

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

GAREY R. LEE,
Appellant

Vs.

G1-07-140

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

David Bae, Atty.
Boyle, Morrissey & Campo, P.C.
695 Atlantic Avenue (11th Floor)
Boston, MA 02111

Respondent's Attorney:

Sheila B. Gallagher, Atty.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant, Garey R. Lee, (hereafter "Lee" or "Appellant"), seeks review of the Human Resources Division's (hereafter HRD) decision approving the reasons, (G.L. c. 31 § 27) proffered by the Respondent-Appointing Authority, Boston Police Department (hereafter, "Department", "BPD" or "Appointing Authority"), for the bypass of the Appellant for original appointment to the position of Boston police officer. The BPD also requested pursuant to

PAR. 09 that HRD remove the Appellant from certification #260616. HRD did remove the Appellant from the certification as requested. The reason proffered for the bypass and accepted by the Human Resources Division was that the Appellant was arraigned on January 14, 1995, in Boston Municipal Court for the charge of *Domestic Assault and Battery*. As a result of this charge, the Appellant pled guilty and received probation for a period of one year. Additionally, a 209 A restraining order was issued against the Appellant for a period of one year. Thereafter, on March 15, 1995, the Appellant was charged criminally in the Dorchester District Court, only two months after it was issued. He was still on probation for the *Domestic Assault and Battery* at the time he was arrested for violating the restraining order. There was no disposition of that case because it was placed on file. Additionally, the Boston Fire Department bypassed the Appellant for his "antisocial behavior" and driving history. The Appeal was timely filed. A full hearing was held on January 16, 2008, at the office of the Civil Service Commission, of which two audio tapes were made.

FINDINGS OF FACT:

Thirty-five (35) exhibits, (BPD -#1 - #8, Lee A - Z & AA), the HRD document packet in the case file and two stipulations were entered into evidence. *Exhibits referring to CORI and/or criminal records and identity of alleged victims or minor children are impounded.* Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Edward P. Callahan, Former Director of Human Resources, Boston Police Department

For the Appellant:

- Garey Lee, the Appellant

- Leslie Kreiger, Director of Marketing and Recruitment for Intensive Foster Care
- Commander Jeffrey Winn, Appellant's friend
- Staff Sergeant James Kivlehan, Appellant's friend
- Desslar Martin, Appellant's neighbor
- Janet Lee, Appellant's wife
- Thelma Jackson, Appellant's mother

I make the following findings of facts:

1. The Appellant took an open competitive civil service examination for the position of police officer in 2006. As a result of that examination the Appellant's name was placed on the eligibility list Certification #260616, requested by the BPD for appointments. (Testimony of Garey Lee; Stipulated fact).
2. On November 27, 2006, the BPD sent HRD a letter requesting the bypass of the Appellant, whose name appeared on the eligibility list, Certification # 260616 for the position of permanent full time police officer. (Exhibit 1, Bypass Letter sent to Sally McNeely by Edward P. Callahan)
3. On January 31, 2007, HRD apparently approved the BPD's request for the bypass of the Appellant (G.L. c. 31 § 27) and also approved the BPD's request for removal of the Appellant's name from that certification pursuant to PAR.09. (HRD document packet)
4. The BPD apparently based its decision to bypass the Appellant on its background investigation and the "totality of circumstances" involving the Appellant's criminal history and his background including his excellent employment, military and personal record. However, the BPD, through its "roundtable" discussion group, based on their view of the circumstances surrounding the criminal charge for assault and battery, a chap. 209A restraining order and his 2002 bypass, by the

Boston Fire Department, found the Appellant to be unsuitable to be a police officer. (Testimony of Callahan)

5. Edward Callahan, the Former Director of the Boston Police Department's Human Resources Division, testified that the results of Lee's background investigation, including documentation, was presented to a Department hiring committee during a "roundtable" discussion. Callahan could only testify as to who typically attends these "roundtable" discussions but not who specifically did attend Lee's. He did not even know if Lee's investigator, BPD Detective Pomodoro attended.

(Testimony of Edward Callahan)

6. However, more specifically the BPD stated its reasons for bypass in its November 27, 2007 bypass letter to HRD as follows: a.) "In January of 1995, [girlfriend], filed an Assault & Battery complaint against Mr. Lee. Mr. Lee served a period of probation for this particular assault. b.) On January 18, 1995, [girlfriend] filed an affidavit in support of a filing for a Chapter 209 A Civil Restraining Order naming Mr. Lee as defendant. The [girlfriend] indicated that Mr. Lee '...punched me in my face, legs, stomach, and arm. He has also threatened to kill me...' A copy of [girlfriend's] affidavit is attached. A one-year restraining order was placed upon Mr. Lee to refrain from abusing [girlfriend]. c.) In March 15, 1995, Mr. Lee was charged with a violation of the 'Abuse Prevention Act.' d.) In June of 2002, Mr. Lee was by-passed for employment by the Boston Fire Department for his 'anti-social behavior' and poor driving history." (Exhibit 1 and HRD document packet)

7. The Appellant was bypassed for appointment by approximately seventy (70) other candidates, whose names appeared lower on the certified eligibility list, Certification # 260616, than the Appellant's name. (stipulation, case file)
8. On July 14, 2006, the Appellant signed his Student Officer Application and submitted it to the Boston Police Department. A background investigation was thereafter, apparently assigned to Detective Frank A. Pomodoro (Exhibit 8, Student Officer Application and Testimony of Callahan).
9. As a part of Mr. Lee's application process, he provided the Boston Police Department with a number of certifications and commendations he had earned while serving in the Army National Guard (2002-present) and Operation Iraqi Freedom (10/2004-12/2005) which included.

