COMMONWEALTH OF MASSACHUSETTS

Decision mailed: 4/22/10
Civil Service Commission
03

DARREN WOOLF,
Appellant

v.

TOWN OF RANDOLPH,
Respondent

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

Case No.: G1-09-36

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on March 11, 2010 to acknowledge receipt of the report of the Administrative Law Magistrate dated January 4, 2010. The Commission received written objections from the Appellant on February 4, 2010 and the Respondent submitted a response to the Appellant's objections on February 24, 2010. By a 3-1 vote, the Commission voted not to accept the recommended decision of the Magistrate.

A copy of the Magistrate's report and the majority's reasons for rejecting the magistrate's recommended decisions are attached. The Appellant's appeal is hereby allowed.

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 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 to:
Frank J. McGee, Esq. (for Appellant)
Robert M. Speigel, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (DALA)

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CIVIL SERVICE COMMISSION

SUFFOLK, SS.

One Ashburton Place - Room 503
Boston, MA 02108
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Darren R. Woolf,
Appellant

v.

CASE NO: G1-09-36

Town of Randolph,
Respondent

THE COMMISSION MAJORITY'S REASONS FOR REJECTING THE HEARING OFFICER'S RECOMMENDED DECISION

After a careful review and consideration, the majority of the Commission determined that, in part, the findings and recommendations of the DALA Administrative Magistrate are not consistent with applicable Civil Service Law and rules, and are not supported by the substantial evidence in the record.[1]

Specifically, the DALA recommended decision: (1) applied the incorrect standard of review; (2) overlooks clear statutory provisions, established Commission decisions and applicable appellate case law concerning the appropriate use of very stale, hearsay evidence in support of criminal charges that did not result in a conviction; and (3) presents one-sided findings of fact without any of the required relevant credibility determinations, including why proper weight and probity was not given to the

[1] Pursuant to the Standard Rules of Adjudicatory Practice and Proceeding adopted by the Commission, the Commission is authorized to affirm and adopt the tentative decision of a hearing officer in whole or in part, except that the Commission is obliged to accept "*express* determinations" of credibility of witnesses "*personally appearing*" before the hearing officer.. 801 C.M.R. 1.00(1) (c)2. (*emphasis added*). See, e.g., Town of Brookfield v. Labor Rel. Comm'n, 443 Mass. 315, 322 (2005) (affirming agency credibility determinations so long as they are supported by a "thorough and reasoned explanation" in the record); Herridge v. Board of Reg. in Med., 420 Mass. 154, 163-66 (1995) [*Herridge I*], appeal after remand, 424 Mass. 201, 206 (1997) [*Herridge II*] (vacating decision after board failed to explain its credibility determinations as previously instructed in *Herridge I*); Jacobs v. Department of Social Svs., 21 Mass.L.Rptr. 569, 2006 WL 3292633 (Sup.Ct.) (Henry, J.) (vacating hearing officer's decision that gave "no reason for crediting the investigator's disbelief and not the plaintiff's testimony" and, thus, failed to provide the required "explicit analysis of credibility and the evidence bearing on it") See also Covell v. Department of Social Svcs, 439 Mass 766, 787 (2003); Doherty v. Retirement Bd., 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988)

uncontroverted evidence proffered by the Appellant regarding his most recent and extraordinary military career and employment history, that included impressive, relevant credentials, experience, commendations and licenses, and fails to make findings as to the sole issue on which the Appellant had been bypassed – i.e., alleged truthfulness of the Appellants' explanation of the 18 year old allegations of violation of a domestic abuse protective order, and the credibility of the other evidence that had been provided to the Appointing Authority's investigators regarding this incident which corroborated his truthfulness. Under a correct application of the law and the evidence, the Commission majority concludes that the Town of Randolph failed to meet its burden to establish, by a preponderance of credible evidence, that the reasons it proffered as grounds to bypass the Appellant, were justified and, thus, this appeal should be allowed.

THE APPLICABLE STANDARD OF REVIEW

The recommended decision applies an unduly narrow standard of review of a bypass decision under G.L.c.31, Section 2(b). That statute provides:

> "If an appointing authority makes an original or promotional appointment from certification of any qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator [HRD] a written statement of his reasons for appointing the person whose name was not highest."

Rule PAR.08(3) of the Personnel Administration Rules, promulgated by HRD to implement this statutory requirement, provides:

> "A bypass will not be permitted unless HRD had received a "complete statement . . .that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed to [HRD] shall later be admissible as reason for selection or bypass in any proceedings before [HRD] or the Civil Service Commission. The certification process will not proceed, and no appointments or promotions will be approved, unless and until [HRD] approves reasons for selection or bypass."

These requirements create a standing presumption that candidates will be selected according to their relative placement on the eligibility list, which creates a rank ordering based on their scores on the competitive qualifying examination administered by HRD for the position. See, e.g., Barry v. Town of Lexington, 21 MCSR 589, 597 (2008) citing Sabourin v. Town of Natick, 18 MCSR 79 (2005) ("A civil service test score is the primary tool in determining relative ability, knowledge and skills and in taking a personnel action grounded in basic merit principles.").

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. "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 line of cases cited 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). In addition to ***sound discretion***, the appointing, public officer is expected to employ **honesty and good faith** in the selection process. 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." Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971).

Thus, contrary to what the DALA recommended decision states, an Appointing Authority does not have subjective "wide discretion", (p.8) to choose among candidates for civil service appointments who, as here, have qualified for the position by taking and passing a competitive examination; subject simply to limited oversight for signs of undue political influence. Rather, in order for a candidate higher on the list to be bypassed, the appointing authority must submit "sound and sufficient" reasons that affirmatively prove "reasonable justification" for picking a lower ranked candidate. "In the context of review, means done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and correct rules of law." For a thorough discussion of all of the factors incorporated in establishing the correctness of the legal standard applied by the Commission in these matters. See City of Cambridge vs. Civil Service Commission, 43 Mass. App. Ct. 300, (1997). See also, Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928);. Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321n.11, 326 (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" has been taken "consistently with 'basic merit principles' as provided in G.L.c.31,§1, which gives assurances to all civil service employees that they are 'protected from arbitrary and capricious actions'."); Tuohey v. Massachusetts Bay

Transp. Auth., 19 MCSR 53 (2006) ("An Appointing Authority must proffer objectively legitimate reasons for the bypass") [2]

