Decision mailed: 10/30/09
Civil Service Commission SB

Commonwealth of Massachusetts

SUFFOLK, SS. CIVIL SERVICE COMMISSION

Brian Walker,
Appellant

v.

Boston Police Department,
Respondent

Docket NO.: G1-07-371

Appellant's Attorney: Brian E. Simoneau
161 Worcester Road, Suite 200
Framingham, MA 01701
508-881-1119
508-302-0212 (fax)
Brian@Policelaborlaw.com (e-mail)

Respondent's Attorney: Sheila Bonfanti Gallagher
Boston Police Department
1 Schroeder Plaza
Boston, MA 02120-2104
Phone: (617) 343-4550
Fax: (617) 343-4609
E-Mail: GallagherS.bpd@ci.boston.ma.us

Commissioner: Daniel M. Henderson

DECISION

This proceeding arises from the timely appeal of Mr. Brian Walker, (hereinafter "Walker" or "Appellant"), filed pursuant to the provisions of Chapter 31, § 2(b) of the Massachusetts General Laws, from the action of the personnel administrator (hereinafter" HRD") approving the reasons proffered by the City of Boston (hereinafter "City," or "Respondent") in bypassing him for original appointment to

the position of Full Time Permanent Police Officer for the City of Boston, with said action having been approved by the Personnel Administrator. The Appellant filed a timely appeal. A full hearing was held on April 16, 2008 at the offices of the Civil Service Commission. The hearing was stenographically recorded and the transcript was designated as the official record of the proceeding with the original provided to the Commission at no cost.

FINDINGS OF FACT

28 exhibits were entered into evidence. Exhibit #1 is a stipulation of the parties. The parties agreed to exhibits #1-#21. The Appellant objected to #22 and #23, which were ordered admitted for limited purposes. Exhibits #22 and #23 are not admitted for the truth of their content, (hearsay), but only as documents relied upon by the City to evaluate the Appellant's candidacy. Exhibit # 27 is the HRD docket packet filed with the Commission. Based upon the items entered into evidence and the testimony of:

For the Appointing Authority:

1. Robin W. Hunt, Human Resources Director, Boston Police Department
2. Detective Bernadette Stinson, Boston Police Department

For the Appellant:

1. Brian Walker, Appellant

I make the following findings of facts:

1. The Appellant is a twenty-nine year old black male, lifelong resident of Boston who is currently employed as a Boston Housing Police Officer. (Testimony of Appellant, Tr. 204). He previously served as a Police Officer for the University of

Massachusetts and Brigham & Women's Hospital. (Exhibit 3, Testimony of Appellant, Tr. 204-205).

2. The Appellant performed well as a police officer in the City of Boston, having received unanimously positive employment references and supervisor recommendations. (Testimony of Hunt, Tr. 47-48). Incident to his employment with the U-Mass Police Department, the Appellant was licensed to carry a firearm. (Testimony of Hunt, Tr. 117).
3. The Appellant is a person of color and according to Ms. Hunt there is "absolutely" a benefit in having a diverse workforce. (Testimony of Hunt, Tr. 116).
4. The Appellant took and passed the municipal police officer civil service examination. (Stipulated Fact).
5. As a result of the Appellant's placement on an eligible list, (Certification No.: 270048) the Respondent reached the Appellant's name for appointment as a Full Time Police Officer for the City of Boston and the Appellant signed the eligible list, indicating his willingness to accept appointment to the position. (Stipulated Fact).
6. On or about July 10, 2007, (date of bypass letter),Ms. Robin W. Hunt, Director of Human Resources for the Boston Police Department notified the state's Human Resources Division (HRD) that she was bypassing the Appellant, "Mr. Brian Walker", for appointment for the position of permanent full-time police officer for the City of Boston. It is noted that the bypass letter from the City does not identify the place or position held by the Appellant on the certification, (85 pages with 12 names per page). His name actually appears on page 20, the 3rd name down as the last name of 25 names tied at that score. His name appears last of the names at that tie due to the listing by score/tie, in alphabetical order. It also fails to identify the place or position of the Appellant on the shorter "certification and report supplement" list, (17 pages with 19 names per page) of the persons who signed the certification, indicating their willingness to accept appointment. The Appellant's name actually appears on page 3, #54 overall on the "certification and report supplement" list. The Appellant was bypassed by more than 300 named

persons lower on this list. (Stipulated Fact, Exhibits 2, 18, 27, and administrative notice).

7. On or about September 17, 2007. HRD, by form letter, notified the Appellant that it had determined that the bypass reasons were acceptable. HRD attached Hunt's July 10, 2007 bypass letter to its form letter to the Appellant. (Stipulated Fact, Exhibit 2).
8. The Appellant is a person aggrieved by a decision of the Personnel Administrator pursuant to G.L. c. 31 § 2(b) in that the Personnel Administrator approved the bypass reasons aforesaid, pursuant to G.L. c. 31 § 27. (Stipulated Fact, administrative notice).
9. The City made a requisition to HRD, to fill seventy (70) permanent full-time police officer positions. The certified eligibility list, of 85 pages (Certification No.: 270048) was issued by HRD to the City. The City was instructed by the certification that *"selection must be of 70 of the first highest 141 who will accept."* The City designated the 70 named persons as selected from that list. Yet, the number hired actually appears to be 73, according to the authorization of employment (Form 14). The Form 14 lists six (6) named persons as "dropped out before able to sign" and another four (4) named persons as "resigned". Three (3) additional named persons were added to or inserted onto the list by HRD after original certification was established on January 17, 2007. The City also designated others down to and including the 358th (151+151+56) named person, (Sadot Vasquez) of those having signed willing to accept appointment, yet as "not selected" (bypassed) from that list. It is noted for clarity that Vasquez appears on the list, 3 places below the last named person indicated as selected for appointment. There is no documentation in the HRD records regarding the expansion of the requisition number of position vacancies, by the City from 70 to 73. No representative of HRD appeared at this hearing. No civil service exam scores for the listed persons, appeared on that certification or any other related documents from HRD. (Exhibits 18 and 27, administrative notice).

10. The Appointing Authority, City, made a requisition to HRD for a suitable eligibility list to fill 70 position vacancies, pursuant to the Personal Administrator Rules (PAR.08). The Personal Administrator, HRD, issued a certified list of eligible names to the City in the form of a certification, (Certification No.: 270048), in accordance with the formula contained in PAR. 09, (2n + 1). That formula permitted the Appointing Authority to appoint only from among the first 2n+1 (here 2 x 70 + 1 = 141), persons named in the certification willing to accept appointment. (administrative notice PAR.08, .09, Exhibits 18, 27)

11. Several years ago, the U.S. District Court (Massachusetts) addressed the issue of the adverse and disparate impact of civil service examinations,(2002 and 2004) and resulting eligibility lists on Black and Hispanic, entry-level firefighter candidates. The issue was addressed pursuant to Title VII. Civil Rights Act of 1964, § 703(a, k), 42 U.S.C.A. § 2000e-2(a, k). The Court found that the Plaintiff class had met its burden by establishing a prima facie case of disparate impact or discrimination. The Court ordered in part that the Plaintiffs shall propose a remedy within thirty days, and the Defendants shall respond within thirty days. See Bradley et al. v. City of Lynn et al., 443 F. Supp. 2d 145 (2006), Civil Action No. 05-10213-PBS, order dated August 8, 2006, Saris, J., Justice Saris subsequently issued a remedial order on December 6, 2006. The remedial order seeks to identify the Black and Hispanic test-takers or "minority candidates" who had suffered an adverse impact from the 2002 and 2004 examinations. The remedial order then describes how HRD shall prepare a ("shortfall") list of names of eligible minority candidates for such appropriate municipalities. The remedial order outlines in clear language the mandatory implementation obligations for HRD and the municipalities. It states at page 4, paragraph A. 4., the following(emphasis added): "4. *In the event that a municipality exhausts the minority list described above, without meeting its shortfall hiring, it shall not be obligated to fill such shortfalls with minority hiring, provided however that HRD shall have the right to review any rejection or disqualification of such minority candidates on such shortfall list, and* ***HRD shall not approve such***

disqualification unless the municipality articulates a sufficiently appropriate reason in writing for not hiring such candidate. The HRD shall state in writing any reasons for approving or disapproving a minority candidate. Plaintiffs shall have the right to review all rejections and disqualifications, together with any HRD decision. In addition to any remedy provided under state law, plaintiffs may present any disputes regarding HRD's good faith compliance with this procedure *to the Court for resolution. The Court will not review HRD's decision regarding qualifications.*"(administrative notice)

