

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

MICHAEL MARCHIONDA,
Appellant

v.

G1-17-187
G1-18-228¹

BOSTON POLICE DEPARTMENT.
Respondent

Appearance for Appellant:

Stephen J. Delamere, Esq.
Law Office of Stephen J. Delamere, P.C.
839 Washington Street
Stoughton, MA 02072

Appearance for Respondent:

Nathaniel R. Beaudoin, Esq.²
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Cynthia A. Ittleman

DECISION

The Appellant, Michael Marchionda (Appellant or Mr. Marchionda), filed a timely appeal with the Civil Service Commission (Commission) in G1-17-187 on September 20, 2017 and a timely appeal in G1-18-228 on November 21, 2018 under G.L. c. 31, s. 2(b), appealing the

¹ The parties agreed to consolidate these cases after the hearing was conducted in docket number G1-17-187, when the Respondent had bypassed the Appellant again and the Appellant filed docket number G1-18-228. The parties further agreed to waive a hearing in G1-18-228 and to have the Commission instead consider the parties' briefs on G1-18-228, along with their respective additional exhibits, in addition to the record in G1-17-187. (Administrative Notice)

² The Respondent was represented by Attorney Jaclyn Zawada in the proceedings up to and including the hearing in docket number G1-17-187. Attorney Zawada no longer represents the Respondent, who is here represented by Attorney Nathaniel Beaudoin.

decisions of the Boston Police Department (Respondent or BPD) to bypass him for appointment to the permanent, full-time position of police officer. A prehearing conference was held in G1-17-187 on October 17, 2017 and in G1-18-228 on December 18, 2018 at the Commission's office in Boston. A full hearing was held on G1-17-187 on December 12, 2017 in the same location as the prehearing conferences.³ The hearing was digitally recorded and copies of the recording were sent to the parties.⁴ The witnesses, with the exception of the Appellant, were sequestered. The parties submitted post-hearing briefs. Upon the filing of the 2018 appeal, the parties agreed to consolidate it with the 2017 appeal since the reasons for bypass were essentially the same in G1-18-228 as in G1-17-187 and that they would submit briefs, with additional exhibits, for the Commission to render a decision in lieu of conducting a hearing in G1-18-228. The parties subsequently filed briefs, with exhibits, regarding the 2018 appeal. For the reasons stated herein, the both appeals are denied.

FINDINGS OF FACT:

A total of fifteen (15) exhibits⁵ regarding the 2017 appeal were entered into the record at the full hearing and a total of thirty-one (31) exhibits⁶ regarding the 2018 appeal were entered into the record with the parties' briefs. Based on the exhibits in both G1-17-187 and G1-18-228 and the testimony of the following witnesses who testified regarding case G1-17-187:

Called by the Appointing Authority:

- Bryan Rivers, Det., Recruit Investigations Unit (RIU), Boston Police Department (BPD)

³The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31 or any Commission rules taking precedence.

⁴If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

⁵ The Respondent submitted twelve (12) exhibits and the Appellant submitted three (3) exhibits in the 2017 appeal.

⁶ The Respondent submitted fifteen (15) exhibits and the Appellant submitted sixteen (16) exhibits in the 2018 appeal.

- Nancy Driscoll, then-Director of Human Resources (HR), BPD

Called by the Appellant:

- Michael Marchionda, Appellant
- Ms. M
- Mr. G

and taking administrative notice of all matters filed in the case; stipulations; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

Background

1. The Appellant has lived at his current Boston address since 2001. He graduated from high school in 2010, attended a Maine preparatory school in 2011 – 2012, and graduated from a New Hampshire college with a B.A. in Criminal Justice in 2016. (R.Ex. 13 (2018))
2. The Appellant worked in security for the Boston Red Sox for several years beginning in 2013. He would drive down from the New Hampshire college for games and then drive back after the game. (Testimony of Appellant)
3. Working for the Red Sox, the Appellant received training in screening fans, dealing with disorderly fans, looking for suspicious activity, breaking up physical altercations, and interacting with Boston Police. In his security work at Fenway, the Appellant interacted with Boston Police, for example, when pre-entry screening of ticket holders indicated that a person had a firearm, and when the Boston Police Bomb Squad trained Fenway security. The Appellant also has experience writing reports pertaining to incidents of unruly fans and fights at Fenway. The Appellant and other security staff have also received training from the Boston Police Bomb Squad. (Testimony of Appellant)

