COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Decision mailed: 1/27/12
Civil Service Commission

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

BRIAN J. LABRIOLA,
Appellant

v.

TOWN OF STONEHAM,
Respondent

Case No.: G1-10-277

DECISION

The Civil Service Commission voted at an executive session on January 26, 2012 to acknowledge receipt of the report of the Administrative Law Magistrate dated November 23, 2011, the written objections of the Appellant dated December 22, 2011 and the response of the Respondent dated January 10, 2012. After careful review and consideration, the Commission voted 3-1 to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby ***dismissed.***

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman – Yes; Henderson, Commissioner – NO; McDowell, Commissioner – Yes; and Stein, Commissioner – Yes [Marquis – Absent]) on January 26, 2012.

A true record. Attest.

Christopher C. Bowman
Chairman

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.

Notice to:
F. Robert Houlihan, Esq. (for Appellant)
Daniel C. Brown, Esq. (for Respondent)
John Marra, Esq. (HRD)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-727-7060
FAX: 617-727-7248
WEBSITE: www.mass.gov/dala

November 23, 2011

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Brian J. Labriola v. Town of Stoneham
DALA Docket No. CS-11-50
CSC Docket No. G2-10-277

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,

Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: F. Robert Houliahn, Esq.
Dainel C. Brown, Esq.

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

Brian Labriola,
Appellant

v. Docket No. G2-10-277
DALA No. CS-11-50

Town of Stoneham,
Appointing Authority

Appearance for Appellant:

F. Robert Houlihan, Esq.
Heavey, Houlihan, Kraft & Cardinal
229 Harvard Street
Brookline, MA 02446

Appearance for Appointing Authority:

Daniel C. Brown, Esq.
Feeley & Brown, P.C.
1600 Boston Providence Highway
Suite 209A
Walpole, MA 02081

Administrative Magistrate:

Kenneth J. Forton, Esq.

SUMMARY OF RECOMMENDED DECISION

The appointing authority's decision to bypass the Appellant for original appointment as a police officer was reasonably justified based on the Appellant's recent arrests for OUI and resisting arrest. During his interview, the Appellant's explanation of the facts surrounding his arrests was evasive and inconsistent with the relevant police reports.

RECOMMENDED DECISION

Pursuant to G.L. c. 31 § 2(b), the Appellant, Brian Labriola, appeals from the decision of the Appointing Authority, the Town of Stoneham, to bypass his appointment

to the position of police officer. Mr. Labriola requested an adjudicatory hearing to challenge the bypass decision.

A pre-hearing conference was held on November 2, 2010, at the Civil Service Commission, One Ashburton Place, Boston, Massachusetts. A hearing was held on January 7, 2011, at the Division of Administrative Law Appeals, 98 North Washington Street, Boston. The hearing was recorded on three (3) cassette tapes.

Fifteen documents were entered into evidence. (Exs. 1-15.) Richard Bongiorno, Police Chief, testified on behalf of the Town of Stoneham. The Appellant testified on his own behalf. He also called his mother, Nancy Labriola, and his girlfriend, Meghan Hardy, to testify on his behalf.

The Appellant filed his proposed decision on February 16, 2011, and the Town of Stoneham filed its proposed decision on March 18, 2011, whereupon the administrative record was closed.

FINDINGS OF FACT

Based on the testimony and documents presented at the hearing, I make the following findings of fact:

1. The Town Administrator, David Ragucci, is the appointing authority for the Town of Stoneham. In a typical hiring process, a civil service certification list is requested. Candidates from that list are then asked to submit an employment application. Each candidate is interviewed by a panel using a set of uniform questions. Then a background investigation is conducted. The Chief of Police then makes a recommendation to the Town Administrator after considering all the information

collected. The Town Administrator relies on the Chief's recommendation in making his appointment decision. (Testimony Bongiorno; Exs. 1, 2, 4, 7.)

2. The Town requested two certification lists from the Human Resources Department to fill two police officer positions. The lists were dated April 30, 2010 and June 30, 2010. (Ex. 1.)

3. The Appellant, Brian Labriola, was the sixth name on the certification lists. He has a Bachelor's Degree in Criminal Justice from UMass Lowell and has been employed for the last seven years with the Middlesex Sheriff's Office. (Ex. 1.)