12. The above quoted language of the remedial order at page 4, paragraph A. 4. Of the *Bradley case*, outlines in clear, cogent language the mandatory implementation obligations for HRD and the municipalities for a specific situation. That situation being a remedy for the disparate and adverse impact of the 2002 and 2004 civil service examinations and resulting eligibility lists, on Black and Hispanic firefighter candidates. However, those obligations as articulated could reasonably be ascribed to HRD and the municipalities or appointing authorities in all civil service permanent appointments, under civil service law. (Administrative notice, reasonable inferences)
13. The City cites in its bypass letter to HRD dated July 10, 2007 the following three reasons as justification for bypassing the Appellant. First, more than seven years before Ms. Hunt wrote the bypass letter, the Appellant was *arrested* by the State Police in 2000 for operating under the influence of alcohol. The letter also relays some alleged circumstances from police reports of the incident. (Testimony of Hunt, Tr. 48, Exhibits 2, 27). Secondly, he was allegedly *disciplined* by a prior employer for reporting for work while intoxicated. Lastly, the City found his employment *sick time usage "of concern"*. (Exhibit 2, 27, Testimony of Hunt, Tr. 13).

14. The Boston Police Department has no established rejection criteria for police officer candidates. (Testimony of Hunt, Tr. 55). Instead, the Department evaluates candidates on a "case by case" basis in the format of a "roundtable discussion". (Testimony of Hunt, Tr. 12, 55-57).

15. The purpose of the roundtable meeting is to discuss each applicant's background to assess their suitability for the position. (Testimony of Hunt, Tr. 12). No notes or records of any kind of the roundtable discussions are kept. Robin Hunt was unable to identify any specific question or concern raised by any other identifiable member of the roundtable discussion. When answering a question regarding the roundtable's actions and process, Hunt invariably used the plural pronouns; "We", "They" or "Us". (Testimony of Hunt entirely and at Tr. 18-19).

16. Anytime members of the roundtable need clarification on something they request a "discretionary interview," which means that the candidate is interviewed by the Commander of the Internal Affairs Unit, the Commander of Recruit Investigations, and sometimes the detective assigned to his or her background investigation. (Testimony of Hunt, Tr. 15).

17. The Appellant's discretionary interview was audio-videotaped and the tape was entered into evidence, as Exhibit 28. (Testimony of Hunt, Tr. 17, Exhibit 28).

18. The audio-video tape cassette, (Exhibit 28), of the September 12, 2006, discretionary interview of the Appellant was reviewed several times by this hearing officer. The video portion only included the Appellant and not the two interviewers: Detective-Sgt. Norman Hill, the director of the Recruit Investigation Unit and Deputy Superintendent Marie Donohue, director of the Internal Affairs Unit. The audio portion of the tape cassette included the voices of all three participants. The interview initially focused on the Appellant's use of 14 sick days in 2004 and then expanded to inquiry of his use of sick days for 2003, 2004, 2005 and that part of 2006 up until the interview. The Appellant had previously provided copies of his employer's sick leave records for that period along with a letter from his supervisor, Sgt. Lynch. The two interviewers conducted the interview in an adversarial manner, which could best be described as inquisitional. The tone, quick cadence, rapid succession and repetition of their questions seemed designed to unnerve, confuse and subdue the Appellant into

acquiescence or admissions. The two interviewers continually cut off the Appellant before he finished his answer. They even cut each other off, before the other's question was completed. The Appellant was repeatedly asked to decipher and explain in detail his employer's records from years earlier. He admitted that he had trouble deciphering them or recalling the particular details of years old entries. Donohue repeated such statements as: "I need a better explanation", "Fourteen days is excessive to me", "I don't see any Doctor's notes" "Did you ever get a warning, discipline or talked to about sick leave?" Both interviewers badgered the Appellant throughout the interview. Yet, the Appellant remained poised, calm and professional through out. The interview ended with Hill demanding that the Appellant provide a detailed written explanation of his sick leave use over a three year period, accounting for work days and days off and reason for the time taken off. This written detailed explanation was ordered to be signed by his supervisor, Sgt. Lynch and his signature being notarized. The detailed written explanation was ordered to be filed with Detective Bernadette Stinson of the BPD, ***by the close of business the following day***. The Appellant explained that he didn't know whether his supervisor would be willing and capable of completing that task, within that limited time period. However, the demanded documentation and deadline remained in effect. (Exhibit 28, demeanor, tone, reasonable inferences, administrative notice)

19. Despite his diligent efforts, because of Sergeant Lynch's work schedule, the Appellant produced the document after the close of business on the required day (Testimony of Appellant, Tr. 224, and Exhibit 9). In the letter, Sergeant Lynch writes, "Mr. Walker has worked for the U/Mass Police Department for the last four years. During this time I have had the pleasure of supervising him. The first couple of years Mr. Walker very rarely called in sick. The last few years the majority of his sick time use can be attributed to a family member who was ill. At no time did I think Mr. Walker was abusing his sick time or using this time excessively." (Exhibit 9).
20. Also included in Sergeant Lynch's letter, pursuant to the City's instructions, was a breakdown of the Appellant's absences. The breakdown shows that there was no

pattern of taking sick days before or after the Appellant's regularly scheduled days off or on weekends. (Exhibit 9).

21. The adversarial if not inquisitional tone of the BPD "discretionary interview" coupled with the severe demand, at the close of the interview that he produce detailed explanatory documentation signed by his supervisor, with the supervisor's signature notarized, by the close of business the following day is an indication of some bias against the Appellant, as a candidate. This bias might not be against the Appellant personally, but against the position he held on the certification, for the possible benefit of some unknown candidate(s) below him on the certification. (Testimony, demeanor of witnesses, Exhibits and the reasonable inferences)
22. In the Appellant's case the roundtable members discussed his seven year old OUI arrest and reviewed the police report. (Testimony of Hunt, Tr. 22, 35, Exhibit 22, 23). The charge was dismissed for lack of prosecution and the Appellant was never prosecuted for the crime. (Testimony of Hunt, Tr. 27, 76-77, Exhibit 15, 17). Ms. Hunt testified that the Appellant's arrest concerned members of the roundtable. (Testimony of Hunt, Tr. 28-29).
23. The Appellant testified that he and his Attorney wanted a trial on the OUI charge, so that a favorable final verdict, (not guilty) would be entered in the court's records but he was denied that opportunity when the case was "***dismissed for want of prosecution***" by the court after another request for a continuance by the District Attorney's office. The District Attorney's office did not appeal the dismissal. (Testimony of Appellant Tr.218-220, Exhibit 17)
24. Ms. Hunt also testified that she considers the timing, number, and disposition of offenses on a candidate's record. (Testimony of Hunt, Tr. 49, 62). Here, the Appellant had one OUI offense, but not a conviction, which occurred at least six and a half years before his candidacy and seven years before the bypass letter was written. (Testimony of Hunt, Tr. 49, Exhibits 2, 17).