4. Since the fall of 2016, the Appellant has been a security officer at Brigham and Women's Hospital, where he has received training on de-escalating situations. As a security officer at Brigham and Women's Hospital, the Appellant carries Narcan to allow him to respond to occasional overdoses at the hospital involving visitors. In addition, at the hospital he is also required to deal with persons who may have to be restrained. If there are patients who have been involved in violent crimes, the Boston Police will provide information to hospital security so that security personnel can look out for possible repercussions or reprisals. At the hospital, the Appellant writes incidents reports and he is sometimes supervised by security personnel who are former police officers. (Testimony of Appellant) The Appellant's hospital supervisor reports that Appellant has volunteered for shifts when they were shorthanded and has mentored newer employees. He added that the Appellant stays calm in stressful situations such as patient restraint calls and enforcing the hospital access control policy and that the Appellant has had a calm and level-headed demeanor when dealing with stressful situations. (A.Supp.Ex. 16 (2018))
5. From the fall of 2016 to the spring of 2017, the Appellant was also a Head Hockey Coach in a training program. (R.Ex. 13 (2018))
6. The Appellant has not been reprimanded at Fenway Park, Brigham and Women's Hospital or the hockey training program and he has not had any attendance issues. (Testimony of Appellant; (R.Ex. 13 (2018))
7. The Appellant has excellent professional references and work history. (Testimony of Rivers) The Appellant also received positive neighbor reviews. (A.Ex. 1 (2017); A.Supp.Ex. 16 (2018))

8. The Appellant took and passed the 2015 police officer civil service exam. A number of candidates ranked lower than the Appellant on Certification 04401 were selected, bypassing the Appellant, which bypass the Appellant appealed in G1-17-187.
- (Stipulation) The Appellant took and passed the 2017 police officer civil service exam. A number of candidates ranked lower than the Appellant on Certification 05213 were selected, bypassing the Appellant, which bypass the Appellant appealed in G1-18-288.
- (Stipulations (2017 and 2018))
9. The Respondent bypassed the Appellant on August 31, 2017 and on November 7, 2018 for the same reasons. (R.Ex. 10 (2017); A.Supp.Ex. 1 (2018))⁷
10. Candidates are told to be truthful during the application process. (Testimony of Driscoll)
11. Rule 102 § 23 requires Employees of the Boston Police Department to be truthful in reports and not provide inaccurate information. (R.Ex. 11)
12. Det. Bryan Rivers conducted the Appellant's 2017 background investigation for the Recruit Investigations Unit (RIU) at the BPD in 2017. (Testimony of Rivers; R.Ex. 1 (2017)) When the Appellant applied to the BPD again in 2018, after being bypassed in 2017, Det. Karyn VanDyke conducted the Appellant's background investigation. (R.Supp.Ex. 13 (2018)) The 2018 report of Det. VanDyke updates the 2017 investigation report of Det. Rivers and relies entirely on Det. Rivers' 2017 report with respect to three (3) incidents that occurred in the following locations: 1) Waltham, 2) Merrimack and 3) NH. (Id.)

⁷ With the exception of the inclusion or exclusion of the word "that" in a couple of places in the bypass letters, a typographical error and, perhaps, one or two other word differences, the two (2) bypass letters are the same.

