COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 979-1900

NELSON N[1],
Appellant

v. G1-[redacted]

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:	*Pro Se* Nelson N
Appearance for Respondent:	Joseph Santoro Department of Correction 50 Maple Street: 1st Floor Milford, MA 01757
Commissioner:	Christopher Bowman[2] Cynthia Ittleman

SUMMARY OF DECISION

The Commission allowed the Appellant's bypass appeal for original appointment as Correction Officer I (CO 1) as DOC was unable to show a nexus between the Appellant's alleged unlawful conduct approximately 17 years ago and his current ability to serve as a CO I. The Appellant's contention -- that the related arrest report, which DOC obtained but did not share with him, is not completely accurate -- does not equate to untruthfulness. The circumstances regarding why the Appellant left his most recent employment, while a closer call, does not, without a more thorough review, provide a valid reason for bypassing the Appellant at this time.

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[1] Since this appeal references relevant information from the Appellant's Criminal Offender Record Information (CORI) and sensitive medical information, the Commission has opted to identity the Appellant only by his first name and last initial.

[2] Commissioner Ittleman conducted the remote full hearing regarding this appeal, but she retired from the Commission prior to drafting a decision. For that reason, the appeal was assigned to me. I have reviewed the entire record in this matter, including the audio / video recording of the full hearing and all exhibits.

More broadly, the Commission has ordered DOC to address two problematic issues regarding the review process including: a) DOC's requirement that candidates undergo medical and psychological evaluations *prior* to offering them a "*bona fide*" conditional offer of employment (e.g. – non-medical background investigations are still ongoing when candidates are subjected to medical and psychological evaluations); and b) DOC's failure to provide candidates with the *entirety* of their criminal records obtained by DOC and then using that information to make an adverse employment decision against them.

DECISION

On July 1, 2021, the Appellant, Nelson N (Appellant), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Department of Correction (DOC) to bypass him for original appointment to the position of permanent, full-time Correction Officer I (CO I). On July 27, 2021, I held a remote pre-hearing conference. On November 3, 2021, Commissioner Ittleman conducted a remote full hearing via Webex, which I have reviewed in its entirety.[3] The hearing was recorded via Webex and both parties received a link to access the recording.[4] Prior to the full hearing, DOC filed a motion to dismiss the Appellant's appeal, arguing that the appeal was not timely filed with the Commission. Both parties submitted proposed decisions after the full hearing.

FINDINGS OF FACT

The Appellant entered seven exhibits (App. Exs. 1-7) prior to the full hearing and, at the request of Commissioner Ittleman, the Appellant submitted two additional exhibits (App. Exs. 8 & 9) after the full hearing was conducted. DOC submitted nine exhibits (Resp. Exs. 1-9) prior to the full hearing regarding whether DOC had reasonable justification to bypass the Appellant as well as four exhibits related to whether the Appellant's appeal with the Commission was timely filed (Resp. Jurisdiction Exs. 1-4). At my request, DOC also submitted one additional document to the Commission – the conditional offer that was sent to the Appellant.

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[3] 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.

[4] Should either party file a judicial appeal of this decision, the plaintiff is 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. If such an appeal is filed, electronic copy of the hearing recording, previously sent to the parties, should be used to transcribe the hearing.

Based upon the evidence and the testimony of the following witnesses:

Called by DOC:

- Rachel E, Personnel Officer II, DOC (Ms. E.);
- Eugene T. Jalette, Supervising Identification Agent, Office of Investigative Services;

Called by the Appellant:

- Nelson N, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

Appellant's Background / Employment History

1. The Appellant, who was 43 years old at the time of the hearing before the Commission, is a resident of Boston, MA where he lives with his girlfriend and two children. He has worked in the automotive industry, including several years as a parts manager, for approximately 21 years. (Testimony of Appellant)
2. For approximately eight years between 2006 and 2014, the Appellant was employed as a Parts Manager for an auto dealership in Norwood. (Testimony of Appellant; Resp. Ex. 4)
3. A former colleague from the auto dealership in Norwood described the Appellant "… as a very responsible leader who leads by example and [is] a reliable family man." (Resp. Ex. 3)
4. After taking a year to care for his then-young son between 2014 and 2015, the Appellant began employment as the Lead Parts Advisor for an auto dealership in Dedham, where he was employed until 2017. (Testimony of Appellant; Resp. Ex. 4)
5. A supervisor from the auto dealership in Dedham described the Appellant as:

> "…very dedicated to his job but added that Mr. N was very upfront about certain limitations regarding his schedule due to [issues related to his child]; however, he

> still managed to be at work for 10 hours a day. When asked if Mr. N faced any discipline issues while at [the auto dealership], [the supervisor] stated there was one issue with one of the technicians but it wasn't Mr. N's fault. Mr. N never abused or overused any sick/vacation/personal time and [the supervisor] stated he had to remind Mr. N to take time off.
>
> On a scale of 1-10 with 10 being the best, [the supervisor] gave Mr. N a 9 in honesty/integrity and a 10 in his ability to get along with coworkers and supervisors. When [the investigator] asked [the supervisor] about Mr. N getting laid off, he stated that he left the company before that happened but added it was not uncommon for the company to lay employees off every once in a while. [Supervisor] believes Mr. N would make a good Corrections Officer because he is a calm person who doesn't lose his temper and would definitely recommend him for this position."

(Resp. Ex. 3)

6. In August 2020, the Appellant began employment as a Parts Manager for an auto dealership in Brookline, MA. A person by the name of "Tim" was his direct supervisor. (Testimony of Appellant; Resp. Ex. 4)
7. The Appellant, in response to a request by the hearing officer, submitted a series of text messages between the Appellant and Tim from December 1, 2020 to March 12, 2021. The communication includes a number of positive, flattering text messages from Tim to the Appellant, in which Tim offers praise for the Appellant's job performance. Starting on February 22, 2021, the text messages appear to reference a decision by the Appellant to leave his employment at the Brookline auto dealership, with apparent confirmation that he was no longer employed at the dealership at least as of March 12, 2021. (App. Ex. 9)[5]
8. As discussed in more detail below, a DOC investigator's efforts to contact Tim were not successful. (Resp. Ex. 3; Testimony of Jalette)

[5] The contents of these text messages are referenced in more detail below in regard to when the background investigation was being completed.

