COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JAMES KERR,
Appellant

v.

G1-16-203 &
G1-17-230[1]

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Patrick Bryant, Esq.
Pyle Rome Ehrenberg P.C.
2 Liberty Square, 10th Floor
Boston, MA 02109

Appearance for Respondent:

Jaclyn Zawada, Esq.
Boston Police Department
Office of the Legal Advisor
1 Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman

DECISION

On December 9, 2016, James Kerr (Mr. Kerr), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Police Department (BPD) to bypass him for original appointment to the position of police officer for allegedly: a) providing untruthful answers on his student officer application; and b) providing untruthful answers to a background investigator. On December 20, 2016, I held a pre-

[1] The BPD bypassed Mr. Kerr a second time as part of a subsequent hiring cycle for essentially the same reasons that were the subject of CSC Case No. G1-17-230. The parties submitted a motion to consolidate these two (2) appeals and agreed to be bound on both bypass appeals by the decision in the first bypass. The motion was allowed.

hearing conference at the offices of the Commission, which was followed by a full hearing at the same location on March 30, 2017.[2] The full hearing was digitally recorded and both parties received a CD of the proceeding.[3] On April 28, 2017, the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Sixty-six (66) Exhibits were entered into evidence at the hearing (Respondent Exhibits 1-13 and Appellant Exhibits 1-53). Based on the documents submitted and the testimony of the following witnesses:

For the BPD:

- Charisse Brittle-Powell, BPD Detective;
- Nancy A. Driscoll, Director of the BPD's Human Resources Department;

For Mr. Kerr:

- James Kerr, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. Mr. Kerr is twenty-four (24) years old. He is a high school graduate; a resident of Dorchester; and a student at UMASS Boston. He served in the United States Marines from 2011 to 2015. (Testimony of Mr. Kerr)

[2] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

[3] If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

Stipulated Facts

2. On April 25, 2015, Mr. Kerr took the civil service examination for police officer and received a score of 97.
3. On October 2, 2015, the state's Human Resources Division (HRD) established an eligible list of candidates for Boston police officer.
4. On May 4, 2016, HRD, at the request of the BPD, sent Certification No. 03766 to the BPD, from which the BPD ultimately appointed eighty (80) police officers.
5. Based on his status as a disabled veteran and his examination score of 97, Mr. Kerr was ranked 12th among those candidates willing to accept appointment as police officer on Certification No. 03766.
6. Of the eighty (80) candidates appointed by the BPD as police officers, seventy-seven (77) were ranked below Mr. Kerr.
7. On November 15, 2016, the BPD notified Mr. Kerr that it was bypassing him for appointment.

Reasons for Bypass

8. The BPD bypassed Mr. Kerr for allegedly: a) providing five (5) untruthful responses on the student officer application; and b) making two (2) untruthful statements to a background investigator. (Respondent Exhibit 11)

Five (5) Written Responses on Student Officer Application Cited in Bypass Letter

9. Page 11, Question 1H asks: "Have you ever been disciplined by an employer for any reason?" Mr. Kerr checked "no". (Respondent Exhibit 1)

10. Page 18, Question C1 asks: "As an owner / operator, have you ever received a written warning from a police officer in Massachusetts? Mr. Kerr checked "no". (Respondent Exhibit 1)
11. Page 19, Question C2 asks: "As an operator/owner, have you ever received a citation from a police officer in Massachusetts?" Mr. Kerr checked "no". (Respondent Exhibit 1)
12. Page 22, Question C asks: "Have you ever been taken into protective custody?" Mr. Kerr checked "no". (Exhibit 1)
13. Page 24, Question 7 asks: "Is there anything not previously addressed that may cause a problem concerning your possible appointment as a police officer?" Mr. Kerr checked "no". (Respondent Exhibit 1)

Two (2) Alleged Statements by Mr. Kerr to Background Investigator Cited in Bypass Letter

14. "Detective Brittle-Powell asked you if you had ever had any interaction with the police at any time, you replied 'no'". (Respondent Exhibit 11)
15. "The Detective then asked you if you had any disciplinary problems at any school you attended, your response was 'no'". (Respondent Exhibit 11)

<u>Findings Related to: Page 11, Question 1H:</u> "Have you ever been disciplined by an employer for any reason?" Mr. Kerr checked "no".

16. Section V of the application is titled: "EMPLOYMENT HISTORY". A separate section, Section VII of the application is titled: "MILITARY RECORD." (Respondent Exhibit 1)
17. Question 1H regarding whether an applicant has ever been "disciplined by an employer" falls under "Section V: EMPLOYMENT HISTORY" of the application. (Respondent Exhibit 1)
18. Mr. Kerr enlisted in the U.S. Marine Corps in 2011. During his service in the U.S. Marine Corps, he earned the rank of Corporal and was deployed on active military duty. (Testimony of Mr. Kerr and Appellant Exhibit 52)

19. Mr. Kerr was deployed overseas from September 2012 to May 2013 as a member of the Fleet Force. (Testimony of Mr. Kerr; Appellant Exhibit 52)

20. Mr. Kerr received several medals, certificates and commendations while on active duty, including the Good Conduct Medal, National Defense Service Medal, Global War on Terrorism Service Medal, Sea Service Deployment Ribbon, Global War on Terrorism Expeditionary Medal, and a Letter of Appreciation. (Testimony of Mr. Kerr; Appellant Exhibit 52)

21. Mr. Kerr received the second highest security clearance possible after being subject to background checks conducted by the Military Intelligence Department and Federal Bureau of Investigation. (Testimony of Mr. Kerr)

22. Upon successfully completing his military obligations, Mr. Kerr was honorably discharged from the Marines on February 1, 2015. (Appellant Exhibit 52)

23. In her written summary regarding her background investigation, Detective Brittle-Powell wrote:

    "While reading through the applicant's military file, I discovered an Administrative Remark dated 6/25/13. The applicant was given a written warning for returning back to base late. The applicant explained that he got lost and separated from his group and was not sure which dock he had to return to. The applicant stated that he received a verbal warning and did not serve any punishment because of it." (Respondent Exhibit 9)

24. Detective Brittle-Powell also spoke with Mr. Kerr's commanding officer. According to Detective Brittle-Powell's written summary, the commanding officer:

    "verified that the applicant worked under his command during his last deployment. [He] describes the applicant as very smart, confident and an all-around good Marine. [He] denied that the applicant had any disciplinary concerns while working under his supervision. [He] did comment on the Administrative Remark that the applicant received in June of 2013. [He] stated that he was told that the applicant failed to return to his post on time. The applicant did not receive any punishment, only a verbal reprimand." (Respondent Exhibit 9)

25. Candidate EE was ranked below Mr. Kerr on Certification No. 03766 and was appointed as a Boston police officer. Candidate EE's background investigation states in part:

" … the applicant stated that he had no type of disciplinary action or non-judicial punishment taken against him while in the military. The applicant provided proof that he requested his military record on 07/20/16. NOTE: At this time, I still have not received the applicant's military record. In review of the applicant's DD214, it showed that the applicant received a Good Conduct Medal. This achievement is the result of no disciplinary action while in the military. In addition, the applicant received an honorable discharge. The applicant's military reentry code: 1, means that the applicant is eligible for reentry; and the application's separation code: MBK, means expiration of service in the military. I requested that the applicant generated a notarized letter stating that he had no disciplinary actions while in the military. When the applicant's military records are received, I will review and confirm applicant's report of no disciplinary actions.." (emphasis added) (Appellant Exhibit 39)

Findings Related to: Page 18, Question C1: "As an owner / operator, have you ever received a written warning from a police officer in Massachusetts? Mr. Kerr checked "no" & Page 19, Question C2 which asks: "As an operator/owner, have you ever received a citation from a police officer in Massachusetts?" Mr. Kerr checked "no".

