Decision mailed: 3/6/07 TM
Civil Service Commission

COMMONWEALTH OF MASSACHSETTS
CIVIL SERVICE COMMISSION

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

FREDERICK T. PREECE, JR.
Appellant

v.

DEPARTMENT OF CORRECTION,
Respondent

Case No.: G1-05-5

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on March 1, 2007 to acknowledge receipt of the report of the Administrative Law Magistrate dated January 24, 2007 as well as the comments subsequently received by the Appellant and the Appointing Authority. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby ***dismissed.***

By vote of the Civil Service Commission (Bowman, Guerin, Marquis, Commissioners; [Goldblatt, Chairman, Taylor, Commissioner – Absent]) on March 1, 2007.

A true record. Attest.

Christopher C. Bowman
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL c. 30A S. 14(1) for the purpose of tolling the time for appeal.
Under the provisions of MGL c. 31 S. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice to:
Paul W. Patten, Esq.
Jeffrey Bolger (DOC)
John Marra, Esq. (HRD)
Joan Freiman Fink, Esq.

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals
98 North Washington Street, 4th Floor
Boston, MA 02114
www.mass.gov/dala

Tel: 617-727-7060
Fax: 617-727-7248

January 24, 2007

Lydia Goldblatt, Chairman
Civil Service Commission
One Ashburton Place
Boston, Ma. 02108

Paul W. Patten, Esq.
56 North Main Street
Fall River, Ma. 02720

Jeffrey Bolger
Department of Correction
PO Box 946
Industries Drive
Norfolk, Ma. 02056

RE: *Frederick T. Preece, Jr. v. Department of Correction*, G1-05-5, CS-07-53

Dear Madame Chairman, Mr. Patten and Mr. Bolger:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that pursuant to 801 CMR 1.01(11)(c), they have thirty (30) days to file written objections to the decision to the Civil Service Commission which may be accompanied by supporting briefs.

Very truly yours,

Joan Freiman Fink

Joan Freiman Fink, Esq.
Administrative Magistrate

Encl.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Division of Administrative Law Appeals

Frederick T. Preece, Jr.,
Appellant

Docket No. G1-05-5
DALA No. CS-07-53

v.

Department of Correction,
Appointing Authority

Appearance for Appellant:

Paul W. Patten, Esq.
56 North Main Street
Fall River, Ma. 02720

Appearance for Appointing Authority:

Jeffrey Bolger,
Department of Correction
P.O. Box 946
Industries Drive
Norfolk, Ma. 02056

Administrative Magistrate:

Joan Freiman Fink, Esq.

RECOMMENDED DECISION ON MOTION FOR SUMMARY DECISION

Pursuant to G.L. c. 31 §2(b), the Appellant, Frederick T. Preece, Jr., is appealing the decision to bypass him for appointment as a Correction Officer with the Department of Correction (DOC). On January 27, 2005, the Human Resources Division accepted the reasons proffered by the DOC for this bypass (Exhibit 7). The Appellant filed an appeal of this decision with the Civil Service Commission in accordance with the provisions of G.L. c. 31 §2(b) (Exhibit 7).

On April 27, 2005, the Appellant submitted a Motion for Summary Decision. The Respondent submitted an Opposition to the Motion for Summary Decision on September 29, 2006. On October 6, 2006, the Appellant submitted a Motion to Strike Respondent's Opposition to the Motion for Summary Decision.

A hearing on the Motion for Summary Decision was held on January 22, 2007 at the offices of the Division of Administrative Law Appeals, Boston, Ma. Various documents were entered into evidence at the hearing (Exhibits 1 – 9). The parties presented oral arguments at this hearing. No witnesses were called by either party. One cassette tape recording was made of the proceeding.

FINDINGS OF FACT

At the hearing, the parties agreed that there are no material issues of fact in dispute. They further agreed to the following facts which I now enter as findings no. 1 - 11:

1. The Appellant, Frederick T. Preece, Jr., d.o.b. 4/11/71, took the civil service examination for the position of Correction Officer I with the DOC. He scored a 94 on the examination and was placed on the Certification list No. 20400080 dated August 31, 2004 (Exhibit 2).
2. In September of 2004, the Appellant was notified to report to the DOC for a pre-screening process applicable to all candidates for the position of Correction Officer I.

3. As part of this pre-screening process, the Appellant executed a written waiver allowing the DOC to perform a Criminal Offender Record Information (CORI) background check.
4. On October 20, 2004, the DOC received the results of the CORI check that revealed that in October of 1991, the Appellant had been charged with second degree murder, assault and battery with a dangerous weapon, as well as various firearm violations including possessing a firearm without a permit and discharging a firearm (Exhibit 3).
5. The CORI check further revealed that on November 19, 1993, after a trial in Bristol Superior Court, the Appellant was found not guilty of all the charges (Exhibit 3).
6. In addition to the documents relating to the court proceedings, the DOC also received on October 20, 2004, a copy of the Incident Report from the New Bedford Police Department contained the underlying facts that led to the arrest of the Appellant on the above named charges. Included in this Incident Report were references to the Appellant's having engaged in aggressive behavior and having used racial epithets (Exhibit 9).
7. On December 30, 2004, the Appellant received written notification that he was being bypassed for the position as a Correction Officer I on the grounds that his background investigation had revealed an unsatisfactory criminal history record (Exhibit 4).
8. On January 27, 2005, the Human Resources Division of the Executive Office for Administration and Finance sent the Appellant notification that it had

accepted the reasons offered by the DOC for bypassing him for the position of Correction Officer I (Exhibit 7).

9. Pursuant to G.L. c. 32 §2(b), the Appellant filed a timely appeal of this decision with the Civil Service Commission (Exhibit 7).
10. On April 25, 2005, the Appellant filed a Motion for Summary Decision along with affidavits and a memorandum of law in support thereof.
11. The Respondent did not file a response to that Motion for Summary Decision until September 29, 2006 when it filed an Opposition to the Motion for Summary Decision on September 29, 2006. On October 6, 2006, the Appellant submitted a Motion to Strike Respondent's Opposition to the Motion for Summary Decision.

CONCLUSION AND RECOMMENDATION

There are no genuine issues of material fact in dispute in this case. Counsel for the Appellant raises two distinct arguments as to why his Motion for Summary Decision should be allowed and the decision to bypass the Appellant reversed. In the first instance, Counsel for the Appellant stresses that although he submitted a Motion for Summary Decision on April 25, 2005, the Respondent not only did not meet the seven day time period for filing a response to that motion pursuant to 801 CMR 1.01 (7), the Respondent did not submit a response until September 29, 2006, almost a year and one-half later. In addition, the Civil Service Commission failed to contact Appellant's Counsel scheduling of the Motion for Summary Decision despite the fact that Counsel

had called the Commission several times prior to September of 2006. Counsel for the Appellant argues that since neither the Respondent nor the Civil Service Commission responded to his Motion for Summary Decision in a timely fashion, the Appellant is entitled to prevail as a matter of law.

The Appellant is not entitled to prevail on this procedural issue. The Appellant has not demonstrated that his rights were in any way prejudiced by this delay. Mr. Preece was afforded a full hearing on both the procedural and substantive issues raised in his motion. At the current hearing, the parties were given an opportunity to present documentary and testimonial evidence as well as an opportunity to present extensive oral arguments. Counsel for the Appellant offered multiple exhibits which were marked into evidence. The Appellant voluntarily chose not to testify in his own behalf.

In the absence of any showing that the Appellant's rights were prejudiced by the delay in response to the Motion for Summary Decision, I recommend that the Civil Service Commission deny the Appellant's procedural claim.

In his Motion for Summary Decision, the Appellant notes that the sole reason offered by the DOC for bypassing him for appointment to the position of Correction Officer I was the fact that he was arrested and tried for various crimes including murder in the second degree and assault and battery with a dangerous weapon in the early 1990's. According to the Appellant, since he was found not guilty by a court of competent jurisdiction of all the criminal charges brought against him, the Civil Service Commission should reverse the decision of the Department of Correction bypassing him for the position of Correction Officer I. The Appellant further argues that the Civil

Service Commission is precluded from considering the underlying police records that led to his arrest as he was subsequently exonerated of all charges.

In a bypass case, the Civil Service Commission must determine "whether the appointing authority has sustained its burden or proving that there was reasonable justification for the action taken by the appointing authority." See *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). "Justified" in this context means "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." Id at 304.

In the current case, it is not disputed that in October of 1991, the Appellant was arrested on the charge of murder in the second degree, assault and battery with a dangerous weapon, and various firearm violations. It is also not disputed that in 1993 after a jury trial in the Bristol Superior Court, the Appellant was found not guilty of those charges.