Waltham Incident

13. The 2009 Waltham incident occurred when the Appellant was in high school, eight (8) years before he applied to become a Boston Police Officer. The incident involved motor vehicle vandalism that occurred during a house party involving a number of teenagers, including the Appellant. This matter was found by the Respondent as a result of an inter-police department name search that showed the Appellant was interviewed; it was not part of a criminal record. (Testimony of Rivers; R.Ex. 5 (2017 and 2018))
14. The Appellant, as well as a number of the approximately nine (9) other high schoolers at the party, were interviewed by Waltham Police concerning the vandalism. Initially, the Police believed that the Appellant knew who caused the vandalism. The Appellant and other teens at the party made various statements to the police at different times about who vandalized the car. (R.Ex. 5 (2017 and 2018))
15. The Appellant knew that a friend of his at the party committed the vandalism and the Appellant tried to coax his friend to come forward but his friend refused to do so. Thereafter, one (1) of the other teens who had been at the party reported that the Appellant's friend was the person who allegedly vandalized the car and the Appellant eventually confirmed the identity of this friend to a Waltham Police Officer. Subsequently, the Appellant spoke with the District Attorney's office to provide information regarding events at the party and the suspect. (Testimony of Appellant)
16. The Waltham Police Officer wrote in his report that the initial investigating officer reported that the Appellant had been untruthful. After further investigation by a second Waltham Police Officer and the Appellant's confirmation that he knew the person

who allegedly vandalized the car, the second Officer wrote, in part, “[d]uring my phone conversations with Mr. Marchionda, I felt that he was genuinely upset about the incident and being truthful as to his own involvement. I also felt that he was torn between his friends and between assisting the innocent victim in this matter.” (R.Ex. 5 (2017 and 2018)) Det. Rivers reviewed the Waltham police report and spoke to one (1) of the two (2) officers involved in the case and the teen who was eventually identified as the person who allegedly committed the vandalism. (R.Ex. 1 (2017))

Merrimack College Incident

17. In 2011, when the Appellant was nineteen (19) years old and six (6) years prior to the Appellant’s application for Boston Police Officer in 2017, the Appellant attended a preparatory school in Maine. (Testimony of Appellant)
18. One night in October 2011, the Appellant and two (2) friends from the preparatory school went to Merrimack College (Merrimack) in North Andover to visit friends. (Testimony of Appellant)
19. The Appellant had his father’s car at the preparatory school. On the way to Merrimack, the Appellant and his friends obtained beer and brought it with them to Merrimack. One (1) of the Appellant’s friends volunteered to be the designated driver on the way back to the preparatory school. (Testimony of Appellant)
20. At some time while the Appellant and his friends were visiting Merrimack in the evening, they were in the car in the parking lot when they saw campus police officers. The Appellant’s friend who was driving did not want to drive past the officers because there was beer in the car. They parked the car on campus, got out of the car and went to a dorm to visit friends there. (Testimony of Appellant)

21. The Merrimack campus police approached the car when they saw the car's parking lights had been left on. The Officers saw beer in the vehicle and looked up the Appellant's name on the campus sign-in sheet. The campus police contacted the room the Appellant was visiting to have him come down. Thereafter, the Officers saw the Appellant and his friends on campus and approached them. He and his friends ran away. (R.Exs. 3 and 4; Testimony of Appellant)

22. The campus officers subsequently located the Appellant and his friends. The Appellant was intoxicated. The officers asked the Appellant if the car he had been in was his and if he had been driving it. The Appellant answered that his father had dropped him off at the college in the car. However, the officers noted that the Appellant had the car keys and he had signed into campus security when he and his friends arrived on campus. The officers asked the Appellant about the beer in the car and the Appellant initially denied having any knowledge about the beer. Asked again if there was beer in the car, the Appellant answered 'yes'. The officers handcuffed and arrested the Appellant as a Minor in Possession of Alcohol. (R.Exs. 3 and 4; Testimony of Appellant)⁸
(Administrative Notice)

23. The officers transported the Appellant to the North Andover Police Department for booking. During this transport, the Appellant stated that his father was a member of the Boston Police Department. While being booked at the North Andover Police Station, the Appellant was repeatedly asked if his father is a Boston Police Officer. A couple of

⁸ Det. Rivers testified that one (1) of the Merrimack campus police officers reported that that the Appellant was "flip" or "arrogant" during the incident. However, Det. Rivers' 2017 investigation report states that BPD Sgt. Det. Dottin is the person who spoke to the Merrimack officer, not Det. Rivers. Det. VanDyke's 2018 report relied entirely on the section of Det. Rivers' 2017 report regarding the Waltham, Merrimack College and New Hampshire incidents. Since neither Det. Rivers nor Det. VanDyke spoke to the Merrimack officer and the Merrimack officer's statement was made approximately eight (8) years after the incident and the Merrimack incident report did not include such allegations, I give no weight to the Merrimack officer's purported statement.

times, the Appellant answered, “[k]ind of” or “[k]ind of, he knows the Commissioner”.