26. As part of her investigation, Detective Brittle-Powell reviewed an Abington Police Department document showing that Mr. Kerr received a written warning from an Abington police officer on November 6, 2011 for a non-illuminated license plate. (Respondent Exhibit 2)

27. Mr. Kerr forgot about this 2011 written warning, received while driving his brother's car, and, thus, acknowledges that his answer was incorrect. He did not recall receiving this warning until it was brought to his attention by Detective Brittle-Powell. (Testimony of Mr. Kerr)

28. As part of her investigation, Detective Brittle-Powell reviewed a "Massachusetts Uniform Citation" issued to Mr. Kerr by the Braintree Police Department on June 24, 2010 for "unlicensed operation of MV". Those records indicate that Mr. Kerr was arrested for this 2010 offense. (Respondent Exhibit 6)

29. While filling out the application, Mr. Kerr remembered that he had been arrested by the Braintree Police in 2010 for operating without a license when he was fifteen (15) years old, but he did not recall that it was accompanied by the issuance of a citation. Thus, he answered "no" to this question. (Testimony of Mr. Kerr)
30. On June 23, 2016, Mr. Kerr met with Detective Brittle-Powell to bring additional documentation to her. Detective Brittle-Powell asked Mr. Kerr to review his Student Officer Application. Mr. Kerr made no changes to any of his responses. (Testimony of Detective Brittle-Powell; Respondent Exhibits 1, 2, 3, 4, 5, and 6)
31. Detective Brittle-Powell then directed Mr. Kerr to review three specific questions on his Student Officer Application, including: "As an operator/owner, have you ever received a written warning from a police officer in Massachusetts?"; "As an owner/operator, have you ever received a citation from a police officer in Massachusetts?"(Testimony of Detective Brittle-Powell and Mr. Kerr)
32. Detective Brittle-Powell asked Mr. Kerr to review his responses to these questions because she had information that contradicted his responses in the Student Officer Application, so she wanted to give him an opportunity to review them. Mr. Kerr reviewed his responses but did not change them. (Testimony of Detective Brittle-Powell)
33. Candidate A was ranked below Mr. Kerr and was appointed as a police officer. His background investigation summary states in part: "The applicant received a citation for speeding … in 2003. He was found not responsible. He omitted this on his application and has written a letter of explanation." Candidate A's letter of explanation states: "In 2003, I was pulled over and received a citation. I didn't remember this incident until my detective mentioned it. When I was filling out my packet and it asked about citations on my driving

record I couldn't remember it. I was not trying to hide this from the detectives (sic) I forgot and it was my mistake." (Appellant Exhibit 3)

34. Candidate D was ranked below Mr. Kerr and was appointed as a police officer. His background investigation summary states in part:

- "The applicant checked off no to the question on page 19, question 5 'As an operator, have you ever received a written citation in any state other than Massachusetts?' The applicant explained that he did not know that a citation showed up on his driving record since he was not behind the wheel at the time of the incident. The applicant submitted an explanation …" (Appellant Exhibit 6)

35. Candidate F was ranked below Mr. Kerr and was appointed as a police officer. His background investigation summary states in part:

- "There was a moving violation in … 2016 that was not documented in the applicant's application."
- "On … 2014 … a citation was issued to the applicant for excessive tint that was not documented in the applicant's application."
- "There was a surchargeable accident on … 2007 that the applicant did not include in his application. The Registry of Motor Vehicles informed me that the incident involved property damage and $2355.00 was paid out by insurance. The applicant was unable to recall the incident. The applicant has provided a letter of explanation regarding these incidents." (Appellant Exhibit 8)

36. Candidate F's written responses stated:

    - "I was informed of an accident … on November 1, 2007 that resulted in property damage. I did not put this down due to no recollection of this accident."

- "I … did not report a speeding ticket in 2016 in … do (sic) to it being a camera speed trap and was not actually pulled over. I was mailed the ticket and paid the fine of 225.00 dollars."
- "I … did not report a fixer ticket in … May of 2014 for my window tint being too dark because it was not a moving violation or payment citation. I removed my tint and mailed the fixer ticket back to the city … " (Appellant Exhibit 8)

37. Candidate J was ranked below Mr. Kerr and was appointed as a police officer. In a letter to his background investigator, Candidate J stated: "Today, October 1, 2016 [background investigator] contacted me to discuss my driving record. I couldn't fully recollect how many citations I had been given, but, based on a review by [background investigator] I have been given 7 citations. Due to the being found not responsible on 3 I didn't believe they counted toward me and another I honestly don't remember Below and attached are the explanations for the Citations that I've been given whether responsible or not responsible …." (Appellant Exhibit 12)

Findings Related to: Page 22, Question C: "Have you ever been taken into protective custody?" which Mr. Kerr checked "no".

38. Including this is a reason for bypass was a "clerical mistake" by the BPD. Mr. Kerr was not untruthful when he answered "no" to this question. (Testimony of Ms. Driscoll)

Findings Related to: Page 24, Question 7: "Is there anything not previously addressed that may cause a problem concerning your possible appointment as a police officer?" which Mr. Kerr checked "no".

39. The BPD concluded that Mr. Kerr's "no" answer was untruthful and that he should have answered "yes" and disclosed the following information:

    a) The previously referenced arrest on 6/25/10 for operating without a license;

    b) The previously referenced "discipline" while serving in the military.

c) A 7/29/10 arrest for minor in possession of alcohol.

(Respondent Exhibits 9 & 11)

40. On June 25, 2016, Mr. Kerr provided a written statement to the background investigator which stated in part:

" … The other question I misunderstood was when the packet asked is there anything that will inhibit you from being a Boston Police Officer. I thought I was answering this question honestly when I said no. I had my record ran (sic) prior to filling the packet out and it came back clean of any criminal charges. I did not think this mistake from childhood would hold me back in any way from becoming one of Boston's finest since my record is clean. I was not trying to hide any information from the Investigators. I am aware that they are formal trained police officers and can probably find out more about me than I know of myself. If the question had asked have you ever been arrested I would have been more forthcoming in explaining this incident among two other incidents when I was charged with a minor in possession of alcohol which neither are on my record. I am sorry that this may have appeared to question my integrity but I promise you it was no more than a misunderstanding on my part and I thank you for your time."

(Respondent Exhibit 8)

Findings Related to Alleged Statement #1 to Background Investigator: "Detective Brittle-Powell asked you if you had ever had any interaction with the police at any time" which Mr. Kerr allegedly replied: "no'".