- Certification from the U.S. Army Chemical School for successful completion of the Toxic Agent Training at the Chemical Defense Training Facility (7/16/2003). (Exhibit A).

- Certificate of Training from the Battelle Memorial Institute regarding completion of 64 hours of Toxic Industrial Chemical Protection and Detection Training 10/6/2004). (Exhibit B).

- Certificate acknowledging Mr. Lee's affiliation with the United States Army Chemical Corps Regiment (8/1/2003). (Exhibit C).

- Diploma from The United States Army Chemical School for Successful Completion of the Chemical Operations Specialist Course (8/1/2003). (Exhibit D).

- Certification for completion of the U.S. Army's Risk Management and Safety Course (9/21-24/ 2004). (Exhibit E).

- Certificate of training of "42 ID Surgeon's Combat Lifesaver Course" (1/22-24/2005). (Exhibit F).

- Certificate of Completion of the Hazardous Materials Handling Course. (11/9/2004). (Exhibit G).

-Certificate acknowledging Mr. Lee's service in the Iraq Task Force "13th Field Artillery Regiment" (2/2005-10/2005). (Exhibit H).

-Letter from the Massachusetts National Guard Office Of the Adjutant General regarding Mr. Lee's promotion to "Sergeant/ E5" (9/1/2005). (Exhibit I).

10. As a part of Mr. Lee's application process, he also provided the Boston

Police Department with a certification from his prior commanding officer

SFC Joseph Coup. This certification substantiated Lee's lack of substance

use or abuse between the dates of 6/27/03 to 1/26/06, Lee has **never**;

-“had any alcohol test results with a breath alcohol concentration of .04 or higher.” (Exhibit J).

-“had any verified positive Drug/ Controlled substance test altered or substituted a specimen.” (Exhibit J).

-“refused to take or submit to any controlled substance or alcohol test required by the Federal Motor Carrier Safety Regulations.” (Exhibit J).

-“had any other violations of DOT Agency Drug and Alcohol Testing Regulations Parts 382 and Part 40.” (Exhibit J).

SFC Joseph Coup further certified that he did **not** have “any information received from a previous employer that [Gary Lee] violated DOT Drug and Alcohol Regulations, including Part 407.” (Exhibit J).

11. As required by the B P D's application, Lee also submitted a number of

personal and professional recommendations with his application. These recommendations are uniformly high, including:

-Personal Letter of Reference from Sammy McCall (U.S. Army Retired). (Exhibit K).

-Personal Letter of Reference from Desslar Martin. (Exhibit L).

-Personal Letter of Reference from Captain Jeff Winn. (Exhibit M).

-Letter of Accountability from Captain Jeffrey Winn (Army National Guard). (Exhibit N).

-Letter of recommendation from Michael Hamilton (Avis Rent A Car District Manager). (Exhibit O).

12. Lee presently owns and operates a private trucking company. (testimony of Lee)
13. Lee has been a member of the Army National Guard for 5 years and his present ranking is Staff Sergeant. (Exhibit V).
14. Prior to opening his private trucking company Mr. Lee was employed by the Army National Guard within the Massachusetts CERF-P (chemical, biological, radiological, nuclear high yield explosives enhanced response force package). (Exhibit W).
15. Lee's official title was NCOIC (noncommissioned officer in charge). (Garey Lee & Staff Sergeant James Kivlehan Testimony). Mr. Lee's duties included supervising the decontamination unit within CERF-P. More specifically, if an individual was contaminated with biological or nuclear agents Mr. Lee would supervise their decontamination. See *ibid.* Mr. Lee was also in charge of training the CERF-P team on decontamination. See *ibid.*
16. As a member of the Army National Guard, Mr. Lee served as a Platoon Sergeant/ Chemical Specialist for Operating Iraqi Freedom (OIF) (Phase 3). (Exhibit X; Garey Lee & Staff Sergeant James Kivlehan Testimony).

17. Lee was deployed in October 2004 and returned to the United States in December 2005. While serving in OIF, Lee engaged the enemy in Tikrit, North of Baghdad. Lee was subsequently awarded The Army Commendation Medal (6/22/05) and a Certificate of Recognition acknowledging Lee's "Support of the Global War on Terror". Both awards were presented to the Boston Police Department during Lee's application process. While serving abroad and in the midst of engaging the enemy in high stress combat situations, Lee never deviated from the "rules of engagement." As a chemical specialist Mr. Lee was the Team Leader of Decon 1 (3rd squad). Duties included (1) rolling patrols, (2) operating Troop Control Points (TCP) where he conducted searches of individuals and vehicles for illegal weapons and explosives, (3) Forward Operating Base (FOB) security where he conducted security for the forward bases and (4) Convoy Security where he conducted security for individuals and supplies being transported. (Exhibit X; Lee & Staff Sergeant James Kivlehan Testimony).
18. Lee's most recent "Non Commissioned Officer" evaluation report categorizes him as "Among the Best Overall." (Exhibit Y; Lee Testimony).
19. Lee along with his wife Janet Lee, have taken into their home and cared for five foster children and are presently caring for two out of the five children to this day. The children's names, and dates of care are; Felicia, (1/31/06-4/10/06), Shawna, (2/06-3/06), Marie, (10/26/06-6/28/07), Sabrina, (6/5/06-

present), Dessiah, (9/6/07-present). (Exhibit Z; Garey Lee & Janet Lee Testimony).