All candidates must be adequately, fairly and equivalently considered. Evidence of undue political influence is one relevant factor, but it is not the only measure of arbitrary and capricious decision-making by an appointing authority. See, e.g., Suppa v. Boston Police Dep't, 21 MCSR 685 (2008). The Commission has been clear that it 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). See 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 (1995), rev.den., 423 Mass. 1106 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to "review, and not merely

[2] The recommended decision relies on the oft-cited precedent for such alleged wide discretion and purportedly limited Commission oversight found in City of Cambridge, 43 Mass.App.Ct. at 304-05, quoting from Callanan v. Personnel Adm'r, 400 Mass. 597, 601 (1987). The quotation from the Callanan opinion, however, was made in the entirely different context of considering the statutory discretion of the *Personnel Administrator [HRD]* to *establish* eligible lists, and had nothing to do with the standard applicable to bypass decisions by appointing authorities from those lists. This quotation, actually dicta, must be taken in context with the established requirements for "sound and sufficient" reasons that must be provided to "justify" a "valid" bypass, acknowledged by the rest of the opinion in City of Cambridge and the other authority it cites (especially the Revere case, which was a bypass appeal), and which are described elsewhere in this Decision. This mistaken reference to the appointing authority's "wide" or "broad" discretion in the place of the correct, "sound" or "valid" discretion in hiring or promotional selection has infected numerous commission and superior court decisions and at least one Appeals Court decision. See Town of Burlington & another vs. James McCarthy, 60 Mass. App. Ct. 914, (2004)

formally to receive bypass reasons" and evaluate them "in accordance with [all] basic merit principles"); Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme requiring approval by HRD, subject to appeal to the Commission, was "sufficient to satisfy due process").

In a bypass case, the Commission is charged to review whether the Appointing Authority sustained this burden of affirmatively proving, based on a preponderance of the evidence presented at the hearing before the Commission, that it had "reasonable" justification for making an exception to the legislative expectation that selection will be made on rank ordering, which is necessary to allow a bypass. E.g., City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (Commission may not substitute its judgment for a "valid" exercise of appointing authority discretion, but the Civil Service Law "gives the Commission some scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground.")

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 Comm'n, 31 Mass. App. Ct. 315, 321, 577 N.E.2d 325, 329 (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (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, 748 N.E.2d 455, 462 (2001)

For a thorough discussion of all of the factors incorporated in establishing the correctness of the legal standard applied by the Commission in these matters. See City of Cambridge vs. Civil Service Commission, 43 Mass. App. Ct. 300, (1997). The commission, however, was not bound to declare that the city had acted arbitrarily and capriciously. Rather, the governing statute, G. L. c. 31, s. 2(b), requires the commission to find whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority. [3] Mayor of Revere v. Civil Serv. Commn., 31 Mass. App. Ct. 315, 320 n.10, 321 n.11, 322 n.12 (1991). See Commissioners of Civil Serv. v. Municipal Court of the City of Boston, 359 Mass., 211, 214 (1971); Murray v. Second Dist. Court of E. Middlesex, 389 Mass., 508, 516 (1983); Gloucester v. Civil Serv. Commn., 408 Mass., 292, 297 (1990); Watertown v. Arias, 16 Mass. App.Ct. 331, 334 (1983); Dedham v. Civil Serv. Commn., 21 Mass. App. Ct., 904, 906 (1985). That standard gives the commission some scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground. To illustrate, while it might be rational for an appointing authority to consider a candidate's twelve year old conviction of assault and battery, it would not be a proper consideration if a statute or regulation existed that prohibited consideration by public employers of a conviction that occurred more than ten years prior to the time of the appointment decision. "Justified," in the context of review, means "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law."

[3] This parallels the standard of review under G. L. c. 31, s. 43

Selectmen of Wakefield v. Judge of First Dist. Court of E. Middlesex, 262 Mass. 471, 482 (1928). Commissioners of Civil Serv. v. Municipal Court of the City of Boston, supra at 214.[4]" (Emphasis added) City of Cambridge Ibid at 303-304.

Under these established principles, the Commission majority concludes that the Town of Randolph did not meet its burden to establish that the reasons proffered justify bypassing the Appellant. Those reasons are not supported by the substantial, credible evidence in the record as a whole and application of correct principles of law.

ADDITIONAL FINDINGS OF FACT

Upon reviewing the digital record of the hearing (along with an unofficial transcript made by the Appellant), the Commission majority finds that the DALA recommended decision omits making findings on numerous materials issues. First and foremost, the DALA recommended decision skirts over the sole issue upon which the Town of Randolph asserted it had bypassed the Appellant, referencing Lt. Sullivan's testimony and the 18-year old court records and police reports, but making no reference (or findings) as to any of the Appellant's testimony or other evidence that supported his claim he had been completely forthcoming and truthful with Lt. Sullivan. In fact, the DALA recommended decision never actually concludes that any of the Appellant's testimony about what actually happened during the 1990 incident, was untruthful or what exactly he said during the interview process that was inconsistent with what he testified to be true under oath or represented a knowingly false statement by him. The DALA recommended decision concludes merely:

> "***Whatever the facts may have been with respect to the July 31, 1990 incident, the Appellant was not totally candid*** with the employing authority as to what occurred. I find that ***the incident involved some form of physical abuse*** and that, as a result of the incident, ***the Appellant was required to undergo abuse prevention training***. Based on the foregoing, I find that ***the appointing***

> ***authority officials involved in this matter reasonably believed that the Appellant had not been totally truthful*** in his explanation of the July 31, 1990 incident." (DALA Recommended Decision, Discussion, p. 9)

When the entire basis for this bypass rests on an allegation of untruthfulness, the Commission majority cannot uphold such a career-ending bypass decision on vague conclusions, without the hearing officer having made any express finding that the Appellant was untruthful about any specific statement he made at the hearing or during his interviews about this 18-year old incident.

Second, there was considerable testimony and evidence, and reasonable inferences from that evidence, that corroborated the Appellant's testimony about the 1990 incident and his claim that his statements to Lt. Sullivan and the Randolph Board of Selectmen were truthful and consistent with his testimony under oath at the hearing. The DALA recommended decision, however, makes almost no reference to this corroborating evidence. Taking all of the evidence in the record of this appeal as a whole, and in the absence of any express credibility determinations to the contrary, the Commission majority accepts the Appellant's sworn testimony as to the 1990 incidents and concludes that nothing he reported to any of the persons who interviewed him rises to the level of proving he was culpable of any "untruthful" or knowingly false statement.

