COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

EDWARD W. KOCHANOWSKI,
Appellant

G-01-1561

QUINCY POLICE DEPARTMENT,
Respondent

Appellant's Attorney:	Richard M. Lane, Esq. 546 East Broadway South Boston, MA 02127 (617) 268-4230 legaleagle2002@msn.com
Respondent's Attorney	David Grunebaum, Esq. City Solicitor City of Quincy Quincy City Hall 1305 Hancock Street Quincy, MA 02169 (617) 376-1516 dgrunebaum@tobinsullivan.com
Commissioner	Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, §2 (b), the Appellant, Edward W. Kochanowksi (hereinafter "Kochanowski" or "Appellant"), seeks review of the Personnel Administrator's decision to accept the reasons of the Respondent, City of Quincy Police Department (hereinafter "City" or "Appointing Authority"), to bypass him for an original appointment to the position of permanent police officer.

The appeal was timely filed, and a Pre-Hearing Conference was scheduled for March 4, 2003. Prior to the Pre-Hearing Conference, the parties filed a Joint Pre-Trial Memorandum. Additionally, the Respondent filed a Motion to Dismiss dated February 21, 2003. Appellant filed a "Memorandum" in opposition to the Motion to Dismiss. On March 4, 2003, oral argument on the motion was heard by former Commissioner Robert E. Tierney, and Appellant was granted an extension of time in which to submit additional information. Thereafter, in June 2003, Appellant submitted an Attorney's Affidavit of Leon P.J. Drysdale in further opposition to the Motion to Dismiss. While the motion was pending, the parties attempted to reach a settlement, to no avail. Thereafter, a status conference was scheduled and held on January 9, 2007 at the offices of the Civil Service Commission, at which time the case history was reviewed, and further argument and testimony was heard on the pending Motion to Dismiss. One (1) tape was made of the hearing. Two (2) exhibits were admitted into evidence.

FINDINGS OF FACT

Based on the documents entered into evidence and the testimony of Appellant, I make the following findings of facts:

1. The City of Quincy is the Appointing Authority for the Quincy Police Department.
2. In the summer of 2004, the City of Quincy sought a certified list of candidates from the state's Human Resources Division (HRD) seeking to hire six (6) permanent police officers. (Exhibit 1)
3. On or about June 11, 2004 the City of Quincy received Certified List #210619 from HRD. The Certification contained the names of twelve (12) candidates, from which

selection was to be made from six (6) of the thirteen (13) highest candidates who would accept. (Exhibit 1)

4. Appellant's name initially appeared in the twelfth position. However, because several candidates declined to sign the certification indicating they would accept the appointment, Appellant ended up in the fifth position. (Exhibit 1)
5. A background investigation of the Appellant by Detective James Greene of the Quincy Police Department determined that the Appellant was initially convicted of assault with a dangerous weapon on January 5, 1978 in the Boston Municipal Court under Docket Number #9379, and received a one (1) year sentence. The Appellant appealed this conviction to Suffolk Superior Court, and prior to trial *de novo*, on August 23, 1978, the Appellant pleaded guilty to a charge of assault with a dangerous weapon (to wit: a replica 38 cal. revolver) under Suffolk Superior Court Docket No. 016650 (Commonwealth v Edward Kochanowski). (Appellant's Memorandum, Exhibits 1 and 2)
6. The Appellant, who was twenty-eight years old at the time of his guilty plea, was sentenced to pay a fine of $500.00, plus a $125.00 surfine (court costs), payable through the probation department at the rate of $50.00 per month. (Exhibit 2, Appellant's Memorandum)[1]
7. Subsequently, on or about June 20, 1996, the Appellant had his record sealed pursuant to G.L. c. 276, s. 100A. (Appellant's Memorandum)

[1] The sealed record show that the Appellant had been charged with larceny by check in 1980, for which the Appellant was found not guilty, and charged with assault and battery with a dangerous weapon in 1980, which charge was dismissed.

8. G.L. c. 41, s. 96A provides that "No person who has been convicted of any felony shall be appointed as a police officer of a city, town or district."
9. In reliance on G.L. c. 41, s. 96A, the City elected to bypass the Appellant based on his 1978 conviction.
10. Thereafter, by letter to HRD dated April 25, 2002, the City, pursuant to G.L. c. 31, section 27, submitted its "reason for bypass letter". As justification for bypassing the Appellant, the City stated the following:

> "Mr. Kochanowski has a felony conviction on his criminal record, which makes him ineligible for appointment."

