

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

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

Marc-Arthur Jean-Phillipe,
Appellant

v.

Docket NO.: G1-11-11

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

Stephen J. Delamere, Atty.
Law Office of Stephen J. Delamere
839 Washington Street
Stoughton, MA 02072

Respondent's Attorney:

Nicole I. Taub, Atty.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31 s. 2(b), the Appellant, Marc-Arthur Jean-Phillippe, (hereafter "Jean-Phillippe" or "Appellant"), seeks review of the decision and reasons proffered by the Appointing Authority in its delegated capacity, Boston Police Department (hereafter "BPD" or "Department"), for the bypass of the Appellant for original appointment to the position of Boston police officer. As the reasons for its decision, the Department cited the Appellant's attendance and disciplinary records from his previous employment, termination from

his previous employer and a domestic violence incident that occurred during the application process. The Appellant filed a timely appeal. A full hearing was held on July 7, 2011, at the offices of the Civil Service Commission (hereafter "Commission") The full hearing was digitally recorded and copies of the CD was provided to the parties. The parties submitted post-hearing proposed decisions.

FINDINGS OF FACT

Twenty-four (24) exhibits and a stipulation of facts were entered into evidence. Upon the Department's request and without objection the witnesses were ordered sequestered, except for the Appellant. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Detective Wayne Williams, Recruit Investigation Unit, Boston Police Department
- Robin Hunt, Director of Human Resources, Boston Police Department

For the Appellant:

- Marc-Arthur Jean-Phillippe, Appellant
- Josette Jean-Phillippe, Appellant's wife

I make the following findings of facts:

1. The Appellant took the civil service exam for police officer on April 25, 2009. He passed the exam with a score of 97. The Appellant's rank was 4 among those candidates willing to accept appointment on this special certified eligibility list for Haitian-Creole speaking candidates, Certification # 207138. Of the 8 candidates selected from this special certification, 6 were ranked below the Appellant. The Boston Police Department is a "delegated" appointed authority; meaning it has the authority delegated from the personnel administrator for the Commonwealth, Human Resources Division or "HRD"

to administer the selection process including the notification to the applicants of the reasons for bypass. *(Stipulation of facts)*

2. The BPD sent the Appellant a letter dated December 13, 2010 stating its reasons for bypassing him as a Boston Police Officer and appointing candidates who appeared lower on the certified eligibility list Certification #207138. The specific reasons contained in the bypass letter total six in number and will be specifically addressed at the end of these findings of fact. *(Exhibit 22 and Testimony of Robin Hunt)*
3. On May 11, 2010, the Appellant signed before a Notary Public his Student Officer Application and submitted it along with required documentation to Detective Wayne K. Williams ("Detective Williams") on May 15, 2010, the assigned Investigator the Boston Police Department. Thereafter, Detective Williams undertook the review of the Appellant's Student Officer Application and background investigation. *(Exhibit 1 and Testimony of Detective Williams)*.
4. During the background investigation, Detective Williams reviewed the Appellant's criminal history, driving record, education, personal recommendations and neighbors previous employment and his Student Officer Application. *(Exhibit 2 and Testimony of Detective Williams)*.
5. After reviewing the Appellant's Student Officer Application, Detective Williams' first concern was the "neatness" of the application. The errors included not following the general instructions of the application, such as not putting his employment history in chronological order. *(Testimony of Detective Williams)*.

6. Additional concerns of Detective Williams included the Appellant's driving record, preventable accidents while working for First Student and his attendance record and termination from First Student. (*Exhibit 2 and Testimony of Detective Williams*).
7. Furthermore, Detective Williams was concerned that the Appellant failed to include his notarized attendance records from First Student in his Student Officer Application, even though the Appellant was provided with Release of Information forms contained in his application packet and the use of the forms was explained to him by Detective Williams at the orientation. (*Testimony of Detective Williams and Exhibit 23*).
8. Detective Williams then contacted the Appellant to inform him that his application was missing the attendance documents from First Student and was not neat enough. Using his discretion, Detective Williams gave the Appellant a chance to correct the errors in his application. (*Testimony of Detective Williams*).
9. When the Appellant informed Detective Williams that he was still unable to obtain his attendance records from First Student, Detective Williams proceeded to obtain the documentation from First Student himself. (*Testimony of Detective Williams*).
10. Detective Williams went to First Student and was able to obtain the Appellant's attendance records from Yvette Clarke by providing a Release of Information form. Additionally, he was given documentation that included a record of a three (3) day suspension from First Student, which although the Appellant disclosed the suspension to Detective Williams at their second meeting, it was not included in Appellant's Student Officer Application. (*Exhibit 2 and Testimony of Detective Williams*).
11. The three (3) day suspension that the Appellant received when working for First Student was in response to two (2) preventable accidents with private vehicles within a thirty-six

(36) month period that both caused extensive damage to the vehicles and one caused personal injury. However, the Appellant explained to Detective Williams that he appealed the 3 day suspension through his union and had won the 3 days back so that the 3 day suspension was erased. It was determined that the Bus had defective brakes which had been reported by previous drivers and never repaired. Since the suspension had been erased, he believed he did not have to list it on the BPD application. (*Exhibit 3 and Testimony of Appellant and of Detective Williams*).

