No.: G-02-673 (2006) (Citing *Hamilton*, the Commission stated in *Reilly* that the appointing authority had an affirmative duty to properly examine a candidate's background and credentials. Every

candidate, the Commission noted, has an expectation of fair and adequate consideration for appointment.")

2. Appellant's Driving History was Not a Valid Bypass Reason

Chief Roddy listed as a bypass reason that the Appellant "[d]rives (sic) history reveals six (6) infractions to include three (3) motor vehicle accidents." (Exhibit 5). Testimony revealed, however, that the Appellant was not found responsible for any of the six infractions *and probably did not commit them.* (Testimony of McDermott, Tr. 66). Indeed, Chief Roddy admitted the Appellant had never been found responsible for a motor vehicle infraction in his life. (Testimony of Roddy, Tr. 211). Further, both the Chief and Det. McDermott admitted that they erroneously identified one of the charges brought against the Appellant as a criminal charge of "failing to stop for a police officer." (Testimony of McDermott, Tr. 58-59; Testimony of Roddy, Tr. 209-210). In actuality, the charge was a civil violation for "failure to stop for a stop light or a stop sign"-a civil violation for which the Appellant was held not responsible. Id.[3]

Testimony also revealed that one of the accidents relied upon by Chief Roddy was the report that the Appellant left the scene of a property damage accident in Carlisle, Massachusetts on May 14, 1997, some 10 years prior to the bypass. (Testimony of McDermott, Tr. 62, Exhibit 8). See Pacini v. Medford Fire Department, Docket No.: G1-04-275 (2005) (Traffic violation which occurred more than eight years prior to the bypass afforded minimal, if any, weight.) McDermott noted that the complaint was dropped and he undertook no effort to determine why. (Testimony of McDermott, Tr. 62-64).

[3] It is a criminal offense to refuse to submit to a police officer. G.L. c. 90 § 25. It is a civil infraction to fail to stop for a stop sign or red light. G.L. c. 89 § 9.

Testimony revealed that the Appellant never appeared in court for this 10 year old charge and it was dismissed. The Appellant explained he loaned his truck to a friend when the accident occurred. (Testimony of Appellant, Tr. 312, 317). Nonetheless, the Chief erroneously relied upon this accident, where the Appellant was *not even present or driving* as a reason to bypass him.

Moreover, the Chief admitted during cross examination that, in approximately 2005, he hired a candidate who had a driving record far more serious than the Appellant's record. (Testimony of Roddy, Tr. 215). In fact, the other candidate's license had been suspended indefinitely and he was found responsible for four speeding violations and a surchargeable accident. (Testimony of Roddy, Tr. 215, Exhibit 17). In contrast, the Appellant has never been found responsible for a motor vehicle violation and has never had his license suspended. (Testimony of McDermott, Tr. 66, Exhibit 9).

The Appellant's driving record as substantiated at this hearing was minimal and far less serious than Chief Roddy had determined it to be at the time of the Appellant's bypass. Chief Roddy emphasized the initial bare citation or charge and ignored the final determination. He did not make a reasonable inquiry or investigation of the facts underlying the charges.

3. Temporary Ex Partite Restraining Orders Not Valid Bypass Reasons

"[Three] 3 civil restraining orders" served as another bypass reason listed by Chief Roddy. Exhibit 5. However, the Chief's reliance on these restraining orders was misplaced. In fact, one of the orders did not require the Appellant to stay way from the plaintiff or her workplace. (Testimony of Roddy, Tr. 224, Exhibit 9). See Nahim v. Boston Police Department, Docket No.: G-02-400 (2004) (This type of restraining order

"is a weak version of the instrument in that it only orders the Appellant to not abuse another person.") Furthermore, Det. McDermott admitted he did not investigate the facts and circumstances which led to the issuance of the restraining orders against the Appellant because, "significant time had passed and they were expired," (Testimony of McDermott, Tr. 69). Neither he nor Chief Roddy made any attempt to speak with the individuals who sought the orders. (Testimony of McDermott, Tr. 23, 69-70, Testimony of Roddy, Tr. 225). If the restraining orders were too inconsequential so as to warrant investigation, the City cannot rely on them to bypass the Appellant. Also, Det. McDermott agreed that restraining orders are sometimes obtained for illegitimate purposes such as harassment or retaliation. (Testimony of McDermott, Tr. 68-69). He is not alone in his recognition of this abuse of the restraining order system. See Szymkowski v. Szymkowski, 57 Mass. App. Ct. 284, 287 (2003) (Restraining orders are sometimes used "abusively by litigants for purposes of discovery and harassment.") Also, it must be noted that no first hand information regarding these restraining orders was proffered either at the instant hearing or during the Appellant's background investigation. Indeed, the restraining orders were all *ex parte*, where the Appellant did not appear before the Judge issuing the initial orders. These facts reduce the orders to complete hearsay and they cannot provide this Commission with the necessary evidence to support a reason for bypass. See Nahim v. Boston Police Department, Docket No.: G-02-400 (2004) (where restraining order issued, but plaintiff failed to appear before the Commission, reducing the Order to "virtual hearsay.") See Alexander v. Boston Police Department, Docket No.: G1-06-147 (2007); Ferguson v. Boston Police Department, Docket No.: G1-06-138, DALA Docket No.: CS-06-1084 (2007) (Civil Service

