

Commonwealth of Massachusetts  
County of Bristol  
The Superior Court

CIVIL DOCKET#: BRCV2007-00510-B

RE: Preece, Jr., v Massachusetts Civil Service Commission et al

TO: Timothy R McGuire, Esquire  
Mass Atty General's Office  
105 William Street  
New Bedford, MA 02740

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Dated at Fall River, Massachusetts this 16th day of July, 2008.

Marc J. Santos, Esq.,  
Clerk of the Courts

BY: John F. Losowski, Jr.  
Assistant Clerk

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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss

Superior Court Department  
Civil No: BRCV2007-510

Frederick T. Preece, Jr.

vs

Massachusetts Civil Service Commission, et al

JUDGMENT

This matter came on before the Court, Richard Moses, Justice upon plaintiff's Motion for Judgment on the Pleadings, and after hearing and consideration and the filing of a Memorandum and Order on Plaintiff's Motion for Judgment on the Pleading,

It is hereby ORDERED and ADJUDGED that;

the decision of the Civil Service Commission, dated March 1, 2007, adopting the Magistrate's report, dated January 24, 2007, hereby dismissing Preece's Appeal is AFFIRMED.

By the Court, (Richard Moses, Justice)



Assistant Clerk Magistrate

Dated: July 16, 2008

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT  
CIVIL ACTION NO.: BRCV2007-00510

FREDERICK T. PREECE, JR.,  
Plaintiff,

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION, ET AL.,  
Defendants.

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S  
MOTION FOR JUDGMENT ON THE PLEADINGS**

This matter is before the Court on plaintiff's Motion for Judgment on the Pleadings pursuant to Mass. R. Civ. P. 1(c). The plaintiff, Frederick T. Preece, Jr. ("Preece"), has filed this action pursuant to G.L. c. 31, § 44, and G.L. c. 30A, § 14, seeking judicial review of a decision of the Massachusetts Civil Service Commission (the "Commission") denying an appeal of Preece from the upholding by the Personnel Administrator (the "Administrator") of a decision of the Department of Corrections ("DOC") to bypass Preece for appointment to the position of Correction Officer I within the DOC.

**BACKGROUND**

In May of 2004, Preece took the Civil Service examination for the position of Correction Officer I with the DOC. He received a grade of 94 on the examination and his name was placed on a certification list on August 31, 2004. He was contacted in September of 2004 for pre-schooling for the position, and as part of the pre-schooling

procedure, he was required to execute a written waiver allowing DOC access to Criminal Offender Record Information ("CORI").

On December 30, 2004, Preece was informed by DOC that he had been bypassed on the list due to an "unsatisfactory criminal history check." Such check revealed that on November 19, 1993, Preece was found not guilty of murder, two counts of assault and battery by means of a dangerous weapon; namely, a handgun, unlawful possession of a firearm, and discharging a firearm within 500 feet of a building.

On January 25, 2005, Preece was advised by the Human Resources Division that it had accepted the reasons proffered by the DOC for bypassing him. As a result thereof, Preece filed a timely appeal to the Commission pursuant to G.L. c. 31, § 2(b).

Preece filed a Motion for Summary Decision with the Commission on April 27, 2005. A timely opposition was not filed thereto by DOC, resulting in Preece requesting, on June 1, 2005, that the Commission decide the Summary Decision. Finally, on September 29, 2006, an opposition with accompanying documents was filed by DOC, resulting in Preece moving to strike the same. A hearing was scheduled on January 22, 2007 before an Administrative Magistrate (the "Magistrate") of the Division of the Administrative Law Appeals. At such hearing, Preece argued that he was entitled to a summary decision based upon the failure of DOC to oppose his motion in a timely manner. At the hearing, the CORI record for Preece was introduced together with police reports relating to an incident occurring on August 28, 1991 in New Bedford, Massachusetts, when Juan Flores, Jr. ("Flores") was shot and killed. Preece objected to the introduction of these reports, claiming that they contained totem-pole hearsay and further challenging whether or not such reports were in the possession of DOC at the time it rendered its decision. Such

reports bear several facsimile transmission dates, some of which include an October 20, 2004 date which coincides with the date shown at the top of Preece's CORI records which were introduced into evidence.

The police reports revealed that New Bedford police officers responded to the area of a housing project in New Bedford on August 28, 1991, at approximately 1:46 a.m.. Several persons advised the police that a white male wearing a red shirt shot another male and then ran off. A male named Tweedy advised the police that he knew Preece and observed him arguing in a doorway with a Puerto Rican man whom Tweedy also knew. Preece stated that he was going to get his friends, come back, and "clean house."<sup>1</sup> Shortly thereafter Tweedy heard shots. Upon discovering that his acquaintance was the victim of the shooting, Tweedy drove him to the hospital.