20. The type of children placed with Garey Lee and Janet Lee are children who have previously been the victims of abuse (sexual or otherwise) and neglect. (Leslie Kriger testimony).
21. In 1997, Mr. Lee was awarded sole custody of his biological daughter, Rondeesha Lee. (Garey Lee & Janet Lee Testimony).
22. Prior to meeting Garey Lee, Janet Lee was in a physically abusive relationship with another male. (Janet Lee testimony). As a result of that previous abusive relationship, Janet Lee has extensive experience with reporting her abuse to the Boston Police Department. (Janet Lee testimony).
23. Mr. Lee has been married to his present wife, Janet Lee, since December of 1999 and she testified that he has never once physically or emotionally abused her. (Exhibit AA; Testimony of Garey & Janet Lee and Desslar Martin).
24. Gary Lee has acted as a peacemaker in his own neighborhood. (Dessler Martin testimony). At one point between the years 2001-2004 Garey Lee witnessed a group of youths about to fight in a dangerous part of his neighborhood. (Dessler Martin testimony). Upon witnessing this, Mr. Lee intervened and prevented the fight from occurring which resulted in the previously combative youths shaking hands. (Dessler Martin testimony).

25. As part of the BPD application process, on his lengthy Student Officer Application, (Exhibit 8, p.8) Lee readily disclosed and explained to the best of his knowledge, the limited entries on his criminal record . It is noted that Lee, as required signed and swore to his Application, before a Notary Public, having his signature and oath notarized on July 14, 2006. It is also noted that Lee also attached to his Application, a very detailed two page statement, addressing these matters, signed and sworn by him before the same Notary Public, on the same day. Lee included so many details, statements and names of people as witnesses, in this notarized statement that the BPD could have used this application solely, with a proper investigation, to either effectively corroborate or refute Lee's version of these events. Lee was and remains vehement in his assertion of absolute innocence for these alleged offenses. (Exhibits 8, P & Q, Lee's testimony)
26. In the "III Relationships" section of the BPD application – Lee explains his restraining order (Boston Municipal Court Central Division 95-10) and the alleged violation thereof (9507CR1520). (Exhibit P). Lee's sworn and notarized statement dated 7/14/06 was attached to his application. Lee described in detail his rendition of the verbal argument which resulted in the allegations of assault and battery made in (Docket No. 9501CR000426). (Exhibit Q). Thelma Jackson, Lee's mother corroborated that some time in 1995, Lee did in fact help her with her car at her work since she was having car trouble due to the fact that she put too much oil in her car. (Thelma Jackson testimony).

27. On page 8, question 3 of his Student Officer Application, the Appellant checked "YES" when asked whether a 209A restraining order was issued against him. The Appellant further described the underlying incident wrote that the named woman , his then girlfriend, alleged he, "tried to run her off the road," and that is why she filed a 209A restraining order against him. The Appellant also stated that he went to court with his boss and testified before a Judge. He indicates that the Judge removed the temporary order after hearing testimony. This version is also consistent with his rendition in the attached two page notarized statement. It is important to note that Lee identified four or five witnesses, in his statement, including two named witnesses, who went to court and testified on his behalf. *Lee pled not guilty to the charge of violation of a restraining order. On August 24, 1995 the Court placed the complaint "on file" without a change of plea. The Court "closed" the case entirely on August 31, 1995.* (Exhibits 8, P & Q)

28. The following are some relevant parts of General Law, CHAPTER 209A.

ABUSE PREVENTION Chapter 209A: "**Section 1. Definitions** Section 1.

As used in this chapter the following words shall have the following meanings: "Abuse", the occurrence of one or more of the following acts between family or household members: (a) attempting to cause or causing physical harm; (b) placing another in fear of imminent serious physical harm;

Section 3. Remedies; period of relief Section 3. A person suffering from abuse from an adult or minor family or household member may file a complaint in the court requesting protection from such abuse, including, but

not limited to, the following orders: (a) ordering the defendant *to refrain from abusing* the plaintiff, whether the defendant is an adult or minor; (b) ordering the defendant to refrain from contacting the plaintiff, unless authorized by the court, whether the defendant is an adult or minor; (c) ordering the defendant *to vacate forthwith and remain away from the household*,..., ...an order to vacate shall be for a fixed period of time, *not to exceed one year*, at the expiration of which time the court may extend any such order upon motion of the plaintiff, with notice to the defendant, for such additional time as it deems necessary to protect the plaintiff from abuse; (f) ordering the defendant to pay the person abused *monetary compensation for the losses* suffered as a direct result of such abuse. Compensatory losses shall include, but not be limited to, loss of earnings or support, costs for restoring utilities, *out-of-pocket losses for injuries sustained*, replacement costs for locks or personal property removed or destroyed, medical and moving expenses and reasonable attorney's fees; (i) the judge may recommend to the defendant that the defendant attend *a batterer's intervention program* that is certified by the department of public health." (administrative notice)

29. The BPD did not introduce any evidence that Lee had been ordered by the court to attend a batterer's program or to monetarily compensate the alleged abused person for losses suffered. It is noted that the girlfriend's 209A affidavit alleged several injuries and lost time from work. (Exhibits and testimony)