Commission considered that restraining orders were issued after adversarial hearings where the Appellants attended and offered evidence); See also Nahim, *supra*, (reliance on a restraining order was improper because like here, *inter alia*, "no criminal charges or complaints were ever brought against the Appellant based on the allegations contained [in the Restraining Order Affidavit.]") The untested nature of the initial restraining orders is further supported by the fact that each temporary *ex parte* order was vacated as soon as a judge heard the Appellant's sworn testimony regarding attendant facts and circumstances. (Testimony of Appellant, Tr. 288-289, 303, 305, 307).

4. The Appellant's "Criminal Record"

The City also cited a twelve year old charge of assault and battery as a reason for bypass in the present case. (Exhibit 5). The Appellant was nineteen at the time of this charge. (Testimony of the Appellant, Tr. 307). The Appellant credibly testified that he was at a party when a man was assaulted with a tire iron, and he was not at the scene of the actual assault. (Testimony of Appellant, Tr. 309). Approximately six persons were charged with the same offense of: Assault and Battery by Means of a Dangerous Weapon (tire iron). (Testimony of the Appellant, Tr. 308). However, when the alleged victim identified another named defendant, the District Attorney's Office moved to dismiss the Assault and Battery by Means of a Dangerous Weapon charge against the Appellant as if it had never been brought. This is evidenced by the disposition of *nolle prosequi*. (Testimony of Det. McDermott, Tr. 73; Testimony of the Appellant, Tr. 309). "A *nolle prosequi* is formal expression of a determination on the part of the Attorney General or the district attorney that he will not further prosecute the whole or a separable part of a

criminal proceeding." Commonwealth v. Norrwell, 423 Mass. 725, N3 (1996), quoting Commonwealth v. Dascalakis, 246 Mass. 12, 19 (1923). "A prosecutor has the absolute discretion to enter a *nolle prosequi*." Baglioni v. Chief of Police of Salem, 421 Mass. 229, 231 (1995).

Despite this disposition, without any investigation, the City took the police report at "face value" and held the resulting against the Appellant. (Testimony of Roddy, Tr. 230). The Commission generally allows Appointing Authorities to afford at least some weight to arrest records, even when a conviction does not result. However, in this case, because the Appellant was the victim of a misidentification, the Commonwealth declined to prosecute him (Testimony of Appellant, Tr. 309, 317-318). The Appointing Authority presented no evidence to refute this and undertook no effort to contact the victim or further explore the matter. (Testimony of Roddy, Tr. 230-232). Knowing that the Commonwealth declined to prosecute the Appellant, and having undertaken no steps to investigate the matter further, the Chief relied on this twelve year old charge as a reason for bypass. I find this reliance unfair and improper.

In addition to the aforementioned, the City also held against the Appellant, a charge of malicious destruction which appears on his record. (Exhibit 5, Exhibit 9, Testimony of Roddy, Tr. 235). The alleged offense occurred more than twelve years before the bypass and the Appellant was nineteen years old at the time. (Testimony of Roddy, Tr. 234). The City never obtained a copy of the police report related to the charge Chief Roddy admitted that he knew none of the underlying facts and circumstances, and the charge was dismissed. (Testimony of Roddy, Tr. 234-235, Exhibit 9). Nevertheless, with absolutely no knowledge of the facts of the case, the City relied upon the twelve year old

dismissed charge in denying the Appellant employment. Such reliance is improper, as it violates basic merit principles.

5. City Failed to Meet its Burden regarding the "Unauthorized Leave" Claim

The City also claims, as a bypass reason, that the Appellant had committed "violations of policies relative to unauthorized leaving of jobsite." (Exhibit 5). Specifically, the City alleged that the Appellant left a worksite without permission to attend a medical appointment. It is undisputed that the Appellant left work for approximately an hour to attend a medical appointment related to a back injury which he sustained on the job. (Testimony of Appellant, Tr. 279-283). It is further undisputed that Mr. LaPointe considered the Appellant to have left without permission and reprimanded him for it. (Testimony of Appellant, Tr. 283-284). However, the parties disagree on the validity of the reprimand and on question of whether the Appellant actually had permission to leave work. Specifically, LaPointe testified that the Appellant "left the jobsite without telling his foreman." (Testimony of LaPointe, Tr. 98.). LaPointe cites the Appellant's foreman and immediate supervisor, Mr. Michael Booth, as the source of this information. (Testimony of LaPointe, Tr. 334-335).

The Appellant's sworn testimony and the reference provided by Mr. Booth starkly contradict LaPointe's claim. The Appellant testified he notified both the dispatcher and Mr. Booth of this appointment. (Testimony of Appellant, Tr. 279-282). In fact, he notified Mr. Booth both on the day before the appointment and on day of the appointment and received Booth's permission to leave work. (Testimony of Appellant, Tr. 279-282). The Appellant further testified that Mr. Booth transported him from the worksite to his

vehicle, which was parked at the DPW facility. (Testimony of Appellant, Tr. 281-282). Mr. Booth also separately transported the Appellant's car keys from the worksite to the DPW facility. (Testimony of Appellant, Tr. 282-283.).