12. Detective Williams was able to ascertain from the Appellant's attendance record with First Student that the Appellant's last physical day of work with First Student was August 7, 2007. From August 13, 2007 to November 7, 2007 he was granted a leave of absence for "childcare" reasons. (*Exhibit 4 and Testimony of Detective Williams*).
13. On November 6, 2007, the Appellant requested an additional leave of absence in writing, from November 7, 2007 to May 4, 2008, again citing childcare as the reason. The Appellant was granted leave until December 7, 2007 and was instructed that he must make childcare arrangements during this extension. (*Exhibit 6 and Testimony of Detective Williams*).
14. When the extension at First Student expired, the Appellant once again requested another leave of absence from December 17, 2007 to March 30, 2008. The Appellant's request was granted until January 17, 2008 and he was notified that "no leave extensions [would be] granted beyond 1/17/08." (*Exhibit 7 and Testimony of Detective Williams*).
15. On January 18, 2008, the Appellant did not report back to work at First Student. Instead, the Appellant began to call out of work on a daily basis, according to First Student's records. (*Exhibit 11 and Testimony of Detective Williams*).

16. Following the Appellant's failure to return to work, he had his union president call the Director of Human Resources at First Student and request an additional extension.
(Exhibit 11 and Testimony of Detective Williams).
17. After the Appellant's additional extension request was denied, First Student stated in a letter to him dated March 18, 2008 that they determined that he had "abandoned" his position with First Student by not returning to work permanently. However, The Appellant testified that he had already notified the First Student HR Department that he was permanently leaving the position due to the denial of his requested extension of leave. *(Exhibit 5, 11 and Testimony of Appellant and Detective Williams).*
18. First Student's Yvette Clarke was confronted by Detective Williams on May 19, 2010 over their erroneous, although notarized attendance records and their failure to notify the Appellant of the March 18, 2008 letter due to the erroneous mailing address and failure to follow-up on that returned letter which listed his correct forwarding address. Yvette Clarke agreed to remedy the situation by placing a letter in the Appellant's personnel file dated June 30, 2010. This letter admitted First Student's "miscommunication" and "improperly recording" and him being "never properly notified nor documented correctly". However, Yvette Clarke described this as he "slipped through the cracks".
(Exhibit 5, 11 and Testimony of Detective Williams).
19. On February 1, 2008, First Student received a fax from the Massachusetts Bay Transportation Authority ("MBTA") verifying that the Appellant was enrolled in a medical plan with family coverage, effective December 17, 2007. At that time, the Appellant was also receiving family medical insurance coverage from First Student. Although the Appellant was employed simultaneously for a period by both First Student

and the MBTA, the hours did not conflict and no claimed breach of the rules and regulations of either employer resulted from this. There is no advantage for the Appellant to carry two family health insurance plans simultaneously, since the coverage is duplicative and the Appellant is responsible for the payment of at least part of both plan premiums. The Appellant subsequently received a refund check of over \$500 from First Student, for his premium overpayment due to this duplicate coverage. (*Exhibit 10 and Testimony of Appellant and Detective Williams, reasonable inferences*).

20. The Appellant also worked a second job driving for a company "Local Motion" when he started working for First Student. First Student was aware of his second job with Local Motion and did not complain. (*Exhibit 1 and Testimony of Appellant*)

21. The Appellant's BPD Student Officer Application contained information, as requested under the Employment History section, regarding his present and two previous employers. The present employer is the MBTA. The two previous employers listed are First Student and Local Motion. Some of the requested information to be provided: Names, supervisor's names, telephone numbers, e-mail addresses and fax numbers etc. It is noted that a few of the blocks to be filled in with this requested information are left blank by the Appellant. However, a directive at the top of this page instructs the applicant: "You must provide a copy of your personnel file from your current and previous two (2) employers. Further instructions are provided in this application packet." (*Exhibit 1*)

22. The BPD did not claim nor was any evidence presented to show that the Appellant did not comply with this requirement to attach these employment personnel files to his application. Detective Williams who conducts a very thorough investigation based on

the application did not testify that the Appellant failed to provide these required personnel files. (*Exhibits and testimony, Exhibit 1 and Testimony of Detective Williams*)

23. First Student stated in a letter to the Appellant, dated March 18, 2008, that the Appellant was terminated immediately from employment because he was “considered to have abandoned [his] position as a school bus driver.” Yet, First Student admits in the letter that he had been on approved personal leave which had been extended several times at the Appellant’s request, with the final leave extended to January 17, 2008. This letter references his failure to return to work at the end of his leave, and the company’s concern that he had been “less than forthcoming concerning the circumstances of the personal leave,” and the fact that he was working at the MBTA at the time he was requesting personal leaves from First Student. (*Exhibit 11 and Testimony of Detective Williams*).

