COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

ALBERT MAN,
Appellant

CASE NO. G1-17-023

v.

CITY OF QUINCY
Respondent

Appearance for Appellant:

John J. Greene, Esq.
15 Foster Street
Quincy, MA 02169

Appearance for Respondent:

Janet S. Petkun, Esq.
Office of the Solicitor - Quincy City Hall
1305 Hancock Street
Quincy, MA 02169

Commissioner:

Paul M. Stein

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DECISION

The Appellant, Albert Man, appealed to the Civil Service Commission (Commission), acting pursuant to G.L.c.31,§2(b), to contest his bypass by the City of Quincy (Quincy) for appointment as a full-time permanent firefighter with the Quincy Fire Department (QFD).[1] The Commission held a pre-hearing conference on February 14, 2017, followed by a full evidentiary hearing on March 28, 2017. The full hearing was digitally recorded.[2] Ten exhibits (Exh.1 through Exh.10) were received in evidence. On May 1, 2017, each party submitted a Proposed Decision.

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

[2] Copies of the CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Quincy Director of Human Resources Helen Murphy
- Quincy Police Lieutenant Terence McDonnell

Called by the Appellant:

- Albert Man, Appellant,

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Albert Man, is a long-time resident of Quincy MA. He graduated from North Quincy High School in 1996. He holds a Bachelor of Arts in Criminal Justice obtained from the University of Massachusetts in 2006 and a Master's Degree in Business & Organizational Security Management from Webster University in 2013. He is multi-lingual, fluent in English, two dialects of Chinese and conversant in Spanish. He was married in 2001 and divorced in 2005. (*Exhs. 1 & 3; Testimony of Appellant & McDonnell*).

2. Mr. Man enlisted in the United States Army Reserves in January 2000 and served three years on active duty as an artillery specialist, responsible for the security, storage, maintenance and safekeeping of various types of military weaponry and explosives. He was honorably discharged in 2003, at which time he joined the Massachusetts Army National Guard. He deployed overseas three times (South Korea, 2000-2003; Iraq, 2009-2010; Afghanistan, 2011-2012). He holds a top-secret security clearance and currently serves as detachment commander for the 211th Military Police Battalion stationed in Lexington MA. (*Exhs. 1 & 3; Testimony of Appellant*)

3. Mr. Man works as a security consultant with a firm in Boston, MA that concentrates on cyber security and business security. His employment after his discharge from active military

duty, excluding subsequent overseas National Guard deployment, has included: security guard with a private security company (2003-2008); fund accountant with a Boston, MA investment firm (2008-2009), tutor at a school (2013-2014) and salesman for a local Ford dealership (2015-2016). (*Exhs. 1 & 3; Testimony of Appellant*)

4. Mr. Man has been the subject of two Chapter 209A Abuse Prevention Orders:

   a. On November 30, 1995, Mr. Man's mother obtained an ex-parte ten-day 209A Order against her son, age 18, who then lived with her. According to Mr. Man, he was "disobeying her" and "not attending school." At the mother's request, the ex-parte Order was terminated, save for a proviso "Not to Abuse" her and to surrender all firearms, which remained in effect for one year.[3]

   b. On September 8, 2003, Mr. Man's then-estranged wife obtained a ten-day 209A Order against him. The Complainant's Affidavit stated that Mr. Man threatened her with serious bodily harm and hit her one night after "months of verbal and mental abuse." Mr. Man contested the allegations. The ex-parte Order was terminated "after hearing" ten days later.

(*Exhs. 3, 4 & 5; Testimony of Appellant & McDonnell*)

5. In 2005, Mr. Man applied for jobs as a police officer in Quincy and in Milton but was not hired by either municipality. He also unsuccessfully sought employment as a police officer with the Boston Police (2006), MBTA Police (2007), San Francisco Police (2008) and the Massachusetts State Police (2013). (*Exhs. 1, 3, 7 & 8; Testimony of Appellant & McDonnell*)

[3] At the Commission hearing, Mr. Man testified that he stayed away one night and soon reconciled with his mother and got his LTC back as early as the next day. This testimony is inconsistent with the documentary evidence, which included a 10-day "stay-away" order and a one year restriction on his LTC. (*Exh. 5; Testimony of Appellant*)

6. Mr. Man took and passed the civil service examination for firefighter administered by the Massachusetts Human Resources Division (HRD) on April 16, 2014. His name was placed on the eligible list established by HRD on November 13, 2014. (*Exh. 10*)

7. On June 8, 2016, HRD issued Certification #03878 for the appointment of approximately two dozen permanent full-time QFD firefighters. Mr. Man's name appeared in 13th place, tied with two others, all of whom were Quincy residents and claimed veteran's preference. (*Exh. 10*)

8. Mr. Man signed Certification #03878 as willing to accept appointment. On or about June 30, 2016, he submitted the required QFD "PRE-EMPLOYMENT CANDIDATE QUESTIONNAIRE". (*Exh. 1; Testimony of Appellant, McDonnell & Murphy*)

9. As was customary, the Quincy Police Department (QPD) conducted background investigations of all candidates who submitted applications for appointment to the QFD. QPD Lt. Terence McDonnell conducted Mr. Man's background investigation and sat in on most of the other background interviews. (*Exh. 3; Testimony of Appellant, McDonnell & Murphy*)

10. As part of his background investigation, Lt. McDonnell obtained the complete 2004 background investigation report prepared by QPD Detective Barkus in connection with Mr. Man's prior application to the QPD, as well as documents from the MBTA Police Department and the San Francisco Police Department regarding his non-selection by those agencies in 2007 and 2008, respectively. He also interviewed the Mass. State Police trooper who oversaw Mr. Man's 2013 application to that agency. (*Exhs. 3, 7 & 8: Testimony of McDonnell*)

11. The documents obtained from the MBTA Police Department state, in part:

> ". . . Mr. Mann [sic] had two restraining orders. . . . His former wife took out the most recent . . . on September 8, 2003. Mr. Mann neglected to list his former spouse on [his] application . . . . the investigator requested to speak with his former spouse . . . [Mr. Man] stated 'he'd rather he didn't, she will only say more bad things about him.' The [other order taken out by his mother] Mr. Mann [sic] neglected to list . . . on his application, and when questioned . . . replied 'I never got another restraining order against me'. . . .

> "[T]wo of Mr. Mann's [sic] character references . . . stated Mr. Mann was an avid poker player. Question #42 on the recruit application states: Do you now or have you ever gambled? Mr. Mann [sic] replied "n/a" (not applicable). When questioned . . . Mr. Mann [sic] replied, I would not say I am an avid poker player. I only play once or twice a week."