In particular, the Commission majority makes the following additional facts that are found in the record that tend to support this conclusion:

1. The two-man team assigned by Lt. Sullivan to investigate the Appellant's background was Safety Officer Robert Legrice and Sergeant Robert Emerson. (Tr. 4) Legrice wrote a final report to Sullivan regarding the Appellant, dated November 3, 2008. That one page report contained a one sentence paragraph,

which stated the following: "Woolf's neighbors have reason to believe he would **not** make a good police officer" (Emphasis added). *It was agreed by the parties and witness-Lt. Sullivan, at the hearing, that this was a typographical error*. The word "not" should have been omitted or the wording should have had similar positive implications. This negative and mistaken sentence was the only negative aspect of Legrice's report. It is very concerning that this mistake was not corrected during the investigative-interview-recommendation process and was apparently presented in this mistaken form to the Board of Selectmen.

2. Officer Legrice was not called as a witness at the DALA hearing and no excuse for his absence was offered. Only Officer Legrice could have testified with direct first hand knowledge regarding an explanation for this critical error in his own report, as the hearing officer noted. (Tr. 6-8, Ex. 3). Lt Sullivan tried to resolve this problem with Legrice's report by testifying, (hearsay) about conversations he had with Legrice. Yet, Lt. Sullivan failed to give any details of these conversations such as date and place so that it could be determined if they occurred before or after the Board of Selectmen interview and selection of candidates. In any event Lt Sullivan failed to explain why the critically erroneous report had not been corrected prior to the DALA hearing, either by affidavit or otherwise. (Tr. 15-16, Ex. 3)
3. Neither of the investigating officers in this matter, Sgt. Robert Emerson nor Safety Officer Robert Legrice testified at the hearing. However, they each wrote one-page background investigation reports to Lt. Arthur Sullivan. The reports of these two investigating officers contained numerous informational facts regarding

the Appellant's entire background. These two officers had first-hand contact with: the Appellant, his neighbors, prior employers, his military (National Guard) associates and his present wife Denise Woolf. Both reports(less Legrice's typo error) were encompassing, supportive and positive towards the Appellant. These two investigators were in the best position to provide an accurate overall assessment for the Town, of the Appellant's background and qualifications to be a Randolph Police Officer. The Town did not offer any explanation or excuse for its failure to call either of these two first-hand witnesses to testify. (Tr. 6-8, Testimony and Ex. 3, administrative notice)

4. **The Appellant completed his written job application and named Officer Robert Legrice several times** in answer to questions. In Section I (m.) in answer to: Do you personally know any police officer in this Department? If yes give name and rank. Also in Section V References (a.) he was asked to list three references, **who had known him for at least five years for the purpose of appraising his character, ability, experience, personality and other qualities**. **The Appellant listed Robert Legrice, with his telephone number, as one of those requested references.** Even Lt. Sullivan volunteered in his testimony that Safety Officer Legrice who was at the Appellant's first interview **"was very friendly with Mr. Woolf and speaks very highly of him."** Yet, Sullivan does not describe any input by Legrice into the Appellant's evaluation. (Ex 9-10, Tr. 43)
5. The Appellant also disclosed in his job application Section VI Criminal Record, (j) that he had been the subject of a petition for restraining order, pursuant to c.

209A? He filled in the required information: Date- 1991, Place/Department- Quincy, Court- Quincy Court and Status- Dismissed. It is also noted that this section of the job application requires complete disclosure of information covering the entire gamut (minor misdemeanor to felonies) of criminal arrests, trials, investigations and dispositions. A question is even asked about being a defendant in any civil court action (Ex 9-10)

6. Apparently, **Lt. Sullivan believed that he had some discretion in deciding to further investigate** the information provided in an application under this entire section, including Section VI Criminal Record, (j) . He testified as follows when asked: Q. - If a candidate answers yes to any of these questions, including the J, which is marked yes here. Do you conduct a further background investigation beyond what's listed in this application? **A. –In most instances, yes.** Q. – Did you do that in this instance? A. – I did do a follow up. Whether it's in regards to Mr. Woolf's answer to this question or other duties that I performed during his background investigation, I did do a follow up." (Tr. 21) Lt. Sullivan then testified to his investigative discretion, regarding his decision not to attempt to contact Quincy Police Officer Robert Costa, the author of the police narrative of the incident. Sullivan believed that he did not have to contact anybody despite the incident being "very important" and the fact that the Appellant repeatedly denied to him, any hitting or assaulting her or admitting same to Costa and the Appellant believing that he was arrested only for being at the premises with her. (Tr. 37-42)
7. **Lt. Sullivan served as the "overseer" of the background investigations for the approximately 25 candidates in this process of selecting for ten positions.**

Lt. Sullivan assigned five groups of two officers to conduct the investigations, thereby assigning approximately five candidates for each two-man team of investigators. Lt. Sullivan is "updated frequently by each team [during the investigations] and at the end..." (Tr. 13-14).

8. Lt. Sullivan also described the interview process which follows along with the investigative process: "There is also the interview process with myself and two other members, either of the investigative team and there was an impartial Lieutenant. And then there is the interview process with the Selectmen."(Tr. 14). Although Lt. Sullivan seems to recognize the need for impartiality in this intermingled and ongoing investigation-interview-recommendation and selection process, he failed to clearly identify the impartial Lieutenant or the other two members, by name, who participated in the Appellant's interviews. He also failed to identify any defined and meaningful role that any of the others, (3?) actually had in this interview process. He did testify that he "***tried to have*** the senior officer or the supervising officer of the two investigators present during the interview, as well as Lieutenant Richard Crowley who was not involved in the background investigation. His only involvement in the whole process was to sit in on the interviews and listen to the candidate's presentation." It is not clear whether Lt. Sullivan is describing himself as the senior officer or supervising officer, being present at the interview. (Tr. 14, 16-17, administrative notice)
9. The hearing officer was rightly concerned and confused by the dates of the two investigating officers' reports, in chronological relation to the Appellant's interviews. Emerson's report was dated October 30, 2008 and Legrice's report

was dated November 3, 2008. ***Lt. Sullivan could not even remember the date(s) of the Appellant's interview(s).*** **"I don't recall the exact date that I met- -."** Yet, Lt. Sullivan tried to resolve this conundrum by testifying: "***I believe*** the actual letter may have come after the interview, but my conversations with both Sergeant Emerson and Safety Officer Legrice regarding every thing that's in those letters would have taken place prior to the letters." Again, Lt. Sullivan attempts to resolve incongruities in the evidence including his own testimony by vague reference to uncorroborated self-serving hearsay. **None of the Appellant's interviews were audio or video recorded. The Town did not produce any documentary evidence regarding the interview questions, answers and grading standards of said answers.** The uniformity of the questions asked each of the candidates and the relative/comparative, measured quality or accuracy of each candidate's answers are important factors in determining whether the interview-selection process was fairly and impartially administered. Lt. Sullivan neither produced nor referred to any written memos, notes or other documentation of the investigative-interview process other than the reports of Emerson and Legrice and Lt. Sullivan's own letter of recommendation to Police Chief Porter, dated October 31, 2008. (Ex. 3, 4 and Tr.17-19, Exhibits and testimony, administrative notice)

