Decision mailed: 10/26/09
Civil Service Commission CS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

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

GEORGE JOHNSON,
Appellant

v.

Docket No. G1-07-380

CITY OF CAMBRIDGE,
Respondent

Appellant's Attorney:

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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, §2(b), the Appellant, George Johnson,(hereafter "Johnson" or "Appellant") seeks review of the Personnel Administrator's (HRD) decision to accept the reasons of the City of Cambridge (hereafter "City" or "Appointing Authority") for bypassing him for original appointment to the position of fire fighter. The Appellant filed a timely appeal with the Civil Service Commission from his bypass.

A full hearing was commenced on November 12, 2008 at the offices of the Civil Service Commission. One (1) audio tape was made of the hearing.

FINDINGS OF FACT:

Seven (7) exhibits and a stipulation of facts were entered into evidence at the hearing. It is ordered, no party objecting, that the identity of the competing candidates who bypassed the Appellant for appointment, are designated by letter (A, B, C etc.) Based on these documents and the testimony of the following witnesses:

For the Appointing Authority:

Christopher Burke, Cambridge Police Department
John Gelinas, Cambridge Fire Department

For the Appellant:

George Johnson, Appellant

I make the following Findings of Fact:

1. George Johnson took a Civil Service examination for appointment to the position of Fire Fighter for the City of Cambridge and was thereafter listed on Certification No. 270237 as eligible for original appointment to that position.(Stipulation)
2. The Appellant was notified by HRD, by letter dated December7, 2007 that he was being bypassed for appointment as a fire fighter in the

City of Cambridge Fire Department, with a letter attached from the City stating the reasons (criminal record as specified below) for said bypass. (Exhibit 6)

3. The attached bypass letter from the City, referred to the criminal record (stipulation) as the stated reasons for bypass: "Mr. Johnson was arrested on January 26, 2004 in Missouri for Operating Under the Influence. He pled guilty, paid court costs and had his driver's license suspended for one year. He was arrested in Somerville MA in September, 1997 for possession of LSD (Class B) and marijuana (Class D) and conspiracy to violate the Controlled Substance Act. He admitted to sufficient facts on all three counts." (stipulation, Exhibit 6)
4. The Appellant was "cooperative" and acted as a "gentleman" in his dealings with the investigating officer, Police Deputy Superintendant Christopher Burke. He fully disclosed his court record of appearances during the application/interview process and never attempted to conceal same. Dep. Superintendant Burke did not make any recommendation to the Fire Dept., regarding appointing or bypassing candidates. (Exhibit 7, Testimony of Burke)
5. George Johnson resides at 333 Columbia Street, Unit 2, Cambridge, Massachusetts 02141. (Stipulation)
6. George Johnson's date of birth is April 14, 1980. (Stipulation)

7. George Johnson served in the United States Navy from 2000 to 2004 when he was honorably discharged from that service. (Exhibit 2, Stipulation)

8. George Johnson's criminal record consists of the following:

   (a) An arrest in Somerville, Massachusetts in September, 1997 for possession of a Class B substance (LSD), a Class D substance (Marijuana) and conspiracy to violate the Controlled Substance Act. He admitted to sufficient facts on all three counts and all three counts were continued without a finding and ultimately dismissed with no conviction;
   (b) An arrest on January 26, 2004 in Mississippi for operating under the influence of alcohol to which he pleaded guilty. George Johnson was reached by the City of Cambridge on Certification No. 270237 and was not selected for appointment. (Stipulation)

9. The reasons given by the City to the Commonwealth's Human Resources Division (HRD), for not selecting George Johnson were based entirely upon his criminal record as set forth in this Stipulation.

10. The City offered no additional substantiated facts or circumstances regarding the Appellant's arrest for operating under the influence of alcohol other than what is stated in finding of fact 8 (b) above. The glaring omission is the court finding on guilt and the court's disposition. (Exhibits and testimony)

11. The record of the Appellant's appearance in Somerville District Court reflect that he was arraigned September 4, 1997 on the three charges and the matter continued until December 12, 1997 for

disposition. On that date, two of the charges: Possession of Class B controlled substance and Conspiracy to violate controlled substance act, were dismissed at the request of the Commonwealth (DRC) and those two cases were closed. The third charge, Possession of controlled substance Class D (marijuana), violation of G.L. c. 94C § 34, was continued without a finding (CWOF), for six months, until June10, 1998 with the mandatory victim witness fee of $35 paid(VWF) and dismissed on that date, and closed (C).All three of the charges against the appellant were misdemeanors. (Exhibit 7, administrative notice)