41. As part of an interview with Mr. Kerr on June 23, 2016, Detective Brittle-Powell asked Mr. Kerr: "Have you ever had any interaction with police for any reason at any time?" Mr. Kerr replied: "No." (Testimony of Detective Brittle-Powell)[4]

42. After Mr. Kerr responded, "No" to her question regarding police interaction, Detective Brittle-Powell then slid the report of Mr. Kerr's arrest by Braintree across the table. She

[4] Detective Brittle-Powell and Mr. Kerr offered conflicting testimony on this point, with Mr. Kerr testifying that he did not recall this question being posed to him during the interview "in that way." I listened (and re-listened) to all relevant testimony by Mr. Kerr and Detective Brittle-Powell regarding this question. Ultimately, I have credited the testimony of Detective Brittle-Powell. Her testimony rang more true to me whereas Mr. Kerr's testimony, at points, appeared to be somewhat equivocal. Further, it seemed logical to me that this question would precede the undisputed act of Detective Brittle-Powell sliding information across the table regarding Mr. Kerr's interaction with the Braintree Police Department.

asked Mr. Kerr if it looked familiar. Mr. Kerr looked at the report and stated that he did recall the incident. (Testimony of Detective Brittle-Powell)

43. Detective Brittle-Powell then reminded Mr. Kerr that moments earlier she had asked him whether he has ever had any interaction with police and that he had stated, "No." She asked Mr. Kerr why he had lied to her. (Testimony of Detective Brittle-Powell)

44. Mr. Kerr stated that he did not understand the question and that he did not think he needed to say, "Yes." He further stated that he had his background run prior to completing his application and the incidents did not show up, so he thought he did not need to disclose them. (Testimony of Detective Brittle-Powell)

Findings Related to Alleged Statement #2 to Background Investigator: "The Detective then asked you if you had any disciplinary problems at any school you attended" which Mr. Kerr replied: 'no'".

45. As part of her investigation, Detective Brittle-Powell obtained police reports from the Abington Police Department regarding two (2) incidents that occurred when Mr. Kerr was in middle school. The first incident involved allegations that Mr. Kerr was bullying a female student. The second incident involved allegations that Mr. Kerr brought a knife to school, an allegation that was not substantiated. (Exhibits 4 & 5)

46. During an interview with Mr. Kerr, Detective Brittle-Powell asked him whether he had any disciplinary problems at any school he had ever attended. He told her, "No." (Testimony of Detective Brittle-Powell)[5]

47. When Detective Brittle-Powell then discussed the reports from the Abington Police Department, Mr. Kerr appeared surprised; noted that the incidents occurred in middle school;

[5] Mr. Kerr and Detective Brittle-Powell also offered conflicting testimony regarding this question. Mr. Kerr testified that the detective asked him if there were any school issues that he did not disclose in the application (which begins with "schools you have attended beyond eighth grade) whereas the detective testified that she asked Mr. Kerr about any disciplinary problems at any school he had ever attended. Mr. Kerr went on to testify that the detective told him "not to worry about" the incidents, as they occurred in middle school. Again, the detective's testimony simply rang more true to me and I credit her testimony over Mr. Kerr's.

and acknowledged that such allegations were made against him. (Testimony of Detective Brittle-Powell)

Roundtable

48. Detective Brittle-Powell summarized her background investigation in a PCM, which she shared with a "round table" which included members of the BPD's command staff, legal division, human resources office and the recruit investigation unit, in or around September 2016. (Testimony of Detective Brittle-Powell and Ms. Driscoll)
49. The round table discussed Mr. Kerr's response of "No" to the Student Officer Application question, "Have you ever been disciplined by an employer for any reason?" The round table noted that upon further investigation, Detective Brittle-Powell discovered that Mr. Kerr had received counseling for his conduct while employed by the military. Based on this information, they concluded that Mr. Kerr had been untruthful in his response. (Testimony of Ms. Driscoll)
50. The round table also discussed Mr. Kerr's responses of "No" when asked on the Student Officer Application if he had received a written warning from a police officer in Massachusetts and if he had received a citation from a police officer in Massachusetts. (Testimony of Ms. Driscoll)
51. The roundtable found that Mr. Kerr was untruthful when he responded "No" to the application question whether he had received any written warnings because he did receive a warning for a non-illuminated license plate. (Testimony of Ms. Driscoll)
52. The roundtable also concluded that Mr. Kerr also was untruthful when he answered "No" to the question regarding receiving a written citation because Detective Brittle-Powell had

received a copy of the citation for Mr. Kerr's arrest for unlicensed operation of a motor vehicle. (Testimony of Ms. Driscoll)

53. The round table also discussed Mr. Kerr's responses of "No" when directly asked by Detective Brittle-Powell whether he had ever had interactions with police at any time for any reason and whether he had ever had disciplinary problems in school. They concluded that Mr. Kerr was untruthful in these responses. (Testimony of Ms. Driscoll)
54. The round table was concerned that despite Detective Brittle-Powell asking Mr. Kerr to review his responses to specific Student Officer Application questions, Mr. Kerr did not volunteer any information. (Testimony of Ms. Driscoll)
55. The round table took note of the fact that although Detective Brittle-Powell attempted to elicit some information from Mr. Kerr by directly asking questions in a different way, Mr. Kerr denied "any interaction with police" and did not acknowledge incidents with police until Detective Brittle-Powell produced his arrest report. (Testimony of Ms. Driscoll)
56. The round table also reviewed Mr. Kerr's written explanation. It stood out to the round table that Mr. Kerr "chose to omit the information" because they recalled no other applicants who "chose" to omit information from the Student Officer Application. (Testimony of Ms. Driscoll)
57. The round table also noted that the Applicant ran his criminal record prior to applying for the position of police officer. The round table concluded that Mr. Kerr chose to withhold information after he learned that no entries appeared on his record and he believed his record was "clean." (Testimony of Ms. Driscoll)
58. The Department has a zero tolerance policy for untruthfulness. (Testimony of Ms. Driscoll; Exhibits 12 and 13)

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass 256 (2001), citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (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).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was

"reasonable justification" shown. Beverly citing Cambridge at 305, and cases cited. "It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." Town of Burlington, 60 Mass. App. Ct. 914, 915 (2004).

Analysis

Honesty is a required trait of any person holding the position of police officer -- or seeking to become a police officer. The criminal justice system relies on police officers to be truthful at all times and an appointing authority is justified in bypassing a candidate who does not meet this standard. See, e.g., LaChance v. Erickson, 522 U.S. 262 (1998) (lying in a disciplinary investigation alone is grounds for termination); Meaney v. Woburn, 18 MCSR 129, 133-35 (discharge upheld for police officer based, in part, on officer's consistent dishonesty and "selective memory" during departmental investigation of officer's misconduct); Pearson v. Whitman, 16 MCSR 46 (appointing authority's discharge of police officer who had a problem telling the truth upheld); Rizzo v. Town of Lexington, 21 MCSR 634 (2008) (discharge upheld based partially on officer's dishonesty regarding a use of force incident); and Desharnias v. City of Westfield, 23 MCSR 418 (2009) (discharge upheld based primarily on officer's dishonesty about a relatively minor infraction that occurred on his shift).Here, the question is whether Mr. Kerr was indeed untruthful, which, if proven, would justify the BPD's decision to bypass him for appointment.

Even the BPD appears to acknowledge that providing incorrect or incomplete information on a student officer application does not always equate to untruthfulness. As referenced in the findings, *multiple* candidates ranked below Mr. Kerr provided incorrect and/or incomplete information on their student officer applications and were still appointed as Boston police

officers. The point here is that labeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and uniform review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety. (See Morley v. Boston Police Department, 29 MCSR 456 (2016) (Based on unreliable hearsay and false assumptions, the Boston Police Department erroneously concluded that the Appellant, a federal police officer and a disabled veteran who had been deployed on active duty overseas on four occasions, was untruthful.)