Appellant's Criminal Record

9. Approximately 17 years ago, in August of 2005, the Appellant was arrested and charged with Shoplifting and Assault and Battery. (Testimony of Appellant; Resp. Ex. 9)
10. According to the Criminal Docket from Dedham District Court, the Appellant was released on personal recognizance. In January 2006, the same docket sheet, under the heading "sentence or other disposition", states: Pre-Trial Probation until 7-17-06; 20 hrs C.S.; no cont w/victim [illegible]." (Resp. Ex. 9)
11. A July 17, 2006 entry on the court's docket sheet states under "final disposition", "Dismissed on recommendation of Probation Department." Under "disposition method", no box is checked, including a box that states "guilty plea or admission to sufficient facts …". (Resp. Ex. 9)
12. The Appellant's "MA Criminal History (BOP)", produced by the state's Criminal Justice Information System (CJIS)", states:

    "ARRAIGNMENT: (0001)

    ARG-DATE: 08/29/05 PD: NOD COURT: DEDHAM DISTRICT OFF: ASSAULT AND BATTERY

    STATUS: C WPD: WOT:

    DISP: C 1/18/06 C 7/17/06 CMNTY SRV DISM

    ARRAIGNMENT: (0002)

    ARG-DATE: 08/29/05 PD: NOD COURT: DEDHAM DISTRICT OFF: SHOPLIFTIN CONCEAL MDSE STATUS: C WPD: WDT:

    DISP: C 1/18/06 C 7/17/06 DISM

    DKT#: 0554CR2027B SHOPLIFT."

(Resp. Ex. 6)

13. Two arrest reports were completed by Norwood police officers regarding the alleged incident, which allegedly occurred at a video rental store. The first officer's arrest report states in relevant part:

> " … I had proceeded to [the store] and spoke with the on duty manager [redacted]. [Alleged victim] told me that two Hispanic males went to exit the store and set off the property detector alarm. [Witness] stood between the exit door and two males and asked them to empty their pockets. A second employee [alleged victim] was standing by the exit door. The two males were described as follows. The first was Hispanic male 20-22 years of age, 5"8" – 5'10" tall, approximately 250 lbs., wearing blue denim cargo short and a white t-shirt with blue trim around the collar and blue lettering on the front. The second subject was described as a Hispanic male, 20-22 years of age, appx 6'00" tall and approximately 285 lbs., wearing a black shirt and dark pants. According to [witness] the first male told her "I don't have anything, this is fucking bullshit' and then pushed [alleged victim] who was standing by the door and the two males left the store. [Alleged victim] later told me she had been pushed up against the glass and metal door frame and that her left wrist had been jammed in the door. [Alleged victim] was later transported to Norwood Hospital by Norwood Ambulance for medical treatment."
>
> (Resp. Ex. 8)

14. A second Norwood police officer, who pulled over a vehicle with the registration number matching what was provided by store employees, also filed an arrest report which stated in part:

> "I approached the driver's side and [Deputy] approached the passenger side. There were two occupants of the car. The operator handed me a driver's license and vehicle registration. Both belonged to the front seat passenger, [Nelson N.], who was the owner of the car. [Two police officers] arrived on the scene. I took [Nelson N.] out of the car and spoke with him off the side of the road … <u>During my conversation with [Nelson N.], he admitted to me that he was at [video store] and did shove the exit door into the employee</u>.[6] He claimed that he did not steal anything from the store. [Nelson N.] gave me consent to search his car. [Two police officers] searched the car where they found six DVD movie cases. Four

[6] As discussed later in this decision, the Appellant vehemently denies that he ever told the police officer that he shoved the exit door into the employee. Rather, he testified that he never entered the store and that he repeatedly asked the police officer to bring him back to the store so the employees could confirm this, which they refused to do.

> DVD's were found under the passenger seat: Kung Fu Hustle, Beauty Shop, the Ring 2, and State of the Union. Two DVD's were found in the sun roof area: Matilda and the Ring 2. [Nelson N.] was arrested for shoplifting and assault and battery." (emphasis added)

(Resp. Ex. 8)

Appellant's Civil Service and Application Process / Bypass Notification

15. On July 6, 2020, the Appellant took the civil service examination for CO I and received a score of 92. (Stipulated Fact)
16. On September 1, 2020, the state's Human Resources Division (HRD) established an eligible list for CO I. (Stipulated Fact)
17. On September 24, 2020, HRD issued Certification No. 07349 to DOC. The Appellant was ranked 55th among those willing to accept appointment. DOC appointed 43 candidates, 21 of whom were ranked below the Appellant. (Stipulated Facts)
18. On April 26, 2021, DOC emailed a letter to the Appellant. The letter stated the reasons for bypass and notified the Appellant of his right to file an appeal with the Commission. The cover email stated: "Good Afternoon [Mr. N], Attached please find your non-selection letter for the Correction Officer I position. A hard copy of this letter will also be mailed to the address we have on file which is: [address redacted]." (emphasis added) (Stipulated Fact; Resp. Jurisdiction Ex. 2)
19. The Appellant read the April 26th email on April 27, 2021. (Testimony of Appellant)
20. The Appellant received a hard copy of the bypass letter in the mail on May 3, 2021. (Testimony of Appellant)
21. The Appellant filed a bypass appeal with the Commission via email on July 1, 2021. (Stipulated Fact)

22. Effective October 1, 2000, the Commission adopted a "bypass appeal statute of limitations" stating that bypassed candidates may file a bypass appeal with the Commission "within 60 days of receipt" of the bypass reasons. (Administrative Notice: Bypass Appeal Statute of Limitations) The Appellant's appeal with the Commission was received within 60 days of the Appellant receiving the bypass letter via *mail*, but not within 60 days of the Appellant receiving the bypass letter via *email*. (Uncontested Facts)

DOC's Review / Background Investigation of Appellant

23. On October 8, 2020, after signing Certification No. 07349 to indicate his willingness to accept appointment if selected, the Appellant signed a waiver form allowing DOC to access his CORI records. (Resp. Ex. 7)

24. On October 14, 2020, DOC obtained the Appellant's CORI record showing that: a) the Appellant had been arrested and charged with shoplifting and assault and battery in 2005; and b) the case was dismissed in 2006 after the Appellant performed community service. (Resp. Ex. 6)

25. On October 15, 2020, prior to obtaining any additional information, including the criminal docket and/or the police reports, DOC sent the Appellant an "Adverse CORI information letter" stating:

> The Massachusetts Department of Correction has reviewed your criminal offender record information (CORI) from the Massachusetts Department of Criminal Justice Information Services (DCJIS).
>
> Under CORI Law we are required to provide you a copy of your specific CORI information for your review. Enclosed is also information pertaining to the process for correcting a CORI check. Please review all of this. information carefully as a background investigator will be discussing your CORI with you and based on this review, the Department may be inclined to make an adverse decision.
>
> Please contact Eugene Jalette at [phone number] if you have any questions."

