COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

ANDREW (ANDY) PEREIRA,
Appellant

v.

CITY OF NEW BEDFORD,
Respondent

CASE NO. G1-17-146

Appearance for Appellant: Joseph Sulman, Esq.
3911 Totton Pond Road, Suite 402
Waltham, MA 02451

Appearance for Respondent: Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
New Bedford City Hall
133 William Street
New Bedford, MA 02740

Commissioner: Paul M. Stein

DECISION

The Appellant, Andrew (Andy) Pereira, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), to contest his bypass by the City of New Bedford (New Bedford) for appointment as a Police Officer with the New Bedford Police Department (NBPD) and to remove his name from the eligible list pursuant to Personnel Administration Rule PAR.09.[1] A pre-hearing conference was held on September 8, 2017 and a full hearing, which was digitally recorded,[2] was held on January 12, 2018 and February 13, 2018, all at UMass School of Law in Dartmouth. Sixteen exhibits (Exh.1 through Exh.16) were received in evidence, and, at the Commission's request, the Appellant also provided a package of additional

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

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

documents (PHExh.17). The Commission received Proposed Decisions from the parties on April 2, 2018.

FINDINGS OF FACT

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

Called by the Appointing Authority:

- NBPD Lieutenant A
- NBPD Lieutenant B
- NBPD Detective A
- NBPD Detective B

Called by the Appellant:

- Andrew (Andy) Pereira, Appellant
- NBPD Police Officer A
- NBPD Police Officer B
- Ms. JF

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

1. The Appellant, Andrew (Andy) Pereira, is a life-long New Bedford resident, graduating in 2001 from the Greater New Bedford Regional Vocational Technical High School. He worked two years as a Group Care Worker for a Plymouth, MA human services provider and, since May 2006, he has been employed as a union laborer in the construction industry for several major Boston area commercial construction contractors. (*Exhs. 1, 2, 5 & 7; Testimony of Appellant*)

2. In January 2003, Mr. Pereira enlisted in the Massachusetts Army National Guard/US Army Reserve (ARNG). He served honorably with a platoon of the 772nd Military Police Company in Taunton, rising to the rank of Specialist (E-4) at the time of his separation in October 2008. (*Exhs. 1, 3 & 5; Testimony of Appellant*)

3. In or about early 2007, Mr. Pereira fell ill. Eventually, after a pulmonary function test, he was diagnosed with asthma and prescribed an inhaler to use as needed to alleviate symptoms (difficulty breathing). (*Testimony of Appellant*)

4. Upon learning of his diagnosis, Mr. Pereira first notified his Army unit medic. Thereafter, the ARNG's Office of the Adjutant General (OAG) informed Mr. Pereira, through his unit commander, that documentation was needed about his medical condition for submission to a Medical Profiling and Record Review Board. Pending the receipt of this documentation, the OAG ordered that Mr. Pereira was not authorized to participate in certain military activities. The OAG Memorandum stated that failure to provide documentation by the "suspense date" (26 June 2007) would result in his separation. (*Exh. 3; Testimony of Appellant*)

5. Mr. Pereira delivered the documents he thought were required to his "admin" specialist, (whom he could remember only by her nickname), and, when those were misplaced, he had copies faxed to her, but, for reasons unknown, the information either still was not sufficient or never got to the review board. (*Testimony of Appellant & JF*)

6. By Memorandum dated 12 October 2007, OAG informed Mr. Pereira's commanding officer:

> "The Medical Profiling and Record Review Board has sent out a Fail to Comply letter . . . with suspense of 12 December 2007. The documentation [provided by Mr. Pereira] was **not sufficient** or **not submitted** by the established suspense date. In order to stop the discharge for Fail to Comply, additional information is required to be **submitted by the Commander** for the State Surgeon to review. . . . This documentation must include . . . [s]pecific limitations, if any, in regards to MOS duties….[r]ecommendations for retaining the soldier in the Massachusetts National Guard. . . [d]iagnosis . . . [t]reatment plan." (**emphasis in original**)

A separate Memorandum dated October 12, 2017 was sent to Mr. Pereira, through his commanding officer, informing him that proper documentation concerning his current medical condition was inadequate and stated: "Unless we receive the previously requested documentation . . . you will be discharged from the Massachusetts Army Guard on [12 December 2007] for failure to meet medical standards." He was also informed that his commander was ordered to

ensure that he had not been paid for participating in certain ARNG operations on and after March 26, 2007 per the original OAG letter of that date. (*Exh. 3)*

7. At some point thereafter, Mr. Pereira began mulling whether he wanted to continue his enlistment in the ARNG. After talking it over with his commanding officer and with the commander's approval, Mr. Pereira decided to leave the ARNG rather than further pursue the process needed to clear him as fit for duty, knowing that would mean he would be discharged as medically unfit. The reason for this decision was the fact that his initial six year commitment was up at the end of 2008 and his Military Police unit was slated for overseas deployment, and he would not be discharged for another year or more when the deployment was competed. For the sake of his family, he chose not to extend his enlistment and be put in harm's way, as he and his significant other were expecting their first child.[3] (*Exhs 2 & 3; Testimony of Appellant)*

8. By Memorandum dated 25 September 2008, Mr. Pereira's commander reported to his superiors what Mr. Pereira had decided.