24. However, the March 18, 2008 letter from James Wolfgang of First Student is questionable on its face. It is addressed to an erroneous address for the Appellant and therefore the Appellant never received this letter. The Appellant testified that First Student did have his correct address at the time of this letter. Detective Williams confirmed this fact and other related and concerning facts such as not resending the letter to the correct address after it was returned to First Student with the correct address on it. The Appellant also testified that Mr. Wolfgang repeatedly telephoned him while he was on leave and afterwards, in a positive way wanted him back working for First Student. Wolfgang also seemed worried that he would collect unemployment comp., which he never applied for. Wolfgang never told him about this letter. (*Testimony of Appellant*) This letter appears entirely over the top in its tone, language, content,

assumptions and conclusions. The language is accusatory and incendiary: “most troubling”, that he received family health care benefits while an MBTA employee. Stating that “It is a clearly fraudulent act to request a long term personal leave to supposedly care for your children on the pretense that you could not secure childcare and then all the while train and work for another employer. You never contacted the Company and admitted you were employed by the MBTA; rather you sought to extend your personal leave under fraudulent circumstances.” (*Exhibit 11, testimony and Exhibits, reasonable inferences*)

25. The Appellant testified that he informed First Student’s HR manager Yvette Clark that he was unable to return to his position after the denial of his request for another leave extension. The Appellant went to First Student months after he left employment there and picked up his refund check of over \$500 for his overpayment for health insurance coverage; yet, Yvette Clarke never mentioned his “abandoned position”, “termination” or the March 18, 2008 letter to him. (*Testimony of Appellant*)

26. The Appellant’s failure to properly and timely document the circumstances of his discontinuance of employment with First Student is concerning. This is especially true since it followed after a personal leave which had been extended several times and then refused to be extended by First Student. The Appellant testified that everything at First Student “had to be done through the union”. Yet, the Appellant failed to produce any documentation, a “cc” to the union for instance on his discontinuance of employment. A reasonably prudent person under these circumstances would have sent a resignation letter, preferably by certified mail with a “cc” to the union, explaining his departure and thanking the employer for the employment experience. Another example is the

Appellant's failure to provide any union documentation to support his claim that the First Student 3-day suspension had later been overturned through arbitration and the 3-days returned to him, due to him not being at fault for the two accidents. These are only a few examples of the Appellant's failure to act reasonably to accurately establish and document important employment related events, especially given his admitted bad memory for dates. (*Exhibits and Testimony, Testimony and demeanor of Appellant*)

27. Yet, Detective Williams determined after speaking with Yvette Clark and reviewing First Student's records that indeed the so called termination letter had been sent to a wrong address and the "certified mail returned" to First Student. No effort by First Student was made to re-send the returned letter to the correct address which was listed on the returned letter. Detective Williams also determined that First Student's notarized attendance records for the Appellant were erroneous, including listing him as being absent after he had been allegedly terminated. Detective Williams also determined that the Appellant's not reporting his second job to either First Student or the MBTA was not improper and did not conflict in hours. He also determined that it was not improper for him to have simultaneous family health plan coverage from both employers; the Appellant did subsequently receive a refund check from First Student for the overpayment for coverage; after prompting by Detective Williams and the MBTA. He determined that First Student's claim of suspected fraud was not born out. (*Testimony of Appellant and Detective Williams, Exhibits 2&11*)

28. The Appellant, like many people had worked two jobs with different hours for years. First Student was aware of that fact when it hired him. There is no claimed obligation for the Appellant to notify First Student of this circumstance. There is no claimed

violation of either employers' rules and regulations for an employee to receive family health care coverage from both employers simultaneously. (*Exhibits and Testimony, reasonable inferences*)

29. The Appellant and his wife met in High school and they were married on July 11, 2001 they both have worked and pursued their education during that time. They were also raising their children; now four, ages: 7, 5, 3 and 1. His wife graduated from Regis College and is now a Registered Nurse. They bought the House at 10 Robey Street while he was working at First Student. Then his hours were cut in 2004 and they couldn't keep up on the mortgage payments. The filed for bankruptcy and the house was lost in foreclosure. His wife had not yet passed her nursing boards then. She was pregnant and/or or had infants during part of that time. The Appellant has often worked two jobs at the same time. The Appellant admitted he had a bad memory for dates. (*Testimony of Appellant*)

30. The Appellant and his family have been under a high amount of stress and financial pressure due to the above described circumstances of work, education and family. The Appellant and his wife were having trouble finding adequate and reliable child care that would allow both of them to work, including the Appellant working 2 jobs; First Student and the MBTA. They even considered bringing a family member from Haiti for this purpose. After his wife passed her nursing boards she was eventually able to locate a nurse supervisor job that required long hours. They then decided that it would be better for them if he provided the family child care instead of working his second(day) job at First Student and she would work her higher paying nurse supervisor job. The Appellant was also continuing his education, a pursuit of a BA degree at the time of his

application. The Appellant seems to have wanted to stay on leave from his job at First Student, just to have it available in the future in case his circumstances changed and he could return to work there. (*Testimony of Appellant and his Wife, reasonable inferences*)