30. Mass.G.L.c.6, §167-§178 (the CORI law) contains the core legislation governing the collection and dissemination of CORI, which is defined as “records and data in any communicable form compiled by a criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, sentencing, incarceration, rehabilitation, or release.” G.L.c.6, §167. The CORI law established the Criminal History Systems Board (CHSB) which administers the CORI law, with responsibility to regulate what specific information may be disseminated and to whom. The CHSB has promulgated rules and regulations governing the collection, dissemination and quality control of CORI. 803 CMR 2.00-9.00 et seq. The CHSB regulations require that non-criminal justice” agencies, i.e., agencies certified under subsections (b) and (c) of G.L.c.6, §172, must provide a copy to the individual of any CORI received on that individual, or a “No Record” report, as the case may be, along with information about how to correct a CORI record and how to enroll in the CHSB “Identity Theft File” program. In addition, the agencies are required to establish a written CORI policy that meets certain minimum requirements prescribed by CHSB regulations, which includes: “Unless otherwise provided by law, agencies that are certified pursuant to M.G.L.c.6, §§172(b) or 172(c), that are inclined to make an adverse decision based upon receiving CORI, shall before making a final decision, afford the individual with an opportunity to challenge the accuracy

or relevance of the CORI."801 CMR 6.11 (*emphasis added*) (administrative notice)

31. The events underlying the restraining order, its alleged violation and the alleged assault and battery all occurred in a two month period, January to March, 1995 and all involved the same person, a woman who was his then live-in girlfriend. He was in the process of breaking-up with this woman at the time of these events and wanted that woman to move out of his apartment. These events were more than eleven years old at the time of his application to the BPD. The Appellant had never been to court before these events nor since. His girlfriend was threatening to pursue the charges if he refused to let her move back to live in his apartment or to drop the charges, if he allowed her to move back in. He was a recent immigrant and worried about deportation at that time. He was inexperienced and very anxious about the potential consequences of these court matters. His understanding of the court disposition of these matters was that of a layperson. These matters occurring over a brief period, with the same woman would after a long period, tend to blend together and the technical distinctions or dispositions would not be as clear to a layperson. He fully disclosed the information as he knew it, on his application. He admitted, on cross-examination to his lack of knowledge of definitions and technical aspects of the court proceedings. He relied on his attorney's explanations at the time. His subsequent renditions of these events and the court dispositions are substantially accurate; as he stated in his attested Application, his attested written two page statement and his sworn testimony at this hearing. (Exhibits 2, 8, P & Q, testimony of Lee)

32. Lee was working two fulltime jobs at the time of these events with his live-in girlfriend. His girlfriend complained that he was not spending enough time together with her. So, Lee arranged to take some time off from one of his jobs to take her to the movies. However, at movie time, his mother called for help with emergency car trouble. He went to help his mother, thereby provoking an argument with his girlfriend. His girlfriend regularly displayed anger at his lack of jealousy, when she went out socializing with her friends. Lee denied ever hitting or assaulting this woman, in any way. His mother testified and corroborated telephoning him regarding car trouble, at that time and his response to fix her car at her place of employment. (Exhibits P & Q, testimony of Garey and Thelma Lee)

33. It is noted that the BPD incident report for Lee's arrest for A & B(209A) on January 13, 1995 contain some incongruities or inconsistencies, on its face regarding his girlfriend's version. His live-in girlfriend called the police and claimed to the responding officer that [Lee] "*struck her* after an argument. Victim further states suspect gave her a black-eye earlier in the week." Lee admitted "arguing over the domestic situation" but denied hitting her. The responding officer did not make any notation of any actual or claimed injury to the girlfriend, including the alleged black-eye from earlier in the week. Police officers are trained and obligated by statute (G.L. c. 209A §6(2)) to note and propose medical treatment for any claimed or observed injury, in these types of situations. It does not seem natural that a victim, just assaulted, would use the word "*struck*". It sounds contrived and formal. This accusation sounds too general, under the

circumstances. A true victim would likely be spontaneous, vocal and specific; for instance claiming that she was punched in the face or kicked in the leg and try to display the alleged injury. It is also inferred that if Lee had actually given her a black-eye earlier in the week, she would then be fearful about continuing to reside there or fearful about calling the police on him. It is noted from Lee's statements and testimony that she could have opted to return to living with her own mother or staying with her friend she was about to visit, but instead preferred staying and calling the police. It is also noted that this incident report contained all of the identification and contact information of the reporting police officer and the girlfriend; including two phone numbers for the girlfriend. Neither the officer nor the girlfriend were contacted during the BPD investigation nor called as witnesses for this hearing. (administrative notice, reasonable inference, Exhibit 4, testimony of Lee)

34. It appears that the girlfriend, five days later, was able to make detailed and specific written accusations. She completed an affidavit form in support of an application for a c. 209A restraining order, on January 18, 1995. This affidavit is witnessed at the bottom by a professional witness, probably a court victim-witness advocate. That person prints her name, initials, and Title/Rank as a witness to the affidavit. The girlfriend states in the affidavit that *on or about date of January 13, 1995* but then refers to some unknown date by stating that Lee *"Before this date..[Lee] has punched me in my face, legs, stomach and arm. He has also threatened to kill me if he ever found out I was cheating on him. He has also hit me in my eye and the result of this was it was swollen for about 2 days. He has*

pushed me down stairs, so I didn't go to work. He has tried to stop me from having friends. On January 13, 1995 [Lee] and I were yelling about one of my friends that he doesn't want me to talk with or see. After about ½ hour when I told him that I was going to see my friend he threw me into the kitchen wall, where I hit my head. I then called the police and he was arrested." This affidavit describes numerous undated past incidents of alleged abuse. It also describes an entirely different event which precipitated her phone call to the police and Lee's arrest on January 13, 1995. It is not likely that a real victim would recount more details of assaults and injuries, five days or more after the events, than spontaneously, at its occurrence. This version is contradictory to her prior statement to the responding police officer, that Lee "*struck*" her. Her version is also inconsistent with a real sense of fear due to receiving that much prior abuse and then in the heat of an argument over her association with a friend, she tells him she's going out to see that friend, at 9:30 PM. Her affidavit and the police incident report are so contradictory and incompatible on their face as to require her testimony, and cross-examination or some other substantive corroboration for support. (administrative notice, reasonable inference, Exhibits 4, 5 & 6 and Lee's testimony)