In that context, it is troubling that one (1) of the seven (7) examples cited by the BPD to show that Mr. Kerr was allegedly untruthful was actually an erroneous statement *by the BPD* due to a "clerical error." The BPD acknowledges that Mr. Kerr's statement that he has never been placed in protective custody is a truthful statement and the BPD has effectively retracted their allegation stating otherwise. Even more troubling is that, even after this was brought to the BPD's attention in the first bypass appeal, they repeated these false statements in the bypass letter sent to Mr. Kerr as part of the subsequent hiring cycle.

Equally troubling is the BPD's conclusion that Mr. Kerr, a disabled veteran who was deployed overseas from September 2012 to May 2013 as a member of the Marine Corps' Fleet Force, and who was honorably discharged as a Corporal after receiving numerous medals and certificates, including the Good Conduct medal, was untruthful when he stated that he had never been disciplined by an employer. Mr. Kerr reasonably concluded that receiving an "administrative remark" while serving in the military did not constitute *prior discipline* by an *employer*. The BPD's insistence otherwise is mind-boggling, particularly when another selected

candidate was deemed to have had no military discipline based on having received a Good Conduct Medal. Mr. Kerr's answer to this question does not constitute untruthfulness.[6]

That leaves three (3) other answers by Mr. Kerr on the student officer application, including those questions pertaining to whether he ever received a written warning or a citation from a police officer. Mr. Kerr answered "no" to both of these questions even though it is now undisputed that he did receive a written warning for a non-illuminated plate several years ago and he received a citation from a Braintree police officer for operating without a license as a teenager.

Mr. Kerr testified that he received the warning during his first trip home after boot camp, while driving his brother's car and that he had forgotten about it until he was reminded of it by the background investigator. In regard to the citation, Mr. Kerr testified that, although he remembered being arrested at the age of 15 for driving without a license, he did not know that a "citation" was accompanied with the arrest. Standing alone, it appears that the BPD would not automatically consider these erroneous answers to constitute untruthfulness. As noted in the findings, *multiple* candidates ranked below Mr. Kerr answered these questions incorrectly or omitted the same information that Mr. Kerr did. Each of those candidates appears to have been

[6] The BPD also compels military veterans to provide all military records, *which includes medical records*, as part of the background investigation prior to offering candidates a conditional offer of employment. Both the federal Americans With Disabilities Act, 42 U.S.C. §§12112(d)(2)-(3), and the Massachusetts Employment Discrimination Law, G.L.c.151B,§4(16), strictly regulate how employers may acquire and use private, medical information about a candidate for employment, essentially, precluding inquiry into a candidate's medical history without first having made a bona fides, i.e., "real", offer of employment based on an evaluation of "all relevant non-medical information." See, e.g., Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 682,n.5 (2012); O'Neal v. City of New Albany, 293 F.3d 998, 1007-1009 (7th Cir. 2002); Downs v. Massachusetts Bay Transp. Auth., 13 F.Supp.2d 130, 137-39 (D. Mass. 1998), *citing*, "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations", (EEOC Notice 915.002 October 10, 1995); Massachusetts Commission Against Discrimination, "Guidelines; Employment Discrimination on the Basis of Handicap-Chapter 151B", §IV & §V, http://www.mass.gov/mcad/resources/employers-businesses/ emp-guidelines-handicap-gen.html . Since there is no evidence to show that the BPD's decision here was based on medical information obtained prior to a conditional offer of employment, I need not address that issue. However, the BPD would be well advised to revisit their practice that effectively requires those individuals who served in the military to turn over medical information prior to receiving a conditional offer of employment.

given the opportunity to provide a written explanation, which the BPD apparently accepted, as each of them was subsequently appointed as a police officer. I also accept Mr. Kerr's testimony that, as part of a subsequent hiring cycle, he was informed by a background investigator that candidates must now obtain a copy of their national driver history to avoid what appears to be a common occurrence of forgetting about a warning or citation that was issued several years ago. For these reasons, I find that, *standing alone*, these two (2) incorrect answers do not constitute untruthfulness that justify Mr. Kerr's bypass.

The final question on the student officer application that BPD considered as part of this bypass asks: "*Is there anything not previously addressed that may cause a problem concerning your possible appointment as a police officer?*" The BPD found Mr. Kerr's "no" answer to this question was untruthful, citing his arrests in high school for offenses of minor in possession of alcohol and driving without a license, as well as his reprimand from the Marines. First, this question is highly subjective and provides no guidance as to what may be considered a problem concerning possible appointment. For example, for many of the reasons previously cited, Mr. Kerr could have reasonably concluded that one (1) "administrative remark" while serving in the United States Marines would not "cause a problem concerning [his] possible appointment as a police officer." Rather, Mr. Kerr could have (rightfully) concluded that his exemplary service in the military would be beneficial to the Boston Police Department, as opposed to being a "problem". Similarly, Mr. Kerr could have reasonably concluded that arrests in high school, prior to his military service, would not "cause a problem" concerning his appointment as a police officer.

Second, in addition to being highly subjective, it raises questions related to G.L. c. 151B, §4(9) which provides that it is unlawful:

> "For an employer, 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 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." (emphasis added)

Here, the BPD acknowledges that, in response to this broad question, *they expected Mr. Kerr to disclose his arrests in high school for which there were no convictions*. The failure to disclose these arrests in response to this question helped form the basis of BPD's decision to bypass him for appointment as a police officer.

While c. 151B would appear to prohibit this question from being asked of job applicants, the Commission has previously held that an applicant's arrest record, even when there is no conviction, can be used as a reason for bypass, illustrating the tension between the prohibitions in 151B on what employers can ask of applicants and the need for public safety agencies to conduct a thorough review of candidates seeking to become police officers.

In Preece v. Department of Correction, 20 MCSR 152 (2007), the Commission held that the Department of Correction could rely on the fact that Mr. Preece had been charged with second-degree murder, assault and battery, and variety of firearms violations, even though he had been exonerated of all charges. In Lavaud v. Boston Police Department, 17 MCSR 125 (2004), the Commission upheld the bypass due to the Appellant's long records of arrests although the charges were later dismissed. More globally, civil service appointing authorities are required to conduct a "reasonably thorough review" which the Commission has consistently ruled should include an opportunity for the applicant to respond to his/her criminal record.

In Rolle v. Department of Correction, 27 MCSR 254 (2014), the Commission admonished DOC for not conducting a more thorough review, stating that the Appellant should have been given an opportunity to address dismissed criminal charges on her CORI report. In Rolle, the Commission cited former Governor Patrick's July 2009 testimony before the Joint Committee on the Judiciary in favor of his Administration's CORI-reform legislation when he stated: "The only condition we impose is that the employer give the applicant a chance to discuss the criminal record, both its accuracy and its relevance to the job in question, before the employer makes a hiring decision." The point here is that whether (and how) public safety agencies can use an applicant's prior criminal history during the hiring process is not settled.

Here, I don't need to reach any conclusion on that issue as, based solely on the highly subjective nature of the question, I find that, standing alone, Mr. Kerr's "no" answer does not constitute untruthfulness that would justify the decision to bypass him for appointment.

That leads to Mr. Kerr's oral responses to questions posed to him by the background investigator. As a preliminary matter, for the reasons cited in the findings, I credit Detective Brittle-Powell's recollection of the questions that she posed to Mr. Kerr and the responses she

received from him. I did take into account that the interviews were not recorded and that Detective Brittle-Powell did not have any hand-written notes to memorialize the interview. That notwithstanding, she appeared to have a clear recollection of her verbal exchange with Mr. Kerr and her account of what was said appeared to be more logical and rang true to me.