31. However, Detective Williams determined that the Appellant had not been aware of this so called “termination” letter and had never received it since it was mailed to the wrong address. The Appellant testified that First Student was aware of his correct address at the time this letter was mailed. Detective Williams also determined by reviewing First Student’s records that First Student was aware of his change of address on 1/29/08 and that the 3/18/08 letter sent to 10 Robey St. (Roxbury) was returned with his correct forwarding address. Yet, First Student failed to re-send this letter to his correct address and had no documentation showing they ever notified the Appellant of this so called termination. The Appellant also listed two addresses including his then current address in his BPD application, both addresses subsequent to that erroneous address used by First Student. Therefore, Detective Williams determined that the Appellant did not lie when he answered “No” to the Bpd application question on any prior termination from employment. (*Exhibits 1, 2 & 11 and Testimony of Appellant and Detective Williams*).
32. It is important to note that Yvette Clark generated a letter on First Student Letterhead to explain the above matters on the lack of delivery of the 3/18/08 letter due to erroneous address and lack of notice to the Appellant. Detective Williams attached this explanatory letter to his final report or “P&C” memorandum sent to Robin Hunt and Sgt. Det. Catherine Doherty, his supervisor. However, this letter was not included as part of

Exhibit 2, as submitted into evidence, so it is inferred that Exhibit 5 is that letter.

(Exhibits 2&5 and Testimony of Detective Williams)

33. Detective Williams testified that the notarized BPD Student Officer Application is the focal point of his investigations and that he explains the importance of truthfulness and completeness to the applicants. He determined that the Appellant was not untruthful in any part of the application or disclosures made to him as the investigator. *(Exhibit 1,*

Testimony of Detective Williams)

34. During the course of his investigation, Detective Williams learned that the Appellant began working for the MBTA on August 13, 2007. The Appellant worked for the MBTA during his multiple leaves of absence from First Student and continued to work for the MBTA after he left First Student permanently. *(Testimony of Detective*

Williams).

35. Additionally, on or about June 30, 2010 Detective Williams informed First Student that the notarized attendance record for the Appellant at First Student was incorrect. He noted specifically, the attendance record erroneously recorded that the Appellant was present at his position from August 13, 2007 to June 20, 2008. *(Exhibit 5 and Testimony*

of Detective Williams

36. On June 10, 2009, the Appellant was given a ten (10) day suspension by the MBTA for violating an MBTA rule that he was made aware of and signed an adherence form to approximately one month prior to violating the rule. The Appellant was in possession of but not using a "bluetooth" device, which apparently amounted to a violation of a specific MBTA rule. This rule had been in effect for only 3 days at that time. This new rule was apparently in response to a recent well publicized incident of a serious MBTA

accident, due to the distractive use of such a device. (*Exhibit 1, 17, and Testimony of Detective Williams*).

37. On July 2, 2010, after the Appellant's background check was complete, Detective Williams sent a Privileged and Confidential Memorandum to Robin Hunt, Director of Human Resources at the Boston Police Department. The memorandum notified Robin Hunt of the information that Detective Williams ascertained from his investigation and also his concerns with the Appellant's driving record, preventable accidents with First student, and attendance explained but still a concern and termination from First Student Bus Company explained, but advised applicant that he could have prevented some of the misunderstandings. (*Exhibit 2 and Testimony of Detective Williams*).
38. Detective Williams reported the termination from First Student Bus Company as being explained, **but advised applicant that he could have prevented some of the misunderstandings.** Detective Williams also testified that he told the Appellant that he **"could have handled this and that better."** (*Exhibit 2 and Testimony of Detective Williams*).
39. The Appellant testified that he telephoned Yvette Clark to get his notarized attendance records from First Student for Detective Williams. Clarke transferred him to another woman who told him he could pick them up in 4 days. He went with his wife to pick them up in 4 days and was told they would be ready in another week; then again he went back and he was told it would take another week after that. By then he figured out they were "playing him" around. However, he still didn't do anything effectively to document and remedy this situation of some urgency. He could have sent a written demand letter after the first delay with a cc to his union and at least have documented his

efforts for Detective Williams. However, he merely repeated his prior expectation several more times. He didn't identify that woman's name, another oversight on his part. This is merely a single example of his many acts or omissions, equating to ineffectualness and lack of reasonable attention to detail. (*Exhibits and testimony, testimony of Appellant*)