(*Exh. 8)*

12. The documents obtained from the San Francisco Police Department state, in part:

> "To accommodate the [out of state] applicant's personal schedule and . . . travel costs and arrangements, the applicant was scheduled for a background interview on 5/22/08 and a polygraph and medical examination on the following day . . . .
>
> "During the background interview and during the polygraph examination, the applicant did disclose that he had been subject to two restraining orders . . . that that his estranged and now ex-wife lied . . . and that it was his two TROs as the [only] reason why he was disqualified . . . from numerous police departments in Massachusetts.
>
> "As part of the background investigation I surveyed and subsequently received numerous documents, police reports and internal memorandums from the Boston PD, Quincy PD and the Metro Boston Transit Authority Police Departments . . . . A review of these documents revealed that there were additional issues . . .
>
> "The applicant was not forthcoming with requested information and was deceptive about information dealing with restraining orders, personal websites, gambling habits, residency preference request, circumstances of past employment and an application for a marriage annulment. . . .
>
> "The outside agency documents review also reveals many serious allegations about the applicant from his ex-wife. . . .At this time it would be difficult if not impossible to prove or disprove her allegations.
>
> "It should also be noted that the applicant initially denied gambling in the past or present to background investigators from the above mentioned departments and on written forms. Outside background investigators learned from references and from discovering the applicant's personal web site that he was a regular and frequent gambler. After being confronted, Mr. Man finally admitted to being a regular gambler playing in weekly poker games and tournaments for money.
>
> "In summary . . . it was concluded by three law enforcement agencies that Mr. Man was not truthful, forthcoming and was intentionally deceptive. . . ."

(*Exh. 7*)

13. On September 12, 2016, Lt. McDonnell, together with QPD Sergeant Jennifer Tapper, conducted a pre-employment interview with Mr. Man at QPD headquarters. Prior to the interview, Lt. McDonnell obtained a copy of Mr. Man's Driver's History and reviewed Mr. Man's "Pre-Employment Candidate's Questionnaire" and the documents supplied with the

questionnaire, as well as his "Personal Declarations Supplement" (completed by Mr. Man upon his arrival for the interview). The interview lasted over three hours, about twice the length of any other of the 44 other candidates' interviews.(*Exhs. 1 &3: Testimony of McDonnell*)

14. On November 17, 2016, Lt. McDonnell prepared a Background Investigation report on Mr. Man. The report summarized the information that Lt. McDonnell learned from his interview with Mr. Man, the additional documents that Mr. Man supplied on request, and Lt. McDonnell's own previously mentioned inquiries of law enforcement agencies who had considered Mr. Man for appointment as a police officer (QPD, MBTA Transit Police, San Francisco Police and Mass. State Police). Lt. McDonnell did not contact Mr. Man's personal references, employers or neighbors. Nor did he conduct his own investigation of Mr. Man's prior domestic abuse restraining orders or criminal history beyond what he found in the QPD, the MBTA Transit Police and the San Francisco Police reports. (*Exh. 3; Testimony of Appellant & McDonnell*)

15. Lt. McDonnell listed three "Positives" in Mr. Man's "Candidate Summary": (1) U.S. Army – honorably discharged; (2) Current member MA Army National Guard; and (3) Bilingual. He listed nine (9) "Negatives", including: "Failure to disclose accurate and complete information regarding criminal, marital, employment, gambling and residence history"; "Denied employment opportunities with six (6) Law Enforcement agencies"; and "Incomplete and haphazard Pre-Employment Questionnaire." (*Exh. 3; Testimony of McDonnell*)[4]

16. Lt. McDonnell provided a number of specific examples of the three "negatives" he found in Mr. Man's application and supporting documents as well has his answers to questions about his background during the background interview. These reasons included, in part:

[4] Lt. McDonough also listed six other "negatives", i.e.: Subject of two (2) Abuse Prevention Orders; Alleged suspect in multiple incidents of Domestic Violence; Reported history of racial and gender intolerance; One (1) License Revocation; One (1) License Suspension; and Seven (7) moving violations. (*Exh. 3*) None of these alleged negatives were specified as reasons for bypass in the letter sent by Quincy to Mr. Man and are not specifically evaluated as such in this Decision. (*Exh. 2; Testimony of Murphy*)

- Mr. Man's paperwork was "barely legible".
- Mr. Man's QFD Pre-Employment Application listed only two Quincy residences. The 2005 QPD background investigation showed two additional addresses prior to 1988.
- Mr. Man submitted copies of his college transcripts as required, but omitted details about his college education in the application packet.
- Mr. Man omitted from the credit and financial history sections of the application packet a mortgage granted by him and his sister to Eastern Bank on property they are listed as co-owners of record and where he formerly resided. Elsewhere, he identified that he received an unspecified amount of income from "rental property with sister". When Lt. McDonnell asked who owned the property and was there a mortgage, Mr. Man responded: "I pay her each month. We both own it. She handles the money." He said he did not know how much he paid. He later reported the amount of the monthly mortgage but did not indicate how much of that he paid. He also corrected the amount he currently paid for rent.
- Mr. Man omitted disclosing some driving infractions from 1995 and 1998 that appeared on his record.
- Lt. McDonnell found Mr. Man's answers to questions about the two restraining orders evasive and inconsistent. Mr. Man stated several times: "It was a long time ago. It's hard for me to remember." Lt. McDonnell reminded Mr. Man that he just acknowledged he "knew all about" the 2005 QPD report, and this was his opportunity to refute those claims. At that point, Mr. Man replied: "That's in my past. I'm a better person now."
- Mr. Man erroneously entered information about his employment history in several parts of the application.

- In the application section entitled "Criminal History", a variety of questions ask the applicant to disclose and explain all pending criminal/civil charges, bail, parole, probation, prior or outstanding arrest warrants or abuse prevention orders, and whether the applicant has "ever been convicted of a criminal offense to include petty offense such as underage drinking parties?" The first such question in this section is as follows:

> Check applicable boxes below:
> Have you ever been ___ by a Law Enforcement agency (including Campus and Security Agencies)
>
> Arrested [ ] Interviewed [ ] Interrogated [ ] Detained [ ] Indicted [ ] Convicted [ ]
> Received a Criminal Summons [ ] Received a Civil Citation [ ]
>
> If checked, explain in detail below giving dates, reasons, agencies and dispositions:
> _____
> _____

Mr. Man answered all questions in this section appropriately save for the one set forth above. He responded to that question solely by checking off the box for "Interviewed" and then listed the six police departments which had "interviewed" him for employment.[5]

- In the Pre-Employment Candidate Questionnaire section on "Gambling Related Activities", Mr. Man answered the following question:

> Do you gamble? Never [ ] Seldom [*x*] Occasionally [ ] Regularly [ ]
> If so, on what?
> *megamillions,powerball l*
> _____

- In the Personal Declarations Supplement on "Gambling", Mr. Man answered:

> 1. Do you now, or have you ever gambled? If yes, what type of gambling?
> *yes, megamillions, powerball*
> 2. How much money do you spend on gambling per year?
> *few hundred*
> 3. What is the largest amount of money you have lost while gambling?
> *few thousand many years ago; no longer gamble like that*
> 4. How many times per year do you gamble?
> *seldom*
> 5. Have you ever borrowed money to cover a gambling debt?
> *no*

[5] Elsewhere in the Personal Declarations Supplement Mr. Man was required to answer more questions about criminal history, including required disclosure of all crimes for which the applicant has been a "suspect" and/or "that you have committed but were not caught at" and "the most dishonest thing you have ever done." (*Exh. 1*)

Lt. McDonnell knew that previous law enforcement background investigators reported that Mr. Man had been an "avid" gambler, who then played poker once or twice a week. During his interview, Lt. McDonnell brought up the subject of gambling and Mr. Man said he went to Twin River Casino twice that year and spent about $500 a year gambling.