> "SPC Pereira has been told numerous times that he needs to bring in further documentation or be discharged under 'failure to comply'. SPC Pereira has made no attempt to bring in additional documentation stating [either] that he is medically cleared or that he need additional follow-up care. In previous conversation with SPC Pereira, he has made it clear that he does not want to continue his career in the military and wished to get medically discharged."
>
> "Any questions should be directed toward the undersigned at (508) 824 –xxxx."
>
> DEREK J. BARAN
> CPT, MP
> Commanding

9. By Memorandum dated 30 September, the ARNG Office of the State Surgeon ordered that Mr. Pereira be discharged from the ARNG. (*Exh.3*)

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[3] Mr. Pereira's prior duty had involved training as well as domestic activation during declared emergencies and disasters and support of local law enforcement at events such as the Democratic National Convention in Boston in 2004. (*Testimony of Appellant*)

10. Mr. Pereira's NG FORM 22 (the National Guard equivalent of a DD214) states the "Authority and Reason" for discharge: "NGR 600-200, 8-35i(8) Medically unfit for retention per AR 40-501" and describes the "Character of Service" as "Honorable". (*Exh. 3*)

11. Mr. Pereira first applied for appointment to the NBPD in 2011 and, again, in April 2012, when he was processed through the background investigation phase and bypassed for failing to disclose in the Employment Application that he was "disciplined" in the military for violating "orders" and providing allegedly false answers to three question (out of more than one hundred questions) on the "Personal History Questionnaire" portion of the application. (*Exh. 1, 2 & 14*)[4]

12. The 2012 background investigation on Mr. Pereira was conducted by NBPD Det. A, who reviewed the background investigation that had been started, but never completed, in connection with Mr. Pereira's first application in 2011. Investigation of residency, neighbors, police contacts, internet search, current employer, personal references, credit report, military record, fingerprint report and firearms check produced many positives and no negative issues. During the "spousal interview" of JA, Mr. Pereira's girlfriend, Det. A showed her Officer A's picture and asked about her prior dating him. (*Exh.2; Testimony of Det. A & JA*) [5]

13. Det. A reviewed Mr. Pereira's application (in which he reported that he had received a "Medical Discharge" from the ARNG, as well as the NG FORM 22 military discharge form Mr. Pereira submitted with the application. Det. A then spoke to a soldier at the Taunton Armory.

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[4] The three questions on the questionnaire were: (1) Have you ever been involved in an act of vandalism? [In 2002, he admitted to throwing a bottle at a motor vehicle that broke the windshield, a misdemeanor – he said he didn't know that was considered "vandalism"] (2) Is your name in a case report file with any police department or law enforcement agency that you are aware of? [His name appears on a 2008 incident report of assault and battery for which no criminal complaint issued and as a victim in a 2009 incident report] and (3) "Have you ever stolen anything?" [He was arrested in 1998 with two other juveniles who had shoplifting some cookies from Walmart]. (*Exhs. 1, 2, 5 & 14; Testimony of Appellant*)

[5] Sometime prior to 2005, Officer A dated Mr. Pereira's significant other for a month or two. Officer A was a good friend of Mr. Pereira's uncle, had met Mr. Pereira before, and knew that JF and Mr. Pereira had been together for many years. He does not recall when he informed his commanding officer (Lt. B, the background investigations supervisor) of these facts, but he is pretty sure he did so prior to the 2012 hiring cycle. Lt. B did not recall knowing about the relationships until after 2012. (*Testimony of Appellant, JA, Officer A & Lt. B*)

Det. A "didn't know much about" the person he spoke with but she gave him a copy of a document that, according to her, showed that Mr. Pereira was discharged "because he did not submit medical paperwork that was required to deploy him. . . . which request for paperwork [the soldier] stated would be considered a "direct order." (*Exhs.1 & 2; Testimony of Det. A*) [6]