35. Although the court may have issued a civil restraining order on January 18, 1995, for one year, there is no evidence on the record to show that Lee was notified of it or served with a copy of it. No restraining order or return of service on it was entered into evidence. Lee testified that the girlfriend, alleged victim was not in court, on January 18, 1995, when he was present in court. Lee was also arraigned

that same day in the same court on the criminal charge of assault and battery, for which he was held on bail with surety. Since some bail conditions are the same or similar to some aspects of c. 209A orders, it is possible that Lee was confused. He was clearly confused by the questioning on cross-examination and unclear as to the distinction between civil and/or criminal and misdemeanor and/or felony. However, Lee testified clearly that he was not aware of the restraining order, that he had not been served with it and did not know that it was in place for one year. (administrative notice, reasonable inference, Exhibits 4, 5 & 6 and Lee's testimony)

36. The potential witness, (victim-witness advocate), who witnesses the girlfriend's affidavit on January 18, 1995, could also have been contacted by the BPD and examined on these and related issues. Other issues including: civil nature of proceedings and/or availability of criminal procedures for violations, guidance, instruction and counseling by the district attorney's office on how to make believable and legally sufficient (specific) accusations, pursuant to G.L. c. 209A § 3A. (administrative notice, reasonable inference, Exhibits 4, 5, 6 and Lee's testimony)

37. Lee testified that the crux of the problem with his girlfriend was the lack of time he spent with her, because of his two full-time jobs. She believed that he must have been cheating on her because he spent so little time with her. Although she was suspicious and jealous, she was always upset because he didn't show any jealousy of her socializing with friends. He explained to her he didn't have the time to be jealous; he barely had enough time for a few hours sleep per night. Lee

testified that she became angry on the night of January 13, 1995, because he didn't become jealous when she said she was going over to her friend's house. She then called the police out of anger and frustration with his lack of jealousy. Lee testimony corresponds to his detailed sworn statement filed with his application to the BPD. (Testimony of Lee, Exhibit Q)

38. Lee testified and when cross-examined on why he pled *guilty* to a charge that he alleges the victim made up, Lee stated he did not know the difference between a *guilty* and a *continuation without a finding*. Additionally, he indicated that he pled *guilty* because his attorney advised him that he could avoid deportation if he pled *guilty*. Lee could not recall his attorney's name or some of the other aspects of what happened in court. However the court docket sheet. (95CR 01-426) indicates that on March 22, 1995 the court made a finding of sufficient facts to warrant a finding of guilty, (CFFS) and placed Lee on probation until March 20, 1996. A Motion to Revise and Revoke sentence was filed on April 21, 1995. Then on 5-11-96 the probation was terminated and Lee discharged.(Testimony of the Appellant, Exhibit 2)

39. Regarding the *Assault and Battery* incident and court proceedings, none of the persons involved were contacted by the BPD. The background and criminal record, including CORI of the alleged victim was not checked by the BPD. BPD's Edward Callahan testified that the Detectives or Recruit Investigators are directed to examine the Appellant's background and sometimes that includes contacting victims. In this case, Callahan believed that Detective Pomodoro did not contact anyone including: the alleged victim, the arresting police officer, the booking

officer, the clerk, the victim witness-advocate or the probation officer involved with the Appellant's case. Callahan indicated that the court documents "are prevailing" and there was no need for Detective Pomodoro to investigate beyond the criminal record. He believed that the Appellant's criminal history was more than sufficient for the BPD to bypass the Appellant; including being found guilty of *Assault and Battery* and receiving a one year probation and the one year *209A Restraining Order* being issued against the Appellant. (Exhibit 6, testimony of Callahan).

40. When asked whether there are published or objective standards that guide how the Roundtable evaluates a recruit candidate, Callahan stated "NO". Callahan explained that each candidate is evaluated on a case by case basis. However, Callahan admitted that there have been other candidates who have not been bypassed despite having criminal convictions and 209A restraining orders against them. Furthermore, the Department examined all court documents including the alleged victim's affidavit, which describes how the Appellant made threats and beat her. The issuance of a one year 209 A *Restraining Order* against the Appellant was "eye catching" and the domestic abuse charge was a "red flag" for the BPD. Callahan also believed that it was significant that these incidents all occurred within a two month period in 1995. Callahan testified that there was no need for the BPD to further explore these issues, because what was most relevant for the Department was the Appellant's violent behavior. (Testimony of Callahan)
41. When asked at this hearing, whether the "roundtable" also took into consideration Lee's military record, employment record and personal references; Callahan

testified that the Lee's entire application including references, awards, employment history were all reviewed. (Testimony of Callahan)

42. Over the BPD's objection, the Appellant's Motion for a New Trial and a Criminal Docket Sheet were marked as exhibits at the hearing. The BPD contends that these two documents, which were dated two years after the bypass, were not relevant to the hearing. Although these documents were not considered at the time of the bypass because they did not yet exist, they are certified and are the court's final determination of this criminal matter from which the district attorney's office did not appeal. This criminal matter and the related matters with this alleged victim substantially amounted to the BPD's justification for bypassing Lee. Therefore, these exhibits are admitted and attributed their proper weight and probity. (Exhibits S, T and Y, testimony of Callahan and Lee)
43. On September 17, 2007 Judge Leary of the Boston Municipal Court Central Division allowed Lee's motion for new trial as to his January 1995 complaint for assault and battery (Docket No. 9501CR000426). (Exhibit S). The Motion for New Trial asserted that Lee did not voluntarily plead guilty given the fact that he pleaded guilty out of fear of being deported. (Exhibit T). Lee did not gain United State Citizenship until February 15, 2006. (Exhibit U). On October 23, 2007 (Docket No. 9501CR000426), after notice and opportunity for the district attorney to prepare, appear and prosecute; this complaint was *dismissed for want of prosecution*. (Exhibit S).
44. The BPD substantially relied on the above described incidents, involving his then girlfriend (209A restraining order, assault and battery), as the reasons for bypass.

