

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, SS.

CIVIL SERVICE COMMISSION  
One Ashburton Place, Room 503  
Boston, MA 02108

MALIK MORGAN,  
Appellant,

v.

G1-17-169

BOSTON POLICE DEPARTMENT,  
Respondent,

Appearance for Appellant:

Sophia L. Hall, Esq.  
Lawyers' Committee for Civil Rights  
& Economic Justice  
61 Batterymarch Street, 5<sup>th</sup> Floor  
Boston, MA 02110

Appearance for Respondent:

David Fredette, Esq.<sup>1</sup>  
Boston Police Department  
1 Schroeder Plaza  
Legal Department  
Boston, MA 02120

Commissioner:

Cynthia Ittleman

**DECISION**

Mr. Malik Morgan (Appellant or Mr. Morgan), acting pursuant to G.L. c. 31, s. 2(b), filed an appeal with the Civil Service Commission (Commission) on September 5, 2017, challenging the decision of the Boston Police Department (Respondent, Department or BPD) to bypass him for appointment to the position of permanent, full-time Police Officer with the Department. A pre-hearing conference was held on October 24, 2017 at the offices of the Commission in Boston and a full hearing was held on January 9, 2018 and February 14, 2018 at the

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<sup>1</sup> The Boston Police Department was previously represented in this case by Attorney Jaclyn Zawada.

Commission's office in Boston.<sup>2</sup> The proceedings were digitally recorded and copies of the recording were sent to the parties.<sup>3</sup> Witnesses were sequestered. The parties submitted proposed decisions. For the reasons stated herein, the appeal is allowed.

### **FINDINGS OF FACT**

Seventeen (17) exhibits were entered into evidence.<sup>4</sup> Based on all of the exhibits, the testimony of the following witnesses:

*Called by the Respondent:*

- Karyn VanDyke, Detective (Det.), Recruit Investigation Unit (RIU), BPD; and
- Nancy Driscoll, Director, Human Resources, BPD

*Called by the Appellant:*

- Malik Morgan (Appellant)
- Ms. Elaine Morgan

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

1. Mr. Morgan is a Black man with a minor daughter. He owns a home in Mattapan. At the time of the hearing, the Appellant was thirty-four (34) years old. He is a Boston native who grew up in Roxbury. (Testimony of Appellant)

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<sup>2</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

<sup>3</sup> If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to supply the court with the 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.

<sup>4</sup> The exhibits entered into the record at hearing are Appellant's Exhibits 1 – 3; Respondent's Exhibits 1 – 5; and Joint Exhibits 1 – 5. At the hearing, the Respondent was ordered to produce certain documents, which the Commission received after the full hearing and marked and entered them into the record as Respondent's Post-Hearing Exhibits 1 – 4. Respondent's Post-Hearing Exhibits 1 – 3 are the subject of a protective order providing that upon the final disposition of this case, including any judicial appeal process, the Respondent's Post-Hearing Exhibits 1 – 3 shall be destroyed and the Appellant shall reference such exhibits in this litigation only. (*See* email messages between the parties and the Commission dated December 18, 2017 and February 16, 2018.)

2. At the time of the Commission hearing, the Appellant was a police officer for the Boston Housing Authority (BHA), where he had been working for five (5) years. Prior to working at the Boston Housing, the Appellant was a police officer at Boston College for approximately five (5) years. (Testimony of Appellant; Joint Exhibit (J.Ex.) 1) All told, the Appellant has been a law enforcement officer for at least ten (10) years. (Id.) There is no indication in the record that the Appellant has been disciplined as a law enforcement officer. (Administrative Notice)
3. The Appellant has completed a full-time municipal law enforcement training academy. (Testimony of Appellant)
4. The Appellant has a License to Carry a Firearm, which was issued by the Department in 2005. (Jt.Ex. 1; Testimony of Appellant)
5. As a child, the Appellant became interested in law enforcement because he was close to an aunt who was a Boston police officer. (Testimony of Appellant)
6. The Appellant took and passed the civil service exam for police officers on April 25, 2015. On November 1, 2015, the state's Human Resource Division (HRD) established an eligible list of those who passed the civil service police exam, including the Appellant. At the Department's request, HRD issued certification 04401 on February 22, 2017 and March 2, 2017. The Appellant was ranked 71<sup>st</sup> on certification 04401 among those willing to accept employment. (Stipulation) The Appellant had taken and passed the civil service police officer exam on previous occasions. (Testimony of Appellant)
7. Det. VanDyke, assigned to the Department RIU, conducted the Appellant's background investigation in the spring and summer of 2017. Det. VanDyke prepared a Personal and Confidential Memorandum (PCM), which reported the results of her investigation

including, *inter alia*, the Appellant's driver's record, credit history, employment history, references, criminal history and residence. (Jt.Ex. 1; Testimony of VanDyke)