(R.Ex. 3 (2017)) When asked if his father is a high ranking Boston police official, the Appellant answered, “[k]ind of”. (Id.) The North Andover police researched online and found that the Appellant’s father worked in maintenance for the Boston Police Department. (Id.; R.Ex. 1 (2017); Testimony of Appellant)

24. The Appellant did not have a copy of the Merrimack campus police report prior to filling out his BPD employment application and stated that he did not vividly remember the incident. When the Appellant attempted to retrieve the report, he was unable to do so because the Merrimack campus police would not provide it to him even though he appeared in person to retrieve it as requested by Merrimack College. (Testimony of Appellant)

25. The Appellant received Pre-Trial Probation for the Minor in Possession of Alcohol charge and the charge was dismissed six (6) months later. (A.Ex. 2; Testimony of Appellant)\

New Hampshire Incident

26. The Appellant attended a college in New Hampshire in 2013 – 2016, after preparatory school. While at the college, the Appellant was on the varsity Hockey Team. Early in 2014, the Appellant’s girlfriend, Ms. M, came to visit him. The Appellant, Ms. M, and another couple went out to dinner at a nearby Pub/Restaurant. At or about this time in 2014, the Appellant was twenty-one (21) years old and it was approximately three (3) years prior to his application to the Boston Police Department. (Testimony of Appellant; R.Ex. 1 (2017); A.Supp.Ex. 13 (2018))

27. On the way back to the college, the Appellant's vehicle was pulled over by a municipal New Hampshire Police Officer. The Appellant's girlfriend was the one who was driving because she had had the least number of drinks. (Testimony of Appellant; Ms. M and Mr. G)
28. The Appellant asked the Officer why Ms. M was being pulled over. The Officer responded that she had crossed the white line on the road. The passengers denied that Ms. M had done so. (Testimony of Appellant and Mr. G)
29. Ms. M was taken out of the car, questioned, and arrested. The Appellant was told by the Officer that his car would be towed because neither he nor the other occupants were able to drive. The Appellant wanted to have someone pick up the car but his request was denied. (Testimony of Appellant and Mr. G)
30. The Appellant questioned the Officer about the stop and having his car towed and he was upset that Ms. M was being arrested. (Testimony of Mr. G and Appellant)
31. The Officer's police report states that the Appellant was "verbally combative and belligerent" and that he was placed in handcuffs and transported to the Police Station in protective custody. (R.Ex. 8 (2017)) Mr. G and his girlfriend were also handcuffed and transported back to the Police Station and put in protective custody. (Testimony of Mr. G)
32. At the Police Station, the Appellant and Mr. G were placed in the same cell and were given their cell phones to call someone to pick them up. When their ride came to pick them up, all of them, including Ms. M, were released. (Testimony of Appellant and Mr. G)

33. The report of the stop of Ms. M does not state the motor vehicle violation for which she was pulled over, nor does it indicate that the police officer conducted a field sobriety test or the results of such tests. (R.Ex. 8 (2017))
34. The Appellant was not charged with any crimes for his alleged behavior during Ms. M's stop. (Testimony of Appellant and Rivers)
35. The charges against Ms. M were reduced to either a marked lanes violation or negligent operation. (Testimony of Ms. M)
36. Det. Rivers spoke to the reporting New Hampshire municipal Officer involved in this stop. The Officer did not recall anything beyond what was in the report. (Testimony of Rivers)

BPD Roundtable and Interview

37. The BPD conducts a roundtable discussion to review candidates' background investigation results. At the roundtable, the pertinent background investigator presents his or her findings and it is determined if a candidate is to be bypassed, moved forward, or if a discretionary interview is to be held for the candidate to ask about certain information in the candidate's background. (Testimony of Driscoll) Det. Rivers presented the findings of his investigation to the BPD roundtable in 2017. (Testimony of Rivers) Det. VanDyke presented the findings of her investigation to the BPD roundtable in 2018. (Testimony of Driscoll)
38. At the Appellant's 2017 roundtable there were three (3) concerns relating to poor judgment: 1) the Waltham incident where the Appellant was a possible witness and did not immediately provide his friend's name to the police; 2) the Merrimack College arrest for Minor in Possession of Alcohol and providing untruthful statements to police; and 3)

the New Hampshire incident where the Appellant was taken into protective custody and was belligerent toward an officer. (Testimony of Driscoll)