10. However, that letter, dated October 31, 2008, states that Lt. Sullivan met with the Appellant on October 29, 2008. (Ex. 3, 4 and Tr.17-19). Earlier in his testimony, Lt. Sullivan was unsure of the sequence of his own letter of recommendation to the Police Chief actually being issued before or after the Board of Selectmen

interview. Lt. Sullivan, in typical fashion here, couched his testimony with the qualifying phrase "I believe..." See also his use of the following phrases of indefiniteness: – "***I believe*** ..." (Tr. 13, twice14, 17, 23, 25, twice 35, 37, twice 40, 42, 47, 49), "***I don't recall***..." (Tr. twice18, 28, 34, 35, 46, 50) "***My recollection is***..." (Tr. twice 23, 28), "***not that I recall***..." (Tr. 36), "***Yes, to the best of my recollection***." (Tr. 45) "***at some point later***..." (Tr. 25) "***I don't know the exact verbiage...***" (Tr. 44) "***He may have. I don't recall that***." (Tr. 50) He continued his testimony by referring to his first interview with the Appellant without identifying a date and being unsure of the sequence of events. He testified that: "... and at some point later after that first interview, I did receive this police report. Q. - And did you interview Mr. Woolf again after you received this police report? A. – I did. There was also an interview with the Selectmen prior to - - ***I believe*** it was prior to the time I had this police report, or just before I had this police report." (Tr. 24-25) The hearing officer continued to be confused chronologically and sequentially when Lt. Sullivan began testifying about his undated second interview with the Appellant. Lt. Sullivan answered that **Sgt. Emerson's report dated October 30, 2008 in which Emerson refers to speaking with the Appellant's wife, Denise at the direction of Sullivan,** occurred after Sullivan's interview, in which he confronted the Appellant with the Quincy police report. (Tr. 29-30)

11. **Sgt. Sullivan believed and assumed** that the Appellant was criminally charged with a violation of a protective order, (c. 209A § 7) occurring on July 30, 1990, **specifically for abusing the plaintiff to wit admitting to committing assault**

and battery on her. Sgt. Sullivan did not believe that the Appellant's violation charge was for merely being present where he was not supposed to be. Sgt, Sullivan based his opinion of untruthfulness and therefore his recommendation to the Police Chief that the Appellant not be selected, solely on these beliefs and assumptions. (Tr. 26-27, 36-42, Town's opening statement Tr. 8-11, reasonable inferences)

12. **Sgt. Sullivan gave divers inconsistent and/or contradictory answers in his sworn testimony.** One answer in particular appears to be wholly inconsistent or improbable or partially contradictory to another part of the same answer. A.- "*His only response* after I spoke of the [police] narrative and of the [court] disposition was that the police officer did not say anything about his wife being drunk,- - excuse me - - his girlfriend being drunk and striking him with a telephone, *And we discussed the incident at length.* And at that point, Darren stated to me, I guess I'm screwed aren't I" and further on: "*It is my recollection - - I don't recall - - he never admitted that he struck [name], the plaintiff*". (Tr. 28) and continuing Sgt. Sullivan was asked: Q. "*Did you ask Mr. Woolf any other questions during the interview? A. I may have. Not that I recall.*" (Tr. 29) Lt. Sullivan later confirmed his indefinite testimony by answering: *A. "I do not recall him responding to me. Q. You're not saying that he didn't? A. If he did, I would have wrote it in my report."* (Tr. 34) However, when pressed on cross-examination regarding the additional fact of Woolf calling her mother on the phone to come over and take care of the child "because she was drunk?" *Lt. Sullivan admitted: A. "I believe there was some conversation about the mother-in-law, yes."* (Tr. 35) However,

Lt. Sullivan did not write this last referred to part (telephoning her mother) of the conversation in his report, (Ex 4) as he previously testified he would have done. Lt. Sullivan continued to contradict his prior testimony on cross-examination when he testified: A. - "I believe I documented that [telephoning her mother when she grabbed the phone and hit him with it] in the report." (Tr. 37) However, there is no reference to the Appellant telephoning her mother contained in Sullivan's report. (Ex.4) and further along: A. – "*No, there could have been more conversation. I just don't recall any other conversation.*" (Tr. 46) Again, Lt. Sullivan admitted in equivocal, contradiction to his prior testimony that the Appellant may have told him this fact (telephoning her mother) at the interview. A. – *"He may have. I don't recall that."*(Tr. 50) Lt. Sullivan admitted that he didn't even know who was living at the premises on the date of the incident (7/30/90), or that she had moved back to live with him, critical facts. Surprisingly, Lt. Sullivan believed those facts to be "*irrelevant*". (Tr. 49-50) It is also improbable that an incident could be discussed at length between two people, at an interview focusing on that incident and yet only three brief factual statements are made by one of the parties. It is also unusual for people to speak in sparse sentences, with out additional descriptive language and specifics or details, even superfluous or colloquial language. (Emphasis added) (Tr. 28-29, reasonable inference)

13. Lt. Sullivan did not make any attempt to contact Quincy police officer Robert Costa, who wrote the police "narrative" of the incident in 1990. (Tr. 34, Ex 6)

14. Then Lt. Sullivan was asked: Q. "What did you do after that interview, with respect to your - - this application process? A. **After this interview,[of Appellant], I directed Sgt. Emerson to have an interview with Darren Woolf's present wife in regards to any issues with - - any concerns regarding the violation of any kind of protective order or any abuse and Sgt. Emerson did do that. Q. Is that conversation reflected in Sgt. Emerson's report? A. Yes it is."** (Tr. 29)