25. The City had the identities and addresses of the troopers involved in the Appellant's arrest, it not only did not call them as witnesses, but it also did not

interview them as part of the background investigation. (Testimony of Stinson, Tr. 168-171). This suggests either that the background investigation was inadequate or that the City did not view the arrest as so serious as to warrant investigation. For the reasons outlined herein, I find that the City's reliance on the disputed facts contained in the unsubstantiated police reports violates basic merit principles. Exhibits #22 and #23 are admitted only for the fact that the City relied on those documents in evaluating the Appellant's candidacy but not for the truth of the contents. (Exhibits, testimony, demeanor, reasonable inferences)

26. The Boston Police Department employs and has hired individuals with criminal records. (Testimony of Hunt, Tr. 60). At least some of the applicants hired have criminal records containing offences committed more recently than the Appellant's six and a half year old OUI. (Testimony of Hunt, Tr. 61). Furthermore, according to Ms. Hunt, the Boston Police Department has likely hired convicted criminals. (Testimony of Hunt, Tr. 62).

27. In addition to hiring individuals who have been convicted of crimes, the Boston Police Department has also hired individuals who have admitted, under oath, to the facts contained in police reports. (Testimony of Hunt, Tr. 65). The Appellant made no such admission and his case was dismissed and not re-filed by the District Attorney's office or the State Police. (Testimony of Hunt, Tr. 65).

28. I find that the Appellant's arrest was not a legitimate concern for the City, but merely a rationalization for the bypass. An Appointing Authority must proffer objectively legitimate reasons for the bypass, rather than rationalizations for the selection of one candidate over the other. (Exhibits, testimony and demeanor of witnesses, reasonable inferences)

29. The Appellant testified credibly that he has never, in his lifetime, operated a motor vehicle while under the influence and that, on the date in question, he had consumed two beers over several hours. (Testimony of Appellant, Tr. 225-226).

He further testified that the accident was a result of another vehicle swerving into his lane. (Testimony of Appellant, Tr. 212-213). This testimony is entirely consistent with the written explanation which he provided to the City. (Exhibit 3).

30. The roundtable members considered that the Appellant allegedly refused to submit to a chemical breath test and Ms. Hunt relied upon the refusal as a bypass reason. (Testimony of Hunt, Tr. 68, Exhibit 2, 27). However, Ms. Hunt admitted that if the "refusal" alleged was the product of a problem with the breathalyzer, it should not be held against the Appellant. (Testimony of Hunt, Tr. 69). The roundtable members did not assess or investigate the Appellant's written explanation that his breath sample failed to register because the breathalyzer was faulty. (Testimony of Hunt, Tr. 69, Exhibit 3, p.18).

31. The Appellant's uncontested testimony regarding the breathalyzer was consistent with his written explanation; that the breathalyzer was not functioning properly and it did not register his breath sample, even though he cooperated and followed the operator's instructions. (Exhibit 3, p.18, Testimony of Appellant, Tr. 217). See G.L. c. 90, § 24 (1) (f) (1) (There is no violation of the implied consent law unless "the person arrested **refuses** to submit to such test or analysis…") (emphasis added) (administrative notice).

32. G.L. Chapter 31, §50 prohibits the employment of any person in a civil service position who is "habitually using intoxicating liquors to excess" or who has been "convicted of any crime" within one year (except for certain misdemeanors or other offenses where the fine imposes is not more than $100 or the incarceration is less than six months, in which case the appointing authority may, in its discretion, employ such person). (Administrative notice)

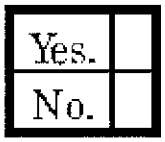
33. G.L.Chapter.41, §96A provides *"No person who has been convicted of any felony shall be appointed as a police officer* of a city town or district." (emphasis added, administrative notice)

34. G.L. Chapter 31: § 20. Applications for examination or registration; fees; requests for information. Section 20. "Each application for examination or registration pursuant to the civil service law and rules shall be made under the penalties of perjury and shall contain requests for such information as the administrator deems necessary. Each such application for a non-promotional examination shall include a fee, not exceeding ten dollars, which may be waived by the administrator, subject to the rules adopted pursuant to section four.

No applicant shall be required to furnish any information in such application with regard to: any act of waywardness or delinquency or any offense committed before the applicant reached the age of seventeen years; any arrest for a misdemeanor or felony which did not result in a court appearance, unless court action is pending; any complaint which was ***dismissed for lack of prosecution*** or which resulted in a finding or verdict of not guilty; or any arrest for or disposition of any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violation, affray, or disturbance of the peace if disposition thereof occurred five years or more prior to the filing of the application.

Notwithstanding the foregoing provisions, an application for examination or registration shall contain the following question:

"Have you been convicted of a criminal offense other than drunkenness, simple assault, speeding, traffic violation, affray, or disturbance of the peace?



If yes, please indicate the date, court, offense charged and the penalty imposed." Each applicant shall answer such question, subject to the provisions of sections one hundred A, one hundred B and one hundred C of chapter two hundred and seventy-six." (Administrative notice)

35. The Civil Service Commission recognizes that there are applicable laws that govern the: access to , compilation and use by state and municipal appointing authorities in making civil service appointments and promotions such as: (1) M.G.L. c.6, § 167-178 and related laws and regulations pertaining to CORI (Criminal Offender Record Information), CJIS (Criminal Justice Information System), NCIC (National Crime Information Center) and other and other records containing information about the criminal history of an applicant for civil service appointment or promotion; (2) various laws governing the "sealing" and "expungement" of criminal records; (3) the obligations imposed under Mass.G.L.c.151B, §4(9) that limit the extent to which appointing authorities, as employers, are permitted to inquire about or use an applicant's criminal history in making employment decisions;(4) and the specific provisions within the Civil Service Law itself that are applicable. The use of "sealed records" is covered under the Sealed Records Law, M.G.L. c. 276, §§ 100A-C. The Commission also recognizes that the foregoing is not a complete list of the applicable laws, rules and regulations. (administrative notice)

36. M.G.L.c. 151B proscribes discrimination in employment, housing and credit services transactions, and is enforced by the Massachusetts Commission Against

Discrimination (MCAD). M.G.L.151B, §4(9) provides: It shall be an unlawful practice. . .[f]or an employer,[1] himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

[1] M.G.L.c.151B, §1: The term "person" includes . . .the commonwealth and all political subdivisions, boards, and commission thereof. . . .The term "employer" . . . shall include the commonwealth and all political subdivisions, boards, departments and commissions thereof. . . . .

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records. (Emphasis added, Administrative notice)

37. The roundtable members also reviewed the Appellant's recruit application, (Exhibit 3), where he indicated that he had not been involved in an accident while drinking. (Testimony of Hunt, Tr. 30). However, the Appellant disclosed the accident, admitted that he was arrested, and fully explained what happened. (Exhibit 3, Testimony of Hunt, Tr. 31-32).

38. The roundtable members reviewed and had difficulty interpreting a "Time and Labor Summary Report" (Employer's payroll records) regarding the Appellant which was dated July, 2006.Robin Hunt admitted that "*It was very hard to interpret.*" (Exhibit 25, Testimony of Hunt, Tr. 15).

39. The Appellant was granted a "discretionary interview" to discuss his time and attendance. (Testimony of Hunt, Tr. 16, Testimony of Stinson, Tr. 147, Exhibit 28). This was the sole issue discussed. (Exhibit 28).

40. At the City's request, ***the Appellant provided additional sick leave data and a memorandum from Sergeant Lynch, his supervisor at U-Mass. Boston, regarding his sick leave.*** (Testimony of Hunt, Tr. 36, Exhibit 9). The City was not satisfied with this information. ***Hunt testified that the additional documentation the Appellant provided "...was still not clarification enough."*** (Testimony of Hunt, Tr. 37).