Having independently obtained information (outside of a CORI check) from police departments, Detective Brittle-Powell knew that Mr. Kerr had been arrested on two occasions – once for driving without a license and once for being a minor in possession of alcohol. Neither of these arrests resulted in a conviction. As part of an interview with Mr. Kerr on June 23, 2016, Detective Brittle-Powell asked Mr. Kerr: "Have you ever had any interaction with police for any reason at any time?" Mr. Kerr replied: "No." After Mr. Kerr responded, "No" to her question regarding police interaction, Detective Brittle-Powell then slid the report of Mr. Kerr's arrest by Braintree across the table. She asked Mr. Kerr if it looked familiar. Mr. Kerr looked at the report and stated that he did recall the incident. Detective Brittle-Powell then reminded Mr. Kerr that moments earlier she had asked him whether he has ever had any interaction with police and that he had stated, "No." She asked Mr. Kerr why he had lied to her. Mr. Kerr stated that he did not understand the question and that he did not think he needed to say, "Yes." He further stated that he had his background run prior to completing his application and the incidents did not show up, so he thought he did not need to disclose them. Again, responding truthfully to this question would require Mr. Kerr to disclose two (2) arrests for which he had never been convicted, raising some of the same issues discussed above. Since this appeal can be decided on other grounds, I reach no conclusion regarding whether his response to a potentially impermissible question can be used to form the basis of a bypass decision.

As part of her investigation, Detective Brittle-Powell also obtained police reports from the Abington Police Department regarding two (2) incidents that occurred when Mr. Kerr was in middle school. The first incident involved allegations that Mr. Kerr was bullying a female student. The second incident involved allegations that Mr. Kerr brought a knife to school, an allegation that was not substantiated. During an interview with Mr. Kerr, Detective Brittle-Powell asked him whether he had any disciplinary problems at any school he had ever attended. He told her, "No." When Detective Brittle-Powell then discussed the reports from the Abington Police Department, Mr. Kerr appeared surprised; noted that the incidents occurred in middle school; and acknowledged that such allegations were made against him.

On the surface, it is eyebrow-raising that the BPD would rely in part on events that occurred while an applicant was in middle school to justify a bypass. Here, however, the BPD did not seek out records from Mr. Kerr's middle school. Rather, as part of a comprehensive background investigation, the BPD obtained records from the Abington Police Department regarding allegations made against Mr. Kerr while he was in middle school. While the alleged incidents occurred when Mr. Kerr was a middle school student, they were serious enough to require the involvement of the Abington Police Department. Further, Mr. Kerr does not argue that he didn't recall the alleged incidents. Rather, he argues that Detective Brittle-Powell never asked him the above-referenced questions, but, rather, limited her question to those schools referenced in the student officer application (high school and above). I don't credit his testimony in this regard. Rather, I find that Detective Brittle-Powell asked the question as she testified to and that Mr. Kerr provided a false – and untruthful response.

Taken together, this untruthful answer, along with the incorrect answers regarding having never received a warning or citation from a police officer, provided the BPD with reasonable justification to bypass Mr. Kerr for appointment.

Conclusion

For all of the above reasons, Mr. Kerr's bypass appeals under Docket Nos. G1-16-203 & G1-17-230 are hereby ***denied***.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a 3-2 vote of the Civil Service Commission on January 18, 2018.

- Commissioner Bowman – Yes
- Commissioner Camuso – Yes
- Commissioner Ittleman - Yes
- Commissioner Stein – No
- Commissioner Tivnan – No

Either party may file a motion for reconsideration within ten days of the receipt of this 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 this order or 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 this Commission order or decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Patrick Bryant, Esq. (for Appellant)
Jaclyn Zawada, Esq. (for Respondent)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JAMES KERR,
Appellant

G1-16-203

v.

G1-17-230

BOSTON POLICE DEPARTMENT,
Respondent

MINORITY OPINION OF COMMISSIONER STEIN & TIVNAN

We concur with most of the thorough and well-stated findings and conclusions adopted by the Majority that the BPD failed to prove six out of the seven examples of allegedly false statements made by Mr. Kerr during the application process. We depart from the Majority, however, and respectfully dissent from the Decision to dismiss these two appeals. We find that neither the facts nor the law justify upholding Mr. Kerr's bypasses for a single undocumented oral untruth he uttered while being interrogated by the BPD background investigator about an incident that occurred a decade ago in middle school, which happened to have been uncovered by the investigator during her criminal history check, and which never resulted in any criminal or civil charges. We fully appreciate the "higher standard" to which police officers must be held.. To decide that Mr. Kerr is disqualified, however, on uncorroborated hearsay accounts stemming from one single, stale juvenile matter that, effectively, will end the career aspirations of this otherwise highly qualified candidate, is, simply, "A Bridge Too Far."

. The Facts Fail To Justify Upholding Mr. Kerr's Two Bypasses.

Save for his alleged untruthfulness during the application process, Mr. Kerr presents as a highly desirable candidate for the position of a municipal police officer. He is a decorated Marine, highly recommended by his commanding officer, who held the second highest possible

security clearance granted by military intelligence and the FBI and was honorably discharged in 2015 after four years of service. He scored 97 on the civil service examination, placing him higher than 77 of the 80 candidates to whom the BPD ultimately offered employment in this hiring cycle (some of whom the evidence showed also had varying degrees of trouble with recalling or telling the unvarnished truth, including, for example, "forgetting" about a surchargeable accident that caused $2,300 in property damage and omitting disclosure of a speeding ticket because it was a "camera" speed trap for which he got "mail in" citation and was not actually "pulled over").

Mr. Kerr's first bypass letter, dated November 15, 2016, recites five allegedly false written statements and two alleged false oral statements as the basis for disqualifying him. We agree with the Majority that none of those five allegedly false written statements justify disqualification.

- The Majority Decision found "mind-boggling" the BPD's claim that Mr. Kerr falsely concealed having been "disciplined" while serving in military, which did not happen. (*Findings of Facts #16 through #25 & #49; Majority Analysis, p. 16*)
- Two falsehoods relate to omissions by Mr. Kerr in answering "NO" to questions about ever receiving a "citation" or a "written warning" from a police officer, which were honest oversights. In 2010, at age 15, Mr. Kerr was pulled over and arrested for driving without a license and received a civil "citation" as well. He disclosed the arrest, but "did not recall that it was accompanied by the . . . citation." He also received a written warning in 2011 "while driving his brother's car" which did not have an illuminated license plate, an event he also "he did not recall . . . until it was brought to his attention by [the BPD investigator]." (*Findings of Fact #26 through #29 & #50 through #53*)

- BPD agreed at the Commission hearing that Mr. Kerr was never taken into "protective custody" and the statement in the BPD bypass letter to that effect, as well as the related alleged untruthfulness about that "interaction with police", were "clerical errors", i.e., "honest" mistakes by the BPD, not Mr. Kerr. (*Finding of Fact #38*)
- The fifth unfounded written alleged falsehood was Mr. Kerr's "NO" to the question "Is there anything not previously addressed that may cause a problem concerning you possible appointment as a police officer?", which BPD claimed was false, for not disclosing his (non-existent) military "discipline", his "warning" and citation", and a 2010 arrest for being one of a number of minors (not the host) arrested at an under-age drinking party. The Majority found that it was impossible to conclude that anyone could be accused of untruthfulness by answering "NO" to such a broad and ambiguous question, citing Morley v. Boston Police Dep't, 29 MCSR 456 (2016) (rejecting alleged untruthful statement about veteran's "combat" experience based on ambiguous question). Mr. Kerr clearly and honestly believed that neither his military record nor juvenile behavior were a "problem" that compelled disclosure. (*Finding of Fact #39*)[7]