- The application required three references "who reside in your neighborhood". Mr. Man listed his roommate and two friends, but not neighbors at either his current (a newly built apartment building where he moved in May 2016) or his prior long-time Quincy home.[6]
- In the "Police/Public Safety/Security Experience" section, Mr. Man checked "No [*x*]" to whether he knew any Quincy firefighters, but at his interview with Lt. McDonnell, he named four whom he did know.

(*Exh. 3; Testimony of McDonnell & Murphy*)

17. At the Commission hearing, Lt. McDonnell also cited two additional examples of Mr. Man submitting incomplete and misleading information during the application process:

- The prior QPD investigation report cited documents indicating Mr. Man had filed to annul his marriage, contrary to what he told Lt. McDonnell at the interview. (There is no option on the application to claim "marriage annulled", only "divorced" status.)
- Mr. Man failed to provide documents, i.e. all school transcripts, car insurance records, credit report, license to carry firearms (LTC), and five years of property tax receipts.

(*Testimony of McDonnell & Murphy*)

18. After the completion of the candidates' background investigations in late November 2016, all application packets (the Pre-Employment Candidate Questionnaire and supporting

[6] I can take administrative notice, based on GPS program maps, that Mr. Man's listed neighborhood references are approximately a 15 to 18 minute walk, respectively, to his current listed address and approximately 1 hour, 8 minutes and 1 hour 37 minutes walking distance, respectively to his listed former address. See https://www.google.com/maps

documentation, the Personal Declarations Supplement, and Background Investigation) were forwarded to Quincy Human Resources Director Nancy Murphy who then scheduled a meeting with Quincy Mayor Koch to review all candidates. (*Exhs. 1 through 3; Testimony of Murphy*)

19. The meeting with Mayor Koch lasted about an hour and a half. The participants included Director Murphy, the QPD Police Chief, Lt. McDonnell, the three other QPD officers who conducted investigations, the Mayor's Chief of Staff and several other members of the Mayor's administrative team. The QFD Fire Chief was not present or otherwise represented by any member of the QFD. (*Testimony of Murphy & McDonnell*)

20. The identical process was used to review each candidate's credentials. The QPD investigator read verbatim the "Candidate Summary" from each candidate's background investigation that they performed and the Mayor then made the decision to select or not select that candidate for appointment. Ultimately, of the 44 candidates presented to the Mayor, 28 were selected for hire, of which 22 ranked below (14th through 22nd place) Mr. Man, who was one of sixteen candidates not selected. (*Exhs. 2 & 10; Testimony of Murphy & McDonnell*)

21. By letter dated November 30, 2016, Director Murphy, informed Mr. Man that he was "no longer under consideration for appointment to the Quincy Fire Department." The letter stated three negative reasons for his non-selection:

- Failure to disclose accurate and complete information on QFD application and during interview
- Failed to completely and accurately fill out QFD application
- By passed [sic] by multiple law enforcement agencies

The letter also listed the twenty-two lower ranked candidates who were hired and listed the positive factors attributed to each of those candidates. (*Exh. 2*)

22. Director Murphy chose to state broad, general reasons, rather than specifics, because she treated the letter as a public record. Both Director Murphy and Lt. McDonnell were reasonably

sure that none of the lower-ranked hired candidates had a criminal record or history of restraining order(s). Some candidates did have driving infractions on their record, including more recent moving violations than Mr. Man's last speeding ticket in 2004. Some of the lower-ranked candidates had friends at the QFD but none were directly related to any Quincy employees as best Director Murphy and Lt. McDonnell could recall. (*Exh. 2; Testimony of Murphy & McDonnel*l)

23. At the Commission hearing, Mr. Man did proffer credible evidence to rebut many of the facts allegedly supporting the reasons stated by Quincy for bypassing him. In particular:

- The application questionnaire, the notes made by Lt. McDonnell, and his Background Investigation Report confirmed that Mr. Man did provide in a timely fashion, with his application or after request, the required transcripts, credit reports and LTC.
- Mr. Man gave sufficient disclosure, in his written answers in the application and through the attachment of documents, concerning the incidents in his prior criminal record, driving history and the record of his two abuse prevention orders.
- On cross-examination, Lt. McDonnell acknowledged that he had not been aware that the second (2003) abuse prevention order had ended after 10 days and, therefore, had made no note of that fact in his Background Investigation report (or in the description of those orders in the Candidate Summary provided to Mayor Koch).
- Lt. McDonnell also acknowledged that the "Negatives" in Mr. Man's Candidate Summary as a "suspect in multiple incidents of Domestic Violence" and "history of racial and gender intolerance" was copied from the prior background investigation reports obtained from other law enforcement agencies. He made no independent inquiry about

those allegations, did not attempt to locate or review police reports, if any, related to them and he had no idea if any of those allegations had ever resulted in any criminal charges.[7]

- Mr. Man proved that he has had a clean driving record for many years. The last citation was for speeding in 2004, and the other three incidents were more than twenty years old.
- Mr. Man's answers on his application papers were written in small printed letters, but I was able to read everything he wrote.
- Mr. Man correctly listed his two Quincy residential addresses for the period requested (residences "within the past ten years"). Other residences not mentioned that appeared in the 2005 QPD investigative report, necessarily, were more than 10 years ago. Mr. Man's only error was using 1988 as the start date for the penultimate residence, which was not true. Lt. McDonnell acknowledged that was a careless mistake, but not a deception.