12. The third charge, Possession of controlled substance Class D (marijuana), violation of G.L. c. 94C § 34, was a misdemeanor at the time of the arrest and court disposition in this matter. That applicable statute then, under the circumstances of being a first offense and no subsequent offense during the CWOF or probation period, allowed the court to dismiss the charge and seal all the official records related to the matter. This applicable statute specifically precluded the use of even a conviction subsequently sealed, stating it could not be used for the purpose of any penalty or disqualification. (Administrative notice)

13. G.L. c. 94C § 34 was subsequently amended by Chapter 387, Sec. 5 of the Acts of 2008 inserting the following text, effective December 4,

2008: "If any person who is charged with a violation of this section has not previously been convicted of a violation of any provision of this chapter or other provision of prior law relative to narcotic drugs or harmful drugs as defined in said prior law, or of a felony under the laws of any state or of the United States relating to such drugs, has had his case continued without a finding to a certain date, or has been convicted and placed on probation, and if, during the period of said continuance or of said probation, such person does not violate any of the conditions of said continuance or said probation, then upon the expiration of such period the court may dismiss the proceedings against him, and may order sealed all official records relating to his arrest, indictment, conviction, probation, continuance or discharge pursuant to this section; provided, however, that departmental records which are not public records, maintained by police and other law enforcement agencies, shall not be sealed; and provided further, that such a record shall be maintained in a separate file by the department of probation solely for the purpose of use by the courts in determining whether or not in subsequent proceedings such person qualifies under this section. The record maintained by the department of probation shall contain only identifying information concerning the person and a statement that he has had his record sealed pursuant to the provisions of this section. Any

conviction, the record of which has been sealed under this section, shall not be deemed a conviction for purposes of any disqualification or for any other purpose. No person as to whom such sealing has been ordered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment, conviction, dismissal, continuance, sealing, or any other related court proceeding, in response to any inquiry made of him for any purpose.

Notwithstanding any other penalty provision of this section, any person who is convicted for the first time under this section for the possession of marihuana or a controlled substance in Class E and who has not previously been convicted of any offense pursuant to the provisions of this chapter, or any provision of prior law relating to narcotic drugs or harmful drugs as defined in said prior law shall be placed on probation unless such person does not consent thereto, or unless the court files a written memorandum stating the reasons for not so doing. Upon successful completion of said probation, the case shall be dismissed and records shall be sealed." (Administrative notice).

14. The Controlled Substance Act G.L. Chapter 94C was also amended by the addition of Section 32L, by Chapter 387, Sec. 5 of the Acts of 2008

inserting the following text, effective December 4, 2008, G.L. Chapter 94C Section 32L: This new statute de-criminalizes the possession of one ounce or less of marijuana. It calls for a civil only penalty with forfeiture and the prohibition of other sanctions or disqualifications. The new statute states in relevant part, "Notwithstanding any general or special law to the contrary, possession of one ounce or less of marihuana shall only be a civil offense, subjecting an offender who is eighteen years of age or older to a civil penalty of one hundred dollars and forfeiture of the marihuana, but not to any other form of criminal or civil punishment or disqualification. An offender under the age of eighteen shall be subject to the same forfeiture and civil penalty provisions, provided he or she completes a drug awareness program which meets the criteria set forth in Section 32M of this Chapter..." (Administrative notice)

15. There were Seven (7) individuals listed lower than George Johnson on Certification No. 270237, who were selected for appointment: Those candidates are identified by letters A through G, in descending order A through G. Two of those named individuals had a tie score with the Appellant but appeared lower on the certification. (Exhibit 6, Stipulation and order of hearing officer)

16. Of the individuals who were selected for original appointment were three individuals who had criminal records, and/or multiple moving violations, as follows:

Candidate (A) was convicted on November 18, 1985 of the charge of operating to endanger. This candidate was also cited for failure to stop on 09/04, 08/96, 06/89 and 01/87, inspection violation 02/84, eleven (11) speeding violations and six (6) surchargeable accidents;

Candidate (B) was arrested on December 27, 1998 by the Malden Police and charged with assault and battery to which he pleaded guilty.

Candidate (C) was cited for motor vehicle violations as follows: Failure to stop 06/04, 09/03, 10/93, 02/89, 1 seatbelt violation 09/03, 1 lane violation 07/95 and ten (10) speeding violations. (Stipulation)

17. Two other candidates were bypassed on Certification No. 270237.

Bypassed Candidate (D) was bypassed for being arrested for operating under the influence on April 23, 2007.