As to the two alleged oral untruths:

- The first of the allegedly false oral statements made to the background investigator were just as equally impermissibly vague and ambiguous as were the similarly framed written questions described above – "ever had any interactions with the police at any time?" or done "anything not previously addressed [referring to the written application] that might cause a problem?". Thus, allegedly "false" NOs to these flawed questions, similarly,

[7] See also Wine v. City of Holyoke, CSC No. G1-17-022, 31 MCSR --- (2018) (honest mistakes on ambiguous questions; forgot minor driving infractions); Boyd v. City of New Bedford, 29 MCSR 471 (2016) (honest mistakes on ambiguous questions); Lucas v. Boston Police Dep't, 25 MCSR 420 (2012) (BPD's mistake about appellant's characterization of medical history)

could not justify the conclusion that Mr. Kerr had "lied" for not disclosing, in response, his history of "alcohol consumption" (underage drinking) and his juvenile arrests and other "interactions"' with police. (*Finding of Fact #42 through 44, & #54 Exhs 9 & 11*).[8]

- The second false oral statement at issue came when Mr. Kerr said "No" when asked by the background investigator, according to her credible testimony[9], whether he "had any *disciplinary problems* at *any* school you attended?" (*emphasis added*) The Presiding Commission found Mr. Kerr's denial was untrue, and he persisted in untruthfulness about the subject in his testimony at the Commission hearing. The Majority Decision holds that the BPD met its burden to justify bypassing Mr. Kerr based on this untruth alone. (*Findings of Fact #45 through #47; Exhs. 4 & 5; Majority Analysis, pp. 21-22*)

The BPD's second bypass letter was sent to Mr. Kerr on August 31, 2017. It came approximately five months after the full hearing was completed in the first bypass appeal (March 2017) and four months after all parties had submitted their proposed decisions to the Presiding Commissioner. Despite the passage of time and evidence of the errors that BPD admitted it made in the first letter, the August 2017 bypass letter is an identical, mirror image, of the bypass letter sent in November 2016. It recites verbatim all of the seven alleged instances of untruthfulness on Mr. Kerr's part. We agree with the Majority that this rote rejection notice is noteworthy. We cannot reconcile the BPD's refusal to accept, as "honest errors" on Mr. Kerr's

[8] The Majority also notes that the written and oral questions that invited a candidate to disclose prior police interactions were not only vague, but they appear to violate the limitations in Massachusetts law which prohibit an employer from asking applicants certain questions about their past criminal history. (Majority Analysis, pp. 18-21) We, too, share this concern and, as more fully discussed later in our opinion, believe that the Commission should also hold that BPD's claim that Mr. Kerr was untruthful in answering questions that an employer had no right to ask cannot be a lawful basis on which to justify his bypass,.

[9] Little is more firmly embedded in our jurisprudence than the principle that credibility assessments are the exclusive purview of the fact-finder, here the Presiding Commissioner, and we must accept those assessments as part of the foundation of our own analysis. We are entitled, however, to question the Majority's legal conclusions drawn from the evidence to the extent we find those conclusions do not hew to the tenants of basic merit principles under civil service or other Massachusetts law.

part, his faulty recollection about traffic tickets almost ten years ago or concealed "problems" and "interactions with police" as a juvenile as well as a persistence in the debunked claim that he received military "discipline", while apparently condoning its own employees' careless repetition of" mistakes as excusable under BPD's "zero tolerance" policy for "knowingly, or cause to be entered, any inaccurate, false or improper information". (*BPD Rule 102, Section 123; Exhs. 4 & 5*).

The BPD's Bypass Decisions Are Not Justified As a Matter of Law.

We depart from the Majority Decision to uphold Mr. Kerr's two bypasses for three reasons:

(1) The evidence is not conclusive that, even after crediting the testimony of the BPD background investigator, Mr. Kerr's statements to her were untruthful;

(2) Assuming that Mr. Kerr's was untruthful in failing to disclose the middle school incidents until he was confronted with the police reports by the investigator, it is impossible to determine from the record whether the BPD "Roundtable" would consider that one false statement, alone, justification to bypass Mr. Kerr; and

(3) Penalizing Mr. Kerr for make a false response to questions that called for him to volunteer information about alleged criminal behavior for which he was never charged or convicted, particularly as a juvenile, is not a justification for bypassing him because it contravenes Massachusetts law.

For these reasons, we would allow these appeals, in part, and order the BPD to provide Mr. Kerr with one more opportunity to be duly considered for appointment as a BPD police officer without regard to the erroneous and unlawful grounds on which he was herein disqualified.

First, just as his military "discipline" was mischaracterized, we do not construe the record to prove that Mr. Kerr actually was "disciplined" as a result of the two middle school incidents reflected in the police reports on which the BPD relies to claim that his failure to admit such discipline was a falsehood. The evidence on that subject, at best, is inconclusive.

The first police report (Abington Police Dep't Incident #06-789-OF) indicates that, on October 24, 2006, Officer Lisa O'Connor was dispatched to investigate a report by parents of a

female student that two of her juvenile classmates, one of whom was Mr. Kerr, had been hitting and bullying her since the beginning of the school year. Upon interviewing the female student, Patrolman O'Conner learned that, while the behavior started with "teasing". it progressed to the point that there was probable cause to believe that the student had been the victim of acts of assault and battery. Officer O'Connor arranged to meet with Mr. Kerr and both his parents at the police station later that evening.[10] She explained the crime of assault and battery and told Mr. Kerr that his behavior had to stop or the police would press charges. Mr. Kerr admitted hitting the student, said he understood that he could be charged with a crime and agreed to stop the behavior. Mr. Kerr's parents expressed grave concern about their son's behavior and asked Officer O'Connor to arrange for the two families to meet so that Mr. Kerr could apologize to the student and, if possible, to the entire class, which she agreed to do. She filed her incident narrative the next day. The report states that the status is "Incident Open" for an Offense of Simple A&B, but there are no entries of any activity after her evening meeting with the Kerrs. The only reference to "discipline" is Officer O'Connor's report that the female student's mother said that the school's Vice Principal had told her that the boys "would be disciplined." (*Exh. 4*)

The second police report (Abington Police Dep't Incident #07-121-OF) indicates that, on Friday, February 9, 2007, Officer (Acting Sergeant) Cantalupo responded to a call from the Abington School Department to investigate a report that the junior high school Principal had found two anonymous notes on his desk which stated: "James Kerr had a knife [illegal butter-fly] . . . on his persons [sic] today." Officer Cantulupo met that afternoon (4:00 pm) with the school officials, along with Mr. Kerr and his parents. Mr. Kerr denied bringing a knife to school, but did state that he had found one on the street several days earlier, which he had brought home and

[10] Officer O'Connor also asked the other boy's parents to bring their son to meet with her at the police station but, just before the meeting, she received a call from them declining to appear, on advice of their lawyer. (*Exh. 4*)

said he had described it to several students. Mr. Kerr's locker was searched but nothing was found. Officer Cantaluopo's narrative report states that, at the conclusion of the Friday afternoon meeting, Mr. Kerr "would be suspended from school until further notice and after this matter was investigated. James Kerr was suspended for causing a school disruption and putting other students in fear." However, later on, Mr. Kerr's father did find a knife in Mr. Kerr's bedroom dresser drawer and turned it over to Officer Cantalupo. Also, the following Monday, Officer Cantalupo learned from school officials that they had subsequently confirmed that one of the students involved said "he did have a conversation with James regarding a knife" and "at no time did he see James Kerr with a knife." Accordingly, Officer Cantaluopo closed the investigation that day: "Due to lack of evidence and the type of knife that was recovered no criminal charges would be filed." (*Exh. 5*)

The best evidence of any formal discipline imposed on Mr. Kerr for either of these two incidents would be his school attendance records, but they were not procured by the BPD investigator or produced at the Commission hearing.[11] Absent those records, the hearsay evidence in the police reports, coupled with evidence of the immediate resolution of both incidents a day or two after being reported, is not the type of probative and reliable evidence required to prove Mr. Kerr, in fact, was ever actually formally disciplined for either incident. Thus, the preponderance of evidence cannot support the conclusion that Mr. Kerr did not believe he had truthfully responded to the investigator's question about being disciplined.