40. Detective Williams has been a member of the BPD for 26 years. He is very thorough and accurate in his testimony and his reported investigative facts. He found all the errors described in First Student's records in the Appellant's file. He did not find that the Appellant was untruthful or non-disclosing to him but did determine that the Appellant mishandled some past situations by failing to document them properly in a timely fashion, thereby creating misunderstandings and making his investigation more tedious. Detective Williams went out of his way to help the Appellant as best he could, but the Appellant seems to have squandered this good will by initially submitting a sloppy application with a few errors. Detective Williams then gave him an opportunity to later correct those mistakes. The Appellant left out some employment contact information like a supervisor name, e-mail address, telephone number or fax number on his BPD application. This omitted information tended to make Detective Williams' investigation more difficult. Detective Williams is a very professional, straight forward and accurate witness. He does not volunteer an answer he is not sure of. He well considers his response to each question before answering. I find Detective Williams to be an accurate and credible witness. (*Exhibits 1&2, Testimony and demeanor of Detective Williams*)
41. Detective Williams found that the Appellant received an Associate's degree from Roxbury Community College and was now pursuing a Bachelor's degree at

Northeastern University. He received excellent recommendations from his 3 personal references, his neighbors and his employment supervisors. (*Exhibits 1&2, Testimony and demeanor of Detective Williams*)

42. On August 26, 2010, a “roundtable” panel including Robin Hunt, Deputy Superintendent Michael Cox and Sergeant Detective Catherine Dougherty made the decision to bypass the Appellant for original appointment to the position of Boston police officer based on information found by Detective Williams in his investigation. (*Testimony of Robin Hunt*).

43. The roundtable’s decision to bypass the Appellant was based on his discipline record from First Student and the MBTA, as well as his attendance record and termination from First Student. The Department was concerned with the Appellant’s violations of his employers’ rules and regulations and was particularly concerned because the violations involved operating a motor vehicle—an essential duty of a Boston police officer. (*Testimony of Robin Hunt*).

44. Additionally, the roundtable was concerned with the Appellant’s abandonment of his position with First Student. This showed the roundtable that the Appellant exercised poor judgment by not properly communicating with his employer that he was not returning to work. (*Testimony of Robin Hunt*).

45. In late September of 2010, Robin Hunt was given a Boston Police Department Incident Report from Detective Williams regarding a domestic violence incident involving the Appellant. According to the police report: the 9/28/2010 incident at approximately 9:56 PM involved multiple 911 calls for domestic violence. One caller observed “a male beating up a female on the second floor of the building.” When the police responded,

the Appellant stated they were having a verbal argument over the length of his wife's shower. The Appellant's wife told the police officers that "after some mutual pushing and shoving, [the Appellant] struck her in the face with a closed fist, pulled her hair, and further struck her about the head area numerous times." Furthermore, one caller who resides in the same building stated "that she heard the screaming and slamming and it was causing her child to begin to cry." She also stated "that this is an 'every other day' occurrence." When asked for the names of his wife and children, the Appellant refused to answer. The wife also refused to identify herself to the police. No obvious signs of injury were observed and several offers of medical assistance were declined. She did not want the incident "to go any further", indicating she did not want to pursue legal action nor wish her husband to be placed under arrest. She further attempted to recant her version of the preceding events to avoid further police action. The Appellant who vehemently denied physically assaulting her was then placed under arrest and brought to the prisoner transport wagon. (*Exhibit 18*)

46. The Appellant and his wife testified that he had driven with his 4 children to pick up his wife at work on the evening of 9/28/10. She was running late, after a long day, due to extra work needing to be completed. He waited in the car with the children for his wife to finish. It was late and the children were tired and hungry. He stopped at a restaurant on the way home to pick up some take-out food. When the family arrived home, the Appellant was anxious to use the bathroom; "I had to go so bad". However, his wife wanted to use the bathroom first for a shower, because she believed he took too long in the bathroom; while he believed her showers took too long. She went in first and the Appellant after a while opened the door hitting his wife's foot with the door. She

became angry over this and his refusal to apologize for it. A fight ensued with the wife physically attacking him after she threw his cell phone at him. She tried to punch and scratch him and he warded off the attempts. They were yelling and screaming at each other and the children were crying and upset. He describes her as “arrogant and bossy” and the “hyper” one and himself as the “quiet” one. She agrees with this assessment; stating that he has never hit or threatened her and he just tried to defend himself from her attack. “I kinda jumped at him”, “I kinda pushed him”. “He knew that I would scratch and bite him...I have a bit of a temper”. She said that the Police officer who talked to her that night kept badgering her to say that he punched her and pulled her hair; she was very tired, so after a time, she lied and agreed with the police officer, thinking the police would then leave. However, the police arrested him instead, over her protests. She went to the police station that night to bail him out unsuccessfully and then to court the next morning. The matter was dismissed in court on the next scheduled date at her request. *(Testimony of Appellant and his wife)*

47. At the next roundtable discussion, Robin Hunt recommended that the roundtable discuss the Appellant’s recent domestic violence incident. The nature of the violence, the fact that children were present and that Appellant refused to provide the names of his wife and children were elements of significant concern to the roundtable. As compliance with law enforcement is an essential quality for all Boston Police Department applicants, the Appellant’s refusal to provide the names of his family was of considerable concern to the roundtable. Furthermore, the roundtable was concerned with the fact that the incident occurred during the Appellant’s application process. *(Testimony of Robin Hunt)*.