4. At the Middlesex Sheriff's Office, he is a member of the tactical response team, a subset of the jail guards who are trained to respond to crises in the jail. He is also trained in crowd control and the use of pepper ball guns. He is licensed to carry a firearm. (Testimony Labriola.)

5. The Appellant's background investigation revealed that he had been arrested in August 2009 for trespassing and resisting arrest and in March 2008 for operating a vehicle under the influence of alcohol. He was also named in a 2004 police report as a suspect in an alleged assault involving a female acquaintance. (Exs. 3, 10, 11.)

6. The report detailing the 2009 arrest states that a police officer attempted to direct the Appellant to leave a country music concert at Gillette Stadium after the officer was called to aid a security guard, at whom the Appellant was yelling. The Appellant would not follow the direction of the police officer, so the officer attempted to take the Appellant into custody. The Appellant pulled his arms away and tried to avoid being taken into custody. Eventually it took the efforts of four officers to control the Appellant.

He was charged with trespassing and resisting arrest. The charges were later dismissed. (Ex. 10.)

7. The 2008 arrest report details that the Appellant was stopped at a sobriety checkpoint in Brighton, Mass. by State Police. When the Trooper asked Appellant for his license and registration, he provided the officer with his license and his Middlesex Sheriff's identification card. The Trooper handed the identification card back to him and asked for his registration, which neither he nor his girlfriend passenger could find. He was asked to step out of the car and failed several field sobriety tests after admitting to having consumed "a couple of beers." The Trooper asked the Appellant if he would like to take a Breathalyzer test. In response, the Appellant leaned into the Trooper and explained that he worked for the Middlesex Sheriff's Office and did not think that taking the Breathalyzer would help him. Consequently, he was arrested for refusing the Breathalyzer, and his license was suspended for 180 days. After being bailed out, the Appellant went to the hospital to have a blood test. After a bench trial in the Brighton division of Boston Municipal Court, he was found not guilty. (Testimony Labriola, Hardy; Exs. 3, 4, 10, 14.)

8. Several hours after his arrest, the Appellant went to St. Elizabeth's Hospital in Brighton to have his blood tested for alcohol. The report stated that at the time that his blood was drawn it was 14mg/dl. (Ex. 4; Testimony Labriola, Hardy.)

9. A 2004 police report details that an ex-girlfriend of the Appellant alleged that he had stolen her cell phone and that, when she went to his house to retrieve it, he locked her in his room and yelled at her. No further investigation was made in this matter because the ex-girlfriend declined to press charges. (Testimony Bongiorno; Ex. 11.)

10. During his interview, the Appellant was asked if he had ever had any problems with an old girlfriend; he stated that he had not. When told about the police report, he stated that he did not think of it and was not aware there was a police report. (Testimony Bongiorno, Labriola; Ex. 3, 7, 11.)

11. [redacted] was seventh on the certification list. He has a Bachelor's Degree in Criminal Justice from Suffolk University. At the time of his application, he was working for a federally contracted security company. He interviewed exceptionally well, and his background investigation revealed nothing that would preclude him from serving as a police officer. (Exs. 1, 3, 5, 7.)

12. [redacted] was eighth on the certification list. He had a Master's Degree in Public Affairs from UMass Boston and a Bachelor's Degree in Law and Government from Endicott College. At the time of his application, he was employed by the Middlesex County Sheriff's Department in the Warrant Apprehension Unit and was a graduate from the Municipal Police Officer Academy. (Exs. 1, 3, 6, 7.)

13. In 2006, Mr. [redacted] was arrested in New Hampshire for driving under the influence of alcohol after failing a field sobriety test and refusing to take a Breathalyzer Test. Mr. [redacted] later pled guilty to reckless driving. At his interview, Mr. [redacted] admitted his conduct was wrong, stated that he had learned his lesson, and pointed out that he had not had any problems since then. (Testimony Bongiorno; Exs. 6, 7b, 8b, 9b.)

14. The interview panel, after reviewing each candidate, unanimously decided to bypass the Appellant and others, and instead recommend Mr. [redacted] and Mr. [redacted] for appointment. (Testimony Bongiorno.)

15. By letter dated August 13, 2010, Chief Bongiorno recommended to the appointing authority, Town Administrator David Ragucci, that Mr. [redacted] and Mr. [redacted] be appointed to fill the two open police officer positions. (Ex. 2.)