41. When examining sick leave usage, the Boston Police Department uses a three year period look back period. However, it does not have any standards or a "cut-off" regarding what level of usage is acceptable. (Testimony of Hunt, Tr. 54). The Department (Testimony of Hunt, Tr. 54). Furthermore, it has no written

documents whatsoever which describe or relate to the process used to select candidates for employment as police officers. (Testimony of Hunt, Tr. 60). It also has no written selection or rejection criteria. (Testimony of Hunt, Tr. 60).

42. The Appellant candidly disclosed in his application that in 2003 he was ordered into work and he reported for duty after he had been consuming alcohol (Testimony of Hunt, Tr. 41-42, Exhibit 3, p.11, p. 30, Exhibit 14). He immediately informed the Shift Commander of his condition and was excused from duty. (Testimony of Hunt, Tr. 43, Exhibits 3, 14). This also concerned the roundtable members because the Boston Police Department sometimes orders personnel into work unexpectedly and they are expected to be able to report for duty. (Testimony of Hunt, Tr. 43, 77). However, Boston Police Officers are not prohibited from consuming alcohol while off duty. (Testimony of Hunt, Tr. 78.)

43. Ms. Hunt testified that instead of being driven to work, the Appellant should have notified his supervisor over the telephone that he had been drinking. (Testimony of Hunt, Tr. 81-82). However, there are no written rules which prohibit the Appellant's conduct. (Testimony of Hunt, Tr. 82). I find that the Appellant's described behavior of being driven to work and reporting to his supervisor that he had been drinking, was reasonable and responsible behavior under the circumstances.(reasonable inference)

44. ***The roundtable members assumed that the Appellant drove to work while intoxicated.*** (Testimony of Hunt, Tr. 84-86, 90-91, 127). This assumption runs contrary the Appellant's supervisor's account of the event, wherein he commends the Appellant and makes no mention of the Appellant having operated a motor vehicle. (Exhibit 14). Also, the Appellant's written statement that he never drove while intoxicated further negates this assumption. (Testimony of Hunt, Tr. 90, Exhibit 3).

45. ***Ms. Hunt testified that "We [the members of the roundtable] didn't know that he was driven to work***. And, and knowing that he was driven does definitely make a difference." (Testimony of Hunt, Tr. 84). She further testified that "driving to work was a huge concern" and "the driving to work was absolutely of utmost concern." (Testimony of Hunt, Tr. 128). Nevertheless, the Appellant was never asked if he drove himself to work and Detective Stinson never attempted to interview the Appellant's supervisor regarding the above-described incident. (Testimony of Hunt, Tr. 85, 92, 122-123, Testimony of Stinson, Tr. 143).

46. At no time was the Appellant instructed to provide any documentation or information regarding how he got to work when he was ordered to report for duty. (Testimony of Hunt, Tr. 122).

47. ***For the first time on re-direct, Ms. Hunt testified that the roundtable members were concerned that the Appellant was carrying a firearm when he reported to work after he had been drinking. (Testimony of Hunt, Tr. 117, 127). The roundtable members did not know whether or not the Appellant was carrying his firearm on the night in question.*** (Testimony of Hunt, Tr. 127).

48. In contrast to this assumption, the Appellant testified credibly that pursuant to an established policy, U-Mass Boston Police Officers do not take their firearms home, they do not carry them while off-duty, and they are kept in a locked gun box at the police station. The City could have easily discovered this overt fact during the selection process. (Testimony of Appellant, Tr. 207, reasonable inference)

49. Ms. Hunt admitted that it would be very easy for a police officer to avoid mandatory overtime by claiming, over the telephone, that he had been drinking. (Testimony of Hunt, Tr. 84).

50. ***Ms. Hunt admitted that she incorrectly claimed in her bypass letter to HRD (Exhibit 2, 27) that the Appellant was disciplined for reporting to work while intoxicated***. (Testimony of Hunt, Tr. 79, See Exhibit 14).

51. According to ***Sergeant Lynch, the Appellant's supervisor*** on the night in question, the Appellant did what he was required to do and ***did nothing wrong***. (Exhibit 14). Furthermore, Sgt. Lynch wrote that the Appellant "has always shown up promptly and fit for duty; he ***has never abused sick time, and has no problem with alcohol.*** He has been an ***exemplary Officer for the five years*** he has served the University of Massachusetts Boston Community." (Exhibit 14). This letter squarely addresses the City's alleged concerns. The City had sufficient information and resources available, on which to reasonably rely and to conclude that the Appellant had not been disciplined and had not abused sick leave while employed at U Mass-Boston, prior to its decision to bypass him. (Exhibits and testimony, demeanor, Exhibit 14, reasonable inferences)

52. Ms. Hunt agreed that if a candidates' mother was ill, it would be proper for an individual to utilize sick leave to care for her. (Testimony of Hunt, Tr. 99).

53. The Appellant's mother was sick, had four surgeries, and he took time off to care for her. (Testimony of Stinson, Tr. 158, Testimony of Appellant 199). During the selection process, he provided his mother's medical bills to the City to substantiate this. (Exhibit 24, Testimony of Stinson, Tr. 158).

54. In a letter dated February 20, 2007, the Appellant stated that he utilized his accrued sick time immediately prior to leaving the U-Mass Boston Police Department, because he was leaving and he was unable to cash in his accrued time. (Testimony of Hunt, Tr. 38-39, Exhibit 3). This caused concern at the roundtable. (Testimony of Hunt, Tr. 39, 52-53).

55. Regarding an individual using his accrued time prior to leaving employment, Ms. Hunt testified that the Boston Police Department "doesn't look fondly on it whatsoever..." (Testimony of Hunt, Tr. 102). Ms. Hunt did not ask the Appellant if he had permission to use his accrued time prior to leaving U-Mass Boston and she was not sure if anyone else did. (Testimony of Hunt, Tr. 102-103). She was unaware of the sick leave policy of the U-Mass Boston Police Department and admitted that it would have potentially had a bearing on the outcome of the selection process. (Testimony of Hunt, Tr. 123, 125). Also, she admitted that some City employees have been allowed to use their sick leave immediately before leaving their position as the Appellant did. (Testimony of Hunt, Tr. 126).

56. Instead of examining the Appellant's sick leave usage at U-Mass Boston from the viewpoint of the U-Mass Boston sick leave policy, Ms. Hunt applied the City's standard to the Appellant's sick leave usage. (Testimony of Hunt, Tr. 124-125).

57. The Appellant testified that it was standard operating procedure at U-Mass Boston for employees to take all of their accrued time prior to leaving the Department and he used his accrued time in accordance with this practice and with his supervisor's permission. (Testimony of Appellant, Tr. 210-212). In fact, he described a process where he would plot his absences with his supervisor, in advance, on the Department's attendance calendar. (Testimony of Appellant, Tr. 210-212).

58. The Appellant has never been counseled, disciplined, reprimanded, or spoken to regarding his use of sick leave and he had no difficulty complying with U-Mass attendance policies. (Testimony of Appellant, Tr. 212).

59. At the Appellant's discretionary interview he was ordered to produce additional documentary evidence regarding his sick leave. (Testimony of Hunt, Tr. 103-104).

60. When reviewing sick leave records to identify malingerers, the roundtable members look for individuals who take weekends off and extend their regular days off. (Testimony of Hunt, Tr. 104-105). The Appellant's sick leave usage did not reflect such a pattern and Ms. Hunt testified that patterned absences were not relied upon as a bypass reason. (Testimony of Hunt, Tr. 110, Exhibit 9, Exhibit 2, 27).

61. Sergeant Lynch, the Appellant's supervisor at the U-Mass Boston Police Department stated in a sworn statement that the Appellant's sick leave was not excessive and there was no indication of abuse. (Exhibit 9). The roundtable members considered this but it was not weighed heavily. (Testimony of Hunt, Tr. 112).

62. Ms. Hunt agreed; she admitted there was absolutely no mention of sick leave abuse in any of the Appellant's supervisor or personal references. (Exhibits 5-8, Testimony of Hunt, Tr. 113-1144).