(Exhibit 1)

11. Thereafter, the Appellant timely filed a bypass appeal with the Civil Service Commission.
12. The Appellant testified briefly as to his August 23, 1978 conviction. The Appellant initially testified that because it was so long ago, he "thought it was reduced to a misdemeanor, but [I] can't remember exactly whether [I] plead guilty to a felony or a misdemeanor" and began to ramble about a traffic incident. When pressed for a definitive answer, the Appellant weakly claimed that he pleaded guilty to a misdemeanor. When asked by this Commissioner if he was confident that it was a misdemeanor, the Appellant vaguely replied "yeah". The Appellant's testimony, which was hesitant and unconvincing, was not credible. Notwithstanding that the event in question occurred more than twenty (20) years ago, the Commission finds it simply unbelievable that a person would not recall with certainty whether they were convicted of a felony or a misdemeanor.

13. It is undisputed that both at the time of the August 23, 1978 conviction and at present, the charge of Assault and Battery with a Dangerous Weapon is a felony offense.

CONCLUSION

The City moved to dismiss this appeal on the sole ground that the Appellant's prior felony conviction in 1978 precludes him from serving as a police officer pursuant to G.L. c. 41, s. 96A, which provides, in its entirety, as follows: "No person who has been convicted of any felony shall be appointed as a police officer of a city, town or district."

The Appellant opposes the motion on two grounds. First, the Appellant alleges that he pleaded guilty to a misdemeanor, rather than a felony charge, of assault with a deadly weapon; as such, Appellant contends that G.L. c. 41, s. 96A is inapplicable. However, a review of the undisputed facts suggests otherwise.

At the outset, the Commission notes that wholly absent from both the Joint Pre-Hearing Memorandum, and Appellant's Memorandum in opposition to the motion, is any allegation that the Appellant pleaded guilty to a misdemeanor rather than a felony. Rather, this contention was only raised during oral argument on the motion.

The Appellant testified briefly before the Commission as to his August 23, 1978 conviction. The Appellant initially testified that because it was so long ago, while he "thought it was reduced to a misdemeanor, [I] can't remember exactly whether [I] plead guilty to a felony or a misdemeanor" and began to ramble about a traffic incident. When pressed for a definitive answer, the Appellant weakly claimed that he pleaded guilty to a misdemeanor. When asked by this Commissioner if he was confident that it was a misdemeanor, the Appellant vaguely replied "yeah". The Appellant's testimony, which was hesitant and unconvincing, was not credible. Notwithstanding the fact that the event

in question occurred more than twenty (20) years ago, the Commission finds it simply unbelievable that a person would not recall with certainty whether they were convicted of a felony or a misdemeanor.

Further, the Affidavit of Leon P.J. Drysdale, who represented the Appellant in the criminal proceeding, lacks probative value. Mr. Drysdale deposes and swears as follows:

> "It is my recollection, I don't know nor recall that Mr. Kochanowski pleaded to a lesser-included offense to wit, a misdemeanor."

This confusingly worded Affidavit seems to cloud, rather than clarify the issue. However, it appears that, at best, Mr. Drysdale does not recall what occurred.

Additionally, a careful review of the June 20, 1996 notice from the Office of Commissioner of Probation advising that the Appellant's conviction records had been sealed, is telling. This notice clearly states that the Appellant was initially convicted of assault with a deadly weapon on January 5, 1978 in the Boston Municipal Court under Docket Number 9379, and received a one (1) year sentence. The Appellant appealed this conviction to Suffolk Superior Court, and prior to trial *de novo*, ultimately pleaded guilty and was ordered to pay a fine. (Appellant's Memorandum, Exhibits 1 and 2)

The Appointing Authority seeks to dismiss this appeal based its assertion that the Appellant committed a felony and based on G.L. c. 46, s. 91A, which provides, in its entirety, "No person who has been convicted of any felony shall be appointed as a police officer of a city, town or district." The Appellant counters that although he pleaded guilty to a crime in 1978, he believes that crime (assault and battery with a dangerous weapon) was addressed as a misdemeanor, not a felony, and that, in any event, his record was sealed in 1996 and, pursuant to G.L. c. 276, s. 100A, the Appointing Authority is barred from considering his guilty plea.

There appears to be some confusion regarding the nature of the crime to which the Appellant pleaded guilty in 1978. A court document relating to the 1978 plea was submitted to this Commission. It refers to the crime as "**assault and battery** by means of a **dangerous weapon.**" (emphasis added) The court document does not indicate the Massachusetts statute under which the Appellant was prosecuted and penalized but it appears to fall under G.L. c. 265, s. 15A. On the other hand, the Appointing Authority relies on the report of its employment background investigator, Detective James Greene, whose report states that the Appellant pleaded guilty to "**assault** by means of a **dangerous weapon** (to wit: a replica .38 caliber revolver), a felony under Massachusetts General Law, Ch. 265, S. 15B." (sic) (emphasis added) For clarification in this regard, the Commission looks to the Massachusetts Sentencing Commission "Master List of Crimes." This List indicates that both G.L. c. 265, s. 15A and G.L. c. 265, s. 15B are felonies.