14. On August 1, 2012, Det. A interviewed Mr. Pereira with three other NBPD officers present (Det. B, Det. C [who did not testify before the Commission] and Officer A). The interview was not recorded. (*Exh. 3; Testimony of Appellant, Det. A, Det. B and Officer A*)

15. According to Det. A's background investigation report, he asked the questions, save for one exchange with Det. C about the 2002 "vandalism" incident and one exchange with Det. B about the New Bedford Madeira Feast, during which exchange, Det. A wrote in his report, that Mr. Pereira became "confrontational with Det. [B]" when Det. B found it incredulous that Mr. Pereira said he had never attended that event. (*Exh.2; Testimony of Appellant, Det. A & Det. B*)

16. According to Det. A's background investigation report, he asked Mr. Pereira about his responses to questions in the application that he was never "disciplined" or violated any "order" in the military, inasmuch as he was discharged for "failure to comply" after not submitting medical documentation, asking: "Isn't that a violation of a direct order and the discipline for not following orders was to be discharged?" Mr. Pereira responded that he did provide some paperwork to his "admin", both personally and, later, his sister also faxed paperwork twice and she would confirm that if he contacted her. Det. A wrote that "it looks like he is blaming his sister for the military not getting his paperwork." (*Exh. 2; Testimony of Appellant & Det. A*)[7]

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[6] The referenced document was not the NG FORM 22 Report of Separation but, rather, it was the commanding officer's Memorandum dated 25 September 2008, described in Finding No. 7 above.

[7] Two days after the investigative interview, Det. A phoned Mr. Pereria's sister who confirmed that she faxed paperwork and said that her brother's girlfriend [JF] also faxed some paperwork, but couldn't give him a specific timeframe. (*Exh.3; Testimony of Det. A*)

17. Another subject raised during the 2012 background interview involved Mr. Pereira's prior firearms application (which was part of a prior NBPD hiring package). He initially answered "NO" to a question about whether he had "ever been arrested or appeared in court as a defendant for any criminal offense?"[8] One of his acquaintances on the NBPD saw his application, told Mr. Pereira that he needed to change his answer and provided him with a new form to complete, which he did. (*Testimony of Appellant, Lt. A, Lt. B & Officer A*)

18. Mr. Pereira provided a detailed recollection of the firearms application colloquy, which was substantially as follows: He was asked if a friend in the NBPD told him to change his answers on the firearms application and provided a new application which was substituted for the original one. Mr. Pereira freely acknowledged this happened. He was then asked to identify the officer, which he also freely disclosed. At that point, he was told something to the effect: "You just threw your buddy under the bus" and "I wouldn't want someone like you as my patrol partner." (*Exh. 2; Testimony of Appellant*)

19. Nothing about the firearms application was included in Det. A's 2012 background report. The background investigator, Det. A, "barely" recalled the subject of the firearms application coming up during the 2012 (unrecorded) interview. Officer A remembered knowing about this issue but wasn't sure if it was brought up during the 2012 interview he attended or he had learned about it earlier in the process. (*Exh. 2; Testimony of Det. A & Officer A*)

20. In the final paragraph of his report on the investigatory interview, Det. B writes:

> "When the interview concluded . . . [Mr. Pereria] then stated . . . he was told by his Sgt [sic] not to submit the paperwork. . . that his unit was being deployed and his girlfriend was pregnant and he didn't want to be deployed in fear that something might happen. . . . [T]wo of the people in his unit were [later] killed. . . He said he did not regret making that decision

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[8] Mr. Pereira's response was based on his understanding that his prior arrests had been removed from his record. I also note that the instructions in the section of the Employment Application about his "Criminal Record" instructed that only certain convictions needed to be disclosed and his two stale misdemeanor arrests on his record fit into a category of offenses that the Employment Application stated did not need to be disclosed. (*Exhs.1 & 5; Testimony of Appellant*)

> . . . I asked him to just give me the Sgt's [sic] name so I could try to make contact. He stated that he didn't remember the name."

(*Exh. 2; Testimony of Det. A*)

21. Det. A concluded his background report, dated August 3, 2012, with the statement:

> "The only negative thing I was able to find on Andy Pereira was his story about his discharge from the Army National Guard, the Army stated several times that Andy ignored a direct order. There is documentation from the National Guard. There is no proof of Andy's story except for his sister stating the same thing Andy told us but she couldn't give me any times or dates. Keep in mind that his discharge took place in 2008 that's not so long ago. Everything else in Andy's background was all positive. . . ."

