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NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

BOSTON POLICE DEPARTMENT vs. DAVID SUPPA & another. [FN1]

+10-P-713+

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After successful completion of the required civil service examination, David Suppa was considered in June, 2007, for appointment as a Boston police officer. During the course of its investigation, the appointing authority of the city uncovered criminal charges against Suppa stemming from an altercation at an after-hours party in Pembroke on November 12, 2000. [FN2] When questioned about the incident, Suppa indicated that he came to the aid of a friend and was accosted from behind by an unknown individual, at which point he defended himself. Though he admitted to punching the victim several time in self-defense, Suppa denied the accounts of numerous bystanders -- reflected in the accompanying Pembroke police report -- that he had repeatedly kicked and head-butted the victim after knocking him unconscious. Excepting this singular incident, Suppa's background check revealed no additional instances of criminal conduct and reflected a meritorious military service record.

The appointing authority ultimately requested and obtained permission from the personnel administrator of the Massachusetts Human Resources Division to 'bypass' him in accordance with G. L. c. 31, § 27. The Civil Service Commission (commission) reversed and ordered that the city recertify Suppa, concluding that the appointing authority's decision was unsupported by substantial evidence. The appointing authority sought judicial review of the commission's decision in Superior Court under the State Administrative Procedure Act, G. L. c. 30A, § 14. [FN3] The Superior Court judge, concluding that the commission had erred as a matter of law and exceeded its statutory authority, reversed the commission's decision. We affirm.

General Laws c. 31, § 2(b), 'requires the commission to find whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken. . . .' *Cambridge v. Civil Serv. Commn.*, 43 Mass. App. Ct. 300, 303 (1997), and cases cited. In undertaking this analysis, the commission must be mindful of 'the fundamental purposes of the civil service system -- to guard against political considerations, favoritism, and bias in governmental employment decisions. . . .' *Id.* at 304, and cases cited. 'It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.' *Ibid*; see *Connolly v. Suffolk County Sheriff's Dept.*, 62 Mass. App. Ct. 187, 192-193 (2004). An agency finding supported by substantial evidence -- such evidence as a reasonable mind might accept as adequate to support a conclusion -- should not be disturbed. G. L. c. 30A, § 1(6); see *Raytheon Co. v. Director of Div. of Employment Security*, 364 Mass. 593, 595 (1974).

The Superior Court judge correctly reversed the commission where the appointing authority's initial decision was supported by substantial evidence. General Laws c. 41, § 96A, inserted by St. 1938, c. 342, states that '[n]o person who has been convicted of any felony shall be appointed as a police officer. . . .' For purposes of

this analysis, '[i]t is the felonious misconduct, not a conviction of it, that is determinative.' *Boston v. Boston Police Patrolmen's Assn.*, 443 Mass. 813, 820 (2005). The record reflects that the appointing authority relied on the Pembroke police report, containing numerous eyewitness accounts of the incident depicting Suppa as the aggressor, in formulating its decision to bypass his application. This it was permitted to do, as proceedings governed by the State Administrative Procedure Act "need not observe the rules of evidence observed by courts," so long as the evidence admitted 'is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.'" *Wardell v. Director of Div. of Employment Security*, 392 Mass. 433, 437 n.5 (1986), quoting from G. L. c. 30A, § 11(2); see *Covell v. Department of Social Servs.*, 439 Mass. 766, 786 (2003), quoting from *Embers of Salisbury, Inc. v. Alcoholic Bevs. Control Commn.*, 401 Mass. 526, 530 (1988) ('Substantial evidence may be based on hearsay alone if that hearsay has 'indicia of reliability)'). Police reports containing eyewitness accounts of the incident in question, though admittedly hearsay, bear sufficient indicia of reliability to be considered as evidence of the conduct alleged. See *Costa v. Fall River Hous. Authy.*, 453 Mass. 614, 627 (2009) (report containing officer's firsthand observations admissible in administrative hearing before public housing authority); cf. *Doe, Sex Offender Registry Bd. No. 10304 v. Sex Offender Registry Bd.*, 70 Mass. App. Ct. 309 (2007) (report containing victim's statements admissible as substantial evidence before review board).

Here, Suppa's involvement in the altercation was undisputed. The record reflects that the appointing authority weighed Suppa's justification for his actions -- self-defense -- against numerous eyewitness accounts describing the altercation as a brutal attack by Suppa on a defenseless victim. Moreover, there is nothing in the record to suggest that the appointing authority based its decision on political considerations or personal bias. Viewed in light of its discretion and, concurrently, the duty of police officers to comport themselves in accordance with the laws that they are sworn to enforce, see *Police Commr. of Boston v. Civil Serv. Commn.*, 22 Mass. App. Ct. 364, 371 (1986), the decision of the appointing authority to bypass Suppa was justified. [FN4]

The judgment entered in the Superior Court reversing the decision of the commission is affirmed.

Judgment affirmed.

By the Court (Grasso, Grainger & Carhart, JJ.),

Entered: May 27, 2011.

FN1. Massachusetts Civil Service Commission.

FN2. Suppa was charged with one count of assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A, one count of assault and battery, G. L. c. 265, § 13A, and one count of assault with intent to maim, G. L. c. 265, § 15. Though he disputes the circumstances surrounding his plea, Suppa ultimately admitted to sufficient facts and received a continuation without a finding on the assault and battery charges in August, 2001. The assault with intent to maim charge was ultimately dismissed.

FN3. General Laws c. 30A, § 14, inserted by St. 1973, c. 1114, § 3, provides that: '[A]ny person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof . . . in the superior court. . . .'

FN4. As the Superior Court judge correctly concluded, the commission further compounded its error by (1) considering the circumstances and underlying motivations surrounding Suppa's admission to sufficient facts, and (2) emphasizing its belief that too much weight was given to the admission rather than the reasons proffered by the appointing authority for the bypass. This amounted to an impermissible substitution by the commission of its judgment for that of the appointing authority regarding Suppa's ability to perform as a police officer and the inferences to be drawn from his criminal record. See *Cambridge v. Civil Serv. Commn.*, 43 Mass. App. Ct. at 304.

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