(*Exhs. 1 & 3; Testimony of Appellant & McDonnell*)

24. On the subject of gambling, Mr. Man testified that he listed only lottery play (MegaMillions and Powerball) because he did not go to casinos very often any more, he could not remember when he had last been to Foxwoods or Mohegan Sun, and he was afraid to be labeled a "gamble-holic" if he described the details about of his past gambling activities from "many years ago". His demeanor showed significant discomfort in discussing his gambling and his responses, at times, were evasive and inconsistent. (*Testimony of Appellant*)

25. Mr. Man acknowledged that the job of a firefighter requires a person who pays attention to detail and who knows how to follow instructions. (*Exh. 1;Testimony of Appellant*)

APPLICABLE CIVIL SERVICE LAW

[7] As noted earlier, neither reason was specifically stated as grounds for the decision to bypass Mr. Man. (*Exh. 9)*

The core mission of Massachusetts civil service law is to enforce "basic merit principles" described in Chapter 31 for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L.c.31, §1. The mechanism for ensuring adherence to basic merit principles in hiring and promotion is the provision for regular competitive qualifying examinations, open to all qualified applicants, from which eligible lists of successful applicants are established, ranking them according to their scores on the qualifying examination, along with certain statutory credits and preferences, which then may be used by appointing authorities to make civil service appointments based on a "certification" of candidates according to their standing on the applicable eligible list. G.L.c. 31, §§6 through 11, 16 through 27. In general, each position must be filled by selecting one of the top three most highly ranked candidates who indicate they are willing to accept the appointment, which is known as the "2n+1" formula. G.l.c.31,§27; PAR.09.

In order to deviate from the rank order of preferred hiring, and appoint a person "other than the qualified person whose name appears highest", an appointing authority must provide written reasons – positive or negative, or both – consistent with basic merit principles, to affirmatively justify bypassing a lower ranked candidate in favor of a more highly ranked one. G.L.c.31,§1,§27; PAR.08. Pursuant to the Personnel Administration Rules (PAR) promulgated by HRD, the statement of reasons must be specific and complete:

> "Upon determining that any candidate on a certification is to by bypassed . . . an appointing authority shall . . . send . . . a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked. . . . Such statement shall indicate all . . . reasons for bypass on which the appointing authority intends to rely or might, in the future, rely 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(4)

A person who is bypassed may appeal that decision under G.L.c.31,§2(b) for a "de novo" review by the Commission. When a candidate appeals from a bypass, the Commission's role is not to determine if the candidate should have been bypassed. Rather, the Commission determines whether, by a preponderance of evidence, the bypass decision was made after an "impartial and reasonably thorough review" of the background and qualifications of the candidates' fitness to perform the duties of the position and that there was "reasonable justification" for the decision. Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012) citing Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban , 434 Mass. 256, 259 (2001); Brackett v. Civil Service Comm'n, 447 Mass. 233, 241 (2006) and cases cited; Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003). See also Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321 (1991) (reasons assigned to justify a bypass must be proved to be "more probably than not sound and sufficient"); Selectmen of Wakefield v. Judge of First Dist.Ct., 262 Mass. 477, 482 (1928) (same)

"Reasonable justification in this context means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.' " Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006) and cases cited; 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).

In selecting public employees of skill and integrity, appointing authorities are vested with a certain degree of discretion. City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997). It is not necessary, however, for the Commission to

find that the appointing authority acted "arbitrarily and capriciously." Rather, the governing statute, G.L.c.31,§2(b), gives the commission broad "scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997). In deciding "whether there was reasonable justification" shown for an appointing authority's exercise of discretion, the Commission's primary concern is to ensure that the action comports with "[b]asic merit principles." G.L.c.31,§1. See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, (2001); City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 188 (2010); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997); MacHenry v. Civil Serv. Comm'n, 40 Mass. App. Ct. 632, 635 (1995), rev.den.,423 Mass.1106 (1996); Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991). Although the Commission may not "substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority", when there are "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." Id. (*emphasis added*)

ANALYSIS

Summary

Quincy's selection process that resulted in the decision to bypass Mr. Man was seriously flawed and it would behoove Quincy to consider procedural changes in that process to ensure that future hiring cycles adhere to proper requirements. Procedural deficiencies, however, are not fatal to an otherwise lawfully grounded bypass so long as "the appointing authority had a reasonable justification on the merits for deciding to bypass a candidate and the flaws in the

selection process are not so severe that it is impossible to evaluate the merits from the record. In such a case, the candidate's bypass appeal should be denied despite the presence of procedural flaws. . .” Sherman v. Randolph, 472 Mass. 802, 613 (2015) citing Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-66 (2001). Here, Quincy meets its burden to justify the bypass, i.e., the preponderance of evidence that proved Mr. Man’s lack of attention to detail, evasiveness around issues bearing on trustworthiness, and a pattern of rejection by other law enforcement agencies. For these reasons, Quincy was reasonably justified to conclude that Mr. Man posed an unacceptable risk for hire as a Quincy firefighter at this time.

Problems with Quincy’s Hiring Process

Mr. Man rightly points to several procedural issues that permeate the selection process that Quincy uses to evaluate, select and reject candidates for appointment as QFD firefighters, from the form of the written applications to the way that the ultimate decision is made by the Mayor of Quincy, as the Appointing Authority. Thus, as a threshold matter, these deficiencies must be addressed and their impact, if any, on the merits of Mr. Man’s bypass appeal must be assessed.

First, QFD’s application is replete with questions that are unclear and ambiguous. Ambiguous and overly subjective questions can easily result in honest mistakes or misinterpretation, and disqualifications based on such answers must be carefully scrutinized so that an applicant is not unreasonably disparaged for good faith mistakes or mutual misunderstandings. See, e.g., Wine v. City of Holyoke, CSC No. G1-17-022, 31 MCSR --- (2018) (honest mistakes on ambiguous questions; forgetting minor driving infractions); Boyd v. City of New Bedford, 29 MCSR 471 (2016) (honest mistakes on ambiguous questions); Morley v. Boston Police Dep’t, CSC No. G1-16-096, 29 MCSR 456 (2016) (appointing authority’s misunderstanding appellant’s responses

about his "combat" experience); Lucas v. Boston Police Dep't, 25 MCSR 420 (2012) (appointing authority's mistake about appellant's characterization of medical history)

Here, for example, the QFD application asks for "your most recent job and list your complete work history for the past seven years in chronological order", followed by three blocks (meant for Current Employer(s), and then additional blocks for Previous Employment History. Mr. Man provided accurate information, starting with his two current employers and continuing with his most recent prior employment, but Quincy contends Mr. Man failed to follow instructions because he put one past employer in a block meant for current employment and listed the rest in "reverse" chronological order. Due to the ambiguous way the form is constructed, his method of providing the information is completely understandable. To the extent Mr. Man's deficiencies had been limited to ambiguities in the form that Quincy created and/or a few benign oversights, those errors, standing alone, would not justify bypassing him. Quincy might consider changing its application to avoid similar complications in the future.