(*Exh. 2: Testimony of Det. A*)

22. By letter dated September 4, 2012, New Bedford Mayor Mitchell notified HRD that Mr. Pereira was being bypassed for making false statements on his application. (*Exh. 14*)

23. Mr. Pereira continued to pursue his desired to serve as a police officer with the NBPD, reapplying for appointment in 2013, 2014 and 2015 and, finally, on Certification #04224, issued by HRD on December 4, 2016. (*Exhs. 4, 5 & 10; Testimony of Appellant*)

24. In his 2016 NBPD Employment Application, Mr. Pereira described his military discharge as "Honorable". In response to the question about whether "any type of disciplinary action" had been taken against him in the military he checked "YES" and stated: "Failure to Comply – Did not pass in documents on weekend was asked too [sic]". He, again, answered "NO" to all questions in the "Criminal History" section of the Employment Application concerning whether he was convicted of any offenses described in that section. (*Exh. 5; Testimony of Appellant*)[9]

25. Mr. Pereira answered "YES" to the question on the Firearms Application attached to the Employment Application which asked if he had "ever been arrested or appeared in court as a defendant for any criminal offense" and listed the 1998 shoplifting incident, the 2002 Motor

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[9] The NBPD's 2016 Employment Application no longer included the 100-plus "Personnel History Questionnaire" that contained the other questions that tripped up Mr. Pereira in 2012. (*Exhs. 1, 5 & 14*)

vehicle "vandalism" and the 2004 complaint for assault & battery that was dismissed at the probable cause stage. (*Exhs. 2 & 5; Testimony of Appellant*)

26. By the time of the 2016 hiring cycle, Lt. B, the background investigations supervisor, knew that one of his investigating officers, Officer A, had once dated Mr. Pereira's significant other. For this reason, Lt. B decided that a detective outside the background investigative unit should conduct the follow-up background investigation of Mr. Pereira.[10] He asked Lt. A (then Sergeant), a detective in the Professional Standards Unit to perform this task, whose experience was limited to internal affairs investigations. Mr. Pereira's 2016 background investigation was his first of an applicant for appointment to the NBPD. (*Testimony of Lt. A & Lt. B*)

27. Lt. A updated Mr. Pereira's residency, education, driving and criminal record, which turned up nothing significant. He interviewed the references provided by Mr. Pereira, spoke to a neighbor, interviewed his current and two prior supervisors, and conducted a "spouse interview", all of whom provided positive feedback. (*Exh. 7; Testimony of Lt. A & JA)*

28. Lt. A did not conduct any follow-up concerning Mr. Pereira's military service, noting in his report only that "[h]e served from January 2003 until October of 2008, when he was honorably discharged." (*Exh. 7*)

29. Lt. A noted in his report: "There was no internal email sent by this investigator regarding negative or positive feedback from members of this department in relation to applicant Pereira's possible employment for the New Bedford Police Department." (*Exh. 7*)

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[10] I take administrative notice that Lt. B also knew that Officer A's brother was one of the other candidates under consideration for appointment to the NBPD during this hiring cycle. After personally conducting the employment history portion of the background investigation of Officer A's brother, who had been terminated from his last job, Lt. B advanced the brother's application for consideration by the NBPD Captains Board, which eventually recommended that the brother be bypassed. (*Administrative Notice [Decision dated March 14, 2019, CSC Docket No. G1-17-140]*)

30. On February 10, 2017, Lt. A conducted a background interview with Mr. Pereira and was "assisted by Lt. [B]". He pressed Mr. Pereira about answers on his prior applications. Mr. Pereira "would not come out and say he was untruthful" but "did say that he has learned from his first application . . . and even sought out the advice of a family member, who happens to be in law enforcement . . . and was honest moving forward." (*Exhs. 6 & 7*)

31. When it came to the military service question, Lt. A reported that Mr. Pereira "was disciplined by the military for failing to follow the orders of providing them with . . . paperwork." (*Exhs 6 & 7; Testimony of Lt. A*)

32. The final two subjects to be raised at the interview were designed to "test" Mr. Pereira's candor and honesty when challenged with a tough question. The basis for both these questions came exclusively from unsolicited information given to Lt. B by Officer A. (*Exhs. 6 & 7; Testimony of Lt. B & Officer A*)

33. Lt. B acknowledged that he was "alarmed" by the fact that Officer A had come to him with derogatory information about Mr. Pereira, and that it did raise "red flags" that there may be a reason for Officer A to have some "dislike for Mr. Pereira", but he believed that, once having the information, he could not ignore it. (*Testimony of Lt. B*)

34. The first question had to do with Mr. Pereira previously substituting a firearms application for the original one he filed to change an answer about his criminal record, with the assistance of an NBPD officer. Lt. B had no issue with making the change, as candidates would routinely be allowed to correct mistakes on their applications. Lt. B simply wanted to see if Mr. Pereira handled the question truthfully. (*Exhs 6 & 7; Testimony of Lt. A & Lt. B*)