The police report also contained an interview with Shawn J. Monteiro, who observed a white male in a red shirt running and then pulling out a silver handgun. He also noticed a group of males, which included Flores. He observed Flores and Preece in a fight, during which Preece fired three to four shots at Flores after which Flores doubled over. Monteiro chased after the individual with the red shirt, who then pointed the gun him and pulled the trigger several times, however, Monteiro only heard a clicking. The male then threw the gun into a yard.

Monteiro returned to the location of the shooting where he met the police and showed them where the gun had been disposed of. A silver handgun was then recovered. At the police station, Monteiro identified Preece as the shooter.

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<sup>1</sup> The police report indicates that Preece was 20 years of age at the time of the subject incident (D/O/B 4-11-71).

Preece was arrested at 102 Sycamore Street, at which time he was wearing a red tee shirt and blue jeans. He had multiple abrasions on his forehead and on the top of his head as well as a broken tooth and a swollen lip. An empty holster, which would accommodate a small caliber handgun, was found tucked in the front of his pants. He told the police that he had "... just got jumped by a bunch of niggers over at the project."

While Preece challenged the introduction of the police reports on hearsay grounds, he did not challenge their authenticity.

Neither the DOC nor Preece elected to call any witnesses at the hearing and relied on their memoranda and the documents introduced into evidence.

The Magistrate issued a recommended decision which was filed with the Commission on January 25, 2007, in which he recited facts which were stipulated by the parties and concluded that there were no genuine issues of material fact in dispute. The Magistrate discounted Preece's argument that Summary Judgment must be granted in light of the late filing DOC's opposition thereto. She concluded that the parties had been given an opportunity to present documentary and testimonial evidence and to present oral arguments and that no prejudice had been shown by virtue of such delay. The Magistrate also considered Preece's argument that sole reason asserted as the basis for denial of his appointment by DOC was his criminal record, which revealed that he had been found not guilty of the above-referenced charges. The Magistrate concluded that DOC was justified in relying upon such record in making its decision. The Magistrate also noted that the Commission may consider the underlying facts which led to the arrest that are contained in the police reports in determining suitability of an applicant for appointment. She concluded that the arrest reports established serious criminal charges as well as Preece's

propensity toward violence and his use of racial epithets. The Magistrate thus concluded that the DOC met its burden of proof of demonstrating that its decision to bypass Preece for appointment to a position that involves public trust was justified. She thus recommended that the Commission deny Preece's Motion for Summary Decision and uphold the decision of the Human Resources Division, which accepted the reasons proffered by DOC for bypassing Preece for appointment to the position of Correction Officer I.

On March 1, 2007, the Commission voted, in executive session, to adopt the findings and recommended disposition of the Magistrate and ordered that Preece's appeal be dismissed. Such decision is the subject of the pending appeal.

#### **DISCUSSION**

A reviewing court may only set aside an agency's decision if it is in violation of constitutional provisions, in excess of the statutory authority of the agency, based upon an error of law, based upon unlawful procedure, unsupported by substantial evidence, unwarranted by facts found by the court or arbitrary and capricious. G.L. c. 30A, § 14(7)(a-e). The court's review is confined to the administrative record and the court must give due weight to the experience, technical competence and specialized knowledge of the agency as well as the discretionary authority conferred upon it. G.L. c. 30A, § 14(7). The court may not substitute its own judgment for that of the agency and must undertake a strictly limited review of the credibility of witnesses. South Worcester County Regional Vocational School District v. Labor Relations Comm'n, 386 Mass. 414, 420 (1982); New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 467 (1981). The party appealing the administrative decision carries the burden of demonstrating that its rights were

prejudiced by the agency's error. G.L. c. 30A, § 14(7); Merisme v. Board of Appeals of Motor Vehicle Liability Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989).

### SEALING OF CRIMINAL RECORD

Preece argues that the language and legislative intent of G.L. c. 276, § 100C, precluded the DOC from denying Preece employment based upon the record of acquittal for murder and other related charges. Such statute provides in part:

In any criminal case wherein the defendant has been found not guilty by the court or jury, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court, the commissioner of probation shall seal said court appearance and disposition recorded in his files and the clerk and probation officers of the courts in which the proceedings occurred or were initiated shall likewise seal the records of the proceedings in their files. .

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 of any political subdivision thereof.