63. Ms. Hunt claimed, as a bypass reason, that the Appellant "demonstrated a pattern of poor judgment involving the use of alcohol." (Exhibit 2, 27, Testimony of Hunt, Tr. 112-113). However, none of the Appellant's references supported her opinion and several references directly contradicted her opinion. (Exhibit 10, 11, 12, 13, Testimony of Hunt, Tr. 114-115). In fact, The Appellant's supervisors were specifically asked about the Appellant's alcohol consumption and none of them reported that he had any alcohol-related issues. (Testimony of Hunt, Tr. 48, Exhibit 14).

64. By all accounts of those at the U-Mass Police Department, the Appellant was a good police officer and his supervisors saw no manifestations of the City's concerns regarding alcohol or attendance problems. (Testimony of Hunt, Tr. 116, 117). He has a clean work record, having never been disciplined or reprimanded in connection with his law enforcement and security work. (Exhibits and testimony, Testimony of Appellant, Tr. 212).

65. The Appellant is a black male, with a shaved head, who appeared dressed in a shirt and tie. He is neat and professional in appearance and presentation. He testified in a straight forward and unhesitant manner. He is poised and easy going in demeanor. His body language, eye contact and facial expressions were consistent with someone speaking honestly and truthfully. He did not volunteer an answer simply because it was convenient or not easily contradicted. His answers, in language and tone rang true. His description of and answers regarding the OUI charge, reporting to work unscheduled as ordered and his sick leave use, were delivered with sincerity and conviction. He would not give an answer unless supported by his memory or refreshed by a document. His testimony was consistent with his prior statements on these matters. His presentation, demeanor and testimony at this hearing mirrored his stable and blemish free employment background. His poise and professional demeanor as a witness is also clearly displayed during the adversarial "discretionary interview" he underwent. I find the Appellant's testimony to be credible and reliable. (Exhibits and testimony, Testimony and demeanor of Appellant)

CONCLUSION

In a bypass appeal, the Commission must decide whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided

by common sense and correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, the Commission must consider the fundamental purpose of the Civil Service System which is "to protect against overtones of political control, objectives unrelated to merit standards and assure neutrally applied public policy." If the Commission finds that there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy," then it should intervene. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. City of Cambridge at 304.

A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001). All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988). Also, Basic merit principles, as defined by Chapter 31 of the General Laws, require that employees be selected and advanced "on the basis of their relative ability, knowledge and skills, assured of fair and equal treatment in all aspects of personnel administration, and that they be protected from arbitrary and capricious actions." Sammataro v. Chicopee Police Department, 6 MCSR 145 (1993). In the instant case, as explained herein, the City has not established that the reasons assigned for the

bypassing the Appellant were more probably than not sound and sufficient. See Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). Furthermore, as also enumerated and explained herein, the selection process was seriously flawed, as the background investigation was inadequate and the City based its decision on unsubstantiated and erroneous assumptions.

It has been found here that Robin Hunt and/or the "roundtable" acted with the belief that, when making the recommendation to the appointing authority, subjective discretion was held to choose, without any clear guidelines, from among the competing candidates. They weighed and considered the alleged criminal record of an "arrest" of the Appellant versus or compared to the other competing candidates, without referring to a clear established written rule or practice for such a determination. The City does not employ any uniform guidelines in its employee selection procedures. There are no established BPD rules or practice applied to the decision made on any of the three reasons stated for bypass. The undocumented, indefinite and unverifiable roundtable process renders the bypass procedure improper since "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988). There are virtually no records kept of the round table discussions regarding the various competing candidates. The City or the BPD emphasized the arrest for bypassing the Appellant, without any mention of the final court disposition of the matter, which was a ***dismissal for want of prosecution***. This seems especially egregious for a law enforcement agency which would be intimately familiar with the court process and procedure and the significance of a final court disposition following an arrest. However, Appointing Authorities are charged with the responsibility of exercising sound discretion and good faith when choosing individuals from a certified list of eligible candidates on a civil service list. The courts have addressed this issue and stated the following: "On a further issue we may now usefully state our views. The appointing authority, in circumstances such as those before us, may not be required to appoint any person to a vacant post. He may select, in the exercise of a ***sound discretion***, among persons eligible for promotion or may decline to make any appointment. (Emphasis added) *See* the following line of cases as quoted in Goldblatt vs.

Corporation Counsel of Boston, 360 Mass 660, 666, (1971); Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv.348 Mass. 184, 187-193 (1964). See also Corliss v. Civil Serv. Commrs.242 Mass. 61, 65; (1922) Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431 (1969). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572 (1940). A judicial judgment should "not be substituted for that of . . . [a] public officer" who acts in good faith in the performance of a duty. See M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272."

The first reason upon which the City relied is that the Appellant "was arrested by the State Police in 2000 for operating under the influence of alcohol. According to the State Trooper's incident report, Mr. Walker responded to a call for a motor vehicle accident on the Gilmore Bridge where Mr. Walker was the driver and struck the Jersey barrier after having been out at a bar." (Exhibit 2, 27, Testimony of Hunt, Tr. 48). First, the City mistakenly claims in its letter to the Human Resources Division (HRD) that "Mr. Walker responded to a call..." While seemingly a minor error, this exemplifies the sloppiness which pervaded the selection process used in this case. Secondly, the incident occurred on May 27, 2000, over seven years before Ms. Hunt wrote the July 7, 2007 bypass letter. (Exhibits 2, 15, 22, 23, 27). Third, Ms. Hunt testified that the Boston Police Department employs and has hired individuals with criminal records and at least some of those hired have records containing offences committed more recently than the Appellant's seven year old OUI. (Testimony of Hunt, Tr. 60-61). Furthermore, she testified that the Boston Police Department has likely hired convicted criminals. (Testimony of Hunt, Tr. 62). Also, in addition to hiring such convicts, the Boston Police Department has also hired individuals who have admitted, under oath, to the facts contained in police reports. (Testimony of Hunt, Tr. 65). The Appellant made no such admission; his case was dismissed for lack of prosecution and not re-filed. (Testimony of Hunt, Tr. 27, 65, Testimony of Stinson, Tr. 141, Exhibit 15). The Appellant has steadfastly maintained his innocence. (Testimony of Appellant, Tr. 212-213, 225-226, Exhibit 3). However, because the case was dismissed for lack of prosecution, he was denied his day in court. (Testimony of Hunt, Tr. 70). The District Attorney's office

decided not to refile or appeal the ***court's dismissal for lack of prosecution***, the DA controls the complaint not the Appellant; thereby depriving the Appellant of an opportunity to challenge the case against him. The City denied him employment on the basis of an unchallenged arrest report containing hearsay allegations which the Appellant credibly and vehemently contests. The City generally failed to make a reasonable effort to substantiate its critical assumptions or factual basis of its statement of bypass reasons.

The City, in this present matter proposed only an accusation or an arrest. It produced no detailed first hand reliable facts regarding the essential elements of the charges in this incident. It offered no corroboration or substantiation of its determination that the Appellant lacked the required character, judgment or responsibility required for the position of Police Officer base on this one arrest, especially as compared to other prior or current competing candidates. The City could not point to any established standards or guidelines to individually or comparatively measure and evaluate the candidates' criminal history or the other stated bypass reasons. The City failed to produce any direct, credible evidence of the Appellant's inadequacies in this area. The Appellant's alleged the criminal/driving arrest was merely a preliminary step into the criminal justice system, as all Police Departments are well aware. It was not a record of a conviction and the final determination by the Court was in the appellant's favor, a ***dismissal for lack of prosecution,*** properly made and entered on the record.