35. Mr. Pereira hesitated when Lt. B asked the question (recalling the scolding he received when he was forthcoming about the issue in 2012 interview) and then, when asked if he was

"comfortable" answering the question, he said "No." When asked what he would do if he was uncomfortable answering a question when testifying in court, he said that was different and he knew he had to answer the question and tell the truth in a court of law. Lt. B dropped the inquiry without delving further. (*Exhs. 6 & 7; Testimony of Appellant*)

36. The second question concerned a text message that Mr. Pereira sent to a close friend on the NBPD (Officer B) expressing how "desperate" the NBPD must be to finally give him an interview. Officer A was present with Officer B and saw the text message when it came in. Officer A reported it to Lt B. (the background investigations supervisor), who asked Officer A for a copy which he later provided to Lt. B. (*Exh. 6 & 11; Testimony of Appellant, Officer A & Officer B*)

37. Mr. Pereira freely acknowledged sending the message. He stated that he wrote it to express his surprise at being called in for an interview after being bypassed four times, thinking he was never going to get another opportunity. Both Mr. Pereira and Officer B were unaware at the time that Officer A gave a copy of the message to Lt. B. Officer B later questioned Lt. B's motives for using this information without first discussing it with him personally. (*Exhs. 6, 7 & 15 through 17; Testimony of Appellant and Officer B*)

38. Based on Mr. Pereira's interview performance, Lt. B concluded that Mr. Pereira continued to give inconsistent explanations about his departure from the military and was troubled that Mr. Pereira could not "answer a simple question" about the firearms application. Lt. B decided that "nothing had changed" about Mr. Pereira's lack of candor and truthfulness since he was last interviewed in 2012. (*Testimony of Lt. B*)

39. On or about April 10, 2017, Lt. B prepared a letter to HRD for New Bedford Mayor Jonathan Mitchell's signature that stated the reasons for bypassing Mr. Pereira and requested that his name be removed from the eligible list pursuant to PAR.09. These reasons included:

- Prior bypass for Untruthfulness/Misleading Information – "false answers on his employment application in 2012 . . . [and] confrontational . . . during the interview".
- Poor Attention to Detail/Failure to Follow Instructions – failed to date the application, to state he was "lawfully eligible for employment'" and to name all former supervisors.
- Misleading during Interview/Discrepancies – falsely claiming he was not "disciplined" or "violated an order, military rule or procedure"; his discharge for "failure to comply" calls into question his ability to follow orders and suitability to perform "inherent dangerous" work of police officers; texting friend on NBPD; failing to be forthcoming about his prior firearms application.
- Credibility as a witness – If "put in a difficult situation, Mr. Pereira would not be forthcoming", calling in to question his ability to testify as a witness under the so-called "Brady Rule" [Brady v. Maryland, 373 U.S. 83 (1963)]

Mayor Mitchell was provided no other information from Mr. Pereira's application package or interviews other than what was set forth in the letter drafted by Lt. B. (*Exh. 8*)

40. By letter dated June 12, 2017, HRD informed Mr. Pereira that the reasons provided by New Bedford in its April 10, 2017 letter for bypassing him and removing his name from the eligible list were approved. This appeal duly ensued. (*Exhs. 8 & 9*)

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, §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 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, §§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,§27; PAR.08(4)

A person may appeal a bypass decision under G.L.c.31,§2(b) for de novo review by the Commission. The Commission's role is to determine whether, by a preponderance of evidence, the appointing authority had "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of a candidate's background and qualifications sufficient to form a "credible basis" to believe allegations of misconduct or other facts that present "legitimate doubts" about the candidate's present fitness to perform the duties of the position. 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

New Bedford's contention that it had reasonable justification for bypassing Mr. Pereira is not supported by the preponderance of the evidence presented in this appeal. New Bedford's conclusion that Mr. Pereira falsely claimed that he was never disciplined in the military for disobeying orders was premised on an inadequate investigation and misunderstanding of the circumstances which resulted in his honorable discharge for medical reasons. Information about his prior firearms application and a private text message sent to a friend was impermissibly provided by an NBPD officer who knew he had been excluded from participation in Mr. Pereira's application process and whose brother was competing with Mr. Pereira for appointment and never properly vetted. The remaining other reasons for bypassing Mr. Pereira, based on his answers in 2012 about stale minor criminal offenses and minor clerical mistakes on his 2017 application are insufficient to demonstrate his unsuitability and do not justify his bypass.