39. Det. Rivers was present during the roundtable discussion relating to the Appellant's application. (Testimony of Rivers) For the Appellant's 2018 application, Det. Karyn VanDyke was the investigator and she presented her report to the roundtable. (R.Ex. 13 (2018); Testimony of Driscoll)

40. The members of the 2017 roundtable decided to give the Appellant a discretionary interview regarding the Appellant's 2017 application. (Testimony of Driscoll)⁹

41. Any concern that the Respondent has about a candidate they are investigating would be raised during the discretionary interview. The reason for raising the issues of concern during the interview is that the candidate can address such concerns. The persons conducting the discretionary interview would be aware of the issues of concern. (Testimony of Driscoll)

42. Det. Rivers told the Appellant the subjects that he would be questioned about at the discretionary interview. (Testimony of Rivers)

43. Lt. McEachern, former head of the RIU, provided a summary of the Appellant's background for the discretionary interview. That summary contained inaccurate information relating to the Appellant's NH incident. (R.Ex. 9) Specifically, Lt. McEachern erroneously stated in his report to Dep. Supt. Walcott that the New Hampshire incident involved the Appellant's arrest for purchasing alcohol for a minor when there is no indication that he was arrested and charged with purchasing alcohol for a minor. (Testimony of Rivers)

⁹ There is no indication in the record that the Appellant was afforded a discretionary interview in the 2018 application process. (Administrative Notice)

44. During the Appellant's discretionary interview in 2017, he was asked some questions about the Merrimack College incident. The Appellant stated that he was intoxicated at that time. However, the Appellant was not asked about statements that he made during this incident that his father was a Boston Police Officer, that his father had dropped him off at Merrimack College, and that he did not know about the beer in his car. (A.Ex. 3, Testimony of Appellant)

45. At the discretionary interview, the Appellant was also asked some questions about the New Hampshire incident and he acknowledged that he could have used better judgment. He was not asked specifically what he said or did that led the police to handcuff him. (A.Ex. 3; Testimony of Appellant)

46. The Appellant was not asked about his statements to Waltham police about the identity of the person who reportedly vandalized a car. (A.Ex. 3 (audio-visual recording of discretionary interview); Testimony of Appellant)

Appellant's 2017 and 2018 Bypasses

47. Ms. Driscoll and Dep. Supt. Walcott made the decision to bypass the Appellant in 2017. (Testimony of Driscoll) Ms. Driscoll drafted and signed the Appellant's 2017 bypass letter. (R.Ex.10; Testimony of Driscoll) Ms. Mary Flaherty, Deputy Director of Human Resources, signed the Appellant's 2018 bypass letter. (Appellant's Supplemental Exhibit (A.Supp.Ex.) 1)

48. Both bypass letters state that the Appellant:

- was "untruthful to police" investigating the vandalism incident in Waltham;

- told Merrimack College Police that his father dropped him off at the campus, that he didn't know about the beer in his car, that his father was a Boston Police Officer and that the Appellant was intoxicated;
- was “verbally combative and belligerent” towards a New Hampshire municipal police officer and he was placed in hand restraints and protective custody during the New Hampshire police stop of the Appellant’s girlfriend; and
- used poor judgment in these incidents and provided untruthful information to police on two (2) of these three (3) occasions, adding, in part,

“your untruthfulness renders you unsuitable for employment as a Boston police officer.