The First Circuit concluded that the first paragraph of the above statute, which requires mandatory sealing of criminal records, is unconstitutional. The court found that under the First Amendment, the press the public have a constitutional right to access to judicial records which could be overcome only by a showing of compelling government interests, and that blanket sealing of records did not represent the least restrictive means for protecting that interest. Globe Newspaper Co. v. Pokaski, 860 F.2d 497, 570 - 571 (1st. Cir. 1989). The court noted that the sealing by the court of a criminal record should be only in exceptional cases because both the proceedings and the case files have already been publicly accessible. The defendant must therefore convince the court or administrative body that their privacy rights have not been lost irretrievably. Id. at 506, n.



The court further concluded that records cannot be sealed on the basis of general reputation and privacy interests and a defendant must demonstrate that specific harm is threatened by continued existence of the record. Id. at 507, n. 18.

Preece argues that as a matter of law, G.L. c. 276, § 100C, precludes DOC from considering his CORI. The short answer is that in light of Globe Newspaper Co. v. Pokaski, Id., Preece's record was not sealed. Furthermore, he apparently has never sought to have his record sealed. The language of the statute clearly provides that "such **sealed** records shall not operate to disqualify a person. . . ." (Emphasis added). Without Preece's records having been sealed, he is not entitled to the protection of the statute.

**Preece's Claim that the Decision of the Commission is Arbitrary, Capricious, and Not Supported by Substantial Evidence**

Preece claims that the Magistrate's decision, which was adopted by the Commission, is arbitrary and capricious and not supported by substantial evidence. In particular, it is asserted that reliance alone upon Preece's CORI records, which demonstrate his arrest and acquittal, is insufficient to support the decision. He further alleges that the police reports submitted do not constitute substantial evidence in that they are unreliable on their face and contain numerous instances of totem-pole hearsay.

In performing a review under G.L. c. 31, § 43, the Commission hears evidence and finds facts. The Commission is not to determine whether it would have acted as the appointing authority had acted but whether or not on the facts found by Commission there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision. City of Leominster, v. Stratton, 58 Mass. App. Ct. 726, 728 (2003).

This court, under G.L. c. 31, § 44(c), and G.L. c. 30A, § 4, is bound to accept the findings of fact by the Commission's hearing officer if supported by substantial evidence. Id. at 728 and cases cited.

In reviewing the CORI records of Preece together with the police reports referred to above, the Court finds that there was substantial evidence on the record to support the Magistrate's decision.<sup>2</sup> Under G.L. c. 30A, agencies are not required to follow the rules of evidence observed by courts. Evidence may be admitted and given probative effect if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. The decision must still be supported by substantial evidence. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, *supra* at 474.

A non-eyewitness police report, standing alone, cannot constitute substantial evidence within the meaning of G.L. c. 30A, however, particular narratives related therein may be admissible, depending on the general plausibility and consistency of the victim's or witness's story, the circumstances under which it is related, the degree of detail, the motives of the narrator, the presence or absence of corroboration and the like. Doe v. Sex Offender Registry Board, 70 Mass. App. Ct. 309, 312-313 (2007). See also, Commonwealth v. Nunez, 446 Mass. 54, 59 (2006), citing Commonwealth v. Durling, 407 Mass. 108, 121 (1990), where it was noted that it is a criminal offense to make a false report of a crime to a police officer, thus bolstering the reliability of the report.

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<sup>2</sup> The CORI record, standing alone, might well be enough to support the decision in light of the seriousness of the charges notwithstanding acquittal, having in mind that such charges require a finding of probable cause by a grand jury. A major factor in this case is the nature of the position sought which is a position of public interest.

While the report in question contains interviews with multiple witnesses, the Court has only cited several thereof in this decision. They include the officers' first-hand report of their arrest and interview of Preece, which revealed that he had obviously been in a physical altercation. They further seized a holster which was capable of holding a small caliber pistol from Preece's person. Furthermore, Preece used a racial epithet at the time of his arrest.

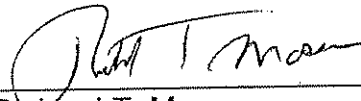
The statement provided by Monteiro was significant in that he claimed to have been an eyewitness to the shooting, he pointed out the location where the gun had been disposed of, and, in fact, a gun was retrieved by the police from such location. He also identified Preece at the police station.

Lastly, the Court notes that while Preece was acquitted of the charges in question, the Commonwealth was held to a high standard of proving its case beyond a reasonable doubt as compared with the standard of the preponderance of the evidence that typically applies in a civil case.

#### ORDER

It is, therefore, ORDERED that the decision of the Civil Service Commission, dated March 1, 2007, adopting the Magistrate's report, dated January 24, 2007, thereby dismissing Preece's appeal is AFFIRMED.

By the Court,

  
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Richard T. Moses,  
Justice of the Superior Court

DATED: July 15, 2008