16. By letter dated September 17, 2010, Town Administrator Ragucci notified the Appellant that he was being bypassed. The letter detailed the Appellant's 2008 and 2009 arrests, along with the 2004 police report naming him as a suspect in a simple assault and argument over a cell phone. Mr. Ragucci also cited the Appellant's evasive interview answers and failure to mention the 2004 cell phone incident. He concluded: "Your explanation of the above chain of events is inconsistent with written police reports. Your inconsistent explanation, coupled with evasive answers during your oral interview, raises concern of your truth and veracity, an important component for a police officer to maintain." (Ex. 3.)

17. By letter of October 18, 2010, the Appellant filed a timely appeal with the Commission.

CONCLUSION AND ORDER

After reviewing the testimony and documents presented in this matter, I conclude that the Town has proven by a preponderance of the evidence that there was a reasonable justification to bypass the Appellant.

The authority to bypass a candidate for permanent promotion or original appointment to a civil service position is governed by G.L. c. 31, § 27, which provides:

> If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest.

PAR.08(3) of the Personnel Administration Rules promulgated by the Human Resources Division provides further that, when a candidate is to be bypassed, the appointing authority must make a full and complete statement of all the reasons to justify the bypass. "No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed . . . shall later be admissible as reasons for selection or bypass in any proceeding before . . . the Civil Service Commission." PAR.08(3).

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for bypass are justified. *Brackett v. Civil Service Comm'n*, 447 Mass. 233, 241 (2006). The Commission should apply *de novo* review and determine "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." *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003).

Reasonable justification is established when such action is "done upon adequate reasons sufficiently established by credible evidence, when weighted by an unprejudiced mind, guided by common sense and by correct rules of law." *See Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971), citing *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). An appointing authority may use as a basis for bypass any information it has obtained through an impartial and reasonably thorough independent review, including allegations of misconduct. *City of Beverly v. Civil Service Comm'n*, 78 Mass. App. Ct. 182, 189 (2010). When considering allegations of misconduct, there must be a "credible basis for the allegations" that presents a "legitimate doubt" about a candidate's suitability, but the appointing authority is not

required "to prove to the commission's satisfaction that the applicant in fact engaged in the serious alleged misconduct . . . ." *Id.* at 189-90.

Although the commission makes the findings of fact anew, substantial deference should be given "to the appointing authority's exercise of judgment in determining whether there was 'reasonable justification' shown." *Id.* at 189. Substantial deference is especially appropriate in cases dealing with the appointment of public safety officers, given the sensitive nature of their position and the high standards to which they are held. *Id.* "It is not within the authority of the commission . . . to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." *City of Cambridge v. Civil Service Comm'n,* 43 Mass. App. Ct. 300, 304 (1997).

"In making that analysis, the commission must focus on the fundamental purposes of the civil service system—to guard against political considerations, favoritism, and bias in governmental employment decisions . . . and to protect efficient public employees from political control." *City of Cambridge*, 43 Mass. App. Ct. at 304, *citing Murray v. Second Dist. Court of East. Middlesex*, 389 Mass.508, 514 (1983); *Kelleher v. Personnel Adm'r of the Dept. of Personnel Admin.*, 421 Mass. 382, 387 (1995); *Police Comm'r of Boston v. Civil Service Comm'n*, 22 Mass. App. Ct. 364, 370 (1986). "When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission." *City of Cambridge*, 43 Mass. App. Ct. at 304, *citing School Comm. of Salem v. Civil Serv. Comm'n.*, 348 Mass. 696, 698-99 (1965); *Debnam*

v. Belmont, 388 Mass. 632, 635 (1983). *Commissioner of Health & Hosps. of Boston v. Civil Serv. Comm'n*, 23 Mass. App. Ct. 410, 413 (1987).

In this case, the appointing authority bypassed the Appellant because of his two arrests in 2008 and 2009 and because his explanations of the incidents were evasive and inconsistent with the reports, which raised concerns about the Appellant's honesty. The Appellant on the other hand has made no allegations of bias or improper influence, but only alleges that the appointing authority failed to adequately investigate his prior arrests and focused too much on his shortcomings and not enough on his positive attributes. He also points out that Mr. [redacted], the selected candidate, had pled guilty to reckless driving, while the Appellant's arrest for operating a vehicle while intoxicated resulted in a finding of not guilty.