Bypassed Candidate (E) was bypassed for a 2002 arrest for vandalism and possession of Class C and Class D drugs. Also, he had been arrested in 2000 for being a minor in possession of alcohol. (Stipulation)

18. The Human Resources Division of the Commonwealth (HRD) not only approved the bypass of the Appellant but also permanently

removed his name from (future certifications) consideration for original appointment to the position of Fire Fighter. (Stipulation)

19. The Appointing Authority did not ask the Department of Human Resources to permanently remove George Johnson's name from any list for appointment as a fire fighter and therefore that removal was an error by HRD. (Stipulation)

20. The Appointing Authority used a hiring panel to make recommendations to the Appointing Authority for appointment from Certification No. 270237. That panel consisted of John J. Gelinas, Michael Gardner and Charles Walker. It was that panel that made a unanimous recommendation to the Appointing Authority Robert Healy, City Manager, to bypass George Johnson.(Testimony of Gelinas)

21. Deputy Fire Chief John J. Gelinas, an interview panel member testified as follows; He believed that the Appellant's arrests were evidence of "poor judgment" and a "lack of responsibility". Gelinas used a "combination of both incidents" to form his opinion regarding the decision to bypass the Appellant. He believed it indicated an inability to follow rules and regulations, which is required by the Department. He also believed it had a "public trust aspect" to it. He and the panel did not apply any written hiring rule of HRD or of the Department or otherwise, to relatively compare the competing

candidates or to disqualify or bypass the Appellant for his "criminal conviction" or arrests. Instead, Gelinas tried to apply the rules and regulations of the Department which governed existing employees. He believes that a criminal conviction is not an automatic disqualification. Gelinas believes there are "different levels of poor judgment; OUI being more serious than Assault and Battery", an intentional crime. He and the panel were aware that all of the appellant's charges; drugs and alcohol were dismissed at the time of the bypass decision. Gelinas admitted that there was no evidence or indication of any drug use by the Appellant since 1997 or any alcohol misuse since 2004. (Testimony of Gelinas)

22. Deputy Chief Gelinas testified that he believed the more than ten (10) years, without recurrence, that had elapsed from the date of the Somerville arrest to the date of the bypass, was insufficient to offset the seriousness of the offense. He also believes that ten (10) years, without recurrence, is not enough to offset the seriousness of an OUI arrest. He believed that both of the incidents or offenses are serious. (Testimony of Gelinas)

23. Deputy Fire Chief Gelinas testified that he was "not satisfied with the Appellant's answers" to the panel's questions regarding the arrest incidents. However, he could not recall the Appellant's answers or explanations. The panel did not have a set or written answer prior to

the interview that the panel deemed acceptable. Gelinas remembers that the Appellant did give an explanation of the OUI arrest in Mississippi, but he could not remember what the explanation had been. Gelinas specifically stated that the ten (10) year lapse of time, without a repeat offense, from the September, 1997 arrest to the October, 2007 bypass decision, was "not long enough to offset the seriousness of the offense". This staleness or ten year lapse was considered by the panel. (Testimony of Gelinas)

24. Deputy Fire Chief Gelinas did find Candidate "B's" explanation to the panel question regarding his arrest and plea of guilty in Malden to assault and battery, to be "to our satisfaction". However, Gelinas could not recall what that explanation had been. Although the panel had general discussions regarding the candidates and recommendations, Gelinas could not recall any of the discussion and he did not make notes. (Testimony of Gelinas)

25. Deputy Fire Chief Gelinas and the panel did consider regarding the Appellant, these three factors: 1) rehabilitation, 2) youth, (age 17) and 3) the lapse of time with no repeat offense. However, he could not remember the discussion, the weight or apportionment of weight for these three factors. (Testimony of Gelinas)

26. Deputy Fire Chief Gelinas testified Candidate "A" was convicted on November 18, 1985 of the charge of operating to endanger. This

candidate was also cited for failure to stop on 09/04, 08/96, 06/89 and 01/87, inspection violation 02/84, eleven (11) speeding violations and six (6) surchargeable accidents. Gelinas did find that the type and frequency of these offenses were serious and did show a "pattern". However, Gelinas admitted that he could not recall what Candidate "A's" explanation had been even though he found it "satisfactory" (Testimony of Gelinas)

27. Deputy Fire Chief Gelinas testified that the City's Town Manager, who is the Appointing Authority, does follow the panel's recommendation on appointments and bypasses. (Testimony of Gelinas)