(Resp. Ex. 5)

26. The Norwood Police arrest reports, which were not received by DOC until a later date, were not attached to the October 15th letter. (Testimony of Appellant)
27. On October 19, 2020, the Appellant received an email from Ms. E, a personnel officer at DOC, notifying him that he was scheduled for a Physical Abilities Test for October 23rd at 7:30 A.M. (App. Ex. 6)
28. On October 20, 2020, the Appellant submitted his completed application for employment to Ms. E. (Resp. Ex. 4)
29. On November 30, 2020, the Appellant was notified by Ms. E that he was required to participate in a drug test and he was provided with a series of available dates between December 2nd and December 9th, 2020. (App. Ex. 6)
30. On December 1, 2020, Ms. E notified the Appellant that he was confirmed to attend a drug test on December 10, 2020. (App. Ex. 6)
31. On December 3, 2020, the Appellant was notified that he was required to complete a psychological examination and was provided with a series of dates to choose from between December 14th and December 17th, 2020. (App. Ex. 6)
32. That same day, on December 3, 2020, the Appellant was notified that he was confirmed to participate in a psychological examination on December 17, 2020. (App. Ex. 6)
33. On December 4, 2020, Ms. E notified the Appellant that he was required to submit an "Industrial Health Questionnaire", to be completed by "a doctor or nurse practionier (sic)" no later than Monday, January 4, 2021. (App. Ex. 6)
34. On December 7, 2020, a background investigator met with the Appellant outside of a local coffee shop for an interview, as opposed to conducting the customary home visit, due to

COVID restrictions at the time. In the section of a report, completed months later, titled "home visit / applicant interview", there is no reference to the background investigator asking the Appellant any questions about his criminal record. (Testimony of Appellant and Resp. Ex. 3)

35. On December 9, 2020, the DOC background investigator received the Norwood Police Department arrest reports and the criminal docket sheet from Dedham District Court. (Resp. Exs. 8 & 9) That same day, in response to a request by the DOC investigator to provide a statement regarding the 2005 incident, the Appellant wrote in part: "I was arrested in Norwood because I was with someone that stole something out of a store. I did not know he stole something. We were both arrested because we were in my vehicle." (App. Ex. 4)
36. On December 14, 2020, the Appellant was asked by the DOC background investigator to provide "a more detailed explanation" regarding the criminal charges from 2005. He was not provided with the Dedham District Court docket sheet nor was he provided with the Norwood Police arrest reports by DOC at any point in the review process. (Testimony of Appellant)
37. That same day, on December 14, 2020, the Appellant replied to the DOC investigator, writing in part:

> "I was arrested because the person I was with had stolen something that I was not even aware of. I was not in the store with him. I was never brought back to the scene of the incident so that I could be cleared. The officers arrested me because the gentleman that had stolen something was in my car after. I did not see him do anything and again I was unaware. I was released the same night. After that I stayed away from that person because I felt the friendship was no longer worth having. The charges against me were dismissed and I agreed to do community service just to be done with the entire incident. It was embarrassing and I just wanted to be done with it."
>
> (Resp. Ex. 3)

38. Also on December 14, 2020, the Appellant notified Ms. E that he had tested positive for COVID. (App. Ex. 6)
39. That same day, on December 14th, Ms. E sent an email to the Appellant stating:

> "Thank you for letting me know about your positive COVID-19 results. At this time, due to your positive result, you are voluntarily deferring yourself to our April 2021 Academy class. We are currently only doing the Psychological screenings this week for the Academy that is slated to start in January.
> Due to testing timeframes, we will be back in touch sometime early next year (possibly February) with more details in regard to the April 2021 Academy and scheduling you for a a psychological screening and drug test for that Academy.
> You will not have to do the PT over again or any of the signing paperwork."
>
> (App Ex. 6)

40. On December 22, 2020, the background investigator spoke with the Appellant's former supervisor at the auto dealership in Dedham and received a positive reference. (Resp. Ex. 3)
41. Also on December 22, 2020, the DOC background investigator sent the Appellant a text message stating: "Hi Nelson I will be calling your supervisor at [the auto dealer in Brookline] most likely tomorrow. Thank you." (App. Ex. 5)
42. On December 23, 2020, the background investigator spoke with a former colleague of the Appellant from the auto dealership in Norwood and received a positive reference. (Resp. Ex. 3)
43. Also on December 23, 2020, the background investigator spoke with a personal reference who has known the Appellant for over 20 years. She is a caseworker at a correctional facility and she highly recommended the Appellant for appointment as a CO I. (Resp. Ex. 3)
44. On December 28, 2020, the DOC background investigator sent the Appellant a text message stating: "Hi Nelson. I left a voicemail a (sic) for Tim [] last week and have yet to hear back. Please have him call me back at his earliest convenience." (App. Ex. 5)
45. On December 29, 2020, the DOC background investigator spoke with a personal reference who has known the Appellant for over 10 years. He recommended the Appellant, stating in part that the Appellant is a "lot more even keeled" now compared to when he was younger. (Resp. Ex. 3)

46. On January 4, 2021, Ms. E sent an email to the Appellant stating:

> "Good Afternoon,
>
> I am following up in regards to the MADOC CO I Hiring Process. Your Background Investigator, [], has informed HR that she has been unable to get a hold of you and your current Supervisor as nobody is returning her correspondence. If your background goes incomplete, you will not be considered for the MADOC CO Academy.
>
> Please get back to me asap, letting me know of your intentions to continue on with the hiring process or if you are withdrawing your name from consideration.
>
> Thank you & I look forward to hearing back from you."