However, notwithstanding the Appellant's argument, the Civil Service Commission has long held that an applicant's arrest record, even when there is no conviction, is entitled to consideration in the determination as to whether that applicant should be appointed to a particular position. See *Andre Lavaud v. Boston Police Department*, 12 MCSR 236 (1999) where the Civil Service Commission upheld the bypass of the Appellant for the position of police officer on the basis of his criminal history despite the fact that all the criminal charges against Mr. Lavaud had been dismissed. See also *Gerald Tracey v. City of Cambridge*, 13 MCSR 26 (2000); *Andre Thames v. Boston Police Department*, 17 MCSR 125 (2004); *Paul Brooks v. Boston*

Police Department 12 MCSR 19 (1999), and *Soares v. Brockton Police Department*, 12 MCSR 168 (2001).

Likewise, the Civil Service Commission may consider the underlying facts that led to the arrest including the official police report in its determination as to the suitability of an applicant for appointment to a certain position. In the current case, the incident report issued by the New Bedford Police Department that led to the Appellant's arrest on serious criminal charges contains references to the Appellant's propensity toward violence as well as his use of racial epithets.

After careful review of the evidence presented in this appeal, I conclude that based on the Appellant's criminal history, the DOC has met its burden of proof to demonstrate that its decision to bypass the Appellant for appointment to the position of Correction Officer I, a position that involves public trust, was fully justified. Accordingly, I recommend to the Civil Service Commission that it deny the Appellant's Motion for Summary Decision and that it affirm the decision of the Human Resources Division accepting the reasons proffered by the Department of Correction for bypassing the Appellant for appointment for the position to Correction Officer I.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Joan Freiman Fink
Administrative Magistrate

Dated:

The Commonwealth of Massachusetts
Executive Office of Public Safety
Department of Correction
Division of Human Resources
P.O. Box 946, Industries Drive
Norfolk, Massachusetts 02056
Phone: (508) 850-7888 Fax: (508) 850-5216

Mitt Romney
Governor

Kerry Healey
Lt. Governor

Edward A. Flynn
Secretary

Kathleen M. Dennehy
Commissioner

James R. Bender
Deputy Commissioner

January 29, 2007

Chairman Lydia Goldblatt
Civil Service Commission
One Ashburton Place, Room 503
McCormack Building
Boston, Massachusetts 02108

RE: **Case: G1-05-5, CS-07-53**

Dear Chairman:

Enclosed please find the Department of Correction's Motion to Adopt the Recommended Decision of the Hearing Officer in this matter. The Department of Correction reserves its right to file an opposition to any and all objections that may be filed on behalf of the Appellant in this matter. Kindly disregard the previous document as, due to a typographical error, the Appellants' name and docket number was incorrect.

If you have any questions please contact my office.

Very truly yours,

Jeffrey S. Bolger
Director Of Employee Relations

cc: Paul W. Patten, Esq.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS **CIVIL SERVICE COMMISSION**

Frederick T. Preece Jr.
Appellant

v. G1-05-5, CS-07-53

Department of
Correction,
Respondent

MOTION TO ADOPT THE RECOMMENDED DECISION OF THE HEARING OFFICER

The Department of Correction, pursuant to 801 CMR 1.01 (11)(C), hereby requests that the Civil Service Commission adopt the Recommended Decision of the Hearing Officer in this matter.

As Grounds, the Department states that:

The Hearing Officer's Recommended Decision was issued pursuant to M.G. L. c. 31 §2(b).

The Recommended Decision was issued in accordance with M.G.L. c. 30A §11(8). "The decision [was] accompanied by a statement of reasons for the decision, including determinations of each issue of fact and law necessary to the decision." M.G.L. c. 30A §11(8).

As the decision is consistent with the findings of fact in this matter, the Commission should adopt the Hearing Officer's Recommended Findings.

CONCLUSION

WHEREAS the Civil Service Commission should adopt the Recommended Findings issued in this matter.

Respectfully Submitted,

Jeffrey S. Bolger
Director of Employee Relations
Department of Correction
P.O. Box 946
Norfolk, MA 02056
(508) 850-7893

CERTIFICATE OF SERVICE

I, Jeffrey S. Bolger, hereby certify that I have sent the above Motion to Paul W. Patten, Esq. 56 North Main Street, Fall River, MA 02720 via first class mail.

Dated: 1-29-07

Jeffrey S. Bolger

PAUL W. PATTEN
Attorney-at-Law
Suite 221
56 North Main Street
Fall River, Massachusetts 02720
Telephone (508)672-3559
Fax (508)672-2401
Email: paulpatten@comcast.net

February 20, 2007

Lydia Goldblatt
Chairman
Civil Service Commission
One Ashburton Place
Boston, MA 02108

Re: Frederick Preece, Jr.
vs. Department of Correction
Case Nos. G1-05-5, CS-07-53

Dear Chairman Goldblatt:

Enclosed for filing please find Appellant's Objections to Recommended Decision on Motion for Summary Decision in the above action.

Thank you very much.

Very Truly Yours,

Paul W. Patten

enclosure (1)

cc: Jeffrey Bolger
Department of Corrections

Commonwealth of Massachusetts
Civil Service Commission

Case No. G1-05-5
CS-07-53

Frederick T. Preece, Jr.,
Appellant

vs.

Department of Correction,
Appellee

Appellant's Objections to
Recommended Decision on
Motion for Summary Decision

Now comes the Appellant and objects to the Recommended Decision on Motion for Summary Decision which was mailed to his counsel by Administrative Magistrate Fink on January 24, 2007, as follows:

1. As to the first paragraph on page 2 of said decision, the Appellant objects to the fact that that paragraph fails to mention that, as contained in the record in this action, the Appellant filed and served a motion on June 1, 2005 asking the Commission to render a decision on his motion for summary decision, i.e. 37 days after filing and serving his motion for summary decision and one year and five months before the Appellee ever bothered to file an opposition to that motion for summary decision;

2. As to paragraph #6 on page 3 of the said decision, the Appellant objects to the stated finding of fact that "the DOC also received on October 20, 2004, a copy of the Incident Report from the

New Bedford Police Department contained the underlying facts that led to the arrest of the Appellant on the above named charges." The bases of that objection are, as follows:

(a) No testimony whatsoever was placed before Administrative Magistrate Fink by the Appellees as to when the copy of that incident report was received by DOC or as to who, if anyone, at DOC ever reviewed that report prior to the decision having been taken to bypass the Appellant, despite the Appellee having the burden of proof in this matter. Consequently, the recommended decision's finding that that report was received by DOC "on October 20, 2004" is without foundation, particularly in light of the fact that the DOC's date stamp on that report is January 6, 2005. At the hearing in this matter on January 22, 2007, the Appellant specifically objected to any such conclusion being drawn by the administrative magistrate as to that "fact", and that objection is hereby renewed;

(b) Neither any police officer who contributed to the contents of that "incident report" nor any civilian described therein testified at the hearing in this matter on January 22, 2007 nor did the Appellee, which bears the burden of proof in this matter, produce the transcript of the Appellant's criminal trial or any other evidence to demonstrate that any of the "totem pole" hearsay statements contained in that police report were ever testified to under oath by any of the people to whom they were attributed in that report or that anything in that report was subsequently substantiated in any way. The Appellant specifically objected at the hearing in this matter on January 22, 2007 to the admission into evidence of that incident report on the grounds of it being an irrelevant and impermissible piece of evidence because it is nothing more than unsworn, unsubstantiated totem pole hearsay as to which the administrative magistrate had not a shred of evidence before her as to the reliability of anything contained within it, and the

Appellant hereby renews that objection to the admission and consideration of that report as evidence in support of the recommended decision.

3. As to the conclusion of the recommended decision that the Appellant did not suffer prejudice as a result of the Appellee's failure to comply with the requirement of 801 C.M.R. 1.01(7) that it file a response to the Appellant's motion for summary decision and, therefore, the Appellant is not entitled to a decision in his favor, the Appellant objects to that conclusion, on the following bases:

(a) contrary to the contention on pages 4 and 5 of the recommended decision "that Counsel had called the Commission several times prior to September of 2006" for the purpose of getting the motion for summary decision heard, the contents of the record are clear that, despite the Appellee having been timely served with that motion on April 25, 2005, it did not file a response within seven days as required by rule 1.01(7) nor ask either counsel for the Appellant or the Civil Service Commission for an extention of that seven day period, and that, rather than merely calling the Commission, the Appellant filed a clear and specific motion for the Commission to make a decision on his unopposed motion for summary decision, on June 1, 2005, and served notice of that filing on the Appellee, so that both the Commission and the Appellee were on specific notice that the Appellant had filed such a motion for summary decision, no opposition – timely or otherwise – had been filed to that motion and the Appellant was aggressively seeking a decision on that unopposed motion. Despite that action on the Appellant's part, he was made to wait an additional one and a half years before ever getting a response to that motion from the Appellee in regard to a job which he had been trying to obtain since September of 2004; and,

(b) The recommended decision's conclusion that the Appellant was not prejudiced is arbitrary and contrary to law in the face of such a delay and, in addition, is particularly against public policy in light of the fact that, in the absence of the Appellee having been required to produce any rational justification for its delay in responding to the Appellant's motion, the recommended decision amounts to a declaration that the rules of adjudicatory procedure governing actions before the Civil Service Commission are going to be treated by the Commission as if they are superfluous.