28. The Appellant, George Johnson testified at this hearing. He is a tall handsome 28 year old single man. He is neat and well groomed in appearance. He graduated from High School in Somerville, in 1999, going into the US Navy shortly thereafter. He remained in the Navy, on active duty for four (4) years, being honorably discharged in February, 2004. While on active duty he served aboard the USS Yorktown, a guided missile cruiser. He attained the grade of Petty Officer Third Class, as an electrician's mate. While in the Navy, he was tested every three months for drugs and all tests were negative. He has not used drugs since his arrest in 1997, and that incident was the only time he had attempted to use drugs. He explained the OUI

arrest in Mississippi in January, 2004. He was about to be discharged from the Navy and his Division Chief threw a party for him. He admits that he was drinking alcohol like everyone else at the party. He admits that after the party he did drive a vehicle back to the ship, a distance of roughly one to one and one-half miles. There was no accident or other motor vehicle violation. He testified in a strong clear voice, without hesitation. He sat or stood erect, had appropriate body language including good eye contact. He admitted his past mistakes and appears to have learned from them. He presents himself as an honest, responsible and reliable person. I find him to be a credible witness. (Testimony, demeanor and appearance of Appellant)

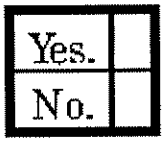
29. G.L.Chapter.31, §50 prohibits the employment of any person in a civil service position who is "habitually using intoxicating liquors to excess" or who has been "convicted of any crime" within one year (except for certain misdemeanors or other offenses where the fine imposes is not more than $100 or the incarceration is less than six months, in which case the appointing authority may, in its discretion, employ such person). (Administrative notice)

30. G.L.Chapter.41, §96A provides *"No person who has been convicted of any felony shall be appointed as a police officer* of a city town or district." (administrative notice)

31. G.L. Chapter 31: § 20. Applications for examination or registration; fees; requests for information. Section 20. "Each application for examination or registration pursuant to the civil service law and rules shall be made under the penalties of perjury and shall contain requests for such information as the administrator deems necessary. Each such application for a non-promotional examination shall include a fee, not exceeding ten dollars, which may be waived by the administrator, subject to the rules adopted pursuant to section four. No applicant shall be required to furnish any information in such application with regard to: any act of waywardness or delinquency or any offense committed before the applicant reached the age of seventeen years; any arrest for a misdemeanor or felony which did not result in a court appearance, unless court action is pending; any complaint which was dismissed for lack of prosecution or which resulted in a finding or verdict of not guilty; or any arrest for or disposition of any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violation, affray, or disturbance of the peace if disposition thereof occurred five years or more prior to the filing of the application.

Notwithstanding the foregoing provisions, an application for examination or registration shall contain the following question:

"Have you been convicted of a criminal offense other than drunkenness, simple assault, speeding, traffic violation, affray, or disturbance of the peace?



If yes, please indicate the date, court, offense charged and the penalty imposed." Each applicant shall answer such question, subject to the provisions of sections one hundred A, one hundred B and one hundred C of chapter two hundred and seventy-six." (Administrative notice)

32. The Civil Service Commission recognizes that there are applicable laws that govern the: access to , compilation and use by state and municipal appointing authorities in making civil service appointments and promotions such as: (1) M.G.L. c.6, § 167-178 and related laws and regulations pertaining to CORI (Criminal Offender Record Information), CJIS (Criminal Justice Information System), NCIC (National Crime Information Center) and other and other records containing information about the criminal history of an applicant for civil service appointment or promotion; (2) various laws governing the "sealing" and "expungement" of criminal records; (3) the obligations imposed under Mass.G.L.c.151B, §4(9) that limit the extent to which appointing authorities, as employers, are permitted to inquire about or use an applicant's criminal history in making employment decisions;(4) and the specific provisions

within the Civil Service Law itself that are applicable. The use of "sealed records" is covered under the Sealed Records Law, M.G.L. c. 276, §§ 100A-C. The Commission also recognizes that the foregoing is not a complete list of the applicable laws, rules and regulations. (administrative notice)

33. Mass.G.L.c. 151B proscribes discrimination in employment, housing and credit services transactions, and is enforced by the Massachusetts Commission Against Discrimination (MCAD). M.G.L.151B, §4(9) provides: *It shall be an unlawful practice. . .[f]or an employer,*[1] himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, *to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting*

[1] M.G.L.c.151B, §1: The term "person" includes . . .the commonwealth and all political subdivisions, boards, and commission thereof. . . .The term "employer" . . . shall include the commonwealth and all political subdivisions, boards, departments and commissions thereof. . . . .

therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records. (Administrative notice)

34. G.L. c. 94C, the "Controlled Substances Act", list the controlled substances by "Class" for the purpose of determining the severity of criminal offenses under this chapter. Class A having the most severe penalty down to Class E having the least penalty. (administrative notice)

MINORITY CONCLUSION (HENDERSON, TAYLOR):

In a bypass appeal, the Commission must decide 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).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, the Commission must consider the

fundamental purpose of the Civil Service System which is "to protect against overtones of political control, objectives unrelated to merit standards and assure neutrally applied public policy." If the Commission finds that there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy," then it should intervene. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. City of Cambridge at 304.