... the Boston Police Department finds you ineligible for appointment as a Boston Police Officer at this time ...” (R.Ex. 10; A.Supp.Ex. 1)(emphasis added)

49. The Appellant has not had any further incidents since the 2017 bypass and no additional reasons for bypass have been provided by the BPD. (A.Supp.Ex. 1)

Other Applicants in 2018¹⁰

50. The Respondent will consider candidates who have been convicted of driving while under the influence of alcohol if the conviction is more than ten (10) years old because people can learn from their mistakes after the passage of time and they overcome their prior mistakes. (Testimony of Driscoll)

51. Thirty-one (31) other BPD applicants who were given conditional offers of employment had some alcohol related incident in their background investigations.
(A.Supp.Exs. 3-16)

52. For example, Applicant 5 had three (3) separate Minor in Possession of Alcohol charges between 2010 and 2012. On the 3rd incident, which occurred 2 months after the

¹⁰ The record does not include information concerning the background of candidates selected in connection with the Appellant’s 2017 bypass appeal.

2nd incident, the Applicant was arrested at a New Hampshire college after being reported as an intoxicated individual who was not a student and was no longer welcome on campus. (A.Supp.Ex. 3, (Privileged and Confidential Memorandum of Applicant (PCM) 5))

53. In April 2011, Applicant 10 was found to be in violation of the Uniform Code of Military Justice by consuming alcohol within eight (8) hours of duty and being outside liberty limits. Applicant 10 forfeited pay and had extra duties imposed upon him and was restricted to barracks for thirty (30) days. In October 2013, Applicant 10 was arrested for public intoxication and he pleaded guilty, paid a fine, he was restricted to base for thirty (30) days and he forfeited a half month's pay along with being required to attend counseling. (A.Supp.Ex. 5 (PCM of Applicant 10))

54. In 2003, Applicant 16 was arrested for operating a vehicle while under the influence of alcohol. The Applicant admitted to sufficient facts pursuant to a Continuance Without a Finding. No report on the facts of the incident was included in the Privileged and Confidential Memorandum. (A.Supp.Ex. 7 (PCM of Applicant 16))

55. Applicant 17 was disciplined three (3) times at a Massachusetts college for drinking and giving a false name to a Resident Advisor, being in the presence of alcohol while under 21, and he was suspended from living on campus for eight (8) months for being so intoxicated that he could not remember what he did. Following another incident, Applicant 17 was required to see an on-campus alcohol assessment/recommendation counselor. (A.Supp.Ex. 8 (PCM Applicant 17))

56. Applicant 19 was placed into protective custody in July 2011 when he stopped his vehicle on the road and was honking repeatedly. The Applicant stopped his vehicle

within inches of a police officer's knee. The officer smelled alcohol on the Applicant, the Applicant was noted to have bloodshot eyes and was unsteady on his feet. The Applicant admitted to consuming alcohol hours before. The Applicant was arrested and placed in protective custody and charged with operating to endanger. The Applicant admitted to sufficient facts and a CWOFF was entered. In December 2010, Police responded to a report of intoxicated youths getting into a vehicle to drive. Officers arrived and observed a bottle of alcohol in the Applicant's car, located a nip bottle in the Applicant's pocket and the Applicant admitted to having had a few beers. The Applicant refused to notify the officers where his keys were located, requiring the Applicant's car to be towed. (A.Supp.Ex. 9 (PCM of Applicant 19))

57. Applicant 26, while serving in the Marine Corps and on duty overseas, was charged with disorderly conduct/drunkenness and destruction of property when he picked up a wet floor sign in a restaurant and threw it. The Applicant's explanation differed from the report, stating that he picked up a wet floor sign over his head and by accident hit a light fixture and broke it. The Applicant was reduced in pay grade, forfeiting \$1,099 per month for two (2) months, restricted to base and given extra duties. Applicant 26 was also arrested for Illegal Transportation of Alcohol and was issued a summons for Unlawful Possession when a police officer observed him drinking beer out of a cup behind a restaurant. The Applicant admitted having alcohol in his car and the officer observed numerous empty beer cans in the trunk. The Applicant told BPD investigators that he only had only a little beer in a cup. (A.Supp.Ex. 12 (PCM of Applicant 26))

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The Commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001), citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 303-05, *rev.den.*, 428 Mass. 1102 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, s. 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304. The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003). The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. City of Beverly v. Civil Service Comm'n., 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm'n., 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. The Commission owes "substantial deference"

to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. Beverly citing Cambridge at 305, and cases cited.