48. The decision to bypass the Appellant was not changed; rather the Appellant's domestic violence incident was added to the reasons for the decision. On December 13, 2010, Robin Hunt sent a letter to the Appellant to inform him of the decision to bypass him for original appointment to the position of Boston police officer. (*Exhibit 22 and Testimony of Robin Hunt*).
49. The Appellant's and his wife's version of events on the night of the domestic incident, 9/28/10 is believed. The wife was sequestered and their renditions corroborated each other in the main. Their demeanor and their respective use of language and accusatory descriptions rang true. They admitted they were yelling and screaming at each other, while their children were upset and crying. The wife admitted she as usual, was the physical aggressor, while the Appellant merely tried to protect himself, as usual. (*Testimony of Appellant and his wife*). This determination is buttressed by one of his MBTA supervisors who described his relationship with others as "very respectful" and is "very calm" resolving conflict, and "doesn't lose his temper" in stressful situations. (*Exhibit 14*)
50. However, taking the Appellant's version of the events of this domestic incident, together with the BPD incident report for 9/28/10; a very serious and disturbing situation is shown. The Appellant and his wife and children were under a lot of stress that evening as they each described. Yet, that stress was the result of circumstances which they created and were well aware of. Plainly and simply they spread themselves too thin with work, school, family and other responsibilities and it exploded on the evening of a particularly long and difficult day. The fact that several neighbors made 911 calls, prompted by the disturbance, describing circumstances which caused concern for the

safety of the Appellant's children; the fact that one neighbor's child actually started crying just from hearing the disturbance is alarming. These and the other facts contained in the BPD incident report create a great concern regarding the Appellant's judgment and maturity. Just taking his declaration, "I had to go so bad", this ignited the fight over the bathroom; calls his maturity, anticipation and judgment into question. (*Testimony of Appellant and his wife, Exhibit 18*)

51. The specific bypass reasons stated in that December 13, 2010 bypass letter are the six following (numbers added): **1.)** While an applicant for the police officer position, an arrest occurred for assault and battery on September 28, 2010, including details from multiple 911 calls by neighbors. **2.)** A ten-day suspension from his job at MBTA for wearing a Bluetooth phone device while working. **3.)** A three-day suspension from employer "First Student" for "two preventable collisions within six months". **4.)** Being terminated from First Student in March, 2008 after abandoning his position, after repeated attendance issues. **5.)** Yet, answering a question on his BPD application- "No" to Q. Ever terminated from employment? **6.)** Unable to obtain attendance records from his employer [First Student]; however, the BPD Investigator was able to obtain such documents and uncovered "significant attendance issues". (*Exhibit 22 and Testimony of Robin Hunt*)

52. The six stated reasons for bypass, as numbered above, are addressed in summary as follows (*numbers added*): **1.)** the domestic incident and arrest has been described above, is found to be proven. **2.)** The ten-day MBTA suspension is found to be partially mitigated as explained by the Appellant, yet still is an employment discipline. **3.)** The three-day suspension by First Student for two accidents is believed to have been later

revoked after he won it in union arbitration, as the Appellant testified. Therefore, this reason is not found to be proven. However, the negative corollary to this reason is the Appellant's failure to properly document this subsequent revocation of the suspension in his file, for his own benefit and the convenience and satisfaction of BPD Investigator, Detective Williams. This is another example of the Appellant's poor judgment and lack of attention to detail or follow-up 4.) The "termination" from First Student in March, 2008 after "abandoning" his position after repeated "attendance issues" is found not to be proven. Detective Williams found the Appellant's explanation satisfactory, since he had never received the March, 2008 "termination" letter and the all other errors, omissions and anomalies in First Students records, which Detective Williams found. However, the negative corollary to this reason is the Appellant's failure to properly document his end of employment there, for his own benefit and the convenience and satisfaction of BPD Investigator, Detective Williams. This negative corollary also raises concern regarding his judgment, attention to detail and maturity. 5.) The Appellant's erroneous answer of the termination question on the BPD application is found not to be proven, pursuant to the previous finding. 6.) The Appellant's inability to obtain notarized copies of his attendance records from First Student is found not to be proven since the Appellant made a protracted effort to obtain these records, but was obstructed by First Student. This is one of the anomalies of First Student's interaction with the Appellant. Naturally, Detective Williams with his badge and professional presentation accompanied by a signed release easily obtained the attendance records. The Appellant's inability to properly document his efforts to obtain these records, even long after realizing he was being "played" by First Student, is a very significant example of the