In making its decision, the appointing authority may use any information it receives as long as there is a credible basis for its consideration. *See City of Beverly v. Civil Service Comm'n*, 78 Mass. App. Ct. at 189-90. Chief Bongiorno properly considered the reports relating to the Appellant's arrests even though the charges were dropped in one case and he was found not guilty in the other. The Commission has long held that an applicant's arrest record, even in the absence of a conviction, is entitled to some weight by the appointing authority in making its decision. *Thames v. Boston Police Dep't*, 17 MCSR 125, 127 (2004); *Soares v. Brockton Police Dep't*, 14 MCSR 168 (2001); *Brooks v. Boston Police Dep't*, 12 MCSR 19 (1999); *Frangie v. Boston Police Dep't*, 7 MCSR 252 (1994).

The August 15, 2009 arrest for trespass and resisting arrest was very recent; it was less than a year before the Appellant's interview. The police report detailed how the

Appellant resisted arrest and four officers were required to control him. The irony of a person who wants to be a police officer resisting arrest and not following the instructions of a fellow law enforcement officer is not lost on me nor was it on the appointing authority, I suspect.

The 2008 arrest was also recent. The relevant police report stated that the Appellant failed a field sobriety test and refused to take a Breathalyzer Test, after admitting to consuming a couple beers. It also detailed how he had presented his Middlesex Sheriff's identification card with his license and had failed to follow simple directions. Again, it is more than reasonable for the appointing authority to be deeply concerned that a police officer candidate refused to take the Breathalyzer and, in addition, presented his Sheriff's ID card to the inquiring state trooper. I cannot think of any reason that the Appellant would have given the officer his Sheriff's ID other than that he expected special treatment because he was also in law enforcement.

In his interview, the Appellant was given ample opportunity to explain the incidents. The Appellant attempted to do so by explaining that in both incidents he had done nothing wrong. He claimed that the 2009 arrest was the result of a misunderstanding over a seat at the concert he was attending and denies that he resisted arrest. In the 2008 OUI arrest, he claims that he was not intoxicated, that he did not fail the field sobriety test, and that the officer was incorrect in her assessment and report.

While it is true that the charges in the 2008 case were dropped and a not guilty bench trial verdict was rendered in the other, it does not necessarily follow that the Appellant's version of the events are accurate or that his conduct was appropriate. The appointing authority is still free to consider the circumstances surrounding the arrests and

the way in which the Appellant reacted to the situations. The reports detail the Appellant engaging in questionable behavior in two fairly recent situations. When given the opportunity to explain the situation, the Appellant provided explanations that were inconsistent with the reports and claimed that the police reports were inaccurate. Given the evidence presented, Chief Bongiorno's assessment that the Appellant's explanations of the events were inconsistent and raised concern about his truthfulness is reasonable.

At the hearing, the Appellant attempted to present evidence to demonstrate that the 2008 OUI arrest report was inaccurate and therefore should not be considered. Unfortunately, none of the evidence tends to prove that he did not fail the field sobriety test or that the arresting officer filed an inaccurate report. The night of his OUI arrest, the Appellant went to St. Elizabeth's Hospital in Brighton to have a blood test taken to prove that he was not intoxicated. According to the report, he registered 14 mg/dl. The report itself has a key that states that greater than 100 mg/dl is intoxicated. A serum conversion chart reportedly used by the State Police shows that a reading of 14 mg/dl falls below 0.05% blood alcohol level. If the blood test was taken contemporaneous with his arrest, it may have more probative value. The test, however, was taken several hours after the arrest and is therefore not probative of whether or not he was intoxicated at the time that he was pulled over. Without some testimony (possibly expert testimony) or further interpretive documents that make clear how fast alcohol metabolizes in the blood stream or otherwise makes clear what the Appellant's level of intoxication was at the time that he was stopped by the State Police, the evidence in the records is not strong enough to counter the evidence that he was intoxicated. The Appellant failed all of the field sobriety tests administered: finger/nose, one-leg balance, and heel/toe. The arresting

officer noted that the Appellant had the strong odor of alcohol on his breath, that his eyes were bloodshot and that his speech was slurred. Meghan Hardy, the Appellant's girlfriend, testified that she thought he did well on the field sobriety tests, but she also admitted that she was preoccupied with trying to find the car's registration. Weighing all of the evidence, it was more than reasonable for the appointing authority to conclude that the Appellant was intoxicated, that he tried to influence the state trooper by handing her his Sherriff's Office identification card, and that he refused to take a breathalyzer test.