4. The Appellant objects to the recommended decision's conclusion, as set out on pages 6 and 7 of that recommended decision, that the bypass of the Appellant should be upheld because (1) the Commission can consider a past arrest record, even where no conviction has taken place, and (2) the Commission may consider "the underlying facts", including the "official police report", by which Administrative Magistrate Fink appears to mean the alleged incident report from the New Bedford Police Department in the present case. The bases of that objection are as follows:

(a) As discussed above in paragraph 2, the use of the alleged incident report as a basis for supporting the bypass of the Appellant was, and is, objected to on the grounds that no testimony or other evidence was placed before Administrative Magistrate Fink to demonstrate that that document was anything other than a collection of unsworn, unsubstantiated, multi-layered hearsay statements. In short, she had nothing on which to conclude that the contents of that report were in any way reliable, particularly in the face of the fact that a full trial on the merits had taken place, which resulted in a judgment in favor of the Appellant on all charges, at which testimony had been taken from witnesses who had been sworn under oath to tell the truth. Without the Appellee, who bears the burden of proof in this action, having at least produced the

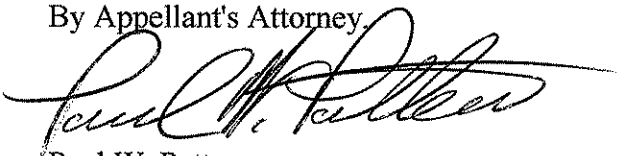
transcript of that trial, Administrative Magistrate Fink had nothing other than her own subjective, arbitrary whim on which to conclude that the totem pole hearsay contents of that incident report carried any "indicia of reliability and probative value". Merisme v. Board of Appeals, 27 Mass. App. Ct. 470, 475 (1989);

(b) The decisions cited by Administrative Magistrate Fink for support of her conclusion that a prior arrest record can be considered, even in the absence of a conviction, do not support a conclusion that a bypass can be justified on the basis of a criminal charge followed by a finding of not guilty on all charges, as occurred in the present case. In each of those cases, although there was no conviction, there was some objective evidence for civil purposes that the individual involved had admitted to some sort of questionable behavior in those cases in the form of admissions to sufficient facts, continuances without a finding and/or payment of fines or court costs. In the present case, by contrast, the Appellant was charged with crimes, went before a jury on those accusations and found not guilty. Without more, those criminal proceedings which resulted in his acquittal cannot be used to justify his bypass. Cf. Crowley v. Department of Correction, 15 M.C.S.R. 16 (2002); and,

(c) Denying the Appellant employment on the basis of him having been criminally charged and acquitted, would constitute a violation of, at least, the intent of G.L.c. 276, sec. 100C.

As a result, the recommended decision is based on unlawful procedure and is arbitrary and capricious, not based on substantial evidence and/or otherwise in violation of law.

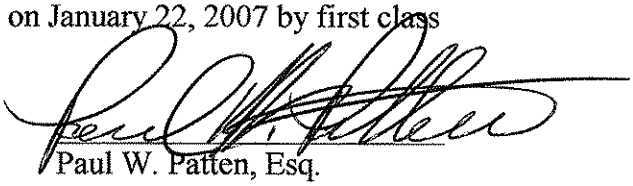
By Appellant's Attorney,



Paul W. Patten
Suite 221
56 North Main Street
Fall River, MA 02720
(508)672-3559
BBO#391400

Certificate of Service

I, Paul W. Patten, attorney for the Appellant, certify that, on 2/20/07, I mailed a copy of this document to Jeffrey S. Bolger, who appeared on behalf of the Appellee at the hearing which took place before Administrative Magistrate Fink in this action on January 22, 2007 by first class mail, postage prepaid.



Paul W. Patten, Esq.

The Commonwealth of Massachusetts
Executive Office of Public Safety
Department of Correction
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Deval L. Patrick
Governor

Timothy P. Murray
Lieutenant. Governor

Kevin M. Burke
Secretary

Kathleen M. Dennehy
Commissioner

James R. Bender
Deputy Commissioner

February 27, 2007

Commissioners
Civil Service Commission
One Ashburton Place
Boston, MA 02108

RE: G1-05-5
Frederick Preece, Jr.

Dear Commissioners:

Enclosed for filing in the above referenced matter, please find the Respondent's Motion to Adopt the Recommended Decision of the Hearing Officer and Opposition to Appellant's Objections.

Sincerely,

Jeffrey S. Bolger
Director of Employee Relations

cc: Richard Greene, Deputy Director, Division of Human Resources
Paul W. Pattern Esq., 56 North Main St., Fall River, MA 02720

s:\jsb07\G1-05-5-Preece, Frederick-csc

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS **CIVIL SERVICE COMMISSION**

Frederick T. Preece Jr.
Appellant

v. G1-05-5

Department of
Correction,
Respondent

MOTION TO ADOPT THE RECOMMENDED DECISION OF
THE HEARING OFFICER AND OPPOSITION TO APPELLANT'S OBJECTIONS

The Department of Correction, pursuant to 801 CMR 1.01 (11)(C), hereby requests that the Civil Service Commission adopt the Recommended Decision of the Hearing Officer in this matter.

ARGUMENT

I. THE HEARING OFFICER'S FINDINGS OF FACT AND RECOMMENDED DECISION ARE CONSISTENT WITH APPLICABLE LAW.

The Hearing Officer's Recommended Decision was issued pursuant to M.G. L. c. 31 §2(b). The Recommended Decision was issued in accordance with M.G.L. c. 30A §11(8). "The decision [was] accompanied by a statement of reasons for the decision, including determinations of each issue of fact and law necessary to the decision." M.G.L. c. 30A §11(8). All of the statutory requirements applicable in this instance were adhered with and there was no error of fact or law. As the decision is consistent with the findings of fact in this matter, the Commission should adopt the Hearing Officer's Recommended Findings.

II. THE APPELLANT'S OBJECTIONS SHOULD BE DENIED.

The Summary Judgment determination was appropriate in this case.

On or about April 27, 2005 the Appellant submitted a Motion for Summary Judgment. The Respondent submitted an Opposition to that Motion and a hearing was conducted on January 22, 2007. The Administrative Magistrate issued a Recommended Decision on the Appelant's Motion for Summary Decision. The Appellant filed an Objection to the Recommendations dated February 20, 2007. For all of the reasons herein, the Objections should be denied.

First, the Appellant filed a Motion for Summary Decision in an effort to secure appointment with the Respondent. The Summary Decision was filed pursuant to the 801 CMR 1.01 (7) (e). That applicable portion of the regulations indicate:

> (h) Motion for Summary Decision. When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues. 801 CMR 1.01 (7)(3)(e).

As indicated in the Recommended Decision, " [T]he parties agreed that there are no material issues of fact in dispute." Also, the doctrine of summary decision mirrors the federal court summary judgment practice. In the federal court there is a significant matter of case law that defines the summary decision procedure. In the federal court a party is entitled to summary judgment when there is no "genuine issue of material fact" and the undisputed facts warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56 (c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). In addressing a motion for summary judgment, "the court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in [its] favor." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Whether any disputed issue of fact exists is for the Court to determine. Balderman v. United States Veterans Admin., 870 F. 2d 57, 60 (2d Cir. 1989). Therefore, as it was the Appellant that

purposefully availed himself to the Summary Decision process and the procedure provides that it is the Administrative Magistrate that makes the determination of relevant facts, the objections should be denied.

(i) The omission of a filing date was within the discretion of the Administrative Magistrate.

The Appellant has objected to the alleged omission of a filing date in paragraph one of the Appellant's Motion. In this matter, the Appellant has purposefully availed himself to the summary decision procedure. The Appellant indicated that there are no material issues of fact before the motion hearing. Now after the Appellant has received an unfavorable decision, he is alleging that the Administrative Magistrate failed to consider relevant facts. The parties had agreed that there are no issues of material fact and the summary decision process defers the relevancy of material facts to the hearing officer. Therefore, the Appellant's objections indicated in paragraph one should be denied.

(ii) The admissibility and evidentiary values assigned by the Administrative Magistrate to the police reports were appropriate.

The Respondent maintains that the Administrative Magistrate's authority to assign relevancy and apply the appropriate weight to the information on the record is discretionary and was applied consistent to applicable law. However, the Respondent addresses the objections in paragraph two of the Appellant's Motion.

