

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

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

BOSTON POLICE DEPARTMENT vs. BRIAN WALKER & another. [\[FN1\]](#)

11-P-2032

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

This case involves an appeal by the Boston police department (department) of a decision by the Civil Service Commission (commission). The commission is charged with enforcing basic merit principles. G. L. c. 31, § 2(b). Courts reviewing decisions of the commission are required to accept the commission's factual findings when they are supported by substantial evidence, see G. L. c. 30A, § 14(7); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003), and may reverse the determination of the commission only where the determination is found to be arbitrary and capricious, unsupported by substantial evidence, in excess of the commission's authority, made through unlawful procedure, or based upon an error of law. See G. L. c. 31, § 44; *Plymouth v. Civil Serv. Commn.*, 426 Mass. 1, 5 (1997) (G. L. c. 31, § 44, requires court to review commission's decision under standards set forth in G. L. c. 30A, § 14[7]). The facts found by the commission are as follows. Walker, a Boston Housing Authority police officer who previously had served as a police officer at the University of Massachusetts and at Brigham and Women's Hospital, and who had received 'unanimously positive employment references and supervisor recommendations,' applied for a job as a Boston police officer. Walker took and passed the municipal police officer civil service examination, and he was number fifty-four overall on the list of those who had passed and were willing to accept appointment.

In determining which individuals to hire, the department at the time in question utilized a so-called 'roundtable' procedure at which the director of human resources, the commander of recruit investigations, a representative of the legal advisor's office, and sometimes the detective who conducted the background investigation for the candidate, reviewed the candidates and determined whether to hire or to bypass them. The roundtable had no written standards, and it evaluated each candidate on his or her own merits. In this case, Walker was bypassed, and another individual more than 300 positions lower on the list ultimately was hired to fill the position for which Walker was eligible. After the roundtable discussion on his candidacy, and a discretionary interview, which the roundtable requests when it requires clarification, and which is conducted by the commander of recruit investigations and the commander of internal affairs, Walker was sent a letter explaining that he was bypassed because of (a) an arrest for operating a motor vehicle while under the influence of alcohol (OUI) seven years prior to his bypass, a charge that ultimately was dismissed for want of prosecution; (b) his having been disciplined by an employer for reporting for his shift while under the influence of alcohol; and (c) concerns about his use of sick leave while a University of Massachusetts police officer.

Walker appealed to the commission. The commission found that the reasons given in the bypass letter were not the true reasons that Walker was bypassed. It found that the

discretionary interview was biased against Walker. Although Walker is black, the commission did not describe any racial bias but indicated its suspicion that there was bias in favor of some other candidate or candidates lower on the list. The commission's determination that the reasons in the letter were pretextual was supported by the following facts. First, the department has hired individuals previously convicted of crimes, including convictions of crimes more recent than the alleged OUI committed by Walker. Second, the commission watched a videotape of the discretionary interview, which it found inexplicably hostile toward Walker, and in which the interviewers, Detective Sergeant Norman Hill (a member of the roundtable) and Deputy Superintendent Marie Donohue, did not ask a single question about the OUI, even though the roundtable had only the police reports and Walker had asserted in his application that those reports were in error. The commission also found that the interviewers unreasonably required Walker to produce by the close of business on the day following the interview a notarized letter from his former supervisor at the University of Massachusetts about his sick leave. Despite the difficulty in obtaining such a letter so quickly, Walker did in fact submit a letter from that supervisor the next day, albeit after the close of business, that stated, 'At no time did I think Mr. Walker was abusing his sick time or using this time excessively.'

The commission also found that events about which the roundtable had concerns had not even happened. Contrary to the assumptions of those at the roundtable, Walker did not drive to work while intoxicated, but had been driven. He did not carry a gun while intoxicated and reporting to work; all firearms were at all times locked at the police station. He had not been disciplined for the incident when he was called to report to duty and had been drinking. As the letter he produced stated, he had done nothing wrong. The commission also noted that the roundtable had not even made any inquiries from which it could have discovered the facts concerning this incident. And there was no pattern of the use of sick days immediately after other days off, which may be an indication of abuse of sick leave. The commission ultimately found no reasonable justification for the bypass.

The commission's findings of fact are adequately supported, and we are bound to accept them. The department emphasizes Walker's arrest for OUI. The commission, however, found that this was not the actual reason Walker was bypassed. Contrary to the department's arguments, the commission neither has required the department to prove that Walker engaged in this misconduct, nor has the commission concluded that, assuming that the misconduct occurred, it could not have been relied upon to bypass Walker. The commission concluded only that the misconduct was not the reason he had been bypassed. For the same reason, this is not a case such as *Beverly v. Civil Serv. Commn.*, 78 Mass. App. Ct. 182, 189 (2010), where there had been an impartial and thorough review by the city of the evidence with respect to the claimed basis for the bypass, but the commission nonetheless rejected its factual conclusion.

Consequently, the commission decision is not arbitrary, capricious, unsupported by substantial evidence, or otherwise not in accordance with law. *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 265 (2001). The judgment of the Superior Court is reversed, and a new judgment

shall enter affirming the decision of the commission.

*So ordered.*

By the Court (Kantrowitz, Sikora & Rubin, JJ.),

Entered: January 16, 2013.

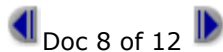
[FN1.](#) Civil Service Commission.

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