Second, even assuming that a preponderance of the evidence does support the Majority's conclusion that Mr. Kerr was untruthful in his one undocumented oral response to the background investigator about being disciplined in "any school he ever attended", that still

[11] The BFD Recruit Application only asks the applicant to provide details about "schools you have attended beyond eighth grade." (*Finding of Fact #46, n. 5*)

leaves the other six of seven untruths upon which the BPD based its bypass decisions as fatally flawed. Thus, on this record, the Commission would be speculating to presume whether or not the BPD's "Roundtable" would reach the same conclusion about what is now a one-legged stool, as it did based upon what it perceived (erroneously) to be a very different, complete façade of written and oral deceptive behavior. Moreover, as the one sustained "untruth" turns on an undocumented, oral colloquy with the background investigator (not a decision-maker), it would behoove the BPD to invoke a more objective means of evaluating this potentially career-ending decision than it used in bypassing Mr. Kerr. One such option is its "Discretionary Interview" process, which involves a video-recorded interview with at least two BPD officers, one of whom is a senior member of the command staff, and is a procedure more in keeping with the requirements of basic merit principles which eschew overly subjective decisions that are incapable of meaningful de novo review by the Commission. Moreover, we note that the BPD overlooked far more serious transgressions and omission by other candidates who were hired over Mr. Kerr. In sum, these appeals present the occasion to overturn an appointing authority's bypass decision and order a new consideration of the applicant, because "flaws in the selection process" are "so severe that it is impossible to evaluate the merits from the record." Sherman v. Randolph, 472 Mass. 802, 813 (2015) citing Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-66 (2001).

Third, Mr. Kerr should not be penalized for failing to disclose information in response to the background investigator's oral inquiries into his past criminal history as a juvenile for which he was never charged or convicted (as well as such questions that appear on the BPD written application), insofar as such inquiry is inconsistent with Massachusetts law. Although this issue

has not previously been decided definitively by the Commission, we believe that these appeals present the occasion for the Commission to address this important public policy issue.

G.L. c. 151B, §4(9) provides that it is unlawful:

> "For an employer, himself or through his agent, in connection with an application for employment. . . 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 . . . occurred *five or more years prior* to the date of such application for employment or such request . . . .
>
> No person shall be held under any provision of any law to be guilty of . . . 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 {G.L.c.94C,§34 or G.L.c.276] relative to the sealing of records." (*emphasis added*)

G.L.c.151B,§4(9½), added by St.2010,c.256,§101, provides that is it unlawful:

> "*For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification* based on a conviction for 1 or more types of criminal offenses; or (ii) the employer . . . is subject to . . . any federal or state law or regulation not to employ persons . . . convicted of 1 or more types of criminal offenses." (*emphasis added*)\

See also G.L.c.31,§20 & §50 (civil service law); G.L.c.6,§167 et seq. and related laws and regulations pertaining to CORI (Criminal Offender Record Information), CJIS (Criminal Justice Information System), NCIC (National Crime Information Center) and other records containing information about the criminal history of an applicant for civil service appointment or promotion; G.L.c.276,§100A et. seq., governing the "sealing" of criminal records; G.L.c.6, §171 and case law regarding "judicial expungement", e.g., Police Comm'r v. Municipal Court, 374

Mass. 640, 648 (1978); Commonwealth v. Roberts, 39 Mass.App.Ct., 355, 356 (1995); G.L.c.41,§96A, prohibiting anyone convicted of a felony as a police officer; G.L.c.94C,§34 et seq., sealing records of certain substance abuse violations. See generally Conner v. Department of Correction, 27 MCSR 556 92014) (DALA Magistrate's decision, adopted by the Commission, with specific reference to the recent "sweeping changes in the CORI law", citing G.L.c.6,§171A, St.2010,c.256; Exec. Order No. 495 (Jan. 11, 2008) (CORI record "should not be an automatic and permanent disqualification for employment"); 803 CMR 2.17 (prior notice to applicant before taking CORI-based adverse employment action)

The question remains unsettled, however, either by the Commission or in the jurisprudence of the Commonwealth, as to whether appointing authorities who are public safety agencies may be required to hew to these same laws that clearly restrict how other employers can use an applicant's prior criminal history during the hiring process, or whether (and to what extent) the special nature of the work of a public safety officer allows for taking a different path.

The MCAD long ago took an expansive interpretation of the law. See Hanson v. Massachusetts Dep't of Social Services, 28 MDLR 42 (2006) (MCAD awarded damages for DDS's improper CORI inquiry of prospective social worker: "Respondent's direct inquiry in this matter about juvenile offenses should be seen as falling squarely within the scope of the [G.L.c.151B,§4(9)] prohibition against inquiries . . . . [W]e firmly believe that the Legislature intended that a violation would occur in the instance where an employer automatically rejected an applicant from employment simply because he possessed a criminal record, the exact contents of which the applicant refused to reveal. To find otherwise would be to perpetuate. . . the most heinous stereotype that individuals with criminal records are, as a group, unemployable. . . ."); McGowan v. Town of Stoneham, 6 MDLR 1639 (1984) ("M.G.L.c.6,§172, may not be *used* by

police departments, as prospective employers, to circumvent . . . M.G.L.c.151B,§4(9**).** For this reason, the [Stoneham police chief] was in error in . . . acquisition of the Complainant's arrest record through M.G.L.c.6,§172. . . ")

Judicial decisions, so far, have given limited scrutiny to the means by which civil service public safety appointing authorities, as distinct from other private employers, may seek CORI information from and about applicants and the extent to which they are exempt from the proscriptions of Chapter 151B and other similar laws governing employment discrimination.

In Kraft v. Police Commissioner of Boston, 410 Mass. 155 (1991), the SJC ordered the reinstatement of a Police Officer terminated (after his probationary period) for false answers on his employment application asked in violation of.G.L.c.151B,§4(9). The SJC's opinion states:

> "*The [police] commissioner had no authority to discharge Kraft for giving false answers to questions that the commissioner under law had no right to ask, and he does not argue otherwise. The commissioner argues rather that § 4(9A) cannot bar him from inquiring into the previous mental health hospitalizations of an applicant* for a position . . . if successful, would be *expected to carry a gun*.[Footnote] *Section 4(9A) obviously does not make the exception the commissioner argues for, and we should not manufacture it judicially*. The commissioner does have the responsibility to determine the conditions under which a police officer will qualify to carry a weapon. [Citations]. He could have obtained information concerning Kraft's qualifications, however, without violating §4(9A). [Footnote] *The inconsistency the commissioner asserts between the clear prohibition of § 4(9A) and his necessary obligation to inquire into a police officer's qualifications to carry a firearm simply does not exist*." (*emphasis added*).