The Appellant's next objection is to the allowance of information that supports the bypass of the Appellant. The December 30, 2004 bypass letter indicates that the criminal history check was the cause for the bypass of the Appellant. Therefore, the underlying evidence that the Respondent utilized to make that determination, "the criminal history check" and the background investigation is relevant and necessarily admissible. Therefore, this objection should be denied.

The second objection in paragraph two is baseless and without sound reasoning. As the Commission has indicated that the reliance on "hearsay records such as police reports to justify bypass of a candidate" is appropriate, the admissibility of the police reports in this matter was justified. Roach v. Boston Police Department, 11 MCSR 48 (1998).

(iii) The Appellant's objections to the Administrative Magistrates rulings on his motion to strike the Respondent's submission in opposition to the Motion for Summary Decision is frivolous and without a basis in law.

In this case, the Appellant has objected to the Administrative Magistrate's determination that he is not entitled to prevail as a matter of law. In paragraph three of the Appellant's Motion he alleges that he was entitled to prevail as a matter of law. As indicated on the record, the Appellant filed a Motion for Summary Decision. The Respondent did reply. The reply was not within the prescribed time limits of the regulations. The Administrative Magistrate entertained the Appellant's argument that his appeal is required to be allowed because of this technical issue. The Administrative Magistrate found no prejudicial harm and, as the Appellant could provide no justification in statute or case law, the request was denied. This determination was appropriate and the exact nature of determinations that 801 CMR 1.01 permits the Commission to defer to an Administrative Magistrate. As evidenced throughout the Appellant's submissions in this matter, relevant case law and or equitable reasoning is painfully absent from the entire Appellant's Motion. Therefore, the objection should be denied.

(iv) The Respondent's reliance on the police reports was consistent with applicable law.

The Appellant objects to the Respondent's reliance on the underlying facts within a police report for the bypass in paragraph four of the Appellant's motion. The Appellant fails to address the lengthy and well-established case law that permits this reliance. As the case law dictates, the Respondent is justified in bypassing an applicant based upon; a criminal history (Tracey v City of Cambridge, 13 MCSR 26 (2000)), allegations of criminal violations without conviction (Lavaud v. Boston Police Department, 12 MCSR 236 (1999)), derogatory police reports (Brooks v. Boston Police Department, 12 MCSR 19 (1999)), and their reliability although hearsay (Roach v. Brockton Police Department, 11 MCSR 48 (1998)). Therefore, the objection should be denied.

(v) The objection to the approval of the bypass based upon M.G.L. c. 276 § 100c should be denied.

The objection to the bypass based upon M.G.L. c. 276 § 100c (Law) should be denied as the statute excludes law enforcement agencies from this statute. The Law indicates that commonwealth employment may not be denied an applicant based upon criminal charges that were disposed of with a finding of not guilty. The statute prohibits the dissemination of the information by the courts to an employer when requested. However, the statute eliminates "law enforcement" agencies from this dissemination prohibition. That is, all commonwealth employers that request a criminal history of an applicant that was found "not guilty" shall receive a "no record" determination. However, law enforcement agencies shall receive the information about the underlying charges. Therefore, the law enforcement agencies, like the Respondent, are excluded from the c. 100c prohibitions. This exclusion coupled with the current Commission case law requires the denial of this objection.

CONCLUSION

WHEREAS the Civil Service Commission should deny the Appellant's objections and adopt the Recommended Findings issued in this matter.

Respectfully Submitted,

Jeffrey S. Bolger
Director of Employee Relations
Department of Correction
P.O. Box 946
Norfolk, MA 02056
(508) 850-7893

CERTIFICATE OF SERVICE

I, Jeffrey S. Bolger, hereby certify that I have sent the above Motion to Paul W. Patten, Esq. 56 North Main Street, Fall River, MA 02720 via first class mail.

Dated: 2/27/07

Jeffrey S. Bolger

THE COMMONWEALTH OF MASSACHUSETTS
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April 4, 2008

Cynthia Ittleman, Esq.
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Frederick Preece v. Civil Service Comm'n et al
Bristol Superior Court 07-510

Dear Ms. Ittleman:

Please find enclosed copies of the briefs in this judicial review action. Please do not hesitate to contact me at (508) 990-9700, Ext. 111 with any questions.

Very truly yours,

Timothy R. McGuire
Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS

SUPERIOR COURT
DOCKET No. 2007-510B

FREDERICK T. PREECE, Jr.
Plaintiff,

v.

MASSACHUSETTS CIVIL SERVICE COMMISSION, DEPARTMENT OF CORRECTION AND PERSONNEL ADMINISTRATOR OF THE MASSACHUSETTS HUMAN RESOURCES DIVISION,
Defendants.

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS TO ENTER FOR THE DEFENDANTS

This case arises out of plaintiff's efforts to obtain employment as a "Correction Officer I" with the Department of Correction. (Complaint para. 5 & 6). The plaintiff took the relevant civil service examination and appeared on a civil service list dated Feb. 28, 2005. (R. 85). The Department of Correction ("DOC") did not hire the plaintiff but bypassed him pursuant to G.L. c. 31, § 27. (R. 6). The plaintiff first appealed the bypass decision to the Human Resources Division ("HRD"). The HRD upheld the DOC's decision to bypass the plaintiff. (R. 25). Before the HRD rendered its decision, the plaintiff filed an appeal to the Commission (R. 4 – original notice of appeal and R. 17 – amended notice of appeal).

Here both the DOC and the Commission were apparently troubled by plaintiff's involvement in a shooting incident in 1991. A young man named Juan Flores, Jr. was shot to death in the Bluemeadow housing project in New Bedford, MA. (R. 125 and

133). Plaintiff had been seen in two separate arguments shortly before the shooting. (R.138 and 126). The first argument was with a male named "Gilly" who was riding a bicycle. (R. 138). Plaintiff pushed Gilly off the bicycle to the ground. (R. 138). Gilly promised to return with "his boys." (R. 138). Approximately 10 minutes later Gilly did return with 6 or 7 other males including the shooting victim Juan Flores, Jr. (R. 138). There was then an argument between Preece and the shooting victim with Preece threatening the victim and also threatening to come back with his own friends to "clean house." (R. 126).

One witness actually saw the plaintiff shoot the victim (R. 127) and the victim double over. (R.127). That witness then saw the plaintiff dispose of the weapon and pointed the police to the general area where the weapon was thrown. (R. 127). The police recovered a small silver handgun during a search of the area indicated. (R. 127 and 132). When the police located plaintiff, just a few minutes after the shooting, he had numerous minor injuries. (R. 131). Plaintiff explained his injuries by saying that he had gotten "jumped by a bunch of Niggers over at the project." (R. 131).

I. STANDARD OF REVIEW

When an appointing authority wishes to appoint a person other than the highest person on a certified list, the procedure is known as a bypass. In the event of a bypass, the appointing authority is required to immediately file with the Personnel Administrator a written statement of its reasons for appointing the lower person on the list. G.L. c. 31, § 27. No appointment is final until the Personnel Administrator passes on the validity of the reasons submitted for the bypass. See MacHenry v. Civil Service Comm'n, 40 Mass. App. Ct. 632, 635 (1996). If the administrator accepts the reasons given, the applicant

can appeal to the Civil Service Commission. G.L. c. 31, § 2. The role of the Commission is to decide whether the appointing authority has sustained its burden of proving that there was reasonable justification for the employment action. Town of Burlington v. McCarthy, 60 Mass. App. Ct. 914, 915 (2004). Thereafter an aggrieved party may institute proceedings for judicial review in the Superior Court. G.L. 31, § 44. Those proceedings: "shall, insofar as applicable, be governed by the provisions of section fourteen of chapter thirty A." G.L. c. 31, § 44.

This action seeks judicial review of the Commission's decision dated March 1, 2007 (R. 164) pursuant to G.L. c. 31, § 44 and c. 30A, § 14. (Complaint). Judicial review under G.L. c. 30A, § 14, is limited. Review is confined to the administrative record and the burden rests with the plaintiff to overcome the presumption that the Commission's decision is valid. See G.L. c. 30A, § 14; Foxboro Harness, Inc. v. State Racing Comm'n, 42 Mass. App. Ct. 82, 85-86 (1997). The Commission's decision must be upheld if it is free from legal error, is supported by substantial evidence, and is not arbitrary or capricious or an abuse of discretion. See G.L c. 30A, § 14(7). "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Cherubino v. Board of Registration of Chiropractors, 403 Mass. 350, 354 (1988), quoting G.L. c. 30A, § 1(6). While the court must consider the whole record, including whatever fairly detracts from the weight of the Commission's decision, so long as substantial evidence supports the Commission's decision, the court should not substitute its view of the facts. A decision is not arbitrary and capricious unless it lacks any rational explanation that reasonable persons might support. City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303 (1997). Moreover, an agency will not be found to

have abused its discretion unless its decision rests on whimsy, caprice, or arbitrary or idiosyncratic notions. Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 266 (2001)(internal quotation marks omitted).