15. **Sgt. Robert Emerson completed and dated his background report to Lt. Sullivan on the same day he interviewed the Appellant's wife Denise, October 30, 2008**. Sgt. Emerson's report contained the following information from Denise regarding the Appellant: 1.) He is a great husband and father. 2.) She has never had any domestic issues with him. 3.) She is absolutely certain that he would be a great police officer, saying "It is what he was born to do" 4.) She knew "all about that", restraining order incident. 5.) His ex (plaintiff) was a nightmare for them to deal with for many years. 6.) The ex made many false allegations against him, including one allegation of abuse when he was on active duty and not anywhere near her. 7.) She explained that the "hit" he referred to was when he put his arms up to block a strike from his ex with a telephone. 8.) He had explained to her that his ex was extremely drunk and angry and struck him with the phone. He put his arms up, blocked the phone and pushed her away from him. 9.) She opined that he sometimes does not express himself clearly and this may have been one of those times. 10.) The ex continues to haunt them even though she has been dead for several years now. 11.) He would not have had any dealings with the ex if it were

not for their child together. 12. They have not seen his child for several years. 13.) He had tried to be part of his child's life, but was prevented by the mother (the ex) and aunts. 14.) He tried to gain custody of the child but was obstructed by the mother (the ex) and aunts. 15.) The mother (the ex) of the child did not have custody of the child (one of the aunts did). 16.) He sought a top secret clearance from the Justice Department for which the Department conducted an investigation including a wire tap on their home phone over several months. He was granted the top secret clearance. 17.) She summed up her marriage by saying that if it could survive all of the difficulties of dealing with his crazy ex, it would survive anything. (Ex. 3)

16. Lt. Sullivan wrote his letter to Police Chief Porter, dated October 31, 2008, calling into serious question the Appellant's ability to perform as a police officer, due to his "untruthfulness about this domestic assault". Lt. Sullivan's letter focused exclusively on this single isolated incident and its implications which had occurred more than (18) eighteen years earlier. Lt. Sullivan's letter omitted any of the Appellant's positive background facts whatsoever, including his lengthy and impressive employment and military record. ***Lt Sullivan completely omitted all of the voluminous positive references for the Appellant contained in the reports of Officer Legrice and Sgt. Emerson, despite having directed Sgt. Emerson to conduct a separate interview with the Appellant's wife on domestic issues and knowing that Officer Legrice had known The Appellant for a long time and held a high opinion of the Appellant .Lt. Sullivan also chose to ignore all of the***

substantial negative information regarding the plaintiff-girlfriend contained in Sgt. Emerson's report.(Ex. 3, 4)

17. Indeed, Lt. Sullivan's determination of the Appellant's untruthfulness was the sole reason for his recommendation that he not be selected as a police officer for the Town. Sullivan claimed that the untruthfulness was the Appellant's repeated (several) denials of or refusal to admit to Sullivan that he had: "hit", "struck", "assaulted", "abused", "physical abuse", "assault and battery", "abuse violation" or had a "physical altercation with" (various terms used by Sullivan in his testimony to describe his questioning of the Appellant) regarding the plaintiff on July 30, 1990. (Tr.11-53). It is noted that each of these terms or phrases has a different definition or connotation and points to Sullivan's inconsistency or questionable interview technique more than any other factor. Sullivan based his determination of untruthfulness on the Quincy police narrative from the date of the incident, which "indicated that he admitted striking her [named plaintiff]". However there is no indication in the record that this unauthenticated and unsworn police narrative was used or referred to by the police or the court in the complaint issuance, arraignment or disposition process. Lt. Sullivan went further and stated that the main job of a police officer is to testify in court truthfully. "**If you have a history of not being truthful**, I believe it brings in doubt your credibility. And again, I don't believe that you can be an effective witness." (Tr. 32-33, Ex 3, 6,8) However, contrary to Lt. Sullivan's belief; the Appellant does not have a history of not being truthful.

18. Lt. Sullivan testified in a manner which reflected a poor memory and/or poor record keeping or an inability to relay events clearly and definitively. For example, the hearing officer asked him "what questions he asked the candidates during the interviews?" He answered: A. "There are no- - there is a set of specific questions that we ask all the candidates. ***I don't recall exactly what they were***. They are general knowledge questions. And all the questions were to see how comfortable they were, communication skills and how they articulated responses." The Town offered no documentation on the questions asked the Appellant during any of his interviews or the absolute or comparative grading of the responses among any of the candidates. (Tr. 18-19, testimony, exhibits, administrative notice, reasonable inference)
19. Lt. Sullivan's investigation, interview and record keeping abilities appear to be selective or inadequate. He repeatedly changed the terms or phrases he employed in the pivotal questions he asked the Appellant. The Appellant consistently denied abusing the plaintiff-girlfriend on the date, 18 years earlier, in question. Yet, Sullivan believed these repeated denials were repeated untruths. Sullivan based this belief on the unauthenticated, unsworn police narrative, without any attempt to corroborate or substantiate it. There was no evidence presented to show that the police narrative had been used in any way in the criminal complaint application, arraignment, and court disposition process. The Appellant had been unaware of the police narrative until Sullivan presented him with it at an interview. Yet, Sullivan asked him to "explain" it anyway. This is a fundamentally improper question in form, as the Appellant would not now or then know the police

officer's state of mind. It also appears to be aimed at flustering the Appellant, due to its surprise revelation. The Appellant responded appropriately by consistently denying that he had abused her on that day. He gave further reasonable responses to indicate several specific inaccuracies and omissions in the police narrative. These inaccuracies and omissions could have been used by Lt. Sullivan to reasonably infer that the police narrative was inaccurate and incomplete as a whole and therefore unreliable. However, Sullivan took the Appellant's reasonable responses as "irrelevant" or indications of being "untruthful" or evasive. Sullivan exhibited a poor memory and some confusion. Sullivan made no attempt to investigate the plaintiff-girlfriend's criminal background, reputation or character. This would appear to be a minimal expectation regarding an incident involving contradictory versions of events and given the indications of her suspect character, motivation and neglectful or criminal behavior, which were contained in the Appellant's statements, the police narrative and Sgt. Emerson's report. The record indicated that she abandoned a child to go out and get drunk and may have failed to appear in court as a witness, and had falsely accused the Appellant of violating the c. 209A order, at a time when the Appellant was provably not in the area. Sullivan did not record his interviews nor keep any contemporaneous written documentation of the ongoing investigation-evaluation-recommendation process. Sullivan's testimony showed his own confusion, lack of awareness of or improper reliance on; indefiniteness and sometimes contradiction regarding the facts and information used in this process. Sullivan ignored overwhelming background information substantiating the Appellant's high character, accomplishments and

integrity in favor of his own subjective opinion of untruthfulness regarding a single 18 year old incident. **Contrary to Sullivan's belief and testimony, the Appellant did not have "a history of not being truthful."** (Exhibits, testimony and reasonable inferences)