(App. Ex. 6)

47. At 6:52 P.M. that same day (January 4, 2021), the Appellant replied to the above email stating:

> "Good Evening [Ms. E.]:
>
> I haven't received any phone calls from [background investigator]. I received a text message that she was going to call my supervisor from my current job. I spoke to my supervisor and he said he called her back twice and she hasn't returned his call. I still want to be considered for the academy.
> Kind Regards,
> Nelson [N]"

(App. Ex. 6)

48. On January 5 2021, Ms. E responded via email to the Appellant stating: "Thanks Nelson for letting me know. I reached out to [background investigator]'s supervisor to get this all cleared up. I still have you for the April class. We haven't set up more dates for the drug and/or psych so when we do I will let you know. Hope you are feeling better."

(App. Ex. 6)

49. Later on January 5, 2021, Ms. E emailed the Appellant stating:

> "This is serving as a reminder that the IHQ was due into HR by **Monday January 4, 2021.** This was the medical document that was handed out at the completion of you passing your PT test. Due to you now being considered for the April Academy, we still need that document returned asap.

> Please let me know what your status is with getting this document completed. Thank you & have a good day."

(App. Ex. 6)

50. On January 8, 2021, the Appellant notified Ms. E that the IHQ had now been completed and asked whether it could be faxed to DOC, to which Ms. E replied that it could.

(App. Ex. 6)

51. On January 19, 2021, Ms. E notified the Appellant that DOC had not received the above-referenced IHQ. The same day, the Appellant replied that he had faxed it to DOC. Ms. E then notified the Appellant that he could fax or email the document. (App. Ex. 6)

52. Via a series of email exchanges between the Appellant and Ms. E on January 21st and January 22nd, 2021, the Appellant was notified that he was scheduled to complete the drug screening on February 11th and the psychological evaluation on February 18th, 2021. (App. Ex. 6)

53. By letter dated January 25, 2021, after the Appellant had completed the IHQ, DOC issued the Appellant a conditional offer of employment which stated in part:

> "We are pleased to inform you that the Department of Correction is able to extend you a *conditional offer of employment* as a Correction Officer I. This employment offer is contingent upon a review of the full background and pre-screening test results, which will consist of a drug screening, a psychological screening and the completed Industrial Health Questionnaire. Be advised that we currently do not have any of these results as the screenings are being scheduled at this time. If you fail ANY stage of this process you will not proceed further and will be disqualified from consideration at this time." (emphasis added)
>
> (Post Hearing document submitted to Commission at request of Commissioner Bowman)

54. On January 29, 2021, Ms. E notified the Appellant that DOC had still not received the above-referenced IHQ. (App. Ex. 6)

55. On February 1, 2021 at 10:37 P.M., the Appellant sent the IHQ to Ms. E via email, which was acknowledged by Ms. E on February 2nd. (App. Ex. 6)

56. The Appellant successfully completed his drug screening and psychological evaluation as scheduled on February 11th and February 18th, 2021 respectively. (Testimony of Appellant)

57. Between February 22nd and March 12th, 2021, the Appellant and his supervisor (Tim) at the auto dealership in Brookline exchanged the following text messages:

Monday, February 22nd:

Tim: "Nel how you feeling about staying on have you spoken to wifey at all?"

Tuesday, February 23rd:

Appellant: "Again I appreciate you and I don't hold any hard feelings. I always keep my head held high!! Never down."

Tim: Totally understand Nelson I see what you mean [] called me and I told him you are great and he mentioned [another dealership] might have something I told him that would be awesome for you.

Appellant: Tim when will I get the bonus that I earned for the most part of February:

Tim: Let me find out if you get it sooner or when bonus is paid out stay tuned.

Appellant: Thank you Tim.

Tim: You are gonna get it when bonus are calculated after month close.

Appellant: Thank you Time I appreciate you more than you know.

Tim: I got you.

Friday, March 12th:

Tim: Nel do you want to come pick up your check or want us to mail it?

App. Ex. 9)

58. On Tuesday, March 16, 2021 at 9:43 A.M., Ms. E sent an email to the Appellant stating:

> "Good Morning,
>
> Gene Jalette and the Background Investigators have been attempting to contact you with no avail and you haven't been returning their calls. You need to contact Gene Jalette at [phone number] **by 12pm TODAY (Tuesday March 16, 2021)**. If you do not contact him, your background will be 'incomplete' and you will not be hired for the next Academy.
>
> Thank you."

(App. Ex. 6)

59. Also on March 16, 2021, Eugene Jalette, head of DOC's investigative services unit responsible for background investigations, penned the following supplemental report:

> "On Monday morning March 15th, 2021 this investigator called the applicant on the phone number he provided to advise him that we needed to finish up his background and contact his present employer. He failed to return my call. [] [A] background investigator had tried the week prior and other times to complete the applicant's background but was unable to get in touch with his present employer. This investigator was scheduled to meet Commissioner Carol Mici and her command staff to review backgrounds on Tuesday March 16th at about 11:30 AM. This would be the final review of questionable backgrounds prior to the April Academy Class. On Tuesday March 16th at around 9:00AM this investigator still had not received a phone call from Mr. [N]. I had advised [] the human resources division of the incomplete background on Mr. [N]. [HR] then sent Mr. [N] e-mail notifying him his background is incomplete and he needed to contact this investigator. Shortly thereafter Mr. [N] called and during the conversation he advised this investigator that he was terminated (fired) from his current position and was currently unemployed. He said he was fired on February 22nd after he took the psychological test on February 18th.[7] He was not sure why he was terminated and this investigator did not have time to follow-up since the meeting with the Commissioner would be in a couple of hours. Mr. [N] was able to provide some proof of his employment to this investigator by e-mail, such as paystub and he also provided references for the employer in question. At the meeting Mr. [N]'s background was reviewed and Commissioner Mici advised he would not be selected for the correctional officer position."

[7] The Appellant denies telling Mr. Jalette that he had been fired. Rather, as discussed in the analysis, the Appellant insists that he told Mr. Jalette that, after informing his employer that he was in the psychological testing phase at DOC, his employer demoted him and asked him to train his replacement, at which time he resigned.

(Resp. Ex. 3) (emphasis added)

60. The background investigation report referenced above states the following under "positive aspects":

> "Positive employment references
> Positive professional references"

(Resp. Ex. 3)

61. The background investigation report also states the following under "negative aspects":

> "Applicant has been less than responsive during the background investigation. Failing to return multiple phone calls and texts even when advised [] to do so.
>
> Unable to confirm current employment at [auto dealership in Brookline].
>
> Applicant denies being involved in the 2005 incident where he was arrested for Assault and Battery, however, the police report states he admitted to being in the store and shoving an employee into the door.
>
> Applicant has reservations about working inside a prison due to safety concerns and the hours associated with the job."