Access to and the use of criminal or court records in the hiring process of public employment is proscribed by various statutes and related regulations. Some of those relevant statutes are outlined in the "Findings of Fact" portion of this decision. The City seems to have ignored the intent if not the parameters of that legislation in its bypass of the Appellant for appointment. See for reference: G.L. Chapter 31, §50, G.L.Chapter.41, §96A, G.L. Chapter 31: § 20, G.L. c.6, § 167-178 and G.L.151B, §4(9).

Furthermore, even though the City had the identities and addresses of the troopers involved in the Appellant's arrest, it not only did not call them as witnesses, but it also did not interview them as part of the background investigation. (Testimony of Stinson, Tr. 168-171). This suggests either that the background investigation was inadequate or that the City did not view the arrest as so serious as to warrant investigation. For the

reasons outlined herein, it has been determined that the City's reliance on the disputed facts contained in the unsubstantiated police reports violates basic merit principles.

Additionally, Robin Hunt testified that when the City needs clarification on something in a candidate's background, he or she is called in for a discretionary interview. (Testimony of Hunt Tr. 15). In this case, the Appellant participated in a "discretionary interview" wherein Detective Sergeant Norman Hill and Deputy Superintendent Marie Donohue badgered him regarding his time and attendance (sick leave) and placed a harsh document production demand on him. (Testimony of Hunt, Tr. 16, Exhibit 28). At no time during this interview, which was held ***after*** the City learned of his OUI arrest, did anyone ask the Appellant about it. (Exhibit 28). The sole issue raised was the Appellant's attendance or sick leave history. (Testimony of Hunt, Tr. 16, Exhibit 28). Accordingly, for all of the reasons set forth herein, I find that the Appellant's arrest was not a legitimate concern, but merely a rationalization for the bypass. See Goldman v. Town of Randolph, Docket No.: G2-03-164 (2004) "An Appointing Authority must proffer objectively legitimate reasons for the bypass, rather than rationalizations for the selection of one candidate over the other."

The next and second reason upon which the City relied was that the Appellant was "disciplined by an employer when he showed up for work under the influence of alcohol after exercising poor judgment by showing up for his shift after having been at a party." (Exhibit 2, 27, Testimony of Hunt, Tr. 13, 41). Although in her letter to HRD, Robin Hunt claimed that the Appellant was disciplined, she later admitted that this was not true and claimed that the use of the term "disciplined" in her letter to HRD was a "technicality." (Testimony of Hunt, Tr. 79). In his application, Mr. Walker stated that in 2003, he was a new employee at U-Mass and was unexpectedly ordered into work. He had been drinking and reported to work. He immediately informed the Shift Commander of his condition and he was relieved from duty. The Shift Commander advised him to report his condition by phone in the future. (Testimony of Hunt, Tr. 42-43, Exhibit 3, p. 28). The Appellant makes no mention of having carried a firearm or operating a vehicle after he had been consuming alcohol. (Exhibit 3, p. 28). In fact, he states in his application that he never operated a motor vehicle while intoxicated. (Exhibit 3, p. 28).

Robin Hunt claimed that the above situation, as assumed by the City, was a major concern for the City because the Boston Police Department has mandatory overtime shifts and employees are expected to report for duty when they are ordered to do so. (Testimony of Hunt, Tr. 43, Tr. 77). Nevertheless, Boston Police Officers are, of course, not prohibited from consuming alcohol while off-duty. (Testimony of Hunt, Tr. 77-78). Likewise, so long as the officer had not operated a motor vehicle, the Boston Police Department has no rules, written or otherwise, which would prohibit and officer from reporting to work in for an unscheduled shift after he had consumed alcohol. (Testimony of Hunt, Tr. 82).

Ms. Hunt testified further that it would have been preferable for Mr. Walker to call in rather than report to work "[b]ecause there is a risk that the individual would be transporting himself to work intoxicated." (Testimony of Hunt, Tr. 81-82). She stated that "driving to work was a huge concern" and "the driving to work was absolutely of utmost concern." (Testimony of Hunt, Tr. 128). Nevertheless, the Appellant was never asked if he drove himself to work and the City never investigated the issue. (Testimony of Hunt, Tr. 85, 92, Testimony of Stinson, Tr. 143). Instead, the roundtable members assumed that the Appellant drove to work while intoxicated. (Testimony of Hunt, Tr. 84-86, 90-91, 127). This assumption runs contrary the Appellant's supervisor's account of the event, wherein he commends the Appellant and makes no mention of the Appellant having operated a motor vehicle. (Exhibit 14). Also, the Appellant's written statement that he never drove while intoxicated further negates this assumption. (Testimony of Hunt, Tr. 90, Exhibit 3). Nevertheless, the City never asked the Appellant how he got to work or otherwise investigated the matter. (Testimony of Hunt, Tr. 85, 92, 122-123.). This unsupported assumption that the Appellant drove himself to work is indicative of a seriously flawed selection process which violates the basic merit principles which this Commission is mandated to enforce.

For the first time on re-direct examination, after being prompted by counsel, Ms. Hunt testified that it was a concern that the Appellant likely carried his firearm when he reported to work after he had been drinking. (Testimony of Hunt, Tr. 117, 127-128). She made absolutely no mention of this concern in her statement of bypass reasons or in her direct testimony. This aspect of the circumstances seems to be an afterthought and not

real consideration by the roundtable at the time of the bypass decision. Again, the City assumed that something occurred when there was absolutely no evidence to suggest that it had. The City could have easily questioned the Appellant or Sergeant Lynch, his former supervisor at U-Mass, regarding whether he carried a firearm after having consuming alcohol. However, it failed to do so. (Testimony of Stinson, Tr. 181-182). Instead, the City assumed that because the Appellant was licensed to carry a firearm, he did so on the date in question, after he had consumed alcohol. (Testimony of Hunt, Tr. 117, 127-128, Testimony of Stinson, Tr. 181). In contrast to this assumption, the Appellant testified credibly that pursuant to an established policy, U-Mass Boston Police Officers do not take their firearms home, they do not carry them while off-duty, and they are kept in a locked gun box at the police station. (Testimony of Appellant, Tr. 207). The City could have easily discovered this during the selection process. Indeed, it had no difficulty questioning the Appellant in hostile and accusatory manner regarding his attendance history. (Exhibit 28). Like the Appellant's seven year old OUI arrest, for which he was never prosecuted, if this incident did not warrant investigation during the selection process, it cannot now be relied upon as reasonable justification to support the bypass; to rule otherwise would be fundamentally unfair and violate basic merit principles.

The third and final reason upon which the City relies is that it found that the Appellant's sick time usage problematic. (Exhibit 2, 27, Testimony of Hunt, Tr. 13-14). Ms. Hunt testified that because the Roundtable members had difficulty interpreting the official attendance records which the Appellant produced, a discretionary interview was conducted. (Testimony of Hunt, Tr. 15-16, Exhibit 25). At the discretionary interview, which was held on September 12, 2006, Detective Sergeant Norman Hill and Deputy Superintendent Marie Donohue aggressively questioned the Appellant regarding his time and attendance. (Testimony of Hunt, Tr. 16, Testimony of Stinson, Tr. 147, Exhibit 28). Detective Sergeant Hill ordered the Appellant to produce, by the close of business on the following day, a notarized detailed statement from Sergeant Lynch, his supervisor at U-Mass Boston, regarding his specific attendance over several years. (Exhibit 28, Testimony of Appellant, Tr. 223, Testimony of Stinson, Tr. 148). Despite his best efforts, because of Sergeant Lynch's work schedule, the Appellant produced the document after

the close of business on the required day. (Testimony of Appellant, Tr. 224, Exhibit 9). In the letter, Sergeant Lynch writes, "Mr. Walker has worked for the U/Mass Police Department for the last four years. During this time I have had the pleasure of supervising him. The first couple of years Mr. Walker very rarely called in sick. The last few years the majority of his sick time use can be attributed to a family member who was ill. At no time did I think Mr. Walker was abusing his sick time or using this time excessively." (Exhibit 9).