In reviewing the Commission's decision the court must give due weight to the "experience, technical competence, and specialized knowledge of the [Board], as well as to the discretionary authority conferred upon it." Flint v. Comm'r of Public Welfare, 412 Mass. 416, 420 (1992), quoting G.L. c. 30A, § 14(7). Moreover, the court may not substitute its judgment for that of the Commission, Southern Worcester County Regional Vocational School District v. Labor Relations Comm'n, 386 Mass. 414, 420-21 (1982), and must acknowledge that the Commission is the sole judge of the credibility and weight of the evidence before it during the administrative proceedings. Greater Media, Inc. v. Department of Public Utils, 418 Mass. 409, 417 (1993). The court may not dispute the Commission's choice between two conflicting views, "even though the court would justifiably have made a different choice had the matter come before it de novo." Zoning Board of Appeals of Wellesley v. Housing Appeals Comm'n, 385 Mass. 651, 657 (1982).

The decision of the appointing authority is subject to two levels of review. In the first instance, bypass decisions are reviewed by the Personnel Administrator. G.L. c. 31, 27. A party then has the right to appeal to the Civil Service Commission. G.L. c. 31, § 2(b). Thereafter an aggrieved party may file for judicial review. G.L. c. 31, § 44.

The Massachusetts Administrative Procedure Act contemplates that some matters will be resolved through the two-level system of review. G.L. c. 30A, § 10. The advantage of such a system is that the first informal proceeding may resolve many problems to the parties' satisfaction more quickly than a more formal proceedings. See

Alexander J. Cella, Robert F. Fitzpatrick, Jr. and Gerald A. McDonough, Administrative Law and Procedure, § 382 (West). In such a two-level system, only the last hearing must comply with the requirement of G.L. c. 30A. "When a party to an adjudicatory proceeding has the opportunity by provision of any law or by regulation, to obtain more than one agency hearing on the same question, whether before the same agency or before different agencies, it shall be sufficient if the last hearing available to the party complies with the requirements of this chapter, and the earlier hearing need not so comply." G.L. c. 30A, § 10 (emphasis supplied); Space Building v. Comm'r of Revenue, 413 Mass. 445, 450 (1992).

II. ARGUMENT

A. THE CIVIL SERVICE COMMISSION PROPERLY CONSIDERED THE POLICE REPORTS AND PROPERLY UPHELD THE BYPASS

The plaintiff suggests that the Commission's decision should be overturned because there is insufficient evidence that the New Bedford Police incident reports were reviewed by the appointing agency (DOC) before it decided to bypass the plaintiff. (Plaintiff's Brief p. 3). Plaintiff has long theorized that the DOC decided to bypass the plaintiff based solely on his probation record and then tried to use after-acquired police reports to justify the bypass: "All he had was the fact that my client was charged with crimes, including murder, went to trial, was found not guilty on it, right across the board. Period. And then subsequently they obtained the police reports and used the police reports to try and justify their decision." (R II-7)(transcript of hearing). The Commission found as a fact that the DOC had copies of both the plaintiff's Board of Probation record (hereinafter "CORI"), and the New Bedford Incident reports before DOC decided to

bypass the plaintiff. (R. 142). This finding is well supported by the record. (R. 52 and 125). There are multiple copies of the police reports in the record. (R. 52 and 125). They were received at different times. (R. 52 and 125). The plaintiff's argument requires the court to ignore the earliest of the date-stamped copies and review only the later-received copy. A copy of the police reports appears in the record bearing a fax-imprinted date of October 4, 2004. (R. 125). The DOC was conducting its investigation on that day. (R. 107 and 108)(Plaintiff's CORI record bearing date of 10/20/04 on page 107 and showing system accessed by DOC for an "investigation" at p. 108). The fax-imprinted date establishes that, contrary to plaintiff's contention the DOC did have the police reports when they made their decision on the bypass. The Commission did not err in considering these reports.

The plaintiff's argument also overlooks the fact that the Commission hears cases de novo and is authorized to hear new evidence never considered by the personnel administrator. Generally, the courts have held that the Commission hears matters de novo. City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003)(dealing with Commission's review of Personnel Administrator's decision on discipline/removal). Hearings before the Commission are governed by the Standard Adjudicatory rules 801 CMR 1.01 which contemplate a full hearing on the merits. See 801 CMR 1.01(f), which provides in part: "All Parties shall have the right to present documentary and oral evidence, to cross-examine adverse or hostile witnesses, to interpose objections, to make motions and oral argument. In a de novo hearing the second hearing may hear new evidence not presented at the first hearing. Pendergast v. Board of Appeals of

Barnstable, 331 Mass. 555, 558 (1954); Prudential Insurance Company of America v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278, 284 (1986).

In a case seeking judicial review of administrative agency action, where the administrative record shows that the agency acted lawfully, the reviewing court should resolve the case by entering judgment affirming the agency's determination. E.g., Commerce Ins. Co. v. Comm'r of Ins., 447 Mass. 478, 493 (2006)(review under G.L. c. 30A); Fafard v. Conservation Comm'n of Barnstable, 432 Mass. 194, 195, 207 (2000)(same result when review under G.L. c. 249, § 4). Here the Commission properly considered the police reports for two independent reasons: (1) the reports were clearly before DOC when it decided to bypass the plaintiff and (2) even had the reports not been before the DOC the Commission in hearing the matter de novo could consider the reports as new evidence.

B. RELIABILITY OF THE POLICE REPORTS

The Commission properly relied on the police reports to establish the plaintiff's actions at the time of the shooting. Administrative agencies may base their decisions "on hearsay alone if that hearsay has indicia of reliability." Covell v. Dept. of Social Services, 439 Mass. 766, 786 (2003)(holding that DSS's decision to support a report of child abuse and list plaintiff's name on registry of alleged perpetrators was supported by substantial evidence, even though based entirely on hearsay reports of allegations by the child), quoting from Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 530 (1988)(which held that ABCC's decision to suspend plaintiff's license for serving alcohol to a minor was supported by substantial evidence, even though only evidence of unlawful conduct was hearsay).

There is no merit to plaintiff's argument that the Commission could not rely on reliable hearsay evidence from the police reports entered as Exhibit 9 at the hearing. (R. 125). First the applicable statute specifically permits agencies to consider hearsay and other evidence that would not be admissible in court. The Massachusetts Administrative Procedure Act expressly provides that agencies need not observe the formal rules of evidence: "...agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law." G.L. c. 30A, § 11(2).
The Supreme Judicial Court has held that an administrative decision can be based entirely on hearsay evidence, so long as the evidence is reliable. It has also been held that factually detailed police reports like those at issue here are reliable and can be relied upon without testimony by the reporting officers, even in probation revocation hearings that involve the deprivation of one's constitutionally protected liberty interest. "Substantial evidence may be based on hearsay alone if that hearsay has 'indicia of reliability,'" Covell at 786.

The question in reviewing whether an administrative decision is supported by substantial evidence "is not whether the administrative decision was based exclusively upon uncorroborated hearsay but whether the hearsay presented at the fair hearing was reliable." Edward E. v. Dept. of Social Services, 42 Mass. App. Ct. 478, 480 (1997).

The Supreme Judicial Court has held that a police report is reliable where it is factually detailed and based on personal knowledge. See Commonwealth v. Nunez, 446 Mass. 54, 59 (2006); Commonwealth v. Durling, 407 Mass. 108, 12-121 (1990). The Court has "noted that it is a crime for police officers to file false reports," and concluded that "this significantly bolsters the reliability of [police] reports." Durling 407 Mass. at

121 (citing G.L. c. 268, § 6A). Likewise, where the police report includes statements from civilians, the Court has found reliability to be established where the statement is factually detailed; based on personal knowledge and direct observation; made soon after the events occurred where the event was still fresh in the witness's mind; and where the statement is corroborated either by observations of the police or by the observations of another civilian witness. Commonwealth v. Nunez, 446 Mass. 54, 59 (2006). The Court has also noted that it is a crime to make a false report of crime (G.L. c. 269, §13A) and that this criminal exposure enhances the reliability of statements made to police. Nunez at 59. In the Nunez case the court found that the civilian's statement that he had been attacked with a knife to be corroborated by police observations of a hole in his sweatshirt: "Moreover, at least one of Lopez's statements is corroborated by the observations of Officer Casalis. (The officer saw the hold in Lopez's sweatshirt that Lopez indicated was made by his attacker.)" Id.

