

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION NO. 08-5237

BOSTON POLICE DEPARTMENT

vs.

DAVID SUPPA & another<sup>1</sup>

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COMMONWEALTH OF MASS  
STATE POLICE COMMISSION

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OFFICE OF THE ATTORNEY GENERAL  
ADMINISTRATIVE LAW DIVISION

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

**Introduction**

The plaintiff, Boston Police Department (the "Department"), filed this appeal under G. L. c. 30A, § 14 and G. L. c. 31, § 44, for judicial review of the defendant, Civil Service Commission's (the "Commission"), decision allowing the defendant, David Suppa's ("Suppa"), appeal of his termination from the Boston Police Department. The Department's Motion for Judgment on the Pleadings is now before the court. After reviewing the administrative record, the relevant law, and the parties' submissions, the Department's Motion for Judgment on the Pleadings is **ALLOWED**.

**BACKGROUND**

The Commission conducted a Civil Service Appeal Hearing on August 6, 2008. The following witnesses provided testimony: Detective Robert Tabb (Det. Tabb), Boston Police Department, and David Suppa. The Commission made extensive findings of fact, as recorded in the administrative record and summarized below.

Massachusetts Civil Service Commission

notice sent 1/7/10  
R.L.Q., JR.  
D.W.R.  
G.L.R.  
N.L.T.  
S.G.

The Appellee, David Suppa, is a 28-year-old resident of Quincy, Massachusetts, who aspired to a law enforcement career from an early age and has taken and passed the civil service examination for police officers every year since he was 19 years of age. After finishing high school, Suppa enlisted in the Massachusetts Army National Guard and served honorably and with distinction as a Military Police Officer and Military Police Team Leader.

Suppa's name appeared on Certification 270048 for the position of police officer in the June 2007 class. On March 10, 2007, Suppa submitted his Student Officer Application and met with Det. Tabb, who was assigned to the Recruit Investigations Unit ("RIU"). Det. Tabb conducted a background investigation, including criminal history, driver history, military history, employment history, financial history, and personal interviews.

Suppa's criminal history disclosed that on January 9, 2001, Suppa was arraigned on charges of assault and battery with a deadly weapon and assault to maim, both of which were felonies. Suppa was also charged with assault and battery. Suppa was arrested on these charges as a result of his involvement in an altercation at a party in Pembroke, Massachusetts. Suppa accepted a "continuance without a finding" disposition for these criminal charges. The facts of that incident as available to the Department and as reconstructed in the administrative record are summarized as follows.

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On the evening of November 12, 2000, Suppa attended a large house party in Pembroke, Massachusetts. According to Suppa, he was at the party for about two or three hours, and stayed in the garage area where he acted as the "DJ." He was not drinking because he was tired from work and needed to be at work early the next day. As Suppa exited the garage, he saw a fight in the driveway involving his friend, Paul G., who was being restrained and hit by a group of unknown men. Suppa became involved in the fight and pulled one of the men away from his

friend. Suppa was then attacked from behind by an unknown male and attacked again by the same man whom he had pulled away from Paul G. Suppa and this man fought and as a result of the fight, the unknown male was left unconscious. Suppa broke free, ran to his car and went home around 1:00 a.m.

At 2:53 a.m., Sergeant Russell Jenness ("Sgt. Jenness") and Officer James Lanzillotta of the Pembroke Police Department were dispatched to the house party. The officers were taken to the basement of the house and observed a male, later identified as Tim H., with "[a]pparent minor injuries," who was attended to by EMTs and transported to the hospital. Sgt. Jenness conducted an on-scene investigation, and identified another slightly-injured victim, Joe C. Sgt. Jenness also identified other participants and witnesses. Follow up interviews were conducted with Suppa, Paul G., Joe C., and other witnesses; however, the principal victim, Tim H., was not interviewed.