20. Although Police Chief Paul Porter made the "final" formal recommendation to the Board of Selectmen, not to appoint the Appellant, he relied almost entirely upon the information and recommendation provided to him in numerous conversations with and several reports provided (Quincy police report and court docket) by Lt. Sullivan. He made his recommendation "in conjunction with Lt. Det. Sullivan" (Tr. 57), (Tr. 53-72)
21. Chief Porter also considered the factor of the Appellant's untruthfulness as it represents a lack of integrity to be the "main", if not the most important factor in his recommendation not to appoint the Appellant, since "it impacts the judicial system." However, Chief Porter testified that he also weighed other factors such as "...past jobs, job references. I weigh military very heavily, especially military police. I weigh stuff like that. That goes a long way in my mind." (Tr.56). Yet, Chief Porter later modified his view and testified: "If I believe you're untruthful, I don't even look at anything else, don't even bother going beyond that." (Tr.71)
22. However, Chief Porter had never met the Appellant until the evening of the Selectmen's interview. He believed that the Appellant had been untruthful, by denying that he had "abused the woman" (Tr. 59) on at least two occasions and possibly three. (Tr.57). He believed those occasions were: 1st. The Appellant's first interview with Lt. Sullivan, 2nd. The Appellant's interview in front of the

Board of Selectmen and then 3rd. the Appellant's final interview with Lt. Sullivan, after Sullivan had obtained the Quincy police report. Chief Porter received this information in conversations with Sullivan, since he had not read the reports at that time. (Tr. 59-60). Chief Porter also claimed not to have read Lt. Sullivan's report in preparation for his testimony at this hearing. (Tr. 60). **Chief Porter displayed confusion, a poor memory and a complete lack of detail, including dates, quantity and sequence of the Appellant's interviews and his conversations with Lt. Sullivan.** (Tr.58-61). He was cross-examined on the details of the Appellant's alleged untruthfulness at the Board of Selectmen interview, at which the Chief claims to have been present. However, Chief Porter answered without providing any specifics: A. – "*I don't recall the exact conversation, but there was some talk about the order I believe. I don't recall exactly - -.*" (Tr. 65) Chief Porter like Lt. Sullivan also qualified much of his testimony with the prefatory indefinite phrase: "I believe…" or similar phrases. e.g. A. - "*Yes, he told me he said it, at some point. I forget. Was it the third interview? Yeah, I believe the third interview.*" (Tr.61)

23. Chief Porter believed at the time of his recommendation that the Quincy Court docket stated in writing, that the Appellant had admitted to sufficient facts to the specific offense of physically "abusing the plaintiff." However, when confronted with the court docket, exhibit 6, on cross-examination, he could not find it on the exhibit. This erroneous testimony was followed by his testimony that he had read the docket, just "a couple of days ago." Chief Porter was also forced to back track on this claim by changing his testimony to "… what's today, Wednesday - - it

may have been last week. It may have been last week, last Thursday, or Friday, maybe Wednesday." (Tr. 61-63). The Town tried to refresh the Chief's memory and rehabilitate his testimony, on redirect examination by having him read the Quincy police narrative while on the stand. This caused the Chief to reverse his earlier testimony and apologize for the confusion he had created. (Tr.66-67)

24. The DALA hearing officer concluded in his recommended decision that while "...the Appellant has an outstanding military record, excellent references and a positive employment history. However, the Respondent acted within its sound discretion in choosing to bypass the Appellant for the position of police officer." The DALA hearing officer formed this conclusion based in part on his determination that "**Whatever the facts may have been with respect to the July 31, 1990 incident, the Appellant was not totally candid with the employing authority as to what occurred. I find that the incident involved some form of physical abuse and that, as a result of the incident, the Appellant was required to undergo abuse prevention training. Based on the foregoing, I find that the appointing authority officials involved in this matter reasonably believed that the Appellant had not been totally truthful in his explanation of the July 31, 1990 incident**." (proposed decision -pp. 9-10)
25. The Appellant is married and has three children. He joined the US Army upon leaving High School when he was 18 or 19 years old. He later got his GED. He was assigned stateside and eventually served as day shift supervisor, MP Commission, for base security at Camp Edwards. He was deployed overseas for 16 months serving in Kosovo and Yugoslavia as the MP Platoon Sergeant,

commanding 42 soldiers for operations including base security. He has received training in the US and Germany. He is now a sergeant first class at Camp Edwards. He has also served on a variety of missions and operations in Macedonia, Croatia and Greece. He has served as the Armorer for his unit. He has Federal and Mass. Licenses to carry firearms. He has a Pentagon Top Secret clearance. He submitted his military records, including his certificates, commendations and awards to the Town with his job application and to the Civil Service Commission with his appeal. (Ex. 1, 3), (Tr. 73-76)

26. The Appellant as pre-requisite to and as a condition of acceptance of his application for employment as a police officer with the Town of Randolph was required to sign and agree to the entire terms and conditions of a detailed "**Release Of Information Agreement**". This agreement appears to be a valid contract between the Appellant and the Randolph Police Department. This agreement also appears to have been drafted by the Randolph Police Department, (RPD), "a standard application form". (Tr. 13) The Appellant gave consent to release any and all past information and waived any claim against the RPD or any other entity for said release of information. The Appellant agreed to indemnify and hold harmless against any and all claims against or liability of the RPD or its agents or employees, associated with his application for employment or arising out of the requests contained in this agreement. The Appellant gave all of his consents, releases and waivers of rights and claims as a pre-condition to the RPD accepting his application for employment. The RPD gave as consideration for this agreement, only a promise to accept and process the Appellant's employment

application. This agreement, as required, is signed by the Appellant with his signature being notarized on August 22, 2008. (Ex. 10)