The Appellant asserts that although the crime with which he was charged was a felony it was addressed by the court as a misdemeanor. Detective Green's report, on behalf of the Appointing Authority, states that the crime was a felony. The Appellant sought to undermine the information provided by the Appointing Authority by producing an affidavit from attorney Leon Drysdale, dated June 12, 2003, who defended the Appellant in regard to the 1978 criminal matter. However, the affidavit is of no assistance. It provides, it pertinent part, "It is my recollection, I don't know nor recall that Mr. Kochanowski pleaded to a lesser-included offense to wit, a misdemeanor." We view Detective Green's report, based on his professional knowledge, as reliable. There is no evidence before us that the Detective was biased toward the Appellant in any way that

would cause us to question his reliability. See also School Committee of Brockton v Civil Service Commission, 43 Mass. App. Ct. 486, 491-92 (1997) and McIssac v Civil Service Commission, 38 Mass. App. Ct. 473, 475 (1995).

Having determined that the underlying crime was a felony, we address the Appellant's assertion that his record having been sealed, the Appointing Authority was barred from considering the felony in the course of his application for employment. The Appellant provides a copy of the approved sealing of his record by the Commissioner of Probation. His record having been sealed, the Appellant relies on G.L. c. 276, s. 100A, which states, in pertinent part, "Such sealed records shall not operate to disqualify a person in any examination, appointment or application for public service in the service of the commonwealth or of any political subdivision thereof …." Further, the Appellant argues that the intent of the sealing statute is to allow for the rehabilitation of a person convicted of a crime and that sealing a record has the same, or similar effect of a governor's pardon, to wipe the slate clean.

Such assertions warrant a further review of the statutes and related case law. The Appellant cites the part of G.L. c. 276, s. 100A that would bar disqualification for appointment to public service employment based on a sealed record. However, the Appellant also apparently concedes that the fifth paragraph of the same statute undermines his position. The fifth paragraph expressly provides, "The commissioner [of probation], in response to inquiries by authorized persons **other than any law enforcement agency, any court, or any appointing authority**, shall in the case of a sealed record … report that no record exists." (emphasis added) Indeed, the Supreme Judicial Court has ruled that, "This provision must be read to imply that law enforcement

agencies, courts and appointing authorities do have access to criminal records which have been sealed." Rzeznik v. Chief of Police of Southampton, 374 Mass. 475, 480 (1978). Thus, the Quincy Police Department was authorized to access the Appellant's record.

In light of these statutory provisions, the Appellant last argues that a sealed criminal record " … should be used for discretionary purposes rather than to automatically disqualify every affected person." Appellant's Memorandum at p. 2. This assertion bumps up against the plain wording of G.L. c. 41, s. 96A, which provides, "No person who has been convicted of any felony shall be appointed as a police officer of a city, town or district." In this statute, the Legislature's intent is clear and makes no exception. From this we interpret that the Legislative intent is to hold that that those with whom we entrust enforcement of the law, and all the responsibilities and obligations therewith, should themselves be not in violation of the most grievous criminal laws. That police applicants should be held to a higher standard is also consistent with the treatment of hired law enforcement officers under civil service law. Specifically, officers who are found to have committed acts that may not rise to the level of a crime or may even be tolerated in the private sector, may be disciplined therefor precisely because of this higher standard. Appellate courts have recognized that "Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel." Police Commission of Boston v. Civil Service Commission, 22 Mass. App. Ct. 364, 371 (1986). Further, police officers, "implicitly agreed that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities." Id. *See also* School Committee of Brockton v. Civil Service

Commission, 43 Mass. App. Ct. 486, 491-92 (1997) and McIssac v. Civil Service Commission, 38 Mass. App. Ct. 473, 475 (1995). For these reasons, it is consistent to hold police applicants to the higher standard contained in G.L. c. 41, s. 96A and preclude them from being considered for the position of police officer. What the statute has explicitly barred, the Commission can not assert is a matter of discretion.

For all of the above stated reasons, it is found that the City of Quincy has established by a preponderance of the reliable and credible evidence in the record that it had just cause to bypass the Appellant for the position of permanent police officer. Therefore, the City's Motion to Dismiss is granted and the Appellant's appeal under Docket No. G-01-1561 is hereby ***dismissed.***

Civil Service Commission

_____
Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Bowman, Marquis, Guerin, Taylor, Commissioners) on May 17, 2007.

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. 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:

Richard M. Lane, Esq.

David Grunebaum, Esq.