(Resp. Ex. 3)

62. On April 26, 2021 (email) and May 3, 2021 (mail), the Appellant was notified that he was being bypassed for appointment. The reasons contained in the bypass letter were:

"Background Investigation: Failed Background due to a recent termination from employer, failure to respond in a timely manner when asked to do so by DOC Background Investigator & a 2005 shoplifting and assault & battery arrest." (Resp. Jurisdiction Ex. 3)

63. After the Appellant filed an appeal with the Commission, DOC submitted proposed exhibits in preparation for a pre-hearing conference. This was the first time that DOC provided the Norwood Police Department arrest reports to the Appellant. (Testimony of Appellant)

Legal Standard

Section 2(b) of G.L. c. 31 authorizes appeals to the Commission by persons aggrieved by certain actions or inactions by the state's Human Resources Division (HRD) or, in certain cases, by appointing authorities to whom HRD has delegated its authority, and which actions have abridged their rights under civil service laws. The statute provides:

> *No person shall be deemed to be aggrieved* . . . *unless such person has made specific allegations* in writing that a decision, action, or failure to act on the part of the administrator [HRD] was in violation of this chapter, the rules or basic merit principles promulgated thereunder *and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status*.

Id. (*emphasis added*)

Chapter 310 of the Acts of 1993 prescribes the discretionary authority granted to the Commission to remediate a violation of civil service law:

> *If the rights of any person* acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder *have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights* notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights. (*emphasis added*)

The fundamental mission of Massachusetts civil service law is to enforce "basic merit principles" described in Chapter 31, which command, among other things, "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. A mechanism for ensuring adherence to basic merit principles in hiring and promotion is the process of conducting regular competitive qualifying examinations, open to all qualified applicants, and establishing current eligible lists of successful applicants from

which civil service appointments are to be made based on the requisition by an appointing authority of a "certification" which ranks the candidates according to their scores on the qualifying examination, along with certain statutory credits and preferences. 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 and 27; PAR.08. A person who is bypassed may appeal that decision under G.L. c. 31, § 2(b) for a de novo review by the Commission to determine whether the bypass decision was based on a "reasonably thorough review" of the background and qualifications of the candidates' fitness to perform the duties of the position and was "reasonably justified". Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688 (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, 543 (2006), And cases cited; Beverly v. Civil Service Comm'n, 78 Mass. App. Ct. 182 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

Analysis: Jurisdiction / Timeliness

801 CMR 1.01 (6)(b) states that:

> "Any Person with the right to initiate an Adjudicatory Proceeding may file a notice of claim for an Adjudicatory Proceeding with the Agency within the time prescribed by statute or ***Agency rule***. In the absence of a prescribed time, the notice of claim must be filed within 30 days from the date that the Agency notice of action is sent to a Party." (emphasis added)

The Commission adopted a Bypass Appeal Statute of Limitations which allows bypassed candidates to file an appeal with the Commission up to 60 days "from receipt of … notice" of the bypass reasons. It is undisputed that the Appellant received and read, via email, the reasons for bypass from DOC on April 27, 2021, more than 60 days before he filed an appeal with the Commission. It is also undisputed that the Appellant received and read, via mail, a hard copy of the reasons for bypass from DOC on May 3, 2021, less than 60 days before filing a bypass appeal before the Commission.

Based solely on the facts involving this particular appeal, I find that the Appellant's appeal with the Commission is timely. The email notice that the Appellant received from DOC explicitly stated that he should expect to receive a copy of the bypass reasons via first class mail. It was reasonable for this pro se Appellant to assume that the "receipt of notice" provision in the Commission's rule, which is subject to Commission interpretation, would be triggered by his undisputed "receipt of notice" via first class mail on May 3, 2021. Moreover, even if the appeal here were not timely, which is not the case, the Commission maintains broad latitude, although it only does so sparingly, to assume jurisdiction over this matter pursuant to G.L. c. 31, § 2(a). Given the systemic issues – and concerns – raised by this appeal, it is appropriate, for reasons discussed in more detail below, for the Commission to exercise its jurisdiction under Section 2(a) in addition to Section 2(b). For these reasons, DOC's motion to dismiss the Appellant's appeal as untimely is denied.

Two Aspects of DOC's Review Process Here are Problematic

1. Requiring candidates to undergo medical and physical examinations before a ***bona fide*** conditional offer of employment is made.

In Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 682 fn.5 (2012), the SJC stated that:

> "to comport with the requirements of the Massachusetts antidiscrimination law, G.L. c. 151B, § 4 (16), and provisions of the Americans with Disabilities Act, 42 U.S.C. § 12112(d) 2006, an employer may not conduct medical or psychological testing prior to making an offer of employment, but may condition an offer of employment on the successful completion of testing."

In Police Dep't of Boston v. Kavaleski and Civ. Serv. Comm'n and Kavaleski v. Reade and City and City of Boston, Suffolk Sup. Crt. No. 09-4978-C (consolidated cases) (August 14, 2014), the Superior Court stated that:

> "... Apart from this footnote [fn.5 in SJC decision in Kavaleski, *supra*], there does not appear to be any Massachusetts case law on this issue. The MCAD guidelines do offer some guidance, however. MCAD Guidelines at V(B). See Dahill, 434 Mass. at 239 ('The guidelines represent the MCAD's interpretation of G.L. c. 151B, and are entitled to substantial deference even though they do not carry the force of law.') Specifically, the Guidelines provide as follows: 'An employer must make a conditional job offer before requiring a medical examination (and/or making inquiries). A conditional job offer is an offer of employment to a job applicant which is contingent upon the satisfactory results of a medical examination (and/or inquiry). Prior to making a conditional job offer, the employer should have evaluated all relevant non-medical information. MCAD Guidelines at V(B)."

In three prior decisions, the Commission has stated its concern that DOC has been simultaneously conducting non-medical background investigations of candidates (which should be completed and evaluated prior to the issuance of a conditional offer of employment) and medical and psychological evaluations (which should be completed only after *all non-medical background investigation has been evaluated* and a conditional offer issued.)