The corroboration in the case at bar is much stronger than in the Nunez case. The witness statements were detailed and interlocking. Each statement corroborated elements of other statements from other witnesses and was further corroborated by both (1) the physical evidence recovered by the police and (2) by Preece's own admissions.

The reports show that the police were dispatched to the area of 110 Jenkins Street in New Bedford on August 28, 1991, at 1:43 AM after receiving numerous phone calls regarding a shooting outside that address. (R. 134). Because of the nature of this complaint, the New Bedford Police responded in force to the crime scene. (R. 125). No fewer than 16 officers were involved in this investigation. (R. 129). The police immediately found a pool of blood and 6 spent small caliber cartridge casings in the

middle of Jenkins Street. (R. 134). Upon arriving at the scene the police were met by several individuals who volunteered statements regarding the shooting. (R. 125). One witness, a man named Edmund Tweedy told the police that a man he knew, - -one Fred Preece- - threatened the victim earlier that morning before the shooting. (R. 126). The shooting occurred at approximately 1:43 AM. (R. 130). Preece was arguing with a Puerto Rican male, who was part of a group of men, about an earlier incident which involved Preece attempting to push a male off a bicycle. (R. 126). Preece was yelling that he would "kick the male's ass." (R. 126). Tweedy also heard Preece tell the men that he would be back with his own friends to "clean house." (R. 126). Later Mr. Tweedy heard the gunshots and saw the victim bleeding from the stomach. (R. 127). Mr. Tweedy transported the victim to St. Luke's Hospital. (R. 127).

At least 3 witnesses who gave their names to the police gave a physical description of the suspect to the police. A witness named Tyrone Telfair saw an argument between a group of men in the Bluemeadow Housing Project. (R. 133). The argument was between a man he knew as Juan Flores (the shooting victim) and two other men, one of whom was wearing a red T-shirt and blue jeans. (R. 133). Telfair later heard 5 shots and ran towards Jenkins Street and saw Flores holding his left side and screaming "He shot me. He shot me." (R. 133).

A witness named Shawn Monteiro told police he heard an argument and then saw a white male in a red shirt (later identified as Preece) run from a group of men. (R. 127). While running from the group, Preece pulled a silver handgun (R. 127). The shooting victim (nicknamed Junior) was in pursuit of Preece. (R. 127). As Junior was climbing a fence, Preece turned and fired at him but apparently missed. (R. 127). Preece tripped and

the two men started fighting. (R. 127). As Preece got up off the ground he fired 3-4 shots, causing Junior to double over. (R. 127). Preece then ran away with the witness Monteiro in pursuit. (R. 127). During the chase, Preece turned and aimed the gun at Monteiro and repeatedly pulled the trigger. (R. 127). The weapon did not discharge but only made a clicking sound. (R. 127). Monteiro saw Preece dispose of the weapon by throwing it into a yard. (R. 127). Monteiro directed the police to the area where the gun was thrown. (R. 127). Police officer Gonzalez conducted a search and recovered the weapon in the back yard of 91 Jenkins Street. (R. 127 and 132). The gun is silver in color, matching its description and a .25 caliber weapon (R. 132), which is consistent with the small caliber shell casings found at the scene. (R. 134). Monteiro identified Preece as the shooter as Preece was being led to a cruiser. (R. 130). Monteiro also made a separate identification of Preece at the station. (R. 132). A witness named Steven DeMello heard 5 to 6 gunshots, causing him to look out of his home's East window; he saw a male with dark hair wearing a red shirt and dark pants in the middle of Jenkins Street. (R. 128). He then saw the male flee Easterly. (R. 128).

A witness named Tracey Rose saw an earlier incident between Preece and a male on a bicycle. (R. 138). Ms. Rose had been at a neighbor's house earlier sitting on the porch with her neighbor and a male named "Fred." (R. 138). There was an argument between Fred and a male named "Gilly" who was riding a bicycle. (R. 138). Fred pushed Gilly off of the bicycle. (R. 138). Gilly pulled a knife but then left the area threatening to return with "his boys." (R. 138). Gilly did in fact return about 10 minutes later with 6 or 7 males, including Juan Flores the shooting victim. (R. 138). "Fred" ran towards Jenkins Street with the group chasing him. (R. 138). Although Ms. Rose did not

see the shooting, she had seen Fred with a gun when he was in the yard of 111 Jenkins Street. (R. 138).

The police located Frederick Preece at 2:05 AM just 22 minutes after the shooting. (R. 130).When located by police, Preece was wearing a red T-shirt as described by the witnesses. (R. 131). Significantly, Preece was also wearing an empty holster, tucked into the front of his pants. (R. 131). The holster is black nylon and sized for a small caliber weapon. (R. 131). This is consistent both with the recovered weapon (R. 132) and the spent casings. (R.134).

When arrested plaintiff has obvious visible injuries. (R. 131). Preece explains the injuries by telling the police he just got "jumped by a bunch of Niggers over at the project." (R. 131). When Preece was arrested he was in the home of his cousin, Mr. Lopes. (R. 130-131). The plaintiff's cousin as well as his aunt Josephine Lopes were interviewed by police. (R. 131). The plaintiff's family told the police that they answered their door to find the plaintiff who was bleeding and who told them that he just got "jumped by a bunch of Niggers." (R. 131). Preece was Mirandized and made admissions. (R. 130). He immediately admitted to possessing the handgun used in the shooting. (R. 130). Preece stated that he was visiting a friend at 42 Bluefield Street. They were outside of the home when they were confronted by a group of black males. There was an argument after which the men chased him and then beat him. (R. 130). Preece "felt someone take his gun from his holster. He kept running and heard shots behind him." (R. 130). Preece was placed in a cruiser where he stated that "he did not shoot anyone and that his gun was unloaded and empty." (R. 130).

Preece was transported to a police stationhouse (R. 130). He there claimed to know only that he had been beaten and to have no further memory of that early morning until meeting the police. (R. 130). Preece desired medical attention and was first checked by ambulance personnel (R. 130) and then transported to St. Luke's Hospital. (R. 132). At the hospital Preece was treated for a small laceration located on the back of his head. (R. 132). He was treated and released with the hospital staff characterizing his injuries as "minor." (R. 132). The police who had accompanied the ambulance personnel to the hospital (R. 132) could see "gun powder stains" on Preece's right hand. (R. 132). They took swabs of the material from Preece's right trigger finger. (R. 132).

There was no error in relying on these police reports. Police reports often serve as a source of evidence even where liberty interests are at stake. It is well established that a facially reliable police report may serve as the sole basis for revoking probation and incarcerating an individual. Commonwealth v. Negron, 441 Mass. 685, 691 (2004); Commonwealth v. Wilcox, 446 Mass. 61, 71 (2006); Commonwealth v. Nunez, 446 Mass. 54, 59-60 (2006); Commonwealth v. Durling, 407 Mass. 108, 120-121 (1990); Commonwealth v. Calvo, 41 Mass. App. Ct. 903, 904 (1996).

Here the police reports met the requirements for reliable hearsay: (1) they were factually detailed; (2) based upon the personal knowledge of the witnesses who spoke from direct observations; (3) the statements were made soon after the events occurred while the matter was still fresh in the minds of the witnesses; (4) the witnesses faced criminal exposure for any false statements; and (5) the statements were each corroborated either by police observations or corroboration by a second civilian witness. See

Commonwealth v. Nunez, 446 Mass. 54, 59 (2006). There was no error in relying upon these police reports and the Commission's decision should be affirmed.

C. THE SEALED RECORDS STATUTE HAS NO APPLICATION TO THIS CASE

The plaintiff relies heavily upon G.L. c. 276, § 100C, a statute providing for the sealing of criminal records in certain instances to argue that DOC and the Commission should not have considered the reports. The argument fails because: (1) application of the statute has been strictly limited by decisional law; (2) the plaintiff's records were never sealed, and (3) the statute does not purport to seal police reports.

1. The Sealed Records Statute has Been Limited Because Its Over Breadth Infringed on the Public's and Press' First Amendment Rights.

The statute as enacted purported to automatically seal the court files and probation files of any prosecution that resulted in a not guilty verdict. The automatic sealing provision of the statute was held constitutionally overbroad. Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989). To save the statute from unconstitutionality, the courts have narrowed it as not compelling sealing but rather as authorizing the sealing of records when ordered by a trial court judge after holding a two-stage hearing, with the second portion of the hearing preceded by 7 days notice by posting a notice in the clerk's office. Commonwealth v. Doe, 420 Mass. 142, 150 (1995). When a judge does order sealing he must make specific on the record findings. Doe, at 152. The judge must find that the value of sealing to the defendant clearly outweighs the constitutionally-based value of the record remaining open to society. Id. at 151.