8. The Appellant's driver's record indicated that he had a surchargeable accident in 2011 and an apparent license non-renewal in 2007. There were a few other charges prior to 2012, such as a seatbelt violation, no inspection sticker and improper equipment, but the Appellant was found not responsible for them. (Jt.Ex. 1)
9. With respect to the Appellant's employment history, Det. VanDyke spoke to BHA Sergeant M, the Appellant's supervisor. Det. VanDyke wrote that Sgt. M said that the Appellant is a "good guy and good employee who is dependable and gets along with co-workers and supervisors. [Sgt. M] stated that the applicant works well with children ... [Sgt. M] stated she trusts her life and her family's lives with the applicant." (Jt.Ex. 1)  
Det. VanDyke tried to obtain information about the Appellant's employment at the Boston College Police Department but was told that they are only permitted to provide a past employee's dates of employment and job title, stating that the Appellant had been a campus police officer who worked there from 2006 to 2011. Prior to Boston College, the Appellant worked for a year at the Boston Public Health Commission Police as a campus police officer; there was no disciplinary record in the Appellant's personnel file there.  
(Jt.Ex. 1)
10. Det. VanDyke interviewed a number of the Appellant's references who knew the Appellant for at least five (5) years. Multiple references stated that the Appellant is fair, not judgmental and he knows how to diffuse situations. There were no negative references. (Jt.Ex. 1)
11. The Appellant's credit report indicated that his credit accounts were all current. (Jt.Ex. 1)

12. Det. VanDyke checked the Appellant's criminal record, including the police report about an incident between the Appellant and his mother in 2001, the Appellant's Board of Probation record, the Department computer aided design (CAD) sheet concerning a call the Department received about the 2001 incident, and a copy of the court docket obtained by the Appellant, at the request of Det. VanDyke, regarding the 2001 incident.<sup>5</sup> In 2001, the Appellant was eighteen (18) years old and he was living with his mother. Det. VanDyke discussed the Appellant's criminal record with the Appellant and, separately, with the Appellant's mother. The 2001 police report stated that in 2001, "officers responded to the [Appellant's] home due to a domestic violence call." (Jt.Ex. 1) The officers who responded reported that they spoke to the Appellant and Appellant's mother separately. The responding officers indicated that the Appellant's mother told them that the Appellant had thrown a shoe and a liquid at her, threatened her and damaged the house phone. Det. VanDyke informed the Appellant of the available information about the incident. The Appellant denied that there was any physical altercation between him and his mother in 2001, stating that he only had a verbal altercation with his mother. Ms. Morgan, the Appellant's mother, told Det. VanDyke that she had a verbal altercation with the Appellant during the 2001 incident and she denied that she called police and told them that he assaulted her. The Appellant was arrested that night in 2001 and was charged with assault and battery/weapon, threats and destruction of property. The case was continued without a finding (CWOFF) and dismissed ten months later, after the Appellant performed community service and wrote an apology to his mother. (Testimony of VanDyke, Appellant and Ms. Morgan; Jt.Exs. 1 – 5) Det. VanDyke also spoke to Officer D, one of the officers who responded to the 2001 incident. Officer D

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<sup>5</sup> A copy of the 2001 phone call is no longer available at the Department. (Testimony of VanDyke)

stated that he had no recollection of the incident, that it “was probably and (sic) 18 year old, being an 18 year old ... and *hopefully he gets a job.*” (Jt.Ex. 1)(emphasis added)

13. Included in Det. VanDyke’s 2017 report is information she obtained about the 2001 incident at the roundtable’s request when the Appellant was being considered for employment in 2014. Specifically, Det. VanDyke also spoke to Officer B, another officer who responded to the 2001 incident; Officer B told Dt. VanDyke that he did not recall the incident as memorable. Det. VanDyke also tried to speak to Officer G, whose name appears in the 2001 incident police report. However, Det. VanDyke found that that Officer G had either retired or was unidentifiable. (Jt.Ex. 1)
14. Det. VanDyke’s 2017 PCM also reported an incident in 2011 when the Appellant’s ex-girlfriend called the police because the Appellant appeared at her home late at night. Det. VanDyke spoke to both the Appellant and his ex-girlfriend in this regard. A responding officer determined that the Appellant and his ex-girlfriend had agreed that he could pick up some of his belongings that night when his work shift ended at 11p.m. The police allowed the Appellant to obtain his belongings and advised both the Appellant and his ex-girlfriend of their rights to obtain restraining orders. In addition, the Appellant’s ex-girlfriend reported to Det. VanDyke that there was no domestic violence between her and the Appellant at any time, that he timely pays child support and that she wished him good luck in his application for employment at the Department. (Jt.Ex. 1)
15. In June, 2017, Det. VanDyke presented the Appellant’s file to the Department roundtable, which was comprised of a superior officer and representatives of the Department Human

Resources office, the Legal office, and the Diversity and Recruit Administrator.