The Appellant also argues that the appointing authority gave too much weight to his 2008 OUI arrest, considering that Mr. [redacted] had also been arrested for driving under the influence of alcohol. The Appellant points out that his arrest resulted in a not guilty finding whereas Mr. [redacted] pled guilty to reckless driving. Mr. [redacted] arrest, however, was in 2006, and he has had no arrests or driving violations since then. The Appellant's arrest was more recent, and he has been arrested again since then. Also, Mr. [redacted] was not working in law enforcement at the time he was arrested, whereas the Appellant was. In Mr. [redacted] interview he admitted he was wrong and that he had learned his lesson. The Appellant, on the other hand, denied any wrongdoing and essentially accused the state trooper of lying in her police report. Considering all of the facts, the appointing authority was not unreasonable in weighing the two situations differently. *See City of Cambridge*, 43 Mass. App. Ct. at 304 ("It is not within the authority of the commission . . . to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.").

The Appellant also claims that the appointing authority should not have considered the 2004 police report because the allegations in the report were inaccurate

and no effort was made to investigate the matter. Whether the allegations in the report are accurate or not does not change the fact that the Appellant failed to disclose the incident when he was asked in his interview if he had ever had any problems with a girlfriend. Once the Appellant was made aware of the report, he was given an opportunity to explain the incident. The Appellant explained that he had forgotten about the incident, that he was not aware that the girlfriend had filed a police report, and that, yet again, he had done nothing wrong. Appellant's mother also testified that he had done nothing wrong. In this context, Chief Bongiorno was entitled to grant at least some weight to the 2004 police report, though the Chief did admit that if this police report was the Appellant's only problem his candidacy would have been much stronger.

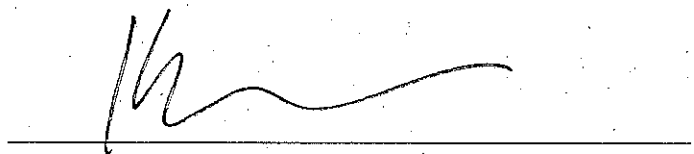
The Appellant alleges that the appointing authority did not adequately investigate the facts surrounding his arrests. In particular, he alleges that the appointing authority's failure to ask the Middlesex Sheriff's Department about their investigations into the incidents prejudiced his candidacy. The Appellant testified that he was not disciplined by the Sheriff's Office for either of the 2008 or 2009 arrests. But, he did not produce the materials to Chief Bongiorno for his consideration, and, crucially, he did not introduce into evidence at the hearing any of the Sheriff's Department's investigatory materials; nor did he call any representative of the Sheriff's Office to testify at the hearing. Appellant attempted to introduce into evidence a document addressed "To whom it may concern at the Civil Service Commission" purporting to be a letter from Appellant's supervisor George Seibold, Assistant Deputy Superintendent II of the Middlesex Sheriff's Office. Even if I were to grant this letter any evidentiary weight—which I do not because (1) it is not dated, (2) there is no evidence that it was created in the normal course of business, (3)

it is not signed under the pains and penalties of perjury, and (4) there is no evidence that the letter's purported author was unavailable to testify—it does not address either of the Sheriff's Office's investigations. It is merely in the spirit of a general letter of recommendation. It also makes fairly serious allegations as to the hiring practices at the Stoneham Police Department, which I have ignored for the above-stated reasons. *See* G.L. c. 30A, § 11(2) ("Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.").

The Appellant further alleges that the appointing authority did not adequately consider his positive attributes and qualifications. Substantial deference is given to appointing authorities in exercising their judgment, especially for positions concerning public safety. *See City of Beverly*, 78 Mass. App. Ct. at 189. In this case, the panel unanimously decided to bypass the Appellant after considering his application, background investigation, and interview. There is no evidence that they did not properly consider his qualifications before making their decision. Additionally, the appointing authority is able to clearly articulate the reasons for the Appellant's bypass. The appointing authority concluded that, despite the Appellant's many positive qualifications, his prior arrests, their serious implications, and the Appellant's inability to confront the facts in the police reports made the Appellant an inappropriate choice for the position of police officer.

Considering all of the evidence, the Town was reasonably justified in bypassing the Appellant based on his prior arrests and his inconsistent and evasive explanations of the incidents. Accordingly, I recommend the dismissal of the Appellant's appeal.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kenneth J. Forton
Administrative Magistrate

DATED: NOV 23 2011