Appellant's lack of judgment, maturity and prudence. All of the above described acts and omissions of the Appellant created a more difficult investigation for Detective Williams. The described difficulties could have been eliminated or minimized by reasonable, prudent and timely action on the part of the Appellant. Even, sympathetic Detective Williams noted in his report that he "advised the applicant that he could have prevented some of the misunderstandings". He also testified that he told the Appellant that "he could have handled this and that better". Considering that good judgment, anticipation, attention to details and follow-through together with timely and accurate report writing are all expected qualities and abilities of police officers; the Appellant fell short. (*Exhibits and testimony, Exhibit 22*)

53. The Appellant's inaction or omissions contributed to or resulted in the appointing authority having some erroneous, conflicting and/or incomplete employment records at its disposal at the time of the decision to bypass. This caused some confusion on the part of the appointing authority, but on balance its decision was based on substantive, sound and sufficient reasons. (*Exhibits and testimony, Exhibit 22*)

54. Based on the totality of the facts and circumstances found by a preponderance of the credible evidence in the record, the appointing authority had sound and sufficient reasons for its decision to bypass the Appellant for appointment to the position of police officer, for the reasons stated in its bypass letter. (*Exhibits and testimony, Exhibit 22, reasonable inferences*)

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); *See Town of Watertown v. Arria*, 16 Mass. App. Ct. 331 (1983); *McIsaac v. Civil Service Commission*, 38 Mass. App. Ct. 411 (2000); *Police Department of Boston v. Collins*, 48 Mass. App. Ct. 411 (2000); *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003). The Commission has held in numerous decisions that its function is not one of substituting judgment for that of the Appointing Authority. *City of Cambridge*, 43 Mass. App. Ct. at 304; *School Committee of Salem v. Civil Service Commission*, 348 Mass. 696, 699 (1965). Massachusetts General Laws chapter 31 § 2(b) provides that “no administrator ... shall be reversed by the commissioner except upon a finding that such decision was not based upon a preponderance of evidence in the record.”

An action is “justified” when it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *City of Cambridge*, 43 Mass. App. Ct. at 304, quoting *Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928); *Commissioners of Civil Service v. Municipal Court of the City of Boston*, 359 Mass. 211, 214 (1971).

In making that analysis, the commission must focus on the fundamental purposes of the civil service system – to guard against political considerations, favoritism, and bias in governmental employment decisions. . . . When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority. . . . In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion.

City of Cambridge, 43 Mass. App. Ct. at 304 (citations omitted).

Appointing Authorities are allowed sound yet significant discretion when choosing individuals from a certified list of eligible candidates on a civil service list. *City of Cambridge*, 43 Mass. App. Ct. at 304. The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. *Falmouth v. Civil Service Commission*, 447 Mass. 814, 824-826 (2006). In doing so, the Commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *City of Beverly v. Civil Service Commission*, 78 Mass.App.Ct. 182, 188 (2010). Such deference is especially appropriate with respect to the hiring of police officers. *Id.* 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." *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). See *Commissioners of Civil Service V. Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975) and *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

It has been found here that most of the employment related stated reasons for bypass have not factually been proven. Yet the BPD reasonably relied on some employment records which were erroneous, incomplete or confusing, partly due to the Appellant's considerable shortcomings regarding these records. Separately, the negative concerns and implications raised by the Appellant's enumerated deficiencies regarding these records creates a significant basis for the belief that the Appellant lacks fundamental traits and abilities necessary to be a police officer.

It has also been found here that the facts and circumstances of the Appellant's arrest for domestic abuse, taken alone was sound and sufficient reason for his bypass. Taking the

Appellant's version of the events of this domestic incident, together with the BPD incident report for 9/28/10; a very serious and disturbing situation is shown.

The Appellant and his wife and children were under a lot of stress that evening as they each described. Yet, that stress was the result of circumstances which they created and were well aware of. Plainly and simply they spread themselves too thin with work, school, family and other responsibilities and it exploded on the evening of a particularly long and difficult day. The fact that several neighbors made 911 calls, prompted by the disturbance, describing circumstances which caused concern for the safety of the Appellant's children; the fact that one neighbor's child actually started crying just from hearing the disturbance is alarming. These and the other facts contained in the BPD incident report create a great concern regarding the Appellant's judgment and maturity. Just taking his declaration, "I had to go so bad", this ignited the fight over the bathroom; calls his maturity, anticipation and judgment into question.

The specific bypass reasons stated in that December 13, 2010 bypass letter are the six following (numbers added): 1.) While an applicant for the police officer position, an arrest occurred for assault and battery on September 28, 2010, including details from multiple 911 calls by neighbors. 2.) A ten-day suspension from his job at MBTA for wearing a Bluetooth phone device while working. 3.) A three-day suspension from employer "First Student" for "two preventable collisions within six months". 4.) Being terminated from First Student in March, 2008 after abandoning his position, after repeated attendance issues. 5.) Yet, answering a question on his BPD application- "No" to Q. Ever terminated from employment? 6.) Unable to obtain attendance records from his employer [First Student]; however, the BPD Investigator was able to obtain such documents and uncovered "significant attendance issues".