Suppa's account of the incident was that he came to the aid of a friend who was fighting with a group of males he did not know. Suppa further alleges that he defended himself after he was hit from behind by someone else. Suppa claims he acted in self-defense, and admits to hitting a person he did not know with his fists, causing this person to either fall down unconscious or be knocked out from the impact of the fall. Suppa, however, denies kicking the victim. Witnesses to the altercation identified Suppa as the aggressor, and stated Suppa punched, kicked, and repeatedly headbutted the victim, Tim H. Other witnesses stated Suppa entered the fight to assist individuals already fighting, but did not use anything other than his fists during the altercation. However, the hearing officer found their credibility questionable because they were at odds with other statements made by others at the party.



On August 14, 2001, after two (2) pre-trial conferences and on advice of defense counsel, Suppa "admitted to sufficient facts" relative to the felony assault and battery with a dangerous weapon and the misdemeanor assault and battery charges. Suppa agreed to dispose of the case by admitting to sufficient facts on the condition that the remaining charges would be "continued without a finding" ("CWOFF") and dismissed in twelve months. The case was continued without a finding for one (1) year and Suppa was ordered to pay restitution in the amount of nine hundred and thirty-nine dollars (\$939.00) and was placed on probation until August 14, 2002. The charge of assault to maim was dismissed on August 14, 2001, and the charges of assault and battery with a dangerous weapon and assault and battery that arose from the incident were dismissed on August 14, 2002.

Suppa states he did not clearly understand the implications of admitting to "sufficient facts" or paying "restitution," but after telling his defense counsel he had aspirations to be a police officer, his lawyer assured him that a CWOFF would not hinder his ability to become a police officer. Suppa was to be deployed overseas in ten days and felt pressure to end the criminal case because of his impending deployment. After having a conversation with a State Trooper who said the CWOFF was definitely a problem, Suppa's father contacted the defense attorney, who said Suppa had nothing to worry about.

Det. Tabb submitted a detailed report to the Department's hiring committee, consisting of the director of Human Resources, the RIU Commander, a Deputy Superintendent from the Internal Affairs Division, and an attorney from the Legal Advisor's Office. During Suppa's interview with Det. Tabb, Suppa explained the basis of the charges and that he felt pressured to agree to the CWOFF because of his pending military deployment. During the hiring committee's review of Suppa's application, the hiring committee focused on Suppa's criminal history.

The hiring committee noted Suppa's honorable military service since 1999. The hiring committee, however, focused on Suppa's "admission to sufficient facts" regarding the felony and misdemeanor charges. The hiring committee did not take into account Suppa's claim that he made the "admission to sufficient facts" under advice of counsel; that he was pressured from the impending deployment overseas; and that he did not understand the "colloquy" he received from the Court nor the significance of agreeing to an order to make restitution. Ultimately, the hiring committee found the "admission to sufficient facts" amounted to confirmation that the underlying facts of the charges were true.

Based on these findings, the Department requested a bypass of Suppa from the Human Resources Division (HRD). On September 17, 2007, HRD accepted the Department's request and notified Suppa of the bypass. On October 19, 2007, Suppa appealed this decision. On August 6, 2008, a hearing was held, and on October 31, 2008, the Commission issued a three-to-two decision allowing Suppa's appeal.

The Commission determined the Department was not justified in bypassing Suppa, and ordered Suppa "be placed at the top of the eligibility list for original appointment to the position of police officer so that his name appears at the top of any current certification and list and/or the next certification and list from which the next original appointment by the [Boston Police

Department ("BPD")] to the position of police officer shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as a BPD police officer." On November 25, 2008, the Department filed this action, pursuant to G. L. c. 30A § 14 and G. L. c. 31 § 44, seeking judicial review of the Commission's decision.

## DISCUSSION

### **I. Standard of Review**

The Court may modify or set aside an administrative agency's final decision where the decision exceeded the agency's authority, was based upon an error of law, was unsupported by substantial evidence, was in excess of the statutory authority, or was arbitrary and capricious or otherwise not in accordance with law. G. L. c. 30A, § 14 (7); see Connolly v. Suffolk County Sheriff's Dep't, 62 Mass. App. Ct. 187, 192 (2004). Pursuant to c. 30A, § 14, it is the function of the agency rather than the Court to make findings of fact and it is the duty of the agency rather than the Court to weigh the credibility of witnesses. Catrone v. State Racing Comm'n, 17 Mass. App. Ct. 484, 486 (1984). The agency has the benefit of observing the witnesses, and thus is better able to make assessments regarding the credibility of the testimony. Cherubino v. Bd. of Registration of Chiropractors, 403 Mass. 350, 356 (1998).