In Appellant v. Dep't of Correction, 32 MCSR 285 (2019), the Commission stated that: "DOC cannot, after granting [the Appellant] a conditional offer of employment, then bypass him based on the information in [] police incident reports, as it was part of a background investigation completed prior to making the conditional offer." In Ortiz v. Dep't of Correction, 33 MCSR 19 (2020), the Commission stated that: "The Commission has noted its concern with the DOC practice to extend a 'conditional offer of employment' prior to completion of the background

investigation, as that procedure makes problematic a subsequent disqualification for any non-medical reasons." In Jane A. Doe v. Dep't of Correction (May 20, 2022), the Commission stated that:

> "DOC's reliance on the background investigation as a reason for bypass is flawed as a matter of procedure. The Appellant's background investigation was completed [] on November 25, 2020. The Appellant was given a conditional offer of employment on November 30, 2020 … DOC claims that the decision to bypass the Appellant based on her background check was made by Commissioner Mici during a roundtable discussion on December 9, 2020, but she was not officially bypassed at that time and continued to be processed for possible inclusion in the following Academy class. Although COVID was certainly impacting DOC's operations in December 2020, it is unclear why, if a determination of unsuitability had been made, DOC did not end her candidacy once the December 9, 2020 decision to bypass was made rather than proceeding to order her to undergo medical and psychological examinations. This appeal does not turn on whether the background investigation could have been used as an independent reason for bypass. In the future, however, prior to making a conditional job offer DOC must take care to evaluate all relevant non-medical information and only issue a conditional offer and further process the candidate if the background investigation has not produced any reasons for non-selection or bypass."[8]

In the instant appeal involving the Appellant, the evidence shows that the (non-medical) background investigation and the medical / psychological evaluations were, once again, being conducted *simultaneously*. A DOC personnel analyst was familiar with both processes as they were taking place, dispelling any suggestion by DOC from prior appeals that there is some ironclad divide between the two processes. Adherence to MCAD guidelines ensures that: a) employers do not gain access to a candidate's sensitive medical information; and b) candidates are not subjected to inherently invasive medical and psychological evaluations, *unless necessary*. Put another way, if a candidate is going to be rejected for employment regardless of the outcome of the medical and psychological evaluations, *then the candidate should* ***not*** *be required to undergo those evaluations*

[8] I acknowledge that the Commission's decision in Doe v. DOC was issued after the hiring cycle regarding this appeal was completed.

and provide such medical information to the employer. DOC's failure to abide by the law, as described above, is also a violation of basic merit principles. See G.L. c. 31, § 1 (definition of "Basic merit principles", which requires "fair treatment of all applicants and employees in all aspects of personnel administration . . . with proper regard for privacy[.]").

2. DOC erred by failing to turn over ***all*** of the Appellant's criminal records to him before questioning him on the underlying events and then labeling him as untruthful for making statements that were consistent with those records.

The Commission is again faced with a situation where an Appellant's criminal record from many years ago (17 years in this case) is relied upon by an Appointing Authority to justify bypassing them for appointment. This is not new ground for the Commission – or DOC. For example, in Kodhimaj v. Dep't of Correction, 32 MCSR 377 (2019), the Commission recognized that the criminal records law provides DOC, as a criminal justice agency, with virtually unbridled access to a candidate's criminal records, including sealed and juvenile records. The Commission, however, also clearly limited in Kodjimah how this information properly can be used when vetting candidates for appointment to a public safety civil service position, such as correction officer. To ensure clarity – and consistency – the relevant guidance from Kodhimaj is repeated here.

G.L. c. 31, § 20 states in relevant part that:

> "No applicant shall be required to furnish any information in such application with regard to: any act of waywardness or delinquency or any offense committed before the applicant reached the age of 18 years; any arrest for a misdemeanor or felony which did not result in a court appearance, unless court action is pending; any complaint which was dismissed for lack of prosecution or which resulted in a finding or verdict of not guilty; or any arrest for or disposition of any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violation, affray, or disturbance of the peace if disposition thereof occurred five years or more prior to the filing of the application."

G.L. c. 151B, § 4 states that it shall be an unlawful practice:

> "9. For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the

transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred 3 or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within 3 years immediately preceding the date of such application for employment or such request for information, or (iv) a criminal record, or anything related to a criminal record, that has been sealed or expunged pursuant to chapter 276. [emphasis added]

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.

9 1/2. For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses."

As referenced in the findings [in Kodhimaj], DOC's "interview checklist", which is effectively a supplement to the application, asks:

- Have you ever been convicted of a felony?
- Have you ever been convicted of a misdemeanor and served time in a jail of (sic)

  House of Correction for said conviction?

- Have you ever been convicted of any crime, which resulted in your being imprisoned?

All of these questions on the application are permissible, given that DOC must assess whether the candidate is statutorily disqualified from being appointed under G.L. c. 125, § 9 which states in relevant part:

> " … no person who has been convicted of a felony or who has been convicted of a misdemeanor and has been confined in any jail or house of correction for said conviction, shall be appointed to any position in the department of correction …"

These limited and permissible criminal record-related questions stand in sharp contrast to other cases that have been decided by the Commission. In Kerr v. Boston Police Dep't, 31 MCSR 35 (2018), a question on the BPD employment application at the time asked: "Is there anything not previously addressed that may cause a problem concerning your possible appointment as a police officer?" These type of broad questions on the employment application, designed to obtain information from the applicant, beyond what is provided for under Chapter 151B, are not permissible.

That turns to the question of whether, as part of the reasonably thorough review that DOC was required to undertake, they were permitted to inquire with Mr. Kodhimaj about his entire criminal record information (beyond the questions in the application) after they had independently, and legally, obtained this information through CJIS. Based on the manner in which DOC's inquiry was conducted [in Kodhimaj], the Commission concluded that the inquiry was permissible under the statute and encouraged under a relevant Executive Order.