Truthfulness

The main thread to New Bedford's rationale for bypassing Mr. Pereria is the conclusion that he lacks the honesty and candor to serve in the position of an NBPD Police Officer. The Commission certainly recognizes that law enforcement officers are vested with considerable power and discretion and, when selecting candidates for such a sensitive public safety position, they must be held to a high standard of conduct:

> "Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities."

Police Comm'r v. Civil Service Comm'n, 22 Mass.App.Ct. 364, 371, 494 N.E.2d 27, 32 rev.den. 398 Mass. 1103, 497 N.E.2d 1096 (1986).

The duty imposed upon a police officer to be truthful is one of the most serious obligations he or she assumes. See Falmouth v. Civil Service Comm'n., 61Mass. App. Ct. 796, 801 (2004) citing City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) ("a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.") An Appointing Authority is well within its rights to bypass an individual for "purposefully" fudging the truth as part of an application process for the position of police officer. See, e.g., Minoie v. Town of Braintree, 27 MCSR 216 (2014) (multiple omissions about prior domestic abuse restraining orders and residences); Noble v. Massachusetts Bay Trans. Auth., 25 MCSR 391 (2012) (concealing suspension from school for involvement in criminal activity); Burns v. City of Holyoke, 23 MCSR 162 (2010) (claiming he 'withdrew" from another law enforcement application process from which he was actually disqualified) Escobar v. Boston Police Dep't., 21 MCSR 168 (2008) (misrepresenting residence)

The Commission also recognizes that, in certain circumstances, a police officer's demonstrated record of untruthfulness may compromise that officer's ability to serve as a credible witness in the prosecution of a criminal case under the obligation that police departments and prosecutors carry to disclose "exculpatory evidence" to defense counsel about the truthfulness of witnesses expected to be called to testify in a criminal prosecution. See generally, United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976), citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). See also Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985).

The corollary to the serious consequences that flow from making what amounts to a career-ending decision that a police officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized under "basic merit principles" so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. See, e.g., Boyd v. City of New Bedford, 29 MCSR 471 (2016) (honest mistake interpreting questions on employment application); Morley v. Boston Police Dep't, 29 MCSR 456 (2016) (candidate unlawfully bypassed on misunderstanding appellant's responses about his "combat" experience); Lucas v. Boston Police Dep't, 25 MCSR 420 (2012) (mistake in characterizing appellant's prior medical history)

In the present appeal, nothing that New Bedford characterizes as disqualifying untruthfulness by Mr. Pereira fits that description.

First, the most significant example of New Bedford's erroneous conclusion about Mr. Pereira's untruthfulness was his alleged failure to acknowledge that "disciplinary action" was taken against him for "failure to comply" with military "orders" to produce paperwork necessary for the ARNG Medical Profiling and Record Review Board to evaluate his fitness for duty. The

only evidence of such “disciplinary action” were hearsay statements of a 2012 conversation between Det. A and a soldier in his former unit (about whom Det. A knew “little”) along with documents obtained by Det. A in response to a request to the National Personnel Records Center for copies of Mr. Pereira’s military personnel records. This evidence fails to establish New Bedford’s contention that Mr. Pereira failed to obey any “orders” or that he was “disciplined” for such misconduct by being “honorably discharged”.

- The Authority and Reason cited in his Report of Separation (see Exh. 3), contains no reference to a “discharge for failure to comply”. The cited regulatory authority classifies Mr. Pereria’s “honorable” discharge for medical reasons as an “administrative separation” and not a punitive action. See NGR 600-200, “Enlisted Separations” at 34-50 & “Terms” at 92-93, https://www. ngbpdc.ngb.army.mil/Portals/27/Publications/ngr/ngr%20600-200.pdf?ver=2018-10-11-074239-517. See also AR 635-200, “Types of Administrative Discharges/Character of Service”, https://armypubs.army.mil/epubs/DR_pubs/DR_ a/pdf/web/ AR635-200_Web_ FINAL_18JAN2017.pdf
- Nothing in the record indicates that the initial 26 March 2017 request for documentation by the OAG was not complied with by the 26 June 2007 suspense date.
- The 12 October 2007 correspondence from the OAG to Mr. Pereira’s chain of command referenced that the State Surgeon and Medical Profiling and Record Review Board had made a prior “review” of Mr. Pereira’s medical case (from which I infer that Mr. Pereira did, indeed, submit initial documentation as he claimed), but directed that “additional information” needed to be submitted by the Commander for further review; the corresponding letter to Mr. Pereira through his commander indicates that the State Surgeon had requested a “current letter” from Mr. Pereira’s doctor, without which would have to be discharged “for failure to meet medical standards.”
- Nothing in the reported hearsay evidence from the soldier with whom Det. A spoke in 2012, or the other personnel records obtained by Det. A, persuade me that the situation as described in these official documents represents an “order” to Mr. Pereira, that his “discharge” was considered by the Army to be “discipline”, or that he was “discharged for Failure to Comply” (as opposed to failing to meet medical standards as recited in the official NG FORM 22 Report of Separation).
- I note that the response Det. A received from the National Personnel Records Center indicated that “the medical documentation requested is not at this Center” and directed Det. A to the Veteran’s Administration “to obtain copies of the medical records.” There was no evidence that Det. A took any further action to track down the medical records.