Second, Mr. Man claims that he has been unlawfully penalized for failing to acknowledge alleged criminal misconduct for which he was not charged or convicted, insofar as such inquiry is inconsistent with Massachusetts law. See, e.g. G.L.c.151B, §4(9) & 4(9½) (prohibiting employers from asking about certain criminal behavior "through a written application or oral inquiry" or discriminating against applicants for "failing to furnish such information"). See also G.L.c.31,§20 & §50 (civil service law permitting inquiry into criminal *convictions*); G.L.c.41,§96A, prohibiting appointment of anyone *convicted of a felony* as a police officer)[8]

[8] See also G.L.c.6,§167 et seq. and related laws and regulations pertaining to CORI (Criminal Offender Record Information), CJIS (Criminal Justice Information System), NCIC (National Crime Information Center) and other criminal history records; G.L.c.276,§100A et. seq., "sealing" of criminal records; G.L.c.6, §171 and case law on "judicial expungement", e.g., Police Comm'r v. Municipal Court, 374 Mass. 640, 648 (1978); Commonwealth v. Roberts, 39 Mass.App.Ct. 355, 356 (1995); G.L.c.94C,§34 et seq., sealing records of certain substance abuse violations. See generally Conner v. Department of Correction, 27 MCSR 556 92014) (DALA Magistrate's decision, adopted by the Commission, with specific reference to the recent "sweeping changes in the CORI law", citing

The QFD application process poses many questions that stray far beyond the letter of these Massachusetts laws. These questions include, among others, those which explicitly ask whether an applicant was ever "Arrested", "Indicted" or "Received a Criminal Summons", was ever served with a "Bench Warrant" or an "Arrest Warrant" or taken into "Protective Custody". Indeed, some questions are not only legally problematic, but are so broadly couched as to be virtually impossible to answer, such as whether the applicant was ever a "suspect" in a criminal case, committed any crimes for which the applicant was never "caught", or was ever convicted of any "petty offense including underage drinking parties." Also, although less clearly covered by legal prohibitions, some questions overreach for little, if any, legitimate purpose, such as asking an applicant to disclose his or her parent's criminal records, state whether they were ever "with anyone who committed a crime", describe "the most dishonest thing you have ever done", or ever had the police "called to any home/residence in which you have resided".

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

The MCAD long ago took an expansive interpretation of the law. See Hanson v. Massachusetts Dep't of Social Services, 28 MDLR 42 (2006) (MCAD awarded damages for DDS's improper CORI inquiry of prospective social worker: "Respondent's direct inquiry in this matter about juvenile offenses should be seen as falling squarely within the scope of the [G.L.c.151B,§4(9)] prohibition against inquiries . . . . To find otherwise would be to perpetuate. .

G.L.c.6,§171A, St.2010,c.256; Exec. Order No. 495 (Jan. 11, 2008) (CORI record "should not be an automatic and permanent disqualification for employment"); 803 CMR 2.17 (prior notice to applicant before taking CORI-based adverse employment action)

. the most heinous stereotype that individuals with criminal records are, as a group, unemployable. . . ."); McGowan v. Town of Stoneham, 6 MDLR 1639 (1984) ("M.G.L.c.6,§172, may not be ***used*** by police departments, as prospective employers, to circumvent the requirements of M.G.L.c.151B,§4(9**).** For this reason, the [Stoneham police chief] was in error in . . . acquisition of the Complainant's arrest record through M.G.L.c.6,§172. . . ")

Judicial decisions, however, have not yet definitively decided whether civil service appointing authorities, as distinct from private employers, may obtain CORI information directly from applicants or the extent to which public safety agencies are exempt from the proscriptions of Chapter 151B,§4 and other similar general laws governing employment discrimination. Bynes v. School Committee, 411 Mass. 264 (1991); Kraft v. Police Commissioner of Boston, 410 Mass. 155 (1991) See also Lysak v. Seiler Corp., 415 Mass. 625 (1993) (applicant's unsolicited remark about her pregnancy status was "unsolicited", distinguishing case from Kraft); Henderson v. Civil Service Comm'n, -- Mass.App.Ct. ---, 54 N.E.3d 607 n.7 (Rule 1:28), rev.den., 478 Mass. 1105 (2016) ("even assuming that there was improper questioning, we see no prejudice to Henderson; improper questioning does not automatically equate to discrimination");[9] (Town of Burlington v. McCarthy, 60 Mass.App.Ct. 914 (rescript opinion), rev.den., 442 Mass. 1104 (2004) (lawfully obtained CORI on school custodian); Ryan v. Chief Administrative Justice, 56 Mass.App.Ct. 1115 (2002) (CORI obtained through independent sources). See also Chief of Police v. Moyer, 16 Mass.App.Ct. 543, rev.den., 390 Mass. 1104 (1993), *citing*, Commissioner of Metropolitan Dist. Comm'n v. Director of Civil Service, 348 Mass. 184 (1964) (information

[9] The Appeals Court's unpublished Henderson decision also notes the "conflict within our law regarding the criminal history information an employer may obtain directly from an applicant", noting that G.L.c.31,§20 permits civil service exam applicants to answer questions about criminal convictions prohibited by G.L.c.151B,§4(9), and opines that the civil service law, added by amendment after enactment of G.L.c.151B, would take precedence. Henderson, 54 N.E3d at 607 n.8 citing Boston Housing Auth. v. Labor Relations Comm'n, 398 Mass. 715, 718 (1986). This issue is now further complicated by the even more recent 2010 legislative changes to CORI, which, among other things, added G.L.c.151B,§4(9½), to enable MCAD now to enforce more narrowly defined limitations on the use of CORI by employers. St. 2010, c. 256, §101.

obtained from outside source); Downs v. Massachusetts Bay Transp. Auth., 13 F.Supp.2d 130 (D. Mass. 1998) ("[A]n employer that violates its employees' rights by asking impermissible questions ought not be able to base adverse employment decisions on the resulting answers (to which it was not entitled in the first place).")

The Commission most recently noted concern with this unsettled state of the law, but did not directly decide what, if any, criminal history questions a civil service appointing authority could lawfully ask an applicant that would be problematic for other employers but possibly relevant to a law enforcement hiring decision. See O'Regan v. Medford Fire Dep't, 30 MCSR --- (2017). See also, Kerr v. Boston Police Dep't, CSC No. G1-16-203; G1-17-230, 31 MCSR --- (2018) Similarly, here, as there is another well-established ground to disregard criminal history as the basis for Mr. Man's bypass, this Decision need not expressly decide whether such inquiry was lawful or whether omissions or false statements in that regard can form a basis for this bypass.