Also included in Sergeant Lynch's letter, pursuant to the City's instructions, was a breakdown of the Appellant's absences. (Exhibit 9). The breakdown shows that there was no pattern of taking sick days before or after the Appellant's regularly scheduled days off or on weekends, a concern expressed both at the hearing, by Ms. Hunt, and during the discretionary interview. (Exhibit 9, Testimony of Hunt, Tr. 37, 104-105). However, when asked if the breakdown showed a pattern, Ms. Hunt first stated, "I have no idea." (Testimony of Hunt, Tr. 105). She later admitted that the breakdown was probably not indicative of the patterned absences which concerned her. (Testimony of Hunt, Tr. 107).

Based on the principles enumerated in Borelli v. MBTA, 1 MCSR 6 (1988), and its progeny, where the Commission has held that reasons which are "untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons" cannot be used to support a bypass, the City has not met its burden to prove that the three reasons upon which it relied "were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). Through testimony and documentary evidence, the Appellant was able to effectively refute the claimed basis for the bypass. Furthermore, "[t]he Appellant had the right to be considered for appointment based on a fair consideration of his relative ability, knowledge and skills or 'basic merit principles' pursuant to G.L. c. 31§ 1." Aponte v. Boston Police Department, Docket No.: G-01-1072 (August 4, 2004). Finally, it was the Respondent's duty to insure that all candidates receive fair and equal treatment in all aspects of the selection process and that they are protected from arbitrary and capricious actions. Boston Police Department v. Collins, 48

Mass. App. Ct., 408, 412 (2001). Here, as outlined above, in violation the basic merit principles aforesaid, the Respondent has failed in its duty.

The reasons as given for the bypass by the BPD were insufficient and/or unsubstantiated, effectively rebutted by the Appellant, contrary to the Appellant's impressive background and presentation at this hearing and inconsequential to the ability of the Appellant to perform as a Boston Police Officer.

After considering all the credible testimony and reliable evidence in the record, I conclude that the City did not have sound and sufficient reasons for bypassing the Appellant, Brian Walker, for selection as a police officer in the City of Boston.

For all of the above reasons, the appeal under Docket No. G1-07-371 is hereby ***allowed***.

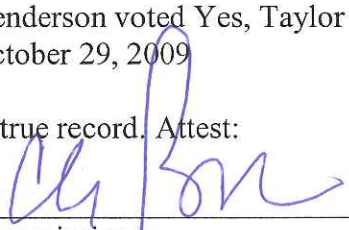
Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs HRD to place the name of the Appellant, Brian Walker at the top of the eligibility list for original appointment to the position of Police Officer so that his name appears at the top of any current certification and list and/or the next certification and list from which the next original appointment to the position of Police Officer in the Boston Police Department 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. The Commission further directs that, if and when Brian Walker is selected for appointment and commences employment as a BPD police officer, his civil service records shall be retroactively adjusted to show, for seniority purposes, as his starting date, the earliest Employment Date of the other persons employed from Certification #70048, (June 25, 2007). Finally, the Commission directs that the BPD or the City may not use the same reasons for bypass in any subsequent consideration opportunity.

Civil Service Commission,

Daniel M. Henderson,
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, voted No, Stein voted Yes, Henderson voted Yes, Taylor voted Yes and Marquis voted No, Commissioners) on October 29, 2009

A true record. Attest:



Commissioner

A motion for reconsideration may be filed by either Party 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 M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

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:
Brian E. Simoneau, Atty.
Sheila Bonfanti Gallagher, Atty.

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

BRIAN WALKER,
Appellant
v.

CASE NO: G1-07-371

BOSTON POLICE DEPARTMENT,
Respondent

OPINION OF COMMISSIONER STEIN CONCURRING IN RESULT

I concur in the conclusion that the, based on the preponderance of the credible evidence, the Boston Police Department (BPD) had failed to sustain its burden of proof to justify the bypass of Mr. Walker with "sound and sufficient reasons" consistent with basic merit principles and, therefore, Mr. Walker's appeal properly should be allowed. I reach the same result as the Hearing Commissioner that, after appropriately consideration of the evidence proffered by the BPD, and properly weighed that evidence, along with the other evidence he found credible, the reasons proffered by BPD for bypassing Mr. Walker did not meet the well-established test for sufficiency under basic merit principles, .i.e., they were "untrue, apply equally to [selected candidates] are incapable of substantiation, or are a pretext for other impermissible reasons." E.g., Borelli v. MBTA, 1 MCSR 6 (1988). See G.L.c.31,§1 (definition of "basic merit principles"). See generally, Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001) ("The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles . . . . the

commission acted well within its discretion."); MacHenry v. Civil Service Comm'n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to "review, and not merely formally to receive bypass reasons" and evaluate them "in accordance with basic merit principles"); Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) ("presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce 'sound and sufficient' reasons to justify his action"). See also, Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission "sufficient to satisfy due process")

A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315, 321 (1991).

> *The greater amount of credible evidence must in the mind of the judge be to the effect that such action 'was justified,*. . . If the court is unable to make such affirmative finding, that is, *if on all the evidence his mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined.* The present statute is different in phrase and in meaning and effect from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, 'unless it shall appear that it was made without proper cause or in bad faith.'

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (*emphasis added*) The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any

particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

Of the four reasons stated to justify bypassing Mr. Walker for lower-ranked candidates, the BPD acknowledged that as to one (untruthfulness), it had been mistaken. At to two of the three other reasons (poor attendance and reporting intoxicated to work), the Hearing Officer's findings and conclusions cogently and appropriately establish that those reasons, also, were untrue. The Hearing Commission found that the evidence presented by Mr. Walker and his employer vouched for the veracity of his contentions and the BPD witnesses acknowledged that nothing within any BPD rules or regulations would prohibit an officer from the same excusable behavior actually proved.

As to the fourth reason, an arrest in May 2000 on a charge of OUI, I differ with the Hearing Commissioner as to his treatment of the police report of the incident. Since the arresting officers did not testify, as I understand, the Hearing Officer admitted the report solely for the fact that it was rendered, but not for the truth of the assertions made by the reporting officers contained in the report. The Hearing Commissioner certainly has considerable discretion in the admission of hearsay evidence, and his determination that the report, when taken with the other evidence (which included evidence that controverted the assertions in the police report) did not persuade him that the hearsay statements were sufficiently reliable to be admitted. See, e.g, Murphy v. Superintendent, Mass. Correctional Institution, 396 Mass. 830, 843 (1986) (distinguishing uncontradicted "reliable" hearsay and "unreliable" disputed hearsay in investigative report) Commissioners of Civil Service v. Municipal Court, 369 Mass. 166, 338 N.E.2d 829 (1975) (receiving multi-level hearsay was not an abuse of discretion because Commission relied on other substantial evidence including eyewitness accounts that corroborated such

hearsay statements) See also Doe v. Sex Offender Reg. Bd., 70 Mass.App.Ct. 309, 312-313 (2007) and cases cited, rev.den., 450 Mass. 1110 (2008) (providing examples of the corroborating circumstances necessary to permit an administrative agency to accept hearsay statements in a police report as "substantial evidence")