The role of the Civil Service Commission is to determine "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 by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-304 (1997). General Laws c. 31, § 2(b) provides "no administrator . . . shall be reversed by the commissioner except upon a finding that such decision was not based upon a preponderance of evidence in the record." The appellant bears the "heavy burden of demonstrating the invalidity of the Commission's decision." Massachusetts Assoc. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 263 (2001).

In reviewing the agency's decision, the Court is not permitted to substitute its choice for the agency's choice between two fairly conflicting views even if the Court would have decided



an issue differently if the matter was before it de novo. Connolly, 62 Mass. App. Ct. at 192-193; citing Embers of Salisbury, Inc. v. Alcoholic Bevs. Control Comm'n, 401 Mass. 526, 529 (1988). If the agency's finding "is supported by 'such evidence as a reasonable mind might accept as adequate to support a conclusion,'" the Court should not disturb the decision. c. 30A, § 1(6); see Raytheon Co. v. Director of the Div. Of Employment Sec., 364 Mass. 593, 595 (1974).

## **II. Analysis of the Civil Service Commission's Decision on Suppa's Appeal**

The Department argues the Commissions' decision is (1) based upon an error of law, (2) unsupported by substantial evidence, (3) in excess of the Commission's statutory authority, and (4) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. See c. 30A, § 14 (7). I consider these arguments in turn.

### **A. Error of Law**

General Laws, c. 41, § 46A states that "[n]o person who has been convicted of any felony shall be appointed as a police officer of a city, town or district." See City of Boston v. Boston Police Patrolmen's Ass'n (Boston I), 443 Mass 813, 821 (2005) (stating the Legislature has forbidden persons who have committed a felony from becoming police officers). "It is the felonious misconduct, not a conviction of it, that is determinative." Id. at 820. Further, "the critical factor is that the conduct was felonious - not the degree or nature of the felony." City of Boston v. Boston Police Patrolmen's Ass'n (Boston II), 74 Mass. App. Ct. 379, 382 (2009). "A court will not permit an arbitrator to order a party to engage in an action that offends strong public policy." Boston I, 443 Mass. 813. This rule applies here in the court's review of the Commission's decision. To determine if there is a public policy exception, the court applies a three-part analysis: (1) the public policy must be well defined, ascertained by the law and not by

general considerations of public interests; (2) the disfavored conduct was “integral to the performance of employment duties”; and (3) “reinstating the employee would violate public policy to such an extent that the employee’s conduct would have required dismissal.” Lynn v. Thompson, 435 Mass. 54, 61 (2001).

The three prongs of the public policy exception are present here. First, the public policy is well defined, and stated in G. L. c. 41, § 96A, which provides: “[n]o person who has been convicted of any felony shall be appointed as a police officer of a city, town or district.” See Boston I, 443 Mass at 821. In this case, Suppa admitted to sufficient facts as to the felony charge of assault and battery with a deadly weapon and to the misdemeanor charge of assault and battery. An admission is the “functional equivalent of a guilty plea.” Commonwealth v. Greene, 400 Mass. 144, 145-146 (1987).

Secondly, Suppa’s conduct is “integral to the performance” of a police officer, who is required to uphold the law and ensure others are upholding the law. “An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Serv. Comm’n, 38 Mass. App. Ct. 473, 473 (1995). Further, police officers “must comport themselves in accordance with the laws that they are sworn to enforce and behave in a matter that brings honor and respect for rather than public distrust of law enforcement personnel.” Police Comm’r of Boston v. Civil Serv. Comm’n, 22 Mass. App. Ct. 364, 371 (1986).