The additional problem with the application process as it relates to criminal history is the lack of clarity as to whether or not, in fact, such information actually was used to bypass Mr. Man. The bypass letter sent to Mr. Man does not expressly state that it relied on any part of Mr. Man's criminal record, or his failure to disclose it, as a reason for bypassing him. Although the "Candidate Summary" prepared by Lt. McDonnell and read "verbatim" to Mayor Koch, and upon which the bypass decision was made, did mention Mr. Man's criminal history, in the absence of a clear record of the meeting at which the decision was made, the fact that the criminal record did not find its way into the required statement of reasons in the bypass letter is determinative. Neither the criminal history (nor the alleged underlying behavior), may now be asserted as reasons for the bypass. Thus, such alleged conduct cannot be considered by the

Commission in assessing Quincy's justification for its bypass decision, and for that reason, any possible CORI violations are moot and do not require the Commission's decision in this appeal.

Third, Mr. Man contends that he was prejudiced because he had less time to submit his application than others, due to his absence on military duty when the list came out. I do not find this claim to be well-founded. Mr. Man was treated no differently from other candidates who applied. He was allowed to submit supplemental information after his interview and he never asked for more time. His time constraints were not due to animus or pre-disposition against him.

Fourth, Mr. Man complains that his "Positives" were misrepresented and his military record, education, Quincy residency, and current clean driving record and excellent credit (not listed in his "Positives" provided to Mayor Koch) were not fairly considered. He further argues that his application process was halted before any effort was made to talk to his references or employers. In my view, as a matter of procedure, this point is well-taken.[10] When candidates present both strong positive and some negative attributes, it is usually preferable that an Appointing Authority have an equivalent data base on all of the candidates so that hiring decisions rest, as they must, on the informed judgment of the Appointing Authority and not become dictated by the whims of a lower level subordinate who is not the decision-maker. See, e.g., Gore c. Department of Correction, 27 MCSR xxx (2014); Rousseau v. Department of Correction, 27 MCSR 457 (2014); but see Boston Police Dep't v. Massachusetts Civil Service Comm'n, Suffolk Sup. Ct. C.A, No,1684CV02878 (2017) (Roach, J.), reversing Zaiter v. Boston Police Dep't, 29 MSCR 411 (2016). However, here, it is clear that it was Mr. Man's "Negatives" not his lack of "Positives"

[10] In this regard, I also note that the fate of Quincy Fire Department candidates is decided by the Mayor at a meeting with input from a half-dozen Police Officers, including the Police Chief, and another half-dozen others, mostly senior members of the Mayor's administration staff, but without the Fire Chief, and, apparently, without formal input from the QFD. As the Mayor is the Appointing Authority, nothing appears legally inappropriate about this, but it does seem to leave out of the process a potentially important and relevant source of judgment about the core indicators for success in the fire service, which may (or may not) necessarily exactly track all of the traits thought necessary to be an armed police officer.

that Quincy used to disqualify him. Thus, Quincy's flaws in overlooking Mr. Man's "Positives" in this case do not make it "impossible to evaluate the merits from the record" that is fairly presented before the Commission. See Sherman v. Randolph, 472 Mass. 802, 613 (2015). Thus, this appeal can be fairly decided on the more typical question – whether Mr. Man's "Negatives" are reasonable justification for the bypass decision – and that question alone.

I turn, therefore, to the substantive issues.

Lack of Candor in the Application Process

Those who are privileged to enter the public service, and especially those who serve in public safety positions as guardians of the lives and property of others, are expected to be held to a "higher standard" commensurate with the trust reposed in them. See, e.g., Desmond v. Town of West Bridgewater, 27 MCSR 645 (2014), on remand, 29 MCSR 555 (2016); Ung v. Lowell Police Dep't, 24 MCRS 567 (2011). There has been a long history under 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 (1964). See also Attorney General v. McHatton, 428 Mass. 790 (1999), Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304-305, rev.den., 398 Mass. 1103 (1997); Police Comm'r v. Civil Service Comm'n, 22 Mass.App.Ct. 364, rev.den, 398 Mass. 1103, 497 N.E.2d 1096 (1986)

An Appointing Authority is entitled to exclude from its police and fire service anyone who either knowingly distorts the truth through lying or whose credibility and trustworthiness is open

to question by demonstrated lack of objectivity (to be distinguished from honest mistakes as noted earlier), as neither trait is acceptable behavior in the public safety profession. See Robichau v. Town of Middleborough, 24 MCSR 352 (2011), citing City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) ("The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic. . . . It requires no strength of character to speak the truth when it does not hurt.") See also Town of Randolph v. Civil Service Comm'n, 81 Mass.App.Ct. 1123 (1:28), rev.den, 462 Mass. 1104 (2012 (appellant was not forthcoming about 20-year-old restraining order); Barbosa v. New Bedford Police Dep't, 29 MCSR 495 (2016) (pattern of inattention to detail and lack of candor regarding prior employment and criminal history); Minoie v. Town of Braintree, 27 MCSR 216 (2014) (multiple omissions about prior domestic abuse restraining orders and residences); Noble v. Massachusetts Bay Trans. Auth., 25 MCSR 391 (2012) (multiple false statements during application process); Burns v. City of Holyoke, 23 MCSR 162 (2010) (claiming he 'withdrew" from another law enforcement application process from which he was actually disqualified); Escobar v. Boston Police Dep't., 21 MCSR 168 (2008) (misrepresenting residence)

In this appeal, many of the alleged mistakes and omissions that Quincy identified in Mr. Man's application papers and interview have been shown to have no basis in fact and/or law to support his bypass. Some were not supported by credible evidence (alleged racial and gender intolerance and failing to produce school records, a credit report, his LTC and car insurance papers). Some were inconsequential "honest mistakes" that, alone, would not be sufficient to justify a bypass (listing his employment history in "reverse" chronological order and putting one of his former employers in the wrong block; claiming he was "divorced" rather than noting he

had filed for an "annulment" (an option that does not appear on the QFD application, and forgetting to list his 1997 license suspension); checking "NO" to a question whether he had "private security" experience when he had such experience and had listed it in the employment section; and, correctly listing the two residences where he lived for the past ten years but erroneously inserting the wrong starting date for one of them.

Those examples aside, three problematic examples of Mr. Man's inattention to the application process (at best), and evasive behavior (at worst), appear in the record.

First, the most troubling omissions concern Mr. Man's less than forthcoming approach to his current and past gambling habits. He admitted, both to Lt. McDonnell and at the Commission hearing that, contrary to his application responses, he did more than play the lottery in the past year, recalling two trips to Twin River and said "did not recall" when he was last at Mohegan Sun or Foxwoods. He did not disclose, as required, undisputed details about his past regular, weekly gambling habits. He also claimed that these omissions were his conscious decision, made because he no longer gambled "that way" and feared that, if he described what he did, it would make him look like a "gamble-holic". The risks associated with having a public employee who has, or once did, gamble with the frequency that Mr. Man described, is a very legitimate concern. Moreover, his QFD application was not the first time Mr. Man had been less than forthcoming about his gambling; he did so in applications to prior law enforcement agencies as well. Had nothing else raised a red flag, this evasive behavior, alone, justifies Quincy's refusal to put Mr. Man in a position of public trust as a QFD firefighter.