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. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001).

All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988). Also, Basic merit principles, as defined by Chapter 31 of the General Laws, require that employees be selected and advanced "on the basis of their relative ability, knowledge and skills, assured of fair and equal treatment

in all aspects of personnel administration, and that they be protected from arbitrary and capricious actions." Sammataro v. Chicopee Police Department, 6 MCSR 145 (1993).

It has been found here that Deputy Chief Gelinas acted with the belief that he, when making the recommendation to the appointing authority held subjective discretion to choose among the competing candidates. He weighed and considered the alleged criminal record of "arrests" of the Appellant versus the other candidates, without referring to a clear established written rule or practice for such a determination. However, Appointing Authorities are charged with the responsibility of exercising sound discretion and good faith when choosing individuals from a certified list of eligible candidates on a civil service list. The courts have addressed this issue and 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* the following line of cases as quoted in Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971); 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; (1922) Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431 (1969). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572 (1940). 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."

In the instant case, the City violated basic merit principles in several ways. Foremost by the selection of candidates whose names appeared lower on the certification and/or scored lower on the civil service exam. However, "[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); Bardascino et al v. City of Woburn, Docket No.: G1-04-134, G1-04-120, G1-04-111 (2006).

Although differences of opinion have been expressed as to the precise "quantum of proof" needed in this area, the Civil Service Commission has previously accepted an appointing authority's justification for bypassing an applicant because of a criminal history, even when incidents did not result in conviction, so long as the Commission was persuaded, by substantial and reliable proof, that the circumstances underlying the charges (as demonstrated by police reports, admissions or other evidence) supported a conclusion that the candidate was unsuitable for appointment. See, e.g., Nahim v. Boston Police Dep't, 20 MCSR 232 (2007) (assault & battery, coupled with subsequent domestic abuse restraining orders and "lengthy" history of driving offenses, for which applicant failed to accept responsibility); Henrick v. City of Methuen, 20 MCSR 215 (2007) (failure to disclose prior charge); Tracy v. Cambridge Police Dep't, 18 MCSR 221

(2005) (multiple charges exhibits "patterns of behavior"); Thames v. Boston Police Dep't, 17 MCSR 125 (2004) (improper to bypass based on pending charges, but bypass upheld based on long history of arrests and applicant's own testimony); Soares v. Brockton Police Dep't, 14 MCSR 109 (2001) (numerous criminal charges and motor vehicle violations);Malone v. Boston Police Dep't, 13 MCSR 102 (2000) (separate charges of assaults on police officers two years apart, corroborated by percipient police officers' reports, on one of which the appellant was initially found guilty in the district court); Lavaud v. Boston Police Dep't, 12 MCSR 236 (1999) (five prior criminal charges); Brooks v. Boston Police Dep't, 12 MCSR 19 (1999) ("considerable criminal history"); Frangie v. Boston Police Dep't, 7 MCSR 252 (1994) ("Mr. Frangie's background investigation revealed a history of adverse involvement with the police and . . . multiple incidents where he had been involved in threats to commit physical harm to others").

Access to and the use of criminal or court records in the hiring process of public employment is proscribed by various statutes and related regulations. Some of those relevant statutes are outlined in the "Findings of Fact" portion of this decision. For the most part, CORI, Chapter 151B and the Civil Service Law should be easy to reconcile when it comes to "non-criminal justice agencies", where CORI access is traditionally limited to conviction data and sealed or "expunged" records are most likely not going to arise as an issue. It would still be important to know that "non-criminal justice", (i.e., police and corrections) employment decisions are being made solely on the basis of authorized access to CORI and in compliance with how the

Commission currently interpret the applicability of the provisions of Chapter 151B in light of the express mandates in the Civil Service Law on the same subject.