Here, Suppa engaged in serious misconduct, which included repeatedly punching, kicking, and headbutting the victim until he lost consciousness, and then Suppa continued the assault. After this arrest, Suppa admitted sufficient facts to warrant a guilty finding, the “functional equivalent of a guilty plea.” Greene, 400 Mass. at 145-146. A police officer, as a



public figure sworn to uphold the laws of the Commonwealth, is expected to adhere to certain standards of conduct. In this case, Suppa's criminal record shows an instance of poor judgment, extreme violence, and criminal behavior. See Boston I, 74 Mass. App. Ct. 381-382; Police Comm'r of Boston, 22 Mass. App. Ct. at 371.

Finally, placing Suppa at the top of the eligibility list for appointment to the position of police officer would violate public policy to such an extent that Suppa's conduct would require his dismissal from the force. Boston I, 443 Mass. at 819. Suppa would have been removed from the force if he was convicted, and the fact that there was no conviction does not alter this.

Boston I, 443 M.A. at 820, 824 (stating the critical fact is that the conduct was felonious, not the degree or nature of the felony, and one who had engaged felonious conduct may not be a police officer); Boston II, 74 Mass. App. Ct. 381-82. Given these findings, hiring Suppa as a police officer would frustrate the strong public policy against the egregious conduct in which Suppa had engaged. Boston I, 443 Mass. at 823 ("The public policy against requiring the reinstatement of police officers who have committed felonious misconduct stems from the necessity that the criminal justice system appear legitimate to the people it serves.").

Therefore, Suppa's admission to felonious conduct bars his employment as a Boston police officer. Boston I, 443 Mass. at 823; Lynn, 435 Mass. at 61.

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### **B. Substantial Evidence**

In determining whether an agency's decision is supported by substantial evidence, this court must take into account the entire administrative record, and also take into account "whatever in the record fairly detracts from the weight of the evidence." New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981). The substantial evidence standard is a test of rational probability, Cobble v. Comm'r of Dep't of Social Servs., 430 Mass.

385, 390 (1999), that “a reasonable mind might accept as adequate to support a conclusion.”

Bournewood Hosp., Inc. v. Massachusetts Comm’n Against Discrimination, 371 Mass. 303, 317 (1976).

In this case, the Commission based its decision on finding that Suppa’s admission was “likely based on his uninformed and involuntary decisions in circumstances that question effectiveness of his counsel.” The Commission found the Department failed to use the investigative tools at its disposition, and rested its conclusion on unreliable statements, and therefore the Department did not have “substantial evidence” upon which it could have based a reasonable justification to bypass Suppa. Andrews v. Civil Service Comm’n, 446 Mass. 611, 615 (2006). This finding, however, is unsupported by the record. There is no dispute that after his arrest, Suppa was represented by counsel and received the appropriate colloquy and general warning pursuant to G. L. c. 278, § 29D prior to entering his admission.

Further, the Appointing Authority’s decision to bypass Suppa was based on a thorough background investigation and consideration by veteran law enforcement and human resource officials. Suppa acknowledged that he repeatedly struck another male while attending a party until the other male was unconscious. The Department relied on Suppa’s arrest record, which is entitled to weight, and Suppa’s own statement when deciding to bypass him for employment.

The Department was also well aware that Suppa served admirably overseas with the military and had positive employment and personal references. The Department, however, strongly believed that Suppa’s criminal history was so egregious that it outweighed all other aspects of his history.

Therefore, the Department provided reasonable justification for its decision to bypass Suppa, and its decision was supported by substantial evidence. See New Boston Garden Corp., 383 Mass. at 466; Bournewood Hosp., Inc., 371 Mass. at 317.

### C. Excess of Statutory Authority

The Police Commissioner, not the Commission, has the authority deem a candidate suitable or unsuitable as a Boston police officer, St. 1962, ch. 322 § 1, cited in Cambridge, 43 Mass. App. Ct. at 304, and the Department has the discretion to bypass candidates provided there is a legitimate reason. Boston Police Dept. v. Campbell, 7 Mass. L. Rptr. 236 (1997). "In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion." Cambridge, 43 Mass. App. Ct. at 304-305. The Commission does not have to agree that it would have acted similarly, but rather only find that the Department was reasonably justified in not hiring the individual based upon circumstances found by the Commission to have existed when the Appointing Authority made its decision. See Watertown v. Arria, 16 Mass. App. Ct. 31, 334 (1983). The Commission may not substitute its own judgment on a valid exercise of discretion by the Department when making employment decisions unless the personnel decisions had "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy". Cambridge, 43 Mass. App. Ct. at 304.