G.L. c. 6, § 171A states in part:

> "In connection with any decision regarding employment, volunteer opportunities, housing or professional licensing, a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession, whether obtained from the department *or any*

> *other source* **prior to questioning the applicant about his criminal history**. If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source; provided, however, that if the person has provided the applicant with a copy of his criminal offender record information prior to questioning the person is not required to provide the information a second time in connection with an adverse decision based on this information." (emphasis added)

In Kodhimaj, [the hearing officer] listened carefully to the testimony of DOC's background investigator as well as Mr. Kodhimaj regarding the manner in which the criminal record information of Mr. Kodhimaj was discussed. Based on their consistent and credible testimony, the Commission found that there was no attempt by the background investigator in Kodhimaj to withhold any criminal history record information that he had obtained regarding Mr. Kodhimaj, nor was there any attempt to see if Mr. Kodhimaj would voluntarily acknowledge his entire criminal record before sharing it with him to assess his honesty. Rather, the background investigator was transparent and forthcoming during the one-on-one interview conducted at his home. The background investigator informed Mr. Kodhimaj at the outset about the CORI-related information he had obtained *and then offered the Appellant the opportunity to address the information that DOC had independently obtained about his criminal record*. While the background investigator did not physically hand Mr. Kodhimaj a copy of the criminal history information before the interview, which the statute appears to call for, the Commission did not consider that misstep to be a fatal flaw in that case. The point was that DOC's process, in that case, was consistent with the intent of the statute: be transparent, let the Appellant know what additional CORI-related information you have obtained; and then allow them to provide an explanation about the alleged or actual misconduct.

Sharing the CORI-related information with a candidate and giving them the opportunity to discuss that information also appears to be consistent with Executive Order 495 (2008) (EO

495): "Regarding the Use and Dissemination of Criminal Offender Record Information.by the Executive Department." In 2009, speaking on behalf of his CORI reform legislation before the Joint Committee on the Judiciary, then-Governor Deval Patrick stated: "The only condition we impose is that the employer give the applicant a chance to discuss the criminal record, both its accuracy and its relevance to the job in question, before the employer makes a hiring decision." That is precisely what occurred in Kodhimaj. That is not what occurred here.

Here, DOC obtained a criminal docket sheet and, importantly, arrest reports related to the criminal charges listed on the CORI printout obtained from CJIS. Although DOC provided the Appellant with the CORI printout from CJIS, they never, at any point in the review process, provided the Appellant with the additional criminal history-related information that they had received (the docket sheet and the arrest reports). In fact, those documents were not obtained by DOC until after the background investigator conducted a personal interview with the Appellant. Instead of sharing this information, including police reports from an incident that occurred 17 years ago, and asking the Appellant to address the information in those documents, DOC withheld that information from the Appellant and asked him to provide more information about the underlying incidents from the CORI printout. Again, without sharing those arrest reports with the Appellant, DOC, after reading the Appellant's written submission to DOC, concluded that the Appellant was untruthful because his account conflicted with the arrest reports from 17 years ago. DOC did not provide the Appellant with those arrest reports until after the Appellant filed an appeal with the Commission. Importantly, the letter that DOC sent to the Appellant does not even state that a reason for bypassing him was that his account of what occurred 17 years ago conflicted with the arrest reports. Rather, the bypass reasons provided to the Appellant stated: "Background Investigation: Failed Background due to a recent termination from employer, failure to respond in

a timely manner when asked to do so by DOC Background Investigator & a 2005 shoplifting and assault & battery arrest." (emphasis added) It wasn't until *after* the Appellant was bypassed and *after* the Appellant filed an appeal with the Commission, that DOC informed him that one reason for bypass was the fact that his account of events differed from the arrest reports that were never shared with him.

This does not constitute the type of fair, impartial and transparent review process that is required under the law. Further, as stated in Section 8.04 of the Personnel Administration Rules (PAR.08(4)): "No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the [candidate][9], shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission." Based on DOC's failure to provide the Appellant with all of the criminal history-related information it had obtained and based on DOC's failure to state it as a reason for bypass, the putatively conflicting accounts between the Appellant's written submission to DOC and the arrest reports from 17 year ago are not a valid reason for bypass.

The reason actually contained in the bypass letter—"a 2005 shoplifting and assault & battery arrest"—also does not provide DOC with reasonable justification to bypass the Appellant. First, based on the above, it is unclear whether DOC took issue with the arrest (and subsequent charges which were dismissed after the Appellant performed community service[10]) or the Appellant's

[9] Although the PARs reference disclosure to the Personnel Administrator, that has been superseded by HRD's decision to delegate responsibilities to the Appointing Authorities, including, but not limited to, notifying candidates (directly) of bypass reasons.

[10] The Appellant testified that he "took a CWOF" which is often associated with admission to sufficient facts related to the criminal charges. As noted in the findings, the criminal docket sheet does not indicate that the Appellant ever admitted to sufficient facts regarding the criminal charges. Rather, the only notation is that the charges were dismissed based on the recommendation of the Probation Department after the Appellant performed community service.

conflicting report of what occurred. Second, although the Appellant was in his mid-twenties when the alleged incident occurred, it is not clear from the record, including the testimony of DOC witnesses, whether they took into account the staleness of the unlawful conduct. Further, in a series of prior decisions, the Commission has recognized that, while employers, including public safety agencies, may, after a thorough investigation, take account of a candidate's past criminal history, they must provide the candidate with an opportunity to address it, *and weigh any infraction against the candidate's entire life record, as opposed to making hiring decisions based simply on a past snapshot*. In order for an appointing authority to rely on a record of prior misconduct as the grounds for bypassing a candidate, they must show that there is 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 (i.e. – correction officer). While the Commission, when there is no evidence of political or personal overtones, owes substantial deference to the judgment of criminal justice Appointing Authorities regarding hiring decisions, that deference is not without limits. See Finklea v. Boston Police Dep't, 30 MCSR 93 (2017) (Commission unanimously concluded that the BPD failed to show a nexus between the Appellant's admission to receiving stolen property 14 years prior and his current ability to serve as a police officer); Finklea v. Civil Service Commission and Boston Police Department, Suffolk Superior Ct. (Fahey, J.) 1784CV00999 (Feb. 5, 2018) (affirmed that 14-year-old CWOF was insufficient predicate for bypass); Morgan v. Boston Police Dep't, 33 MCSR 131 (2020) (Commission unanimously concluded that the BPD failed to prove a nexus between the Appellant's criminal conduct 16 years prior and his current ability to serve as a police officer); Teixera v. Dep't of Correction, 27 MCSR 471 (2014) (Commission unanimously concluded that DOC failed to show a nexus between the criminal conduct from 21 years prior (solicitation - prostitution) of the Appellant, then 38 years old, with his current ability to perform

duties of Correction Officer); Stylien v. Boston Police Dep't, 31 MCSR 154, 209 (2018) (overturning bypass based on a lack of evidence, and consequent failure to indicate a pattern of criminal behavior or poor driving habits).