(Testimony of Driscoll)<sup>6</sup>

16. By letter dated August 31, 2017, the Department informed the Appellant that he had been bypassed because the Department “has significant concern with your felonious conduct and untruthful reporting[]”, asserting that the pertinent Boston Police Incident report in 2001 states that he physically assaulted his mother in a dispute over the Appellant’s loud music, he threatened his mother, threw things at her, damaged their home phone, he was arrested and charged with assault and battery with a weapon, threats and destruction of property, agreed to perform pre-trial probation and the criminal charges were later dismissed, which charges the Appellant denied. The letter reported that, during the recruit investigation process, the Appellant told investigators (as he told police at the 2001 incident) that the incident only involved a verbal argument, which the Department views as inconsistent with the pertinent report and the CAD dispatch log. Because of the alleged inconsistencies, the Department asserted, the Appellant was not credible and truthfulness is essential for officers to testify in criminal proceedings. Therefore, the letter asserts, the Department found the Appellant to be “ineligible for appointment ...”.

(Jt.Ex. 4)

17. The Department selected 130 candidates for appointment. Of the 130 who were selected, 68 were ranked below the Appellant. (Stipulation)

18. Included among the candidates whom the Respondent selected in 2017 were three (3) candidates:

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<sup>6</sup> There is no indication in the record that the Appellant was interviewed other than when investigators met with the Appellant during the requisite home visit to establish his residence. (Jt.Ex. 1)

- 1) one of the selected candidates admitted to purchasing alcohol for a minor in 2012, as indicated a police report but denied intending to do so during his background investigation, the candidate's driver's license was suspended in 2012 and 2015, he was found responsible for speeding and for a right of way violation in 2012 and a warrant was issued regarding one of such violations;
- 2) another selected candidate was arraigned in 2007 for disturbing the peace which was continued without a finding. In 2006, the same candidate was arraigned for attempting to commit a crime, which was subsequently dismissed. The same candidate did not initially report that he had been fired from a job and he denied receiving a warning at another job; and
- 3) another selected candidate was arraigned in 2011 for assault and battery with dangerous weapon, which was dismissed in 2013. In 2009, this candidate was charged with assault with a dangerous weapon and breaking and entering in the nighttime with the intent to commit a felony, which charges were dismissed in 2010.<sup>7</sup> Det. VanDyke was surprised that this candidate was hired. (Testimony of VanDyke)

(A.Exs. 1 – 3)

19. The Appellant timely filed the instant appeal. (Administrative Notice)

*Applicable Civil Service Law*

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L.c. 31, s. 1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, (2001); *MacHenry v. Civil Serv. Comm'n*, 40 Mass.App.Ct. 632, 635 (1995), *rev.den.*, 423 Mass.1106 (1996).

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking

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<sup>7</sup> There is no information in the record indicating if they bypassed the Appellant or if they ranked higher than the Appellant on the certification.

candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L.c. 31, ss. 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons – positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, s. 27; PAR.08(4).

A person may appeal a bypass decision under G.L. c. 31, s. 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 474-78 (2019); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003).

“Reasonable justification . . . 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); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. *See also* Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991)(bypass reasons “more probably than not sound and sufficient”).

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The Commission,

“. . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, 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.”

City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, *rev.den.*, 428 Mass. 1102 (1997)(*emphasis added*) However, the governing statute, G.L.c.31,§2(b), gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority’s action” and it is not necessary for the Commission to find that the appointing authority acted “arbitrarily and capriciously.” *Id.*

### *Analysis*

The Department has not proved by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. Although the Department is entitled to considerable deference in deciding whom it finds suitable for appointment to the position of police officer, that deference is not absolute.