Public employment appointing authorities are controlled in their hiring practices by the proscriptions of Chapter 151B, §4(9) or solely constrained by the separate provisions of Chapter 31, §20 & §50. The only reported case that involved a Commission decision concerning a CORI issue is Town of Burlington v. McCarthy, 60 Mass.App.Ct. 914, 805 N.E.2d 88 (2004) (rescript opinion). The McCarthy case turned on the Commission's error in overlooking G.L.c.71, §38R, a specific statute on point. In McCarthy, the Commission allowed a bypass appeal for appointment of a school building custodian on the grounds that the school committee had improperly considered the applicant's CORI record (which included, among others, multiple convictions for DWI, driving to endanger and shoplifting). The Appeals Court reversed, holding that school departments are expressly authorized to use CORI for hiring purposes [G.L.c.71, §38R allows schools "all access" to the CORI of any applicant who may have direct and unmonitored contact with children] and, in the McCarthy case, the applicant's extensive CORI record "reflects a habitual and sustained disrespect for the law" that established a "reasonable justification" to decline to hire the individual. The McCarthy circumstances are in clear contrast with the Appellant's, with a record of only two isolated and unrelated instances with very favorable court dispositions. The City, in this present matter proposed only an accusation. It produced no detailed first hand information regarding the essential elements of the charges in either incident (e.g. breathalyzer reading or drug analysis). It offered no corroboration or substantiation of its determination that the Appellant lacked the required judgment or responsibility for the position of Fire Fighter base on his record of "arrests",

especially as compared to the competing candidates A and C. The City failed to produce any direct, credible evidence of the Appellant's inadequacies in this area. The Appellant's alleged criminal record and/or the criminal/driving record were not actually a record of a conviction or a finding of guilty properly made and entered on the record.

Deputy Chief Gelinas did not cite or reference any statutory authorization for his collection and use of the criminal history information on the competing candidates. Some of the collected information was raw or from a secondary source.

Despite the raw nature of some of the criminal history information, it was employed for evaluation purposes anyway. In this present appeal, Deputy Chief Gelinas emphasized the seriousness of the Appellant's "criminal record" or his two "arrests", without taking any notice of the courts' finding and disposition in each arrest. Deputy Chief Gelinas testified that he believed the more than ten (10) years, without recurrence, that had elapsed from the date of the Somerville arrest to the date of the bypass, was insufficient to offset the seriousness of the offense. He also believes that ten (10) years, even without recurrence, is not enough to offset the seriousness of an OUI arrest. He believed that both of the incidents or offenses are of a serious nature, deserving of the career or employment consequences here. The Appellant actually has no record of a criminal conviction on these two matters. The totality of the surrounding circumstances of each incident mitigate against their seriousness. The two incidents could best be described as isolated and unrepeated. The charges are both misdemeanors. The overall purpose of the legislative and judicial systems is to do justice and to

encourage rehabilitation. The court dispositions of both matters clearly indicate the courts' intention to protect the Appellant's criminal record by the avoiding the entry of a guilty finding. In keeping with the civil service or public employment and criminal statutory schemes, the Appellant was to be saved from a "criminal record" of a conviction along with its potential disqualification from or ineligibility for public employment. *See for contrast* Commonwealth v Travis Powell, 453 Mass. 320, 327, 329 (2009)

In the Powell case the Supreme Judicial Court addressed all of the relevant factors, including the rights of the parties and power of the legislature, in the appropriate disposition of a serious criminal matter. - "Accordingly, unless the statutory language of the charged offense prohibits it, the dismissal of an indictment in the interests of justice after a guilty plea and after the satisfaction of conditions remains a viable disposition in the Superior Court.[9] For reasons of practicality and fairness, the Commonwealth should be permitted to exercise its right of appeal pursuant to G. L. c. 278, s. 28E, and Mass. R. Crim. P. 15, as appearing in 422 Mass. 1501 (1996), at the time the judge disposes of the case as if it were an appeal from a dismissal." Commonwealth v Travis Powell, 453 Mass. 320, 327 (2009). The Powell decision addressed many of the overt issues involved in a remedial disposition of a serious criminal matter, an indictment. It took into consideration: the public's "interests of justice", the trial judge's discretion, the legislature's purpose and intent, the prosecutor's opportunity to exercise rights and the defendant's opportunity to claim and establish rehabilitation on a first offense for a misdemeanor. It is noted, by contrast, that Powell pled guilty to a felony and was placed on probation for a period of three (3) years with conditions. The Powell decision stated:

" We conclude that a Superior Court judge may dismiss a valid indictment, in certain circumstances, after accepting a guilty plea, by "continuing the case without a finding," and imposing conditions. 1. Background. On January 9, 2002, an indictment was returned charging the defendant, Travis Powell, with unarmed burglary in violation of G. L. c. 266, s. 15. On June 18, 2003, following a full plea colloquy, Powell pleaded guilty to the indictment. The judge accepted Powell's guilty plea, and in "the interests of justice," "plac[ed] it on file" without entering a guilty finding and imposed a three-year term of probation with conditions.[1] The judge stated that if Powell complied with all of the conditions of probation, "it is anticipated that the court will dismiss the case" in accordance with the procedure outlined in Brandano, [Commonwealth v Brandano, 359 Mass.332 (1971)] supra at 337." See *Powell ibid*, page 321-322.