I would reach the same result but through a slightly different method of analysis. This case does not involve a police report which recites uncorroborated, contested multi-layer hearsay of a third party witness which the Commission has found to be clearly outside the bounds of the degree of reliability that warrants its admission. See Suppa v. BPD, 21 MCSR 614, 665 (2008). Here, the report purports to contain the percipient observations of police officers. Accordingly, this Commissioner would have admitted the report for what it was worth. Upon weighing the hearsay statements of the officers (and weighing those statements, as the Hearing Commissioner did, in light of the fact that Mr. Walker was unable to cross-examine the officer who made the statements) along with Mr. Walker's testimony, the convincing evidence that the breathalyzer equipment had a proven record of malfunction, as well as the fact that all criminal charges were dropped for lack of prosecution, and the BPD acknowledgement that it has hired officers with criminal convictions of even more recent vintage than Mr. Walker's seven year old charge, this Commissioner concurs that the preponderance of the evidence does, indeed, establish that it is more likely than not that Mr. Walker's testimony was credible and no inference of unlawful, disqualifying behavior properly may be drawn from the circumstances. See Burns v. Commonwealth, 430 Mass. 444, 449-451, 720 N.E.2d 798, 803-805 (1999) (State Police trial board's discipline based on officer's *admission to sufficient facts* and resulting CWOF on the underlying charges was reversed as legal

error); Santos v. Director of Div. of Empl. Sec., 398 Mass. 471, 474, 498 N.E.2d 118, 120 (1986) ("The record reflects that the *plaintiff claimed he was innocent*; for all that is shown in the record, he may have admitted to sufficient facts to avoid the expense, publicity, and notoriety which a full trial might engender"); Wardell v. Director of Div. of Empl. Sec., 397 Mass. 433, 436-37, 491 N.E.2d 1057, 1059-60 (1986) ("*Criminal charges not resulting in conviction do not provide adequate or reliable evidence that the alleged crime was committed.* To the extent that the 'deliberate misconduct' relied upon by the board refers to the alleged criminal act of the employee, there was no substantial evidence on the record to warrant his disqualification [from receiving unemployment benefits]." (*emphasis added*) [1]

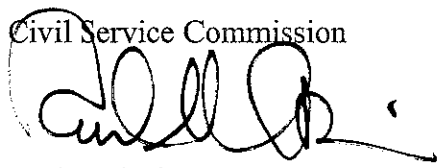
This appeal is not a case in which the BPD was presented with an applicant whose background investigation revealed an undisclosed prior criminal record or contained other credible, corroborating evidence that inferred "patterns" of criminal or other unsuitable traits or behavior. cf. Henrick v. City of Methuen, 20 MCSR 215 (2007) (failure to disclose prior charge); Tracy v. Cambridge Police Dep't, 18 MCSR 221 (2005) (multiple charges exhibits "patterns of behavior"); Thames v. Boston Police Dep't, 17 MCSR 125 (2004) (improper to bypass based on pending charges, but bypass upheld based on long history of arrests and applicant's own testimony); Soares v. Brockton

[1] This Commissioner does not question the use of true prior convictions as disqualifiers. The BPD stands on clear footing to disqualify a candidate who *was* convicted of a serious crime. The Commission notes that police officers may, in the course of their duties, be called to testify in court, where a felony *conviction* could be used to impeach the officer's testimony. See, e.g.., Commonwealth v. Fano, 400 Mass. 296, 302-303, 508 N.E.2d 859, 863-64 (1987) ("earlier disregard for the law may suggest to the fact-finder similar disregard for the courtroom oath"); Brillante v. R.W. Granger & Sons, Inc., 55 Mass. App.Ct. 542, 545, 772 N.E.2d 74, 77 (2002) ("one who has been convicted of crime is presumed to be less worthy of belief that one who has not been so convicted') As discussed above, however, these policy reasons do not apply where the disposition does not amount to a conviction. See Commonwealth v. Jackson 45 Mass.App.Ct. 666, 670, 700 N.E.2d 848 (1998) (admission to sufficient facts not a conviction for purposes of statute allowing impeachment by prior conviction); Commonwealth v. Petros, 20 Mass.L.Rptr. 664, 2006 WL 1084092*4n3 (2006) (same)

Police Dep't, 14 MCSR 109 (2001) (numerous criminal charges and motor vehicle violations); Lavaud v. Boston Police Dep't, 12 MCSR 236 (1999) (five prior criminal charges); Brooks v. Boston Police Dep't, 12 MCSR 19 (1999) ("considerable criminal history") See also Anderson v. Department of Correction, 21 MCSR 688 (2008)

Rather, Mr. Walker's brush with the law six years earlier was an isolated incident that appeared completely out-of-character in an otherwise positive record. The evidence does not support the accuracy of the alleged charges. An otherwise qualified applicant cannot be bypassed for reasons that it did not substantiate as true before this Commission, as it was the burden of the BPD to have done.

Civil Service Commission



Paul M. Stein
Commissioner

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

BRIAN WALKER,
Appellant

v.

G1-07-371

BOSTON POLICE DEPARTMENT,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The instant appeal involves an original appointment to the position of police officer in the Boston Police Department. The BPD bypassed the Appellant in 2007 for reasons related to: 1) an OUI arrest in 2000; 2) an incident in which the Appellant was unexpectedly called into work and reported to duty intoxicated; and 3) sick time usage with a former employer.

In regard to the OUI arrest in 2000, the BPD relied on written statements submitted by two uniformed state troopers who observed the Appellant on the night in question and submitted their reports as part of their official duties.

According to the arrest report, Trooper Kevin Murray was dispatched to Gilmore Bridge in Cambridge on report of a motor vehicle accident on May 21, 2000, around 1:40 A.M. Upon arrival, the Trooper observed a vehicle facing the wrong way on the bridge with no occupants inside the vehicle. Trooper Murray learned from two Cambridge police officers that the occupants had left the scene and were on the Charles River Dam Road. The occupants were apprehended and brought to the State Police barracks. At that time, the Appellant identified himself as the operator of the motor vehicle. Trooper Murray indicated that he asked the

Appellant where he was coming from and if he had anything to drink. In the report, Trooper Murray writes that the Appellant stated that he came from "Good Times in Somerville" and that he started drinking around 8 or 9 P.M. The Appellant stated that he only had "two Heinekens".

According to the arrest report, Trooper Murray detected an odor of alcohol emanating from the Appellant's breath and he observed his eyes to be glassy. Trooper Murray administered field sobriety tests to the Appellant, which he deemed the Appellant had failed. The Appellant elected to take the breathalyzer test. After six (6) attempts to take the breathalyzer test, the machine gave a deficient sample and the Trooper regarded the attempts as a refusal. A second state trooper who was assigned to the desk at the barracks on the night in question also submitted a report consistent with that of Trooper Murray, including statements that the Appellant failed to blow properly for the breathalyzer test and that he "had been drinking more than he stated."

Neither of these reports were properly considered by the hearing officer. Rather, the hearing officer found that the BPD's reliance on "disputed facts contained in the unsubstantiated police reports violate basic merit principles" and admitted the reports only for the fact that the City relied on those documents in evaluating the Appellant's candidacy, but not for the truth of the contents. The police reports offered a detailed factual account based on the personal observations of the Troopers and it is a crime for them to file a false report. G.L. c. 268, § 6A. The BPD appropriately weighed these reports when making its hiring decision and it was an error for the hearing officer to limit their admissibility before the Commission.

The BPD also considered another alcohol-related incident in which the Appellant reported to work while intoxicated as well as the issue of excessive sick time with a prior employer. Taken together, these reasons provided the Boston Police Department with reasonable justification for bypassing the Appellant.

Further, the record does not show evidence of political overtones or personal bias on the part of the BPD. Rather, it was a valid exercise of judgment in deciding whether or not the Appellant should serve as a police officer, be issued a badge, a gun and all of the authority that comes with that. I believe the majority has impermissibly substituted its judgment for that of the Appointing Authority on a matter within the Appointing Authority's "broad discretion," the candidate's suitability to serve as a police officer in Boston. Cambridge v. Civil Service Commission, 43 Mass. App. Ct. at 304-05; Burlington v. McCarthy, 60 Mass. App. Ct. at 914-15.

Finally, I believe the references to the Bradley decision by the hearing officer are misplaced as there are no allegations that the BPD's decision was based on racial discrimination.

For all of the above reasons, I respectfully dissent.

Christopher C. Bowman
Chairman
October 29, 2009