The Department’s bypass letter to the Appellant states that it was bypassing the Appellant for “felonious conduct” and “untruthfulness”. With respect to “felonious conduct”, the Department relies on one (1) instance that occurred in 2001, sixteen (16) years prior to the Appellant’s application to the Department in 2017. In 2001, the Appellant was eighteen (18) years old and still living with his mother. Following an apparently loud argument between the Appellant and his mother, police charged the Appellant with assault and battery/weapon, threats and destruction of property. After pretrial community service and writing an apology to his mother, the charges against the Appellant were continued without a finding (CWOFF) and later dismissed. A stale CWOFF does not provide reasonable justification for a bypass. Finklea v Civil Service Commission and Boston Police Department, Suffolk Superior Ct. (Fahey, J.) 1784CV00999 (Feb. 5, 2018)(affirmed as to the CWOFF and remanded for further explanation of the Appellant’s

driving record). In addition, as noted by the Commission in Kodhimaj v DOC, G1-18-131, reliance on a candidate's conduct many years prior to the candidate's application for employment for a law enforcement position is not without limitation. Specifically, in Kodhimaj the Commission indicated,

In order for an appointing authority to rely on a record of prior misconduct as the grounds for bypassing a candidate, there must be a sufficient nexus between the prior misconduct and the candidate's current ability to perform the duties of the position to which he seeks appointment. While the Commission, when there is no evidence of political or personal overtones, owes substantial deference to the judgement of criminal justice Appointing Authorities regarding hiring decisions, that deference is not without limits. (Id.)

The record here does not establish such a nexus by a preponderance of the evidence. At the time that the Appellant was bypassed, sixteen (16) years had passed, with no indication in the record that the Appellant repeated his conduct of 2001 or been charged with any other crimes. To the contrary, in the interim the Appellant has been a police officer for the BHA for five (5) years and, prior to that, he was a campus police officer for five (5) year and a medical facility security officer before that. Moreover, there is no indication in the record that the Appellant has even incurred any discipline for misconduct in these positions. In addition, all of the Appellant's references were positive. In fact, the Appellant's BHA supervising Sergeant reported to the recruit investigator that she trusts the Appellant with her life and that the Appellant deescalates difficult situations and works well with children. Further, the Appellant is a responsible adult who owns his own home in Boston and supports his minor daughter. Thus, the Commission finds no nexus between the charges against the Appellant in 2001 and his ability to perform the job when he applied for it sixteen (16) years later.

The Department also alleges, but has not established by a preponderance of the evidence that its bypass of the Appellant was justified for alleged untruthfulness. There is no question that

police officers are required to report events and testify truthfully. The Respondent specifically alleges that the 2001 police report and printed CAD log indicate that the altercation between the Appellant and his mother was physical. However, the Appellant has consistently stated in 2001 and 2017 that the altercation was verbal, not physical. Ms. Morgan told the recruit investigator and testified at the Commission that the altercation was verbal, albeit loud. Further, the Department's reliance on the incident report and the CAD log is flawed. The incident is so old that the Department no longer has a copy of the recording of the 911 call that supposedly resulted in the police arriving at the Appellant's house during the argument between the Appellant and his mother. The recruit investigator reported that the only police officer who reportedly responded to the argument that she could find told her that the incident was not particularly memorable, probably involved an eighteen year old being an eighteen year old, and that he hoped the Appellant got the job.

The Appellant argues that his bypass was unfair because the Department hired candidates in 2017 with poor records. As noted herein, the Department hired three (3) candidates in 2017 with records that include multiple and more recent criminal offenses. In addition, one of these three selected candidates did not initially report that he had been fired from a job and denied that he received a warning at another job. Another one of the three also denied that he intended to purchase alcohol for a minor even though a police report stated that he admitted doing so. Further, one of the three previously had been the subject of a warrant. That the Respondent hired such candidates and bypassed the Appellant was indeed unfair, violating basic merit principles.

### *Conclusion*

For the reasons stated herein, this appeal of the Appellant, Malik Morgan, is allowed. Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission

ORDERS that the Massachusetts Human Resources Division and/or the Boston Police Department, in its delegated capacity, take the following action:

- Place the name of Malik Morgan at the top of any current or future Certification for the position of permanent fulltime police officer at the Boston Police Department until he is appointed or bypassed after consideration.
- If Mr. Morgan is appointed as a permanent fulltime Boston police officer, he shall receive a retroactive civil service seniority date which is the same date as the the candidates who were selected from certification 04401, which certification was issued on February 22, 2017. This retroactive civil service seniority date is not intended to provide Mr. Morgan with any additional pay or benefits including, without limitation, creditable service toward retirement.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 26, 2020.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L.c.31,§44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L.c.30A,§14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. 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:

Sophia L. Hall, Esq. (Appellant)

David Fredette, Esq. (for Respondent)

Michelle Heffernan, Esq. (HRD)