Deputy Chief Gelinas did not follow a prescribed or identifiable process for the evaluation of the competing candidates and their respective criminal histories. There were no written memoranda of the relative performance of the candidates. There were no written rules employed on how to define and evaluate the candidates' criminal histories. He made no reference to any statutory authority on access to or use of criminal history information. Gelinas kept no notes of the interviews with the candidates. He used his own subjective evaluation of the competing candidates' alleged criminal records and their respective explanations of the related incidents. However, he could not recall, even generally what the Appellant's "unsatisfactory" explanations had been. He also could not recall what the various successful candidates' "satisfactory" answers or explanations had been regarding their respective criminal/driver's records.

The conclusion could easily be made that competing Candidate A has an abysmal driving record, which reflects a history of complete disregard for the public safety when he is driving a motor vehicle. The Commission could also easily conclude that Candidate A has demonstrated a lack of personal responsibility and poor judgment as it relates to the safe operation of a motor vehicle, an important fire fighter duty.

One could also find that competing Candidate C's driving record to be atrocious. This candidate was cited for failure to stop four times between February, 1989 and June, 2004 and cited for speeding ten times between November, 1988 and June, 1997. It could be reasonably argued that Candidate C has demonstrated a complete disregard for public safety while he is driving a motor vehicle and the Commission could easily conclude that he has demonstrated a lack of personal responsibility and poor judgment.

The criminal/driver's records of both the competing Candidates A and C indicate a lack of responsibility and poor judgment on numerous occasions. These two competing candidates demonstrated a disregard for public safety, (auto laws) over a prolonged period. This is an obvious conclusion. Yet, the Appointing Authority saw fit to appoint these competing candidates to the position of permanent full-time Fire Fighter.

The evaluation process employed here is entirely subjective, arbitrary and capricious and implemented contrary to the clear statutory intent of the applicable legislation, interests of public justice and judicial discretion, *Ibid.* Powell decision. The City's claimed reasons for bypass are thus rendered "incapable of substantiation" by this indefinite evaluation process and therefore is impermissible for the basis of a proper bypass. *See* Borrelli v MBTA, 1 MCSR 6

(1988), Collett v. Department of Correction, CSC Docket No.G1-08-53 (2008). and Anderson v Department of Correction, CSC Docket No.G1-08-106 (2008).

The Appellant has honorably worn the uniform of his country as a United States Navy Petty Officer third Class, serving for four years before being honorably discharged. Although subject to drug screening throughout his naval career, there is no evidence that he tested "positive" for any illegal drugs. There was no indication of any other blemish on his record or anything but an isolated incident of intended drug use or experimentation. There is no evidence of any character flaw in the Appellant. The Appellant made full disclosure of his arrest/court record to the City and HRD in the application process. The conclusion supported by direct and uncontroverted evidence is that the Appellant was no substance abuser or an irresponsible or injudicious person, at the time of this bypass. cf. Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001) (commission must take account of all the evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence)

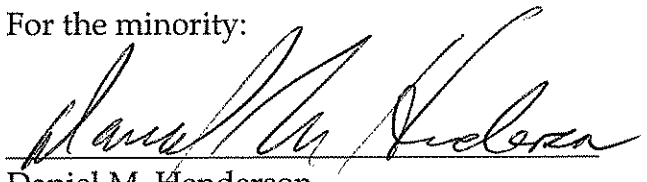
This appeal is not a case in which the City was presented with an applicant whose background investigation revealed an undisclosed prior criminal record or contained other credible, corroborating evidence that inferred a "patterns" of criminal or other unsuitable traits or behavior. cf. Henrick v. City of Methuen, 20 MCSR 215 (2007) (failure to disclose prior charge); Tracy v. Cambridge Police Dep't, 18 MCSR 221 (2005) (multiple charges exhibits "patterns of behavior"); Thames v. Boston Police Dep't, 17 MCSR 125 (2004) (improper to bypass based on pending charges, but bypass upheld based on long history of arrests and applicant's own testimony); Soares v. Brockton

Police Dep't, 14 MCSR 109 (2001) (numerous criminal charges and motor vehicle violations); Lavaud v. Boston Police Dep't, 12 MCSR 236 (1999) (five prior criminal charges); Brooks v. Boston Police Dep't, 12 MCSR 19 (1999) ("considerable criminal history").