27. G. L. Chapter 209A is the "Abuse Prevention" law. Section 3(i) states in part: "Any action commenced under the provisions of this chapter shall not preclude any other civil or criminal remedies. A party filing a complaint under this chapter shall be required to disclose any prior or pending actions involving the parties for divorce, annulment, paternity, custody or support, guardianship, separate support or legal separation, or abuse prevention." Chapter 209A: Section 3A addresses the nature of proceedings and availability of other criminal proceedings; information required to be given to complainant upon filing Section 3A states: "Upon the filing of a complaint under this chapter, a complainant shall be informed that the proceedings hereunder are civil in nature and that violations of orders issued hereunder are criminal in nature. Further, a complainant shall be given information prepared by the appropriate district attorney's office that other criminal proceedings may be available and such complainant shall be instructed by such district attorney's office relative to the procedures required to initiate criminal proceedings including, but not limited to, a complaint for a violation of section forty-three of chapter two hundred and sixty-five. Whenever possible, a complainant shall be provided with such information in the complainant's native language." (administrative notice)

28. Orders made under domestic abuse protection statutes, (c. 209A) are equitable in nature. Domestic abuse prevention order proceedings were intended by legislature

to be as expeditious and informal as reasonably possible. Zullo v Goguen, 423 Mass. 679, (1996) (administrative notice)

29. The party initiating court action under Chapter 209A is designated as "Plaintiff" and the party against whom the action is sought is designated as "Defendant". These are party designations on civil actions. However, despite an abuse prevention order being civil in legal effect and equitable or remedial purpose, a violation of a protective order may be treated as a criminal act pursuant to §7. There are at least three distinctive acts which may be considered a violation of a protective order and then either criminally and/or civilly processed. Those distinctive acts are: 1.) The defendant abusing the plaintiff. 2.) The defendant failing to vacate a designated premises or household. 3.) The defendant failing to stay away from a designated premise or household. and 4.) The defendant failing to stay away, a specified distance from the plaintiff and/or another household member, such as a child. Police Chief Paul Porter admitted this in his testimony, that abusing a person would be only one of the ways you could violate a restraining order.(Tr. 61-62) (Ex. 6, administrative notice)

30. The Appellant was arraigned in Quincy District Court, on the Violation of Protective Order offense on Docket No. 9056CR 6621, on July 31, 2010, by a plea of Not Guilty. The offense appears to have been disposed of on 2/13/91, apparently based on the Appellant's admission to sufficient facts and the Court continuing the matter without a finding until 2/11/92. The docket has the box checked off indicating he received an assigned attorney on 10/24/91, for which a $40 fee was imposed on the Appellant. The disposition of this matter has many of

the earmarks of a civil, equitable, remedial one and not as a criminal matter, despite the CWOF. The Appellant was released on his personal recognizance, which is defined as no surety for his reappearance in court was required other than his personal promise ($100) and signature. The Appellant received no fines, no sentence, no suspended sentence and no probation. The Appellant on the court docket received a notation of costs of ("$30 VWF"), with another notation of total due, "Waived". There is no notation of any inquiry by the court into the issue of any damages suffered by the victim, such as medical costs or lost wages as outlined in § 7. The notation under other disposition reads: "eval. re: Alcohol & Emerge prog & Restrain order: Pick up child @ home-not to enter apartment, for purposes of visitation only." There are not any notations on the court docket regarding any factual finding on criminal elements of any crime, e.g. abusing, assault and battery, assault, threats etc. There is no notation of any required judge's colloquy, documentary or testimonial evidence taken nor punitive assertion or disposition against the Appellant, e.g. sentence, suspended sentence, fine, restitution, probation, abusing, assault and battery, assault, threats etc., nor any separate criminal charge for any of these or other criminal acts. The most informative entry on the docket sheet is on page 2, dated 11-28-90: "Comm witness fails to appear. … Motion to terminate continuance will be entertained." This entry clearly implies that the court expected the "Comm witness" to appear and the witness did not appear as expected. The plaintiff-girlfriend or a Quincy Police Officer, most likely Costa would be the likely witness referred to here. (Ex. 6, reasonable inferences)

31. The original c. 209A restraining order issued by Quincy District Court in August, 1989, and subsequently extended, lists the Plaintiff-girlfriend's address as [redacted] and the Defendant-appellant's address as [redacted]. **The arrest on July 30, 1990 occurred at the Appellant's address**. Part of the order checked off is that the Appellant is to remain away from her household located at [redacted]. with a hand written note "wherever she may be". The criminal docket sheet for violation of protective order c. 209A § 7 offense does not indicate any colloquy by the Judge with the Appellant-defendant regarding any crime or the elements constituting abuse; such as assault, assault and battery or threats etc. The Quincy Police Department "arrest report" also lists only the offense of "violation of 209A", not any of these specific crimes. There is no reference to any reading of the so-called "Miranda Warnings" to the Appellant in either the Quincy Police "arrest report" or the "narrative", which would be routinely expected in any arrest for a crime of violence. There is no mention in either of these police reports of any offer by the police to provide medical treatment to the alleged injured victim, or notice given of the other enumerated victim rights including seeking a criminal complaint for threats, assault and battery, assault,... or other related offenses, a requirement of c. 209A § 6 (Ex. 6, 8, administrative notice).

32. There were strong indications in the background information that the girlfriend-plaintiff had a problem with alcohol abuse, (several stays in detox. and abandoning a toddler child to get drunk on the day of the arrest). Her fitness as a parent was also raised by the fact that she abandoned her child that day and that

she did not have custody of her biological child, one of her sisters did. She and the Appellant had an ongoing disagreeable relationship over the care and custody of their child. She moved out of the apartment that she had been living in with the Appellant at [redacted] and moved to [redacted] sometime in 1990. She obtained a c. 209A restraining order against the Appellant at that time. Shortly thereafter she informed the Appellant that she wanted to move back to live with him. He told her that she could not because of the restraining order. She responded that she would have the restraining order removed. A few days afterwards she informed him that the restraining order had been removed (a lie) and returned to [redacted] to live with him. On the day of the incident, July 30, 1990 she returned from a bar room drunk and argued with the Appellant. He then attempted to telephone her mother regarding her behavior. She grabbed the telephone out of his hand and hit him with it. He attempted to defend himself by reflexively pushing her back. Her mother telephoned the police, who arrived sometime thereafter, prompting the Appellant's arrest. Her background which exhibits a lack of responsibility, honesty and a motive to lie and/or retaliate against the Appellant was outlined by the interview of his present wife Denise contained in Sgt. Emerson's report and the Appellants testimony. (Ex 3, 6, Tr. 77-85)

CONCLUSION:

"The fundamental purpose of the civil service system as outlined in the civil service law, G.L. Chapter 31 is to guard against political considerations, favoritism and bias in governmental hiring and promotion." Cambridge v Civil Ser. Comm'n 43 Mass.