2. There Is No Evidence In This Record That Plaintiff's Records Were Sealed

It is the plaintiff's burden under Superior Court S.O. 1-96 to demonstrate error with reference to the record. Nothing in this record shows that these reports were sealed. In fact plaintiff's board of probation record contains no such notation. (R. 107). The section of the statute relied on by plaintiff reads in part: "Such sealed records shall not operate to disqualify a person in any examination, appointment or application for public employment...." G.L. c. 276, § 100C. This statute is inapplicable to this case.

3. The Statute does not Purport to Seal Police Reports.

The statute relates to the sealing of court and probation records, it does not purport to extend to the expungement of police records. The statute applies by its terms only to probation and court files: " ...the commissioner of probation shall seal said court appearance and disposition recorded in his files and the clerk and the probation officers of the courts in which the proceedings occurred or were initiated shall likewise seal the records of the proceedings in their files." G.L. c. 276, § 100C. There is no language in the statute that would make the police reports inaccessible. There was no error here.

III. CONCLUSION

The Commission did not err in relying upon the police reports where the statements contained therein where factually detailed, given by named witnesses, consistent with the reports of the other witnesses and consistent with the physical evidence recovered by police. There being no error this court should affirm the decision

allowing the bypass of the plaintiff by the DOC.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail ~~(by hand)~~ on 3/26/08.

Commonwealth of Massachusetts

Bristol, ss.

Superior Court
Civil Action
No. BRCV2007-0510-B

Frederick T. Preece, Jr.,
Plaintiff

vs.

Massachusetts Civil
Service Commission,
Et Al,
Defendants

Memorandum in Support of
Plaintiff's Motion for
Judgment on the Pleadings

Background

In May of 2004, the Plaintiff took the civil service examination for the position of Correction Officer I with the Department of Correction (herinafter referred to as the "DOC"). (Admin. Rec. I pg. 141). The Plaintiff received a grade of 94 on that examination, and his name was placed on certification list no. 2040080 dated 8/31/2004. (Admin. Rec. I pg. 141). Subsequently, on or about September of 2004, the Plaintiff was contacted by the DOC for prescreening for that position. (Admin. Rec. I pg. 141). As part of that prescreening procedure, the Plaintiff executed a written waiver allowing the DOC to do Criminal Record Offender Information (CORI) check on him. (Admin. Rec. I pg. 142).

On or about December 30, 2004, the DOC informed the Plaintiff that he had been bypassed on the list because of an "unsatisfactory criminal history check". (Admin. Rec. I

pgs. 105 & 142). The reason for that decision to bypass the Plaintiff was because the CORI report regarding the Plaintiff showed that, in 1991, the Plaintiff had been charged in the Bristol County Superior Court with second degree murder and related charges. (Admin. Rec. pg. 142). The Plaintiff had gone to trial on those charges in November of 1993 and was found not guilty on each of them on November 19, 1993. (Admin. Rec. I pgs. 103 & 142).

By letter dated January 27, 2005, the Plaintiff was informed by the Human Resources Division that that Division had accepted the reasons proffered by the DOC for bypassing him, i.e. "unsatisfactory criminal history check". (Admin. Rec. I pgs. 120 & 142 - 143). As a result, the Plaintiff filed a timely appeal to the Civil Service Commission, pursuant to M.G.L.c. 31, sec. 2(b). (Admin. Rec. I pg. 143).

On April 27, 2005, in accordance with Rule 7 of the procedural rules of the Civil Service Commission, the Plaintiff filed a motion for summary decision in the case. (Admin. Rec. I pgs. 28 - 42 & pg. 143). No opposition was filed by the DOC to that motion within the seven day period allowed by those rules for the filing of such an opposition and, after waiting an additional thirty days without such an opposition being filed or any action being taken by the Civil Service Commission on that motion, the Plaintiff filed a motion on June 1, 2005 requesting that the Civil Service Commission render a decision on that motion for summary decision, in which he specifically raised the issue that he was being prejudiced by the ongoing delay in this matter. (Admin. Rec. I pgs. 43 - 45 & pg. 143).

Despite further efforts by the Plaintiff through counsel to obtain a decision on his motion for summary decision, the Civil Service Commission continued to fail to render

any decision on that motion and the DOC failed to file any opposition to it, including any request for additional time to file such an opposition, until on or about September 29, 2006, at which time such an opposition was finally filed. (Admin. Rec. I pgs. 46 - 51 & pg. 143). The Plaintiff filed a motion to strike that opposition on October 6, 2006, but no action was taken by the Civil Service Commission in regard to the case, until December 12, 2006, at which time a hearing was scheduled to take place on January 22, 2007. (Admin. Rec. I pgs. 72 - 78 & pg. 143).

That hearing took place before an Administrative Magistrate on January 22, 2007. (Admin. Rec. I pg. 141 & Admin. Rec. II). That hearing consisted of the introduction of various documentary exhibits into evidence, including a copy of the CORI report showing the charges against the Plaintiff and the resulting verdicts of not guilty on each of them. (Admin. Rec. I pgs. 79 -138 & 141 & Admin. Rec. II pgs. 3 - 10). In addition, the DOC was allowed to introduce an unsworn copy of a New Bedford Police Department investigative report dated August 28, 1991 regarding the investigation of the incident which gave rise to the charges against the Plaintiff. (Admin. Rec. II pgs. 5 - 7). The Plaintiff specifically objected to the admission of that report and to the unsupported and unattributed claim by counsel for the DOC that, in addition to the facial contents of the CORI report, that investigative report had been received by DOC and its contents considered by DOC in making its decision to bypass the Plaintiff, prior to that decision to bypass having been made by the DOC. (Admin. Rec. II pg. 5 - 8 & pgs. 17 - 20). The DOC produced no witnesses to testify as to when that report was actually received and considered by the DOC, despite the fact that the date stamp on that report and various emails by DOC personnel which were in evidence demonstrated that that report was

received after the decision had already been made to bypass the Plaintiff solely on the basis of the contents of the CORI report. (Admin. Rec. II pgs. 17 - 20). In addition, the DOC did not call any of the people who prepared that report or any of the people whose hearsay statements were contained in that report to testify at the hearing nor did it produce any transcript from the Plaintiff's trial in 1993 of any of the testimony which took place at that trial. (Admin. Rec. II).

As a result of that hearing, the Administrative Magistrate issued a recommended decision, in which she found that the DOC had sustained its burden of proof to justify the bypass of the Plaintiff. (Admin. Rec. I pgs. 141 - 146). The essential finding of that decision was that the contents of the investigative report provided that justification. (Admin. Rec. I pgs. 143 - 146). The Plaintiff filed timely objections to that recommended decision; but, by a vote taken on March 1, 2007, the Civil Service Commission issued a decision adopting the recommended decision of the Administrative Magistrate and ordered the Plaintiff's appeal in this matter dismissed. (Admin. Rec. I pgs. 150 - 156 & pg. 164). The Plaintiff then brought this action for judicial review of that decision of the Civil Service Commission, in accordance with the provisions of G.L.c. 31, sec. 44 and G.L.c. 30A, sec. 14.

Argument

Bypassing the Plaintiff on the basis that he was charged with criminal offenses and found not guilty on all of them constituted an arbitrary and illegal act on the part of DOC. The decision of the Civil Service Commission affirming that act violated the Plaintiff's rights to due process and equal protection of the law under both the state and

federal constitutions in regard to his right to receive fair consideration relative to his status as a placeholder on the certification list. In addition, it also constituted a violation of the clearly expressed legislative mandate contained in G.L.c. 276, sec. 100C that a criminal case resulting in the acquittal of a defendant is not to be used as a basis for disqualifying that defendant from consideration for public employment by the Commonwealth or its political subdivisions.

Specifically, although the fact that an individual occupies a place on a civil service list does not provide a constitutional entitlement on the part of that person to be appointed to a position as to which that list is applicable, that person does have a due process right not to be treated in an arbitrary or discriminatory manner in regards to his consideration for such a position. Lavasch v. Kountze, 473 F.Supp. 868, 871 - 872 (1979)("Under Massachusetts law, those people who score highest on the civil service exams, while not statutorily guaranteed of an appointment or promotion, nevertheless secure a position on certification lists such that they gain an expectancy that if an appointment or promotion is available, someone on the certification list will be selected."); Burns v. Sullivan, 619 F.2d 99, 104 (1st Cir. 1980)(recognizing the possibility of a property interest in an examinee's place on a certified list). As the federal district court for Massachusetts said in Kahn v. Secretary of Health, Education and Welfare, 53 F.R.D. 241, 246 (D.Mass. 1971):

> "Public employment, though it may be denied altogether, may not be subjected to arbitrary or unlawful conditions, ...
> Applicants for public employment are entitled to protection against arbitrary or discriminatory treatment by the Government, and

they may not be disqualified for arbitrary or discriminatory reasons."