In sum, the preponderance of the evidence quite accurately tracks Mr. Pereira’s credible testimony about what transpired. When he first learned he had asthma, he immediately informed his unit medic and provided evidence of his condition through his unit “admin”, both in hand and

by fax. He did not submit the follow-up letter from his doctor because, with his initial enlistment period a year or less away, he was no longer sure that he wanted to remain in the ARNG. With the prospect of an extended overseas deployment on the horizon, he chose to let the medical review take its course so that he could be discharged and remain with his family. Thus, I am not persuaded that Mr. Pereira was untruthful, and certainly not purposefully so, when he claimed that he had no military discipline on his record. I am persuaded that he reasonably believed he could truthfully claim that his decision to be medically discharged, in consultation and with the approval of his commanding officer, nullified the need to submit follow-up documentation and did not "violate" any military "orders".

Second, the other statements made by Mr. Pereira during the application process cannot be used as the grounds to disqualify him, i.e., those which he made in his 2012 application about never having committed vandalism, never stolen anything, or whether he "is" listed in any police or law enforcement case file. The NBPD Employment Application expressly stated that Mr. Pereira was not required to disclose juvenile and other stale criminal offenses, especially misdemeanors and those for which he was never charged or convicted. As a matter of law, NBPD is probably prohibited from doing so, even if they had already learned of the record through a CORI review. See G.L.c.31,§20; G.L.c.151B, §4(9). Nevertheless, when asked about these offenses at his 2017 interview, Mr. Pereira was fully forthcoming, but still maintaining that he did not intend to be untruthful in 2012 when he answered these ambiguous questions: "NO". Moreover, in 2016, the NBPD eliminated using the "Personal History Questionnaire", no longer asks applicants those problematic questions and did not use the underlying conduct to justify the bypass. It is inconsistent with basic merit principles to allow New Bedford now to reach back to the answers on the 2012 questionnaire as reason to disqualify Mr. Pereira as unsuitable.

Third, while the Commission appreciates the obligations of the so-called Brady rule, it bears notice that the Commonwealth takes a somewhat different path from the federal courts in the type of exculpatory evidence that must be disclosed in a criminal prosecution and, in particular, evidence "beyond information held by agents of the prosecution team" is subject to other, stricter rules. See, e.g., Mass.R.Crim.P. 14(a)(1)(A); Commonwealth v. Laguer, 448 Mass. 585 (2007) Thus, information found in an employment application package, especially involving incidents, such as here, that occurred a decade or more ago and/or when the applicant was a juvenile, if relevant at all to a future prosecution, typically, would be subject to stricter limits imposed on internal affairs investigation and personnel files. See, e.g., Worcester Telegram & Gazette Corp. v. Chief of Police, 58 Mass.App.Ct. 1, rev.den. 440 Mass. 1103 (2003) (employment applications); Commonwealth v. Wanis, 426 Mass. 639, 643-44 (1998) (internal affairs files)

Information Provided by Officer A

The criticism about Mr. Pereira's discomfort in answering questions about his 2011 or 2012 firearms application, as well as for sending a text message to his friend on the NBPD upon learning he would be granted another interview after five failed attempts, raises other concerns.

First, the involvement of Officer A in this hiring process, in general, and, in particular, with respect to Mr. Pereira, when he and Lt. B. knew that Officer A's brother was competing for a position with Mr. Pereira and Lt. B knew Officer A may have reason to "dislike" Mr. Pereira, presents an unacceptable appearance of impropriety that must be strictly avoided. See, e.g., Phillips v. City of Methuen, 28 MCSR 345 (2015 ("Employees whose immediate family members are seeking appointment should have no role in any part of the review and selection process . . ."). See also, Lima v. City of Somerville, 30 MCSR 103 (2017); Dorney v. Wakefield Police Dep't, 29 MCSR 405 (2016); Civil Service Comm'n v. Town of Braintree (Investigation),