The Appellant's position, that he had Booth's permission, is supported by the absence of any mention of the incident in Booth's interview with Det. McDermott. (Exhibits 7, 8). In fact, Booth described the Appellant "as a pretty good guy who was quiet. He rated the job performance of Mr. Gallagher as being average, and reported no issues with sick time or tardiness. Mr. Booth stated that he would recommend Mr. Gallagher without reservation for the job of a police officer." (Exhibit 7). The positive tone of Booth's reference and the absence of any mention of the Appellant having left the worksite without permission, as well as the fact that Booth drove the Appellant to his vehicle and brought him his car keys, strongly suggests that the Appellant had authorization to attend the medical appointment.

Nevertheless, when faced with this stark conflict between the sworn testimony of the Appellant, which Booth's reference supports, and LaPointe's claim that that the Appellant left a jobsite without permission, which ironically he claimed to have learned from Booth, the evidentiary record was left open for a period of several months for the sole purpose of addressing this conflict either by calling Mr. Booth as a witness or by introducing a joint stipulation of fact as to what he would say. The Appointing Authority failed to introduce such testimony or stipulation.

In the instant case, the City bears the burden to prove that the reasons proffered for the bypass were more likely than not sound and sufficient. G.L. c. 31, § 2(b); Mayor of Revere *v.* Civil Service Commission, 31 Mass. App. Ct. 315 (1991). This burden does

not shift and remains constantly with the City. See Kenneth B. Hughes, Evidence, 19 Massachusetts Practice Series, Chapter 4, §§ 23 and 24 (1961). In contrast to this constant and non-shifting burden of proof, the burden of production (the burden of introducing evidence to avoid an adverse finding) generally shifts between the parties during the proceeding. See Kenneth B. Hughes, Evidence, 19 Massachusetts Practice Series, Chapter 2, §§ 23 to 25, inclusive (1961); See also Paul J. Liacos, Handbook Of Massachusetts Evidence, 5th Edition, Topic 2(A)(2), pp. 44–48 (1981); Alexander J. Cella, Administrative Law and Practice, 38 Massachusetts Practice Series, Chapter 7 § 277 (2007).

In the instant matter, in addition to bearing the overall burden to demonstrate that they bypass reasons were both sound and sufficient, it was the City's burden to refute the Appellant's sworn testimony by either presenting Booth before this Commission or obtaining a stipulation as to his testimony; the City did neither. Consequently, by not rebutting the Appellant's sworn testimony that Booth was aware of and authorized his temporary absence from the worksite, the City failed to meet its burden of production, after being afforded an ample opportunity to do so. I therefore find that the Appellant did not, as the City claimed, leave the jobsite without permission. The negative statements and events concerning the Appellants employment at the Leominster DPW did originate with Lapointe and he has been found to be an inconsistent and unreliable witness of questionable credibility.

"A civil service test score is the primary tool in determining relative ability, knowledge and skills and in taking a personnel action grounded in basic merit

principles." Sabourin v. Town of Natick, Docket No. G-01-1517 (2005). Here, the Respondent has failed to present sufficient credible evidence so as to warrant bypassing the higher scoring candidate. Moreover, "[b]eyond the basic fact that test scores, while not granting an individual an entitlement, should not be lightly disregarded and that the criteria for selection should not be unfairly weighed, the appointment process in this case was completely subjective and it flies in the face of the purpose of G.L. c. 31, which requires employees to be selected and advanced on the basis of their relative ability, knowledge and skills and be assured fair and equal treatment." Duguay v. City of Holyoke, Case No.: G-3652 (1998), quoting Tallman v. City of Holyoke, Case No.: G-2134. Because the Respondent failed to comply with the basic merit principles under G. L. c. 31, the Commission, pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, orders the Human Resources Division to take the following action:

The Civil Service Commission directs the Division of Human Resources to place Michael R. Gallagher's name at the top of the eligibility list for original appointment for the position of permanent police officer so that his name appears at the top of the current and/or next certification which is requested by the City of Leominster from Human Resources Division and from which the next appointment to the position of permanent police officer is made, so that he shall receive at least one opportunity for consideration. The City shall not use the same reasons for bypass of the Appellant. Upon appointment to the position of Leominster Police Officer, the Appellant shall receive additional relief consisting of a retroactive seniority date, for civil services purposes only, from the date of this bypass.

For all of the above reasons, the appeal under Docket No. G1-07-63 is hereby ***allowed***.

Civil Service Commission

_____
Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Bowman voted No, Henderson voted Yes, Taylor voted Yes, Stein voted Yes and Marquis voted No Commissioners) on January 29, 2009.

A true record. Attest:

_____
Commissioner
CIVIL SERVICE COMMISSION

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

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

Notice to: John Marra, Atty. HRD
Brian E. Simoneau, Atty.
Brian M Maser, Atty.