Analysis

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant in 2017 and 2018. The Respondent bypassed the Appellant for being untruthful to police regarding the Waltham incident and the Merrimack College incident, he was "verbally combative and belligerent toward police" in the New Hampshire incident, and showed poor judgment in these incidents. The duty imposed upon a police officer to be truthful is one of the most serious obligations he or she assumes. "Police work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer." Falmouth v. Civil Service Comm'n., 61 Mass.App.Ct. 796, 801 (2004) citing City of Cambridge v. Civil Service Comm'n., 43 Mass.App.Ct. 300, 303-305, *rev.den.*, 428 Mass. 1102 (1997). *See also*, Desmond v. Town of West Bridgewater, 27 MCSR 645 (2014); Ung v. Lowell Police Dep't, 24 MCRS 567 (2011); Gallo v. City of Lynn, 23 MCSR 348 (2010). Untruthfulness also may compromise an officer's credibility as a witness. *See* United States v. Agurs, 427 U.S. 97, 108 (1976), citing Brady v. Maryland, 373 U.S. 83 (1963). *See also* Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667 (1985). Likewise, an appointing authority is well within its rights to bypass a candidate for police officer who "purposefully" fudges the truth during the application process. *See, e.g.*, 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)(concealing suspension from school for involvement in criminal activity); Burns v. City of Holyoke, 23 MCSR 162 (2010)(claiming he ‘withdrew’ from another law enforcement application process from which he was actually disqualified); and Escobar v. Boston Police Dep’t., 21 MCSR 168 (2008) (misrepresenting residence). The corollary, however, to the serious consequences that flow from a finding that a police officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. *See, e.g.*, Boyd v. City of New Bedford, 29 MCSR 471 (2016) (honest mistakes answering ambiguous questions on NBPD Personal History Questionnaire); Morley v. Boston Police Dep’t, 29 MCSR 456 (2016)(candidate unlawfully bypassed on misunderstanding appellant’s responses about his “combat” experience); and Lucas v. Boston Police Dep’t, 25 MCSR 420 (2012) (mistake about appellant’s characterization of past medical history). The Commonwealth has somewhat different standards for prosecutorial disclosure of exculpatory evidence; facts not generated by “the prosecution team”, but unrelated internal affairs investigations, generally, do not come within the “Brady” paradigm. *See, e.g.*, MASS.R.CRIM.P. 14(a)(1)(A) and 2014 Reporters Notes; Commonwealth v. Laguer, 448 Mass. 585 (2007); Commonwealth v. Tucceri, 412 Mass. 401 (1992); Commonwealth v. Daye, 411 Mass. 719 (1992); Commonwealth v. Gallerelli, 399 Mass. 17 (1987); and Commonwealth v. Wilson, 381 Mass. 90 (1980). *See also* Commonwealth v. Wanis, 426 Mass. 639, 643-44 (1998); and Commonwealth v. Thomas, 451 Mass. 451 (2008).

In regard to the Appellant’s conduct in connection with the Waltham incident, the initial investigating Waltham police officer found the Appellant to be untruthful. The subsequent investigating Waltham police officer added (as noted above), in part, “[d]uring my phone

conversations with Mr. Marchionda, I felt that he was genuinely upset about the incident and being truthful as to his own involvement. I also felt that he was torn between his friends and between assisting the innocent victim in this matter” (R.Ex. 5 (2017 and 2018)) The Appellant knew that it was one of his friends who vandalized a car and yet he initially told Waltham Police that he did not know who did it. In fact, the Appellant did not tell Waltham Police that his friend vandalized the car until the police informed the Appellant that another one of the teens at the party had already reported that the Appellant’s friend had vandalized the car. Although this event occurred when the Appellant was a teenager and it was eight years prior to his application for employment at the BPD, it was the first a series of events also showing that the Appellant exercised poor judgement, that the Respondent reasonably found troubling. The Respondent conducted a reasonably thorough review of the Waltham incident, confirming the Waltham report by contacting one of the investigating Waltham officers and affording the Appellant a discretionary interview. The Appellant was informed of the topics of concern to the Respondent. That the interviewers did not ask the Appellant certain specific questions does not undermine the opportunity the Appellant was given to address the Respondent’s concerns.