28 MCSR 114 (2015); Civil Service Comm'n v. City of Springfield (Investigation), 24 MCSR 627 (2011); Civil Service Comm'n v. Town of Oxford (Investigation), CSC No. I-11-280, -- MCSR – (2011) For that reason, alone, I am persuaded that basic merit principles precludes New Bedford from relying on Officer A's unsolicited report to Lt. B about the 2011/2012 firearms application that he only knew because of his earlier problematic participation in the 2012 interview with Mr. Pereira and the disclosure of a harmless text message that, in effect, breached the confidence of a fellow officer. I also note that, in this case, the 2017 background investigator, Lt. A, expressly noted in his report that he did not circulate any internal requests to his fellow officers inviting information about Mr. Pereira.[11]

Second, New Bedford exacerbated the problem by choosing to rely on Officer A's information without further vetting and declined to advance Mr. Pereira to the next level – a Captains Board of superior officers (or, as sometimes is warranted, using outside sources to vet candidates when potential conflict situations arise). While not being able to cure the initial impropriety, an independent review would, at least, have had an opportunity to more impartially handle the significance of this issue. In particular, further vetting Lt. B's conclusion that Mr. Pereira lacked candor and honesty because he (truthfully) said he was not "comfortable" answering questions about his firearms application would have discovered he lacked some essential facts because the issue was dropped in the 2017 interview without asking Mr. Pereria why he was uncomfortable and without ever learning what happened in 2012 when this issue was discussed. Officer A did know about the 2012 interview but never shared that part of his

[11] I have not overlooked the fact that Lt. B was placed in a difficult position after Officer A came to him with information that was arguably relevant to the NBPD's consideration of a candidate and, once he learned the information, believed he had to make use of it. There may well be a case in which the information about a candidate that routinely came into the possession of the officer whose family member was also a candidate and is so objectively critical to suitability, that its use would be justified, but that would be the exception, not the rule. The circumstance of this appeal do not warrant making that exception here.

knowledge with Lt. B, nor was he ever asked about it until the Commission hearing. This situation is particularly problematic, as Officer A's brother –the key source of the appearance of impropriety – was advanced to the Captains Board, despite a far more serious workplace offense than correcting an application or spouting off to a friend.[12]

Third, wholly apart from the unusual way in which the text message came to Lt. B's attention, New Bedford blew its significance out of proportion, implying at his interview (and in the bypass letter) that, stating the NBPD was "desperate" meant Mr. Pereira admitted he wasn't qualified, when Mr. Pereira meant nothing of the sort. Rather, as he freely explained during his interview and at the Commission hearing, he sent his friend the text because he was surprised that NBPD was going to give him a second chance, which I find the evidence showed to be a plausible, honest and credible explanation for his isolated sarcastic remarks to a friend on the NBPD.

Other Issues

I need address only summarily the remaining reasons New Bedford used to bypass Mr. Pereira. His few clerical errors in completing the 2017 Employment Application are not disqualifying, even in the view of Lt. B, who acknowledged that applicants often make mistakes on the application and are allowed to fix them. The implication that Mr. Pereira was not suited for "dangerous" police work because he chose to leave the military and remain with the expectant mother of his first-born child, rather than have his enlistment extended by a long-term overseas employment, is mere speculation and flies in the face of all of the evidence to the contrary about Mr. Pereira's "honorable" service as a military police officer for almost six years

[12] The same point could be raised about depriving Mr. Pereira an opportunity to state his case that the background investigators got the facts wrong and erroneously treated his honorable administrative discharge as discipline.

and his persistent commitment to continue a career in law enforcement with the NBPD to "protect and serve" the citizens of New Bedford.

CONCLUSION

In sum, for the reasons stated herein, this appeal of the Appellant, Andrew (Andy) Pereira, 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 City of New Bedford in its delegated capacity take the following action:

- Place the name of Andrew (Andy) Pereira at the top of any current or future Certification for the position of NBPD permanent full-time Police Officer until he is appointed or bypassed after consideration consistent with this Decision.
- If Mr. Pereira is appointed as an NBPD Police Officer, he shall receive a retroactive civil service seniority date which is the same date as the first candidate ranked below Mr. Pereira who was appointed from Certification No. 04224. This retroactive civil service seniority date is not intended to provide Mr. Pereira with any additional pay or benefits including, without limitation, creditable service toward retirement.

Civil Service Commission
/s/Paul M. Stein
Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 28, 2019.

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

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

Notice:
Joseph Sulman, Esq. (for Appellant)
Jane Medeiros Friedman, Esq., (for Respondent)
Michele Heffernan, Esq. (HRD)