Second, Mr. Man was unwilling, or unable, to provide the names of anyone who knew him as a neighbor. While this is understandable with respect to the apartment building to which he had only recently moved, Mr. Man had no explanation why he could not obtain any references from

neighbors who lived near the home he owned and where he had lived for at least the previous ten years. Similarly, Mr. Man checked "NO" to a question that asked if he knew any Quincy firefighters, although he did provide the names of four QFD firefighter when interviewed. While this omission could, possibly, be inadvertent, it equally could imply that Mr. Man did not want the background investigator asking QFD firefighters about him.[11] Finally, I find incredible Mr. Man's decision to limit his answer to the first question in the "Criminal History" section to identifying law enforcement agencies which had "interviewed" him for a job. Considering all of the evidence, I do not believe that he actually thought he was answering the question properly, but simply chose an easy way to avoid having to supply the information requested.

Third, I find troubling Mr. Man's sketchy knowledge about his finances, especially his initial indifference in compiling the details about his obligations as a homeowner, landlord and mortgagee that his application required. The QFD is rightly entitled to expect a greater level of due diligence in this area.

Had there been only one or two truly "honest" errors here I might assign little, if any, weight to the more benign responses. After taking account, however, of the more truly substantive and seriously problematic issues, especially about gambling, even those "honest" mistakes cannot be entirely discounted as irrelevant. The sheer number of Mr. Man's errors, taken together, do give some credence to Quincy's position that Mr. Man is too susceptible to both evasiveness and inattention to be trusted with the job of a firefighter.

In sum, I agree with Quincy that Mr. Man's evasiveness about his gambling is reasonable justification for his bypass and, while standing alone, his other less consequential omissions

[11] At the Commission hearing, Mr. Man professed that he could have called many, many QFD firefighters, State Police and other law enforcement witnesses, but lacked the time and money to do so. I find that testimony mere puffery and do not credit the statement as any evidence that such character witnesses actually existed.

would not support the bypass, they do add succor to the risk of trustworthiness and reliability that underlies all of those mistakes.

History of Rejection By Other Law Enforcement Agencies

The other core reason Quincy advanced to justify the decision to bypass Mr. Man is his repeated rejection by six other law enforcement agencies (all police agencies), including the QPD (2005), Milton Police (2005), Boston Police (2006), MBTA Transit Police (2006/2007), San Francisco Police (2008) and, most recently, the Massachusetts State Police (2013). Mr. Man contends that all these rejections are solely traceable to a single adverse, stale background report generated by the QPD when he first applied to become a police officer and that the QFD/QPD should have conducted another independent review based on who he is now, not "the Albert Man of ten years ago". Quincy contends that the pattern of rejections is not stale and is, per se, a reliable basis on which to also reject Mr. Man's application to the QFD.

First, the Commission's assessment of an appointing authority's reliance on third-party employment actions as the basis to bypass a candidate is governed by the judicial precedent set forth in City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182 (2010) which held:

> During its investigation, the city uncovered the undisputed fact that Bell had been fired. . . . The [city] did not stop there, but met with hospital officials to glean the basis of their belief that Bell had in fact engaged in the [alleged serious] misconduct. . . .
>
> *[T]he city conducted an impartial and reasonably thorough review that confirmed that there appeared to be a credible basis for the allegations. The city therefore was able to show that it had legitimate doubts about Bell's suitability for such a sensitive position and,in our view,demonstrated that it had a "reasonable justification" for bypassing Bell.*
>
> . . . *[T]he commission focused on whether the city had proved that Bell in fact engaged in the misconduct. We believe the commission erred as a matter of law in placing such an added evidentiary burden on the city. In simple terms, neither Bell nor the commission has presented a convincing argument that the Legislature intended to force an appointing authority to hire a job applicant for such a sensitive position unless it is able to prove to the commission's satisfaction that the applicant in fact engaged in the serious alleged misconduct for which he was fired.*

> . . . . After completing its own independent review, the city decided that it was unwilling to bear the risks of hiring Bell. *Absent proof that the city acted unreasonably, we believe that the commission is bound to defer to the city's exercise of its judgment*.

78 Mass.App.Ct. at 188-191 (*emphasis added*)

Applying the rule in Beverly to the facts of this appeal, I am persuaded that Quincy has made the required "impartial and reasonably thorough" review of Mr. Man's prior rejections for employment by six different law enforcement agencies and found a "credible basis" for those rejections that justified Quincy's decision that Mr. Man posed an unacceptable risk to be hired.

Lt. McDonnell's background investigation included contacting four of the six law enforcement agencies that had previously rejected Mr. Man's application. He had access to the complete file at the QPD, obtained the rejection letters from the MBTA Transit Police and the San Francisco Police, and interviewed the trooper at the Mass State Police familiar with Mr. Man's application. This review meets the Beverly standard. The evidence obtained from multiple law enforcement officers with percipient knowledge of the application process at their agencies showed a "credible basis" for each of those rejections. Although, as noted above, the application process was imperfect in some respects, its shortcomings do not detract from the Commission's ability to assess the "credible basis" for these law enforcement rejections. An "impartial and reasonably thorough review", not perfection, is the required standard.

Mr. Man argues that the prior rejections were rote decisions based on the original QPD investigation which duly relied on his ex-wife's false and salacious allegations about him and the restraining orders entered against him, which he was never given a fair chance to rebut. The record, however, does not support this self-serving characterization of the prior application process. In fact, the prior rejections were grounded on a variety of reasons, including Mr. Man's omissions and evasiveness in the application process, not just about the restraining orders, but other issues as well, particularly his gambling habits. In fact, the San Francisco Police rejection

letter expressly indicated that the issues with his ex-wife had occurred long before and were "difficult if not impossible to prove or disprove" and its risk assessment did not turn on whether or not he had actually been guilty of domestic abuse.[12]

Second, Mr. Man contends that Quincy's bypass relies on a history of rejection that goes back ten years and was influenced by events in his life that go back even further into his late teens, arguing that behavior does not represent "the Albert Man" of today. While, in fact, the most recent rejection by the Mass. State Police was in 2013, the Commission does consider the issue of staleness in appropriate cases, and the issue is fairly raised here.