Here, DOC has not shown that there is a nexus between the Appellant's unlawful conduct 17 years ago and his current ability to meet the high standards of and perform the duties and responsibilities of a correction officer.

I now turn to the two remaining reasons in the bypass letter: (1) The Appellant's alleged failure to respond to DOC in a timely manner; and (2) his recent "termination" from his most recent employer. In regard to whether the Appellant was responsive to DOC throughout the hiring process, I have reviewed the entire record, including a series of text messages and email correspondence submitted by the Appellant that were conspicuously absent from DOC's exhibit submissions. DOC's own witness, a personnel analyst, testified that she found the Appellant to have been fairly responsive to all of her requests. Although the background investigation report states that the Appellant was "… less than responsive during the background investigation. Failing to return multiple phone calls and texts even when advised [] to do so", the background investigator, who has apparently accepted employment elsewhere, did not testify before the Commission. Based on the testimony of Ms. E, who had the most frequent contact with the Appellant and the voluminous email and text correspondence that is part of the record, the preponderance of the evidence does not show that the Appellant was non-responsive. To be clear, there do appear to be limited gaps in which the Appellant could have been more expeditious in his replies, but, as a whole, I cannot find a degree of non-responsiveness that would justify bypassing the Appellant for appointment, particularly given that DOC's conclusion is based, in part, on a period of time in which the Appellant tested positive for COVID and the failure of the Appellant's

supervisor (not the Appellant) to return the background investigator's phone call.

That leaves the final reason for bypass contained in the bypass letter: "his [the Appellant's] recent 'termination' from his most recent employer." The Appellant testified that, after his current employer, the auto dealership in Brookline, learned that he was at the point in the DOC hiring process of undergoing a psychological examination (for which he needed to request time off work), he was going to be demoted to assistant parts manager and would be responsible for training his replacement. He insists that he told Eugene Jalette, who oversees the Office of Investigative Services for DOC, that he was *demoted*, not *terminated* during a phone call between the Appellant and Mr. Jalette. I credit the testimony of Mr. Jalette that the Appellant informed him that that he had been terminated from the auto dealership in Brookline. Mr. Jalette is a good witness; he takes his sworn testimony before the Commission seriously and his credible testimony is consistent with the written summary he completed within one day of his phone conversation with the Appellant. Left unanswered, however, are the circumstances regarding the Appellant's termination from his recent employer, the stated reasons for bypass. At least based on the text messages provided to the Commission by the Appellant, it appears that the Appellant had a good relationship with his supervisor at the auto dealership who, at least based on the text messages submitted, appeared to offer regular praise for the Appellant's performance and, at or around the time of the Appellant's separation from employment, appeared to be encouraging the Appellant to stay. In short, there are too many unanswered questions regarding this most recent employment separation for it to form the basis for a valid bypass decision at this time.

Conclusion / Relief / Need to Assess Systemic Issues

The most common relief provided to Appellants who prevail in a bypass appeal before the Commission is that their name be placed at the top of the next certification issued to the Appointing

Authority to ensure at least one additional consideration for appointment and, if not selected, the non-selection constitutes a bypass that may be reviewed by the Commission, upon appeal by the Appellant. Also, based on the facts of a specific case, the Commission has also, when warranted, restricted an Appointing Authority from relying on some or all of the same bypass reasons in a future hiring cycle. Such restrictions, in part, are warranted here. DOC has failed to show, and will not be able to show going forward, that there is a nexus between the Appellant's seemingly unlawful behavior 17 years ago and his current ability to successfully serve as a Correction Officer. Thus, relying on that reason, and/or whether the Appellant's recollection of events coincided with the arrest report from 17 years ago, is simply not a valid reason for bypass and may not be used by DOC as a reason for bypass on a going forward basis. DOC is not, however, prohibited from conducting a more thorough review regarding the circumstances that resulted in the Appellant's separation from employment at the Brookline auto dealership and relying on the information obtained as part of its consideration of the Appellant's candidacy on a going-forward basis.

The problematic issues identified by the Commission regarding the review process go beyond this appeal and are more appropriately addressed through a review by the Commission under Section 2(a) of the civil service law.

For all of the above reasons, the Appellant's appeal is ***allowed***. Pursuant to the Commission's authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

- HRD shall place the name of the Appellant at the top of any current or future certification for the position of permanent full-time police Correction Officer I (CO I) at the Department of Correction until he is appointed or bypassed.
- DOC may not rely on the Appellant's putatively unlawful misconduct from 17 years ago as part of any future consideration for appointment.
- DOC is not prohibited from conducting a more thorough review of the Appellant's employment at the auto dealership in Brookline and relying on that information as part of any future consideration. If negative information regarding this employment

stint becomes the basis for a future bypass, and the Appellant elects to appeal any future bypass to this Commission, the Appellant will be entitled to subpoena a witness from this dealership, if he chooses, to provide context to the end of this employment relationship.

- If the Appellant is appointed as a CO I, he shall receive the same civil service seniority date as the candidate appointed from Certification No. 07349. This date is for civil service purposes only and is not intended to provide the Appellant with any additional compensation or benefits, including creditable service toward retirement.

- Once the Appellant has been provided with the relief ordered above, DOC shall notify the Commission, with a copy to the Appellant, that said relief has been provided. After verifying that the relief has been provided, the Commission will notify HRD that the Appellant's name should no longer appear at the top of future certifications.

Further, pursuant to its authority under G.L. c. 31, §§ 2(a), 72 and 73, as well as Chapter 310 of the Acts of 1993, the Commission, hereby order the following:

- DOC has until January 2, 2023 to provide the Commission with an updated employment review process that is consistent with the civil service law and all other applicable state and federal laws, including the state's anti-discrimination law and MCAD guidelines. Responses related to this order should be forwarded to the Commission referencing Case Tracking No. I-22-118.

Civil Service Commission

/s/Christopher Bowman
Christopher C. Bowman
Chair

By vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on August 25, 2022.

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 to:
Nelson N (Appellant)
Joseph Santoro (for Respondent)
Michele Heffernan, Esq. (HRD)
Regina Caggiano (HRD)