In Bynes v. School Committee, 411 Mass. 264 (1991), without reference to Kraft decided three months earlier, the SJC upheld use of CORI on a school bus driver because CORI law expressly authorized school committees to obtain CORI records on such employees, but left open the broader issue raised in the MCAD's McGowan and Hanson decisions:

> "Without expressing our opinion on the merits of the [MCAD] commission's decision, we note that the commission merely determined that it was inappropriate for a police department to use its ability [qua "criminal justice agency"] to obtain criminal offender information under G.L.c.6, §172(a) to effectuate its role as an employer. . . That is not the case here." Id. 411 Mass. at 269 n.51.

More recent decisions echo the holding in Kraft and Bynes that public safety employers may use CORI information gained through other *lawful* means, or by an applicant's *unsolicited* admissions, but the degree to which the applicant must answer questions about such lawfully obtained information remains unclear. See Lysak v. Seiler Corp., 415 Mass. 625 (1993) (applicant's unsolicited remark about her pregnancy distinguished it from Kraft); Henderson v. Civil Service Comm'n, -- Mass.App.Ct. ---, 54 N.E.3d 607 n.7 (Rule 1:28), rev.den., 478 Mass. 1105 (2016) ("assuming that there was improper questioning, we see no prejudice to Henderson; improper questioning does not automatically equate to discrimination");[12] (Town of Burlington v. McCarthy, 60 Mass.App.Ct. 914 (Rule 1:28)), rev.den., 442 Mass. 1104 (2004) (lawfully obtained CORI on school custodian); Ryan v. Chief Administrative Justice, 56 Mass.App.Ct. 1115 (2002) (CORI obtained through independent sources). See also Chief of Police v. Moyer, 16 Mass.App.Ct. 543, rev.den., 390 Mass. 1104 (1993), *citing*, Commissioner of Metropolitan Dist. Comm'n v. Director of Civil Service, 348 Mass. 184 (1964) (information from outside source) See generally 801 CMR 2.17 (requiring a copy of CORI and chance for applicant to dispute or explain required before using CORI in adverse employment decisions)

The state of the law and its underlying public policy was summarized in the context of the termination of an employee for giving false answers to analogous impermissible questions in Downs v. Massachusetts Bay Transp. Auth., 13 F.Supp.2d 130 (D. Mass. 1998):

[12] The Appeals Court's unpublished Henderson decision also notes the "conflict within our law regarding the criminal history information an employer may obtain directly from an applicant", noting that G.L.c.31,§20 permits civil service exam applicants to answer questions about **any** criminal convictions and opines that the civil service law, added by amendment after enactment of G.L.c.151B, would take precedence. Henderson, 54 N.E3d at 607 n.8 citing Boston Housing Auth. v. Labor Relations Comm'n, 398 Mass. 715 ,718 (1986). This issue is now further complicated by the most recent 2010 legislative changes to CORI, which, among other things, added G.L.c.151B,§4(9½), to enable MCAD to enforce limitations on CORI use by employers. St. 2010, c. 256,§101.

> "Downs's false statements were in response to impermissible questions posed by the MBTA . . . . [T]his fact is significant in determining whether Downs's actions can be considered misconduct or action against the MBTA's legitimate interests. . . .
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> *This analysis is consistent with that of Kraft v. Police Commissioner of Boston* . . . There, a police officer was fired after five years of service when the department learned that, on his application form, he had given false answers to questions seeking information about any prior hospitalization for mental illness. *The Supreme Judicial Court ("SJC") held that M.G.L.ch.151B§4(9A) prohibited employers from asking such questions of job applicants, and concluded that the police commissioner 'had no authority to discharge Kraft for giving false answers to questions that the commissioner under law had no right to ask.' [Citation] More recently, the SJC elaborated on the Kraft decision by explaining that any other result "at best would have ignored the employer's unlawful inquiries, and at worst would have rewarded the employer for them. In either event, employers in the future would have been encouraged to violate the law.*' *Lysak v. Seiler Corp.*, 415 Mass. 625, 628, 614 N.E.2d 991 (1993). . . .
>
> "*The reasoning of these cases is persuasive*: an employer that violates its employees' rights by asking impermissible questions ought not be able to base adverse employment decisions on the resulting answers (to which it was not entitled in the first place). . . . *[T]he . . . MBTA's analysis . . . equates Downs's false responses with misconduct, pure and simple, without recognizing that the responses were triggered by its own improper actions. Had the MBTA not overstepped the bounds set by the ADA, the misconduct at issue never would have occurred. Moreover, the challenged inquiries seem problematic not only in that they violated the ADA and Rehabilitation Act, but . . . they set up . . . to 'trap' a disabled applicant into making false statements that a non-disabled applicant has no incentive to make. . . . '[O]verreaching invites deceit. If an employer asks only questions tailored to the requirements of a specific job. . . it is more likely that it will get honest responses*.' [Citation]"

Id., 13 F.Supp.2d at 140 (*emphasis added*)

In O'Regan v. Medford Fire Dep't, CSC no. G1-16-162, 30 MCSR – (2017), the Commission most recently noted its concern with this unsettled state of the law, but did not directly decide, what, if any, questions about an applicant's criminal history a civil service appointing authority can ask that would be prohibited for other employers but possibly relevant to a law enforcement hiring decision. Based on the serious consequences for Mr. Kerr in this case, the Commission should now address this issue. Reliance on Mr. Kerr's "untruthful" failure to volunteer information confirming what the BPD background investigator already knew about

his past criminal history must be called out as an unlawful and de facto discriminatory reason to disqualify him.

We are mindful that, strictly speaking, the background investigator's questions did not directly seek admission to alleged criminal misconduct, but asked more generally whether Mr. Kerr had had any "interactions with police" or had been disciplined at "any school he ever attended". It is clear, however, that the investigator's intent was solely focused on the alleged criminal behavior. The information came to the investigator's attention through her criminal history background check and she used a police criminal offense incident report to pry out the information. The BPD gave the investigatory no indication that it had any interest in getting to the substance of the alleged misconduct or discipline taken, those that BPD would not ordinarily consider, as they relate to a school incident prior to the eighth grade and occurred nearly ten years earlier. See also, Finklea v. Boston Police Dep't, 30 MCSR 93 (2017), *appeal pending* (citing BPD's ' Guidelines that set forth a "ten year look back" period for 209A restraining orders and OUI convictions), appeal pending. The distinction is noted – the questions, as posed, asked about "problems", "interactions with police" and academic sanctions, not the underlying criminal offenses – but that does not change the calculus.. This is no place for such hair-splitting analysis. The Commonwealth's laws and public policy clearly intend to root out all forms of discriminatory treatment such as illustrated by the over-reaching entrapment that occurred here.

Conclusion of the Minority

In sum, for the reasons stated, we would allow this appeal, in part, and direct Mr. Kerr's name to be placed at the top of all current and future certifications for appointment as a permanent, full-time BPD police officer, until he receives at least one further consideration consistent with basic merit principles under civil service law, and is either hired or bypassed.

/s/ Paul M. Stein
Paul M. Stein, Commissioner

/s/ Kevin M. Tivnan
Kevin M. Tivnan, Commissioner