Here, the Commission exceeded its authority and was not in accordance with the law when it found that the Department should not have bypassed Suppa based upon evidence that Suppa was arrested and charged with assault and battery with a deadly weapon, a felony; assault to maim, a felony; assault and battery, a misdemeanor; and the admission to felonious conduct. As discussed above, the Department was reasonably justified in its decision to bypass Suppa based on the criminal docket, the incident that resulted in the arrest, and the admission to sufficient facts. The decision was based on a thorough background investigation by a Boston Police detective and a careful consideration of Suppa's application and background information by a roundtable of veteran law enforcement and human resources officials.



There is nothing to suggest political overtones or personal bias by the Appointing Authority, however, the Commission focused on its belief that too much weight was given to the admission of sufficient facts rather than reasons given by the Appointing Authority for the bypass. Cambridge, 43 Mass. App. Ct. at 304. This decision was an impermissible substitution by the Commission of its judgment for the Appointing Authority's decision regarding Suppa's ability to perform as a police officer and the weight of his criminal record. See Cambridge, 43 Mass. App. Ct. at 305 (where the court found an impermissible substitution by the commission of the appointing authority's judgment).

The Appointing Authority is to decide whether to take the risk in hiring an individual, and may be reasonable in not hiring an individual who has "shown poor impulse control." Cambridge, 43 Mass. App. Ct. at 305. If the Department determines that the public policy concerns and the risks associated with handing a badge, firearm and authority to an individual that has admitted to felonious conduct in violation of the law he would be expected to enforce, then the Department's assessment is accurate. Cambridge, 43 Mass. App. Ct. App. at 305 (where the Commission erred in "substituting its judgment" for the appointing authority by concluding an applicant "was worth [the] risk" based on favorable employment references).

Therefore, the appointing authority's decision to bypass Suppa was reasonable based on the credible evidence, and therefore is not subject to correction by the Commission. Cambridge, 43 Mass. App. Ct. at 305.

#### **D. Arbitrary or Capricious**

Finally, this Court turns to the Department's last argument, that the Commission's final decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. The more deferential, arbitrary or capricious standard requires only that there be a

rational basis for the decision. Attorney Gen. v. Sheriff of Worcester County, 382 Mass. 57, 62 (1980). "A decision is arbitrary or capricious when it lacks any rational explanation that reasonable persons might support." Cambridge, 43 Mass. App. Ct. at 303. Further, a decision made without evidentiary support is arbitrary and capricious. Massachusetts Gen. Hosp. v. Comm'r of Pub. Welfare, 350 Mass. 712, 720 (1966). In reviewing an agency decision, the Court should be slow to decide that an agency has acted unreasonably or arbitrarily, and "should cast to discover, if possible, some ground which reasonable [persons] might deem proper on which action can rest." Cotter v. Chelsea, 329 Mass. 314, 318 (1952).

In this case, the Commission's decision was arbitrary and capricious. As previously explained, the Commission's decision was based on a finding that Suppa's admission was "likely based on his uninformed and involuntary decisions in circumstances that question effectiveness of his counsel." Suppa, however, was represented by counsel and received the appropriate colloquy and general warning pursuant to G. L. c. 278, § 29D prior to entering his admission. Further, the Department found that Suppa's criminal history outweighed his military service. The Appointing Authority had support when it concluded that a demonstrated willingness to engage in violence was a doubtful character attribute for a police officer. See Cambridge, 43 Mass. App. Ct. at 303-304 (where the willingness to "fudge the truth" was a doubtful character for a police officer, and therefore the bypass was not arbitrary).

**ORDER**

It is therefore **ORDERED** that the plaintiff, Boston Police Department's, Motion for Judgment on the Pleadings in its appeal of the Civil Service Commission's final decision be **ALLOWED**. It is further **ORDERED** that the Civil Service Commission's final decision be **REVERSED**.

*Geraldine S. Hines*  
Geraldine S. Hines  
Justice of the Superior Court

DATED: January **4**, 2010