(Testimony of Callahan). However, the BPD also listed as a reason the following, "In June of 2002, Mr. Lee was bypassed for employment by the Boston Fire Department (BFD) for his "anti-social behavior" and poor driving history." The BPD failed to call a witness for the BFD to testify regarding their decision process to bypass Lee and the specific substantive basis for it. The language used here is clearly conclusory, "anti-social behavior" and "poor driving record". No substantiation for these conclusions by the BFD was offered. A bald assertion for bypass, by one employer cannot be adopted by a subsequent employer, without sufficient substantiation to support it. Lee testified that he did not receive notification from the BFD as to the reasons for his bypass and he joined the military about that time and did not pursue it. The BFD bypass occurred four (4) years earlier and a firefighter position is different from that of a police officer. The BFD is City of Boston department and therefore it should have been easier for the BPD to procure witnesses for this hearing. The BPD refers to (Exhibit 7), the BFD bypass letter of October 30, 2002 to HRD. However that letter is clearly erroneous on its face regarding its conclusion on the definition of a felony and the terms of its own application form. The BFD application form did not require Lee to list any offenses or misdemeanors older than five years and no felony conviction is stated in the letter, but is assumed. (Testimony of Lee and Callahan, Exhibits 1, & 7,)

45. According to the evidence in this case, including the BPD's bypass letter; the BPD relied on the BFD's 2002 conclusions of "anti-social behavior and "poor driving history" as a secondary reason for the bypass of Lee. The BPD did not

rely on its own separate investigation and determination of those 2002 conclusions and find that they also existed in 2006. (Exhibits, Testimony of Callahan & Lee and Exhibit 1)

46. One witness, Ms. Leslie Kreiger, testified that the Appellant and his wife were approved to become foster parents. When asked whether a background investigation was conducted on the Appellant, Ms. Kreiger testified that a red flag was raised based on the Appellant's criminal history. Ms Kreiger testified that her agency never contacted the alleged victim because she believed the Appellant was a good candidate for foster parenting. She stated that the Appellant demonstrated great patience, especially after the Appellant allowed a foster child to remain in his care even after the child made sexual comments to the Appellant. (Testimony of Ms. Leslie Krieger).

47. The Appellant, Garey Lee testified at this hearing. The Appellant testified in a straight forward and unhesitant manner. He was dressed in his army National Guard uniform for this hearing and comported himself professionally. His presentation and demeanor is that of a calm, yet serious and responsible person. His body language and facial expressions were consistent with someone speaking honestly and truthfully. He maintained good eye contact. His answers, in language and tone rang true. He reflected and did not rush his answers. He readily conceded that his layperson recollection of the court proceedings might not be technically precise. He relied on his then attorney for advice. However he never varied on his detailed factual description of the actual events underlying the criminal charges and 209A order. He was adamant in his denial of these offenses or any other

assault. He asserted that the charges are contrary to his nature and established record in every respect. His description of the alleged incidents and court proceedings of January – March, 1995 was delivered with sincerity and conviction. His testimony was consistent with his prior detailed written statements on the matter. His presentation, demeanor and testimony at this hearing mirrored his numerous excellent references and attested accomplishments. Many witnesses either testified or filed statements affirming his longstanding reputation for honesty, reliability, responsibility and commendable behavior. These witnesses were military associates, family and neighbors. I find the Appellant's testimony to be credible and reliable. (Testimony and demeanor of Appellant)

CONCLUSION

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the Appointing Authority. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997); *See* Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 411 (2000); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). The Commission has held in numerous decisions that its function is not one of substituting judgment for that of the appointing authority. City of Cambridge, 43 Mass. App. Ct. at 304; School Committee of Salem v. Civil Service Commission, 348 Mass. 696, 699 (1965). Massachusetts General Law chapter 31, § 2(b) provides that “no administrator

... shall be reversed by the commissioner except upon a finding that such decision was not based upon a preponderance of evidence in the record.” An action is “justified” when “done upon adequate reasons sufficiently supported by credible evidence, when weighted by an unprejudiced mind, guided by common sense and by correct rules of law.” City of Cambridge, 43 Mass. App. Ct. at 304, quoting Selectman of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 262 Mass. 477, 482 (1928); Commissioner of Civil Service v. Municipal Court of City of Boston, 359 Mass. 211, 214 (1971).

The issue of discretion exercised in original or promotional appointments has been addressed by the Supreme Judicial Court; “...On a further issue we may now usefully state our views. The appointing authority, in circumstances such as those before us, may not be required to appoint any person to a vacant post. He may select, in the exercise of a *sound discretion*, among persons eligible for promotion or may decline to make any appointment. See Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv. 348 Mass. 184, 187-193 (1964). See also Corliss v. Civil Serv. Commrs. 242 Mass. 61, 65; (1922) Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431 (1969). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572 (1940). A judicial judgment should “not be substituted for that of . . . [a] public officer” who acts in good faith in the performance of a duty. See M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272.” Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971)

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, 334 (1983). *See* Commissioners of Civil Service V. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

It is undisputed that the Appellant was arrested on the charge of *domestic assault and battery and had a civil chapter 209A restraining order* issued against him for the same incident, with his then girlfriend. However the truthfulness or accuracy of the underlying facts was emphatically and repeatedly denied by the Appellant in writing and testimony. He also contested some aspects of the technical court proceedings.