The Commission has held that an indiscriminate automatic bar to appointment for all forms of misconduct, unless expressly embedded in statute, is not consistent with basic merit principles. See Benevento v. Springfield Fire Dep't, 25 MCSR 537 (2012) (rejected fire department permanent bar for a criminal conviction; bypass allowed despite 27 year old felony conviction); Laguerre v. Springfield Fire Dep't, 25 MCSR 549 (2012) (same; stale juvenile offense); Ramirez v. Springfield Police Dep't, 10 MCSR 256 (1997) (upheld bypass but appellant not precluded from proving future rehabilitation); Radley v. Brookline Police Dep't,10 MCSR 289 (1997) (noting that, in the future, appellant's "redeeming factors must be given added weight" and "past indiscretions should play a lessened role")

> "A fundamental precept of our system (particularly our correctional system) is that men can be rehabilitated. 'Rehabilitation . . . is a 'state of mind' and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved 'reformation and regeneration.' [Citation] Time and experience may mend flaws of character which allowed the immature man to err. The chastening effect of a severe sanction . . . may redirect the

[12]As explained above, I do not interpret Quincy's bypass letter to assert that it relied on the other prior rejections or otherwise concluded that there was a "credible basis" to believe all of the hearsay allegations underlying the restraining orders or the other claims of domestic abuse attributed to Mr. Man's ex-wife. Rather, it was the manner in which he equivocated, then and now, that reinforced the conclusions about his lack of candor surrounding those incidents, as well as others. If Quincy's bypass letter had rested on the behavior underlying the restraining orders and uncharged claims of domestic abuse, with no more information than what appears in the prior rejection letters, those reasons would have to be rejected for want of the "independent and thorough review" that Beverly requires.

> energies and reform the values of even the mature miscreant. There is always the potentiality for reform . . . ."
>
> . . .
>
> "[I]t is sufficient that the petitioner adduce substantial proof that he has 'such an appreciation of the distinctions between right and wrong in the conduct of men toward each other as will make him a fit and safe person . . . . Mere words of repentance are easily uttered and just as easily forgotten."

In Re Hiss, 368 Mass. 447, 453-57 (1975) (*emphasis added*)

No bright lines have been set between when an applicant's history remains an unreasonable risk of present fitness to be appointed to perform the duties of a public safety officer or other civil service job and when intervening circumstances demonstrate rehabilitation that makes such behavior too stale to be used as an indicator of present fitness consistent with basic merit principles of civil service law. See, e.g., Henderson v, Civil Service Comm'n, 54 N.E.2d.3d, 607 (Rule 1:28), rev.den., 476 Mass. 1105 92016) (bypass upheld, in part, on 14 year old misdemeanor conviction (possession of marijuana); Town of Randolph v. Civil Service Comm'n, 81 Mass.App.Ct. 1123 (Rule 1:28), rev.den., 462 Mass. 1104 (2012) (bypass upheld, in part, on 20 year old abuse prevention order); Boston Police Dep't v. Suppa, 79 Mass.App.Ct. 1121 (2011) (Rule 1:28) (upholding bypass; CWOF to felonious misconduct seven years earlier); City of Cambridge v. Civil Service Commission, 43 Mass. 300 (1997), rev.den, 426 Mass. 1102 (1997) (bypass upheld; involvement in 10 year old criminal incident). Compare Finklea v. Boston Police Dep't, 30 MCSR 93 (2017) (14 year old CWOF for receiving stolen property (a tire) insufficient, noting BPD's typical use of a "10-year lookback" period; bypass upheld 4-1 on prior driving record); Boyd v. New Bedford Police Dep't, 29 MCSR 471 (2016) (14 year old felony acquittal insufficient; bypass upheld on other grounds); Teixeria v. Department of Correction, 27 MCSR 471 (2014) (bypass overturned; 21 year old CWOF); Hartnett v. Town of Ludlow, 25 MCSR 290 (2012) (15-year old misdemeanor insufficient; bypass upheld on other grounds); Kusser v. City of Quincy, 23 MCSR 33 (2010) (22 year old discipline too stale in

considering promotion to police lieutenant); Monagle v. City of Medford, 23 MCSR 267 (2010) (stale juvenile criminal records insufficient; bypass justified on other grounds); Conroy v. City of Worcester, 22 MCSR 400 (2019) (3-2 decision overturning bypass; 5 year old driving record); Bulger v. City of Quincy, 22 MCSR 339 (2009) (3-2 decision overturning bypass; 10 year old juvenile driving record); Stanley v. Town of Watertown, 20 MCSR 832 (2007) (3-2 decision overturning bypass; 12 year old OUI charge) with O'Regan v. Medford Fire Dep't, 30 MCSR --- (2017) (bypass upheld; 12 year old restraining order); Maillet v. City of Medford, 27 MCSR 397 2012)(3-1 decision upholding bypass; 10 year old record as teenager); Gleba v. Department of Correction, 26 MCSR 251 (2013) (13 year old CWOF; bypass upheld); O'Rourke v. Boston Police Dep't, 26 MCSR 434 (2013) (8-10 year old criminal and driving records; bypass upheld); Buckley v. Boston Police Dep't, 26 MCSR 281 (2013) (4-1 decision upholding bypass; 10 year old CWOF); Cruz v. City of Lowell, 25 MCSR 255 (2012 (4-1 decision upholding bypass; 7 year old juvenile record); Alband v. Department of Correction, 24 MCSR 56 (2011) (bypass upheld; 3 year old criminal record, leaving open possible future rehabilitation); Gagnon v. City of Springfield, 23 MCSR 23 (2010) (4-1 decision; 8 year old disciplinary record)

In sum, rehabilitation involves shared roles of earning and giving second chances which carry responsibilities for both the applicant and the appointing authority and must be decided on a case-by-case basis. To demonstrate rehabilitation, a candidate for appointment to the sensitive position of a public safety officer must demonstrate more than merely showing repentance or the passage of time between his or her prior misconduct and the application for employment, but bears the burden to show, by credible evidence, why past indiscretions are not probative of a present fitness for appointment. For its part, the appointing authority must remain open to acknowledging rehabilitation when it has been shown. Ultimately, however, absent any showing

of bias, political motivation or other unlawful motives, the judgment call on rehabilitation rests within the sound discretion of the Appointing Authority.

After carefully considering the specific facts and circumstances of this case, including the nature of Mr. Man's prior negative history of employability (specifically, six law enforcement agencies questioning his trustworthiness), the time that has elapsed since those decisions were taken, Mr. Man's own recent problematic performance during the QFD application process, and the absence of credible evidence of any unlawful motives, I conclude that Quincy was reasonably justified to believe, in the exercise of sound discretion, that, at the time of his bypass, Mr. Man was not yet a suitable candidate to entrust with the duties of a QFD firefighter. Accordingly, Quincy's decision to bypass Mr. Man for appointment should be upheld.

CONCLUSION

In sum, for the reasons stated herein, the appeal of the Appellant, Albert Man, in appeal G1-17-023, is ***dismissed***.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 18, 2018.

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

Notice:
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