The record also reveals the City's unacceptable inconsistency or inability to document or explain its decision to bypass the Appellant in favor of the appointed candidates. This lack of consistency or acceptable explanation would, as a matter of law, at least raise a specter of pretextual or unlawful behavior. See, e.g., Sinai v. New England Tel.& Tel. Co., 3 F.3d 471, 474, cert.den., 513 U.S. 1025, 115 S.Ct. 597, 130 L.Ed.2d 509 (1993); Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 432 (1st Cir. 2000); Brennen v. GTE Government Systems Corp., 150 F.3d 21, 29 (1st Cir. 1998) ("Deviation from established policy or practice may be evidence of pretext"); Wooster v. Abdow Corp., 46 Mass.App.Ct. 665, 672-73, 709 N.E.2d 71, 77 (1999) citing Powers v. H.B. Smith Co., 42 Mass.App.Ct. 657, 658, 662, 679 N.E.2d 252, rev.den., 425 Mass. 1105, 682 N.E.2d 1362 (1997) (case "rife with 'procedural tangles and . . . several critical missteps.' ")

The issue before the Commission is whether George Johnson was fairly considered by the Appointing Authority in light of his alleged past (criminal) history compared to that of the appointed candidates, who bypassed him. For the reasons set forth herein, the majority concludes, based on a preponderance of the credible evidence in the record that he was not fairly considered and that he was improperly bypassed for appointment as a Fire Fighter.

For the minority:



Daniel M. Henderson,

Commissioner

MAJORITY CONCLUSION (STEIN, BOWMAN, MARQUIS)

The Majority of the Commission concludes that, based on the facts found by the Hearing Commissioner, the City of Cambridge has established sound and sufficient reasons to bypass the Appellant for appointment to the position of firefighter. The undisputed evidence established the Appellant's 2004 guilty plea and conviction for operating under the influence, and subsequent one-year suspension of his motor vehicle operator's license. This offense was committed less than three years before his consideration for appointment. While the Appellant showed that there were mitigating circumstances involved and his offense was an isolated example of an otherwise unblemished driving record, the City of Cambridge was fully justified to decline to appoint a person with a recent, serious driving offense to the position of firefighter. The Commission notes that the Appellant was not the only candidate with an OUI record who was bypassed – "Candidate D", with an arrest for OUI in 2007, was also bypassed.[2]

The Majority of the Commission is obliged to comment on the findings that show that the City of Cambridge did appoint three other candidates (Candidates "A", "B" and "C") with what appear, on their face, also to be appalling criminal and poor driving records:

[2] Since the Appellant's bypass is justified by his OUI conviction , alone, the majority does not address whether the Appellant's 1997 brush with the law for possession of controlled substances (LSD and marihuana), misdemeanor violations for which he was charged as a minor and which were dismissed without conviction, are, arguably, too stale to justify his bypass. The majority note, however, that at least one other candidate ("Candidate E") was bypassed for similar reasons.

(1) Candidate "A" was once convicted for "driving to endanger" (i.e., operating a motor vehicle so that the "lives of the public may be endangered", G.L.c.90,§24), as well as four traffic violations, eleven speeding violations and six surchargeable accidents; (2) Candidate "B" pleaded guilty to a assault and battery charge); and (3) Candidate "C" had a record of six traffic violations and ten speeding violations. Ordinarily, basic merit principles, compel an appointing authority to justify its bypass decisions with sound as sufficient reasons that are applied equally to all candidates. The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The Commission has been clear that it will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988).

While the Commission will not set aside this bypass and, thus, participate in a "race to the bottom", neither can it condone the appointment of persons to the highly sensitive and responsible position of a firefighter who have exhibited the type of risky behavior that the record here seems to show is the case for at least three selected candidates appointed (and presumably now serving) as firefighters in the City of Cambridge. The Commission puts on notice that, any appointing authority which continues to place high risk individuals such as the three candidates described above into sensitive positions of

public safety officers – while contemporaneously seeking to justify bypassing other, equally risky individuals as unworthy of such appointments -- should expect to be held accountable and, when such actions appear to be sufficiently pervasive that the Commission suspects ulterior motive or bias, it will not hesitate to exercise its authority to take appropriate and necessary action within the scope of its statutory powers to investigate and, if it finds substantial evidence that, indeed, the civil service law and rules have been violated, it will order immediate action to remediate those

For the majority:

Paul M. Stein
Commissioner

For all of the reasons cited in the majority conclusion, the Appellant's appeal is hereby ***dismissed.***

By vote of the Civil Service Commission (Bowman, Chairman – Yes; Stein, Commissioner – Yes; Marquis, Commissioner – Yes; Henderson, Commissioner – No; Taylor – Commissioner – No)

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

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30)

days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Robert H. Clewell, Atty.

Daniel C. Brown, Atty.

John Marra, Atty. (HRD)