The BPD reviews each and every candidate’s suitability for appointment, by a close background investigation, based on the voluminous candidate application. This review includes not only the applicant's statements in his application, but also a background investigation to determine his character and fitness. While the decision to appoint a candidate is based on a number of factors, an Appellant’s criminal and employment history are given particular emphasis and attention. The Commission has previously held that an applicant's arrest record, even where there is no conviction, is entitled to some weight by the appointing authority in making its decision. However, the appointing authority is obligated to produce sufficient substantiation of the facts underlying those charges. This obligation is enhanced in the face of the applicant’s emphatic and detailed written denial of those facts, which were relied upon by the appointing authority as the reasons for bypass.

Lee, in his application to the BPD clearly stated in writing, his detailed denial of those facts relied upon for bypass. In the face of this clear rebuttal, the BPD then became obligated to conduct a reasonable investigation and make a reasonable effort to substantiate those contested facts. Instead, the BPD opted to rely almost entirely on Lee's court and arrest record through checks with the (BOP) Board of Probation and the (CORI) Criminal Offender Record Information. However, the BPD did not comply with the minimal statutory requirements of supplying a copy to and notifying Lee of their use of the CORI information for a bypass and afford him an "opportunity to challenge the accuracy or relevance of the CORI". (M.G.L.c.6, §§172(b) or 172(c)) The BPD also apparently relied on its own record (Incident Report), and other records of the underlying event of January 13, 1995. However, The BPD did not even contact the BPD arresting officer, the alleged victim or any of the numerous witnesses and court personnel involved.

In the face of Lee's emphatic written denial and other inconsistencies and incongruities garnered from a cursory examination of the alleged victim's various statements contained in the Incident Report and her 209A affidavit; the BPD failed to conduct even a minimal investigation. The BPD failed to obtain sufficient reliable evidence to rebut Lee's substantial denial and otherwise clean if not exemplary background record. The BPD failed to even contact the Appellant regarding the facts he rebutted in writing. Detective Pomodoro, the BPD investigator, did not contact anyone including: the alleged victim, the arresting police officer, the booking officer, the Judge, the clerk, the victim witness-advocate or the probation officer involved with the Appellant's case.

Massachusetts law does not preclude the hiring of a police officer for an arrest or even a conviction for assault and battery coupled with a 209A civil restraining order. BPD's witness Edward Callahan testified that other candidates had been hired by the BPD with prior convictions and 209A orders. Mass.G.L.c.31, §50 prohibits the employment of any person in a civil service position who is "habitually using intoxicating liquors to excess" or who has been "convicted of any crime" within one year (except for certain misdemeanors or other offenses where the fine imposed is not more than \$100 or the incarceration is less than six months, in which case the appointing authority may, in its discretion, employ such person). However, the General Laws do state a clear disqualification for employment as a police officer. Mass. G.L.c.41, §96A provides" "No person who has been convicted of any felony shall be appointed as a police officer of a city town or district."

The civil service law, which recognizes that the selection of persons for public employment, especially, the employment of public safety officers, calls for heightened scrutiny in assuring that persons who are entrusted in such positions have the honesty and other qualities of good character to make them worthy of the public trust, both on- and off-duty. See, e.g., Commissioner of Metropolitan Dist. Comm'n v. Director of Civil Service, 348 Mass. 184, 203 N.E.2d 95 (1964). See also Attorney General v. McHatton, 428 Mass. 790, 705 N.E.2d. 252 (1999), Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304-305, 682 N.E.2d 88, rev.den., 398 Mass. 1103, 497 N.E.2d 1096 (1997); Police Comm'r v. Civil Service Comm'n, 22 Mass.App.Ct. 364, 494 N.E.2d 27, 398 Mass. 1103, 497 N.E.2d 1096 (1986)

The appointing authority may rely on a past criminal history as a justification for bypass, even when incidents did not result in conviction, so long as the Commission was persuaded, by substantial and reliable proof, that the circumstances underlying the charges as demonstrated by the evidence supported a conclusion that the candidate was unsuitable for appointment. See, e.g.,); Tracy v. Cambridge Police Dep't, 18 MCSR 221 (2005) (multiple charges exhibits “patterns of behavior”); See also Frangie v. Boston Police Dep't, 7 MCSR 252 (1994) (“Mr. Frangie’s background investigation revealed a history of adverse involvement with the police and . . . multiple incidents where he had been involved in threats to commit physical harm to others”). However, Lee in this present case had a life long lack of involvement with the police and the courts, except for a brief two month period in 1995 when he was breaking-up with his then girlfriend. The BPD failed to adequately investigate and corroborate the underlying facts of the criminal charge and 209A restraining order. Lee on the other hand emphatically denied the allegations and when called upon effectively rebutted those allegations.

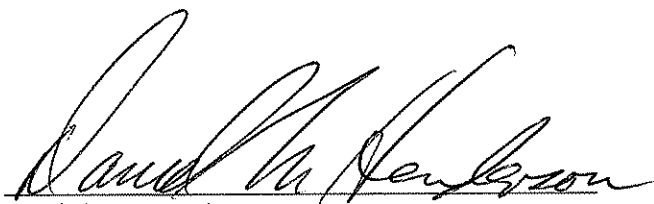
As testified to by Lee during his hearing, the 1995 criminal allegations asserted by the girlfriend were completely false and intended solely to harm him. Furthermore, the restraining order affidavit filled out by the girlfriend was also replete with inconsistencies, incongruities and unsubstantiated allegations. Lee fully disclosed his detailed version of events in his application to the Boston Police Department. The girlfriend’s version of events was motivated by jealousy and ill will toward Lee. Lee’s court room plea to the criminal charge was motivated by his fear of a false conviction and possible deportation since he was not a citizen at the time of the allegations. Lee followed the advice of his then attorney, at that time and his plea was later determined

to be involuntary, due to his fear of deportation. The District Court entered a final disposition of this charge, on October 23, 2007, by dismissing the complaint for want of prosecution. The District Attorney's Office did not appeal this final disposition. Thereby, Lee achieved a clean conviction-free criminal record.