In the present case, the Commonwealth of Massachusetts brought a criminal action against the Plaintiff. That action then went to trial, in which the Commonwealth put the evidence gathered by its investigative agents, i.e. the police, before a jury, and that jury decided the case against the Commonwealth. The Commonwealth, however, through the Defendants, is now denying public employment to the Plaintiff on the basis of a claim that it can still somehow penalize the Plaintiff, despite having lost that case, and that it can do so by taking the unsworn "totem pole" hearsay of a police investigative report out of the context of that case and using it to justify that denial of public employment, without producing a shred of evidence to show that any of the hearsay in that report was ever repeated under oath at trial and subjected to cross-examination or was otherwise tested in any manner which would give rise of any indicia of reliability as to those statements, despite the fact that it was the burden of the government, i.e. the DOC, to prove justification for the bypass of the Plaintiff. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997)(burden is on the appointing authority to prove reasonable justification for bypass).

In addition to the fact that such a position directly undermines the constitutional guarantee that a person is always to be considered innocent, unless and until the government has proved that person to be guilty beyond a reasonable doubt, the Massachusetts legislature has already foreclosed such a claim by its enactment of G.L.c. 276, sec. 100C. That statute provides that, in the event a defendant is found not guilty in a criminal action, the record of that action must be automatically sealed and:

"Such sealed records shall not operate to disqualify a person in any

examination, appointment or application for public employment in the service of the commonwealth or any political subdivision thereof."

Although the decision in Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989) held that the sealing provisions of section 100C were unconstitutional for federal first amendment purposes, that decision was only concerned about public access to such records and had nothing to do with the fact that the legislature clearly intended that an acquittal on criminal charges is not to be used to exclude a person from public employment. The fact that, in terms of the public's right of access to records under the first amendment, the federal court decided that there had to be a notice period prior to any record being sealed did not affect the fact that the legislature clearly has decided that a criminal case in which a defendant had been acquitted is not to be used in Massachusetts to disqualify that defendant from public employment. Indeed, in light of the provisions of the eleventh amendment, it is difficult to see how a federal court would ever have jurisdiction to interfere with the right of a state to decide that a particular factor does not exclude a person from employment by that state or its political subdivisions.

Thus, the federal court's revision of the automatic sealing portion of section 100C only concerned the means which the legislature chose to guarantee that such a record would not be used against a defendant and is severable from the fundamental rule of that statute, which is that an acquittal automatically prohibits the Commonwealth or its subdivisions from using that criminal case for purposes of disqualifying that defendant from public employment. Since section 100C has never been repealed and the federal decision had nothing to do with the fundamental rule of law embodied in that statute that a case in which a defendant is acquitted cannot thereafter be used as a means of denying

that defendant employment by the state, it constitutes a direct violation of the clearly expressed intent of the legislature for the Defendants to deny the Plaintiff public employment on the basis of the fact that he had been charged with crimes for which he was subsequently acquitted.

As to the Administrative Magistrate's citation of past cases of the Civil Service Commission for the proposition that "the Civil Service Commission has long held that an applicant's arrest record, even where there is no conviction, is entitled to consideration in the determination as to whether the applicant should be appointed to a particular position" (Admin. Rec. pg. 145), the simple answer is that the Civil Service Commission has no power to override the statutory mandate of section 100C. In addition, however, is the fact that the Civil Service Commission decisions cited for that proposition are all cases in which the disposition of the criminal actions involved consisted of something other than not guilty verdicts. Rather, the criminal records in those cases all carried some sort of positive indicia that, in fact, the person whom they concerned had done something to support the charges against them, usually in the form of an admission to sufficient facts followed by a continuance without a finding on one or more charges, payment of a fine, etc. For example, the case of Andre Lavaud v. Boston Police Department, 12 M.C.S.R. 236(1999), on which the Administrative Magistrate prominently relies, actually involved an appellant who had a record of five criminal cases resulting in dismissals n conjunction with the payment of fines/court costs and a one-year continuance without a finding on the basis of an admission to sufficient facts, resulting in a total of $1600.00 in payments. In fact, in Crowley v. Department of Correction, 15 M.C.S.R. 16 (2002), when faced with an effort by the DOC to justify a promotional bypass of an employee on the basis of the

fact that that employee had been charged with offenses as to which he was then found not guilty, the Commission specifically held that criminal proceedings which resulted in that employee's acquittal could not be used to deny him promotion.

As to the police investigative report which was entered into evidence at the hearing over the Plaintiff's objection, the reliance of the Defendants on the contents of that report was improper for several reasons. To begin with, using such a report as a basis for denying public employment undermines the clear legislative intent of section 100C. Since the legislature can be imputed to have been aware that most, if not all, criminal cases entail the existence of some sort of investigative report, the fact that it still chose to enact an absolute rule that the bare fact of acquittal precludes that case from being used to justify excluding a person from public employment prevents the government from taking a portion of such a case out of context in the form of an investigative report from the case and, in effect, using the contents of that report to evade that absolute prohibition.

This is particularly true in light of the reality that taking a hearsay police report out of the context of the case to which it relates, without any demonstration of what other investigative reports, sworn witnesses' statements, physical evidence and, most importantly, what sworn testimony had been given from the witness stand in the case, including on cross-examination, cannot be viewed as anything other than an arbitrary and unreliable basis on which to make a decision in a case such as the present one. As the Appeals Court said in Merisme v. Board of Appeals, 27 Mass. App. Ct. 470, 475 (1989), in which the Court held that the "totem pole" hearsay nature of a police report could not provide the "substantial evidence" needed under G.L.c. 30A, sec. 11(2) to justify a motor vehicle surcharge being upheld against the plaintiff in that case:

"In the recent Embers decision, supra, the court, in elaborating on the meaning of the Sinclair decision, supra, made clear that the crucial point is not whether the only evidence relied upon is hearsay inadmissible in a court of law, but, instead, is whether the hearsay carried with it certain "indicia of reliability and probative value." If the hearsay testimony contained in the police report is determined to be reliable, then it supports the board's decision.

We cannot say with any degree of comfort that such is the circumstance presented here. In sharp contrast to the present action, the evidence in Embers involved the transcript of a related criminal trial." (emphasis added).

In the present case, the record is completely devoid of any indicia of reliability as to the contents of the police report on which the Defendants relied. The DOC, which carried the burden of proof, did not produce a transcript of the trial nor did it produce anything to demonstrate that any of the statements reported in that report were reliable in any way. This is particularly true of the reported statement by a "witness" who claimed to have heard the Plaintiff make a racial slur, on which the Administrative Magistrate relied in making her recommended decision. There was no evidence whatsoever produced at the hearing to show that the person alleged to have made that statement about the Plaintiff ever testified to it under oath at trial or was otherwise a reliable source of information in any respect.

In short, the investigative report which was introduced over the Plaintiff's objection was nothing other than an amalgamation of multi-level hearsay statements taken out of the entire context of a criminal case lasting two years, without anything

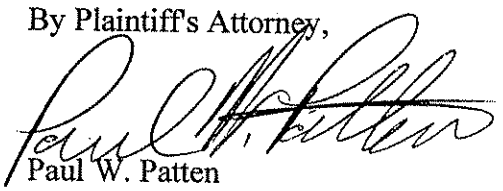
being introduced at the hearing on which a rational trier of fact could determine that any of the statements in that report were reliable. In fact, based on the record, in light of the failure of the DOC to produce any competent evidence to prove that that report was reviewed by the DOC decisionmaker on the Plaintiff's case, prior to DOC making its decision to bypass the Plaintiff, it appears that the DOC actually just relied on the bare of contents of the CORI report to make its decision to bypass the Plaintiff and actually was only using the investigative report as an after-the-fact attempt to justify that illegal action.

As a result, the recommended decision adopted by the Civil Service Commission in this action was arbitrary and not based on anything resembling substantial evidence or, indeed, anything which even could be dignified with the word "evidence".

Conslusion

The decision of the Civil Service Commission affirming the bypass of the Plaintiff is in direct violation of the mandate of G.L.c. 276, sec. 100C that a criminal case in which a defendant has been acquitted not be used to deny that defendant public employment. In addition, even if that prohibition is not dispositive, the use of an unsworn, unsubstantiated police investigative report consisting of nothing but multi-layered hearsay without any indicia of reliability as to the contents of that report to deny the Plaintiff public employment in this case was an arbitrary, capricious and unlawful act on the part of the Defendants, including the Civil Service Commission, in this matter.

By Plaintiff's Attorney,



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Certificate of Service

I, Paul W. Patten, attorney for the Plaintiff, certify that, on 2/13/08, I mailed a copy of this document to counsel for the Defendants in this action by first class mail, postage prepaid.

Paul W. Patten, Esq.