The six stated reasons for bypass, as numbered above, are addressed in summary as follows (numbers added): 1.) the domestic incident and arrest has been described above, is found to be proven. 2.) The ten-day MBTA suspension is found to be partially mitigated as explained by the Appellant, yet still is an employment discipline. 3.) The three-day suspension by First Student for two accidents is believed to have been later revoked after he won it in union arbitration, as the Appellant testified. Therefore, this reason is not found to be proven. However, the negative corollary to this reason is the Appellant's failure to properly document this subsequent revocation of the suspension in his file, for his own benefit and the convenience and satisfaction of BPD Investigator, Detective Williams. This is another example of the Appellant's poor judgment and lack of attention to detail or follow-up 4.) The "termination" from First Student in March, 2008 after "abandoning" his position after repeated "attendance issues" is found not to be proven. Detective Williams found the Appellant's explanation satisfactory, since he had never received the March, 2008 "termination" letter and the all other errors, omissions and anomalies in First Students records, which Detective Williams found. However, the negative corollary to this reason is the Appellant's failure to properly document his end of employment there, for his own benefit and the convenience and satisfaction of BPD Investigator, Detective Williams. This negative corollary also raises concern regarding his judgment, attention to detail and maturity. 5.) The Appellant's erroneous answer of the termination question on the BPD application is found not to be proven, pursuant to the previous finding. 6.) The Appellant's inability to obtain notarized copies of his attendance records from First Student is found not to be proven since the Appellant made a protracted effort to obtain these records, but was obstructed by First Student. This is one of the anomalies of First Student's interaction with the Appellant. Naturally, Detective Williams with his badge and professional presentation accompanied by a

signed release easily obtained the attendance records. However, the Appellant's inability to properly document his efforts to obtain these records, even long after realizing he was being "played" by First Student, is a very significant example of the Appellant's lack of judgment, maturity and prudence. All of the above described acts and omissions of the Appellant created a more difficult investigation for Detective Williams. The described difficulties could have been eliminated or minimized by reasonable, prudent and timely action on the part of the Appellant. Even, sympathetic Detective Williams noted in his report that he "advised the applicant that he could have prevented some of the misunderstandings". He also testified that he told the Appellant that "he could have handled this and that better". Considering that good judgment, anticipation, attention to details and follow-through together with timely and accurate report writing are all expected qualities and abilities of police officers; the Appellant fell short.

The Appellant's inaction or omissions contributed to or resulted in the appointing authority having some erroneous, conflicting and/or incomplete employment records at its disposal at the time of the decision to bypass. He left his prior employment record unclear, incomplete or erroneous regarding his: absenteeism, abandonment of position, termination, reasons for personal leave, and the subsequent arbitration revocation of the driving accidents 3-day suspension. This confusion could have all been avoided by reasonable and prompt action on the Appellant's part.

The Appellant had the burden of referencing, and producing and attaching these accurate records to his BPD application. This records imbroglio caused some confusion on the part of the appointing authority, but on balance its decision was based on substantive, sound and sufficient reasons. The BPD's investigation and review of his background raised serious concerns

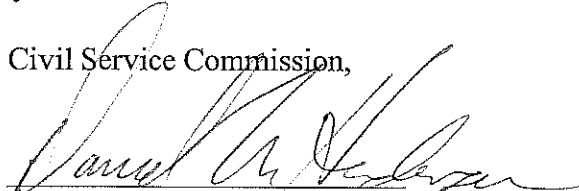
regarding the Appellant's qualifications leading to its determination that he lacked the required personal qualities and fitness to be a police officer.

The BPD has demonstrated a sufficient risk that the Appellant may respond with the same poor judgment and other stated inadequacies, as a police officer. There was no evidence presented to show any political favoritism or bias or other improper consideration.

Based on the totality of the facts and circumstances found by a preponderance of the credible evidence in the record, the appointing authority had sound and sufficient reasons for its decision to bypass the Appellant for appointment to the position of police officer, for the reasons stated in its bypass letter.

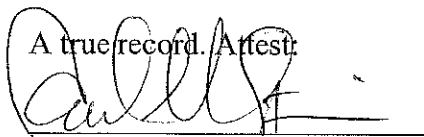
For all of the above reasons, the Appellant's appeal under Docket No. G1-11-11 is hereby *dismissed*.

Civil Service Commission,



Daniel M. Henderson
Commissioner

By a vote of the Civil Service Commission (McDowell, Stein, and Henderson, Commissioners), [Bowman, and Marquis absent], on October 6, 2011

A true record. Attest:


Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

Under the provisions of MGL c. 31 S. 44, 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:

Stephen Delamere, Atty. (Appellant)
Nicole Taub, Atty. (Appointing Authority)
John Marra, Atty. (HRD)