There is virtually little or no unrebutted, credible and reliable evidence in Lee's history to corroborate the BPD's conclusion that he was unqualified, by virtue of bad character or criminal behavior, to be a Boston Police Officer.

For all of the above-stated reasons, it is found that the BPD has not 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 Boston Police Officer. For the foregoing reasons, the appeal under Docket No. G1-07-140 is hereby *allowed*.

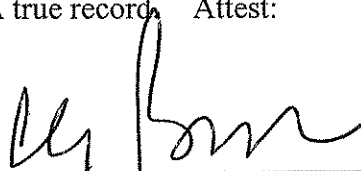
Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs that name of the Appellant, Garey Lee, be placed at the top of the eligibility list for original appointment to the position of Police Officer so that his name appears at the top of any current certification and list and/or the next certification and list from which the next original appointment to the position of Police Officer in the Boston Police Department shall be made, so that he shall receive at least one opportunity for consideration from the next appointment to the position of BPD police officer. The BPD shall not use the same reasons for bypass. The Commission further directs that, if and when Garey Lee is selected for appointment and commences employment as a BPD police officer, his civil service records shall be retroactively adjusted to show, for civil service seniority purposes only, as his starting date, the earliest Employment Date of the other persons employed from Certification 260616.



Daniel M. Henderson,
Commissioner

By 3-2 vote of the Civil Service Commission (Bowman, Chairman NO, Marquis NO, Henderson YES, Taylor YES, and Stein YES Commissioners) on April 9, 2009.

A true record. Attest:



Commissioner
CIVIL SERVICE COMMISSION

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801CMR 1.01 (7) (1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Commission 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 M.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 section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice to: John Marra, Atty. HRD
Sheila Gallagher, Atty.
David M. Bae, Atty.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

GAREY LEE,
Appellant

v.

G1-07-140

BOSTON POLICE DEPARTMENT,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The instant appeal involves an original appointment to the position of police officer to the Boston Police Department. The Department bypassed the Appellant in 2007 for the following reasons:

- On January 14, 1995, the Appellant was arrested by the Boston Police Department for the charge of Assault and Battery. The victim, the Appellant's then-girlfriend, told police that the Appellant struck her during the argument and had given her a black eye earlier in the week. As a result of the arrest, the Appellant was arraigned in Boston Municipal Court on January 18, 1995. Although the Appellant testified that he pled guilty, the docket sheet from the Boston Municipal Court indicates that the Appellant waived a jury trial and that he was found guilty on one Count of Domestic Assault and Battery.
- On January 18, 1995, the victim in the January 14, 1995 incident was granted a temporary restraining order which was subsequently extended for one year. In her affidavit, the victim swore that the Appellant, "...punched me in the face, legs, stomach and arm. He threatened to kill me...".

- On March 15, 1995, the Appellant was charged criminally in Dorchester District Court with violating the restraining order that was issued on January 18, 1995, while he was still on probation for the Assault and Battery charge. The Court placed the Appellant's case on file.

In light of the above facts, I disagree with the majority's conclusion that, "there is virtually little or no unrebutted, credible and reliable evidence in Lee's history to corroborate the BPD's conclusion that he was unqualified, by virtue of bad character or criminal behavior, to be a Boston Police Officer."

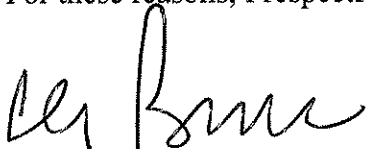
Furthermore, I do not adopt the following statements and inferences referenced in Finding of Fact 33, in which the hearing officer concludes that "It does not seem natural that a victim, just assaulted, would use the word 'struck'. It sounds contrived and formal. This accusation sounds too general, under the circumstances. A true victim would likely be spontaneous, vocal and specific; for instance claiming that she was punched in the face or kicked in the leg and try to display the alleged injury. It is also inferred that if Lee had actually given her a black-eye earlier in the week, she would then be fearful about continuing to reside there or fearful about calling the police on him. It is noted from Lee's statements and testimony that she could have opted to return to living with her own mother or staying with her friend she was about to visit, but instead preferred staying and calling the police." (emphasis added) (Finding of Fact 33)

This finding, and the conclusion that, "the girlfriend's version of events was motivated by jealousy and ill will toward Lee" is not supported by the record and appears to be based solely on inappropriate inferences that reflect a glaring and outdated misconception about domestic violence and its victims.

Finally, I believe it was an error of law to rely upon the Appellant's Motion for a New Trial, which was filed after the BPD's decision to bypass the Appellant, and the fact that the District Attorney's office was not able to prosecute the case again over a decade after the incident, to

conclude that the bypass was not justified. These documents were not considered at the time of the bypass because they did not exist and therefore should not be considered.

For these reasons, I respectfully dissent.

A handwritten signature in cursive script, appearing to read "Chris Bowman". The signature is written in black ink and is positioned above a horizontal line.

Christopher C. Bowman
Chairman
April 9, 2009