The Respondent also bypassed the Appellant for untruthfulness and poor judgement in connection with the Merrimack College incident. This incident occurred only three (3) years after the Waltham incident and five (5) years prior to his application for employment at the BPD. The Appellant initially denied to campus police that he arrived at the campus in his (or his father’s) car and that he was unaware that there was beer in the car, he subsequently admitted to both and was arrested for being a minor in possession of alcohol. At some point during his interaction with the campus police, the Appellant stated that his father worked at the BPD, implying that his father is a police officer, no doubt in a foolish, intoxicated attempt to obtain

favorable treatment. While being processed at the Andover Police Department, the Appellant was asked if his father was a BPD police officer multiple times and he repeatedly stated “kind of” and said that his father was close to the BPD Commissioner. The Andover police conducted a brief computer search and found that the Appellant’s father works at the BPD in maintenance, not as a police officer. Thereafter, the Appellant was placed on probation for six (6) months, following which the case was dismissed. BPD investigators conducted a reasonably thorough review, confirming the incident with one of the arresting officers and granting him a discretionary interview. The Merrimack incident constitutes the second occasion in which the BPD found that the Appellant was untruthful to police and again showed poor judgment. The Appellant was granted a discretionary interview in which to explain these matters. That the interviewing officers did not ask the Appellant specific questions does not undermine the opportunity he was given to explain these matters.

The Respondent also bypassed the Appellant for being “verbally combative and belligerent toward police” and using poor judgment in connection with the New Hampshire incident. At the time of this incident, the Appellant was twenty-one (21) years old, attending college, and it occurred just three (3) years prior to his application for employment at the Boston Police Department. The Appellant admitted that he questioned the arresting officer and that he was upset that his girlfriend was being arrested, that he was not allowed to have a friend pick up the car instead of having it towed, and that he did not believe that his girlfriend, who had been driving, crossed the white line. The arresting officer’s report states that the Appellant was verbally combative and belligerent, in fact, so much that the arresting officer found it necessary to handcuff the Appellant. That the other passengers were handcuffed to be put into protective custody does not mitigate the Appellant’s poor judgment in being verbally combative and

belligerent toward the arresting officer. The BPD conducted a reasonably thorough review of this incident, including confirming the incident with the arresting officer, and granted the Appellant a discretionary interview to discuss these incidents. The Appellant told the discretionary interviewers that he regretted his demeanor during this incident and that he has learned from the experience. The Appellant's behavior during the New Hampshire incident, in addition to his behavior during the Waltham and Merrimack College incidents, establish reasonable justification to bypass the Appellant.

The Appellant argues that in the 2018 hiring process he received disparate treatment because more than thirty candidates were given conditional offers of employment notwithstanding their various problems involving alcohol. Two candidates' backgrounds were particularly troubling. Specifically, one of the candidates was apparently drunk enough while driving that he just missed an officer when he (the candidate) was stopping his car and refused to give police his car keys. However, this occurred approximately seven (7) years prior to the candidate's application to BPD and he admitted his misconduct, including entering an admission to sufficient facts in court for driving to endanger another, leading to a continuance without a finding. Another candidate was convicted of an OUI but it was more than ten (10) years prior to his application for employment to the BPD. However, there is no indication in the record that these two (2) candidates, or the others who were also given conditional offers of employment, were repeatedly untruthful to police and were verbally combative and belligerent toward police. Thus, it has not been established that the Appellant received disparate treatment. Rather, the Respondent has established by a preponderance that it had reasonable justification to bypass the Appellant. Finally, I note that the bypass letters sent to the Appellant in 2017 and 2018 indicate that the Appellant was being bypassed "at this time". At the time that the Appellant first applied

to the BPD for employment as a permanent full-time police officer, he had only been out of college and working full-time in security for a year. Perhaps with the passage of time, continued successful employment experience and no further negative interactions with police, the Appellant's chances of being given a conditional offer of employment will improve.

Conclusion

Accordingly, for the above stated reasons, Mr. Marchionda's bypass appeals, Docket Nos. G1-17-187 and G1-18-228 are *denied*.

Civil Service Commission

/s/Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan [Camuso – absent], Commissioners) on August 15, 2019.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

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