App. Ct. 300, 304 (1997). This purpose is effectuated by the implementation of basic merit principles in the hiring and promotion process. G.L. c 31 § 1 defines as follows: "***Basic merit principles", shall mean*** (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) ***assuring fair treatment of all applicants and employees in all aspects of personnel administration*** without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and ***with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens,*** and; (f) assuring that all employees are protected against coercion for political purposes, ***and are protected from arbitrary and capricious actions.***

In a bypass appeal, the question is "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the Appointing Authority." City of Cambridge v. Civil Service Commission. 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification requires that the Appointing Authority's actions be were based on adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law." Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). All applicants must be adequately and fairly considered.

"An Appointing Authority must proffer objectively legitimate reasons for the bypass, rather than rationalizations for the selection of one candidate over the other." See Tuohey v. MBTA, Case No.: G2-04-394 (2006). The interview-evaluation process did not identify a personality or character trait that might reasonably interfere with the Appellant's ability to perform the duties and responsibilities of the position he sought. Compare Radford v. Andover Police Department, 17 MCSR 93, (2004).

CORI and CRIMINAL RECORD USE:

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)

Chapter 31: Section 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?

Yes.	
No.	

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.

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)

G.L. Chapter 41 § 96A - No person who has been convicted of any felony shall be appointed as a police officer of a city, town or district. (Administrative notice)

G. L. Chapter 276 § 100A. Requests to seal files; conditions; application of section; effect of sealing of records.

Calls for in relevant part that any person having a record of criminal court appearances and dispositions in the commonwealth may file a request with the office of the commissioner of probation and have said records sealed. This statutory right mandates sealing of all records of convictions, including termination of court supervision, probation or sentence for any misdemeanor occurred not less than ten years prior to said request; or for any felony occurred not less than fifteen years prior to said request; providing that said person had not been found guilty of any criminal offense within the commonwealth or in another state in the ten years preceding such request, except motor vehicle offenses in which the penalty does not exceed a fine of fifty dollars; and has not been imprisoned in any state or county within the preceding ten years; and. This section shall apply to court appearances and dispositions of all offenses, (with several exceptions stated).

And Section 100A further states:

"...Such sealed records shall not operate to disqualify a person in any examination, appointment or application for public service in the service of the commonwealth or of any political subdivision thereof; nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any boards or commissions, except in imposing sentence in subsequent criminal proceedings.

An application for employment used by an employer which seeks information concerning prior arrests or convictions of the applicant shall include the following statement: "An applicant for employment with a sealed record on file with the commissioner of probation may answer 'no record' with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a sealed record on file with the commissioner of probation may answer 'no record' to an inquiry herein relative to prior arrests or criminal court appearances. In addition, any applicant for employment may answer 'no record' with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution.".

The commissioner, in response to inquiries by authorized persons other than any law enforcement agency, any court, or any appointing authority, **shall** in the case of a sealed record or in the case of court appearances and adjudications in a case of delinquency or

the case of a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution, **report that no record exists**. (Administrative notice.)

Section 21. Proof of conviction of crime to affect credibility.

G.L. Chap. 233 § 21- prescribe the time limits after which convictions cannot be used to impeach a witness (unless intervening criminal convictions revive them) The conviction of a witness of a crime may be shown to affect his credibility, except as follows:

First, The record of his conviction of a misdemeanor shall not be shown for such purpose after five years from the date on which sentence on said conviction was imposed, unless he has subsequently been convicted of a crime within five years of the time of his testifying.

Second, The record of his conviction of a felony upon which no sentence was imposed or a sentence was imposed and the execution thereof suspended, or upon which a fine only was imposed, or a sentence to a reformatory prison, jail, or house of correction, shall not be shown for such purpose after ten years from the date of conviction, if no sentence was imposed, or from the date on which sentence on said conviction was imposed, whether the execution thereof was suspended or not, unless he has subsequently been convicted of a crime within ten years of the time of his testifying. For the purpose of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section.

Third, The record of his conviction of a felony upon which a state prison sentence was imposed shall not be shown for such purpose after ten years from the date of

expiration of the minimum term of imprisonment imposed by the court, unless he has subsequently been convicted of a crime within ten years of the time of his testifying.

Fourth, the record of his conviction for a traffic violation upon which a fine only was imposed shall not be shown for such purpose unless he has been convicted of another crime or crimes within five years of the time of his testifying.

For the purpose of this section, any period during which the defendant was a fugitive from justice shall be excluded in determining time limitations under the provisions of this section. (Administrative notice)

(CWOF) CONTINUANCE WITHOUT FINDING – CRIMINAL RECORD

There is considerable confusion, both among laypersons as well as in the case law, as to the precise meaning and effect of a criminal defendant's "admission to sufficient facts" followed by a CWOF. Some case law holds that, prior to accepting any "admission to sufficient facts", a judge must give the appropriate "colloquy" under G.L.c.278, §29D warning, inter alia, of possible consequences such as deportation because, according to federal immigration rules, a conviction after "admission to sufficient facts" puts the defendant "in the same posture as if he had pleaded guilty" and is, therefore, the "functional equivalent" of a guilty plea, at least for purposes of determining federal immigration status. See, e.g., Commonwealth v. Casimir, 68 Mass.App.Ct. 257n1, 861 N.E.2d 497, 498 (2007) (defendant found guilty after admitting facts); Commonwealth v. Mahadeo, 397 Mass. 314, 316-17, 491 N.E.2d 601, 602-03 (1986) (same).

In other circumstances, however, especially in cases involving administrative review of agency decisions concerning the use of a CWOF in an employment context, an "admission to sufficient facts" that is followed by a CWOF and later dismissed without

any guilty plea or finding is explicitly held "*not the entry of a formal guilty plea* and is, therefore, not a conviction",[4] specifically, distinguishing the G.L.c.278, §29D line of cases. E.g., Fire Chief of East Bridgewater v. Plymouth Co. Ret. Bd., 47 Mass.App.Ct. 66, 71n13, 710 N.E.2d 644, 647 (1999) citing Commonwealth v. Jackson, 45 Mass. App.Ct. 666, 700 N.E.2d (1998).

Impeachment by prior convictions is available in both civil and criminal cases and is controlled by G.L. Chap. 233 § 21. It can only be done by production of records of criminal convictions pursuant to G.L. Chap. 233 § 21. The Appellant was not convicted of any crime within the time limitations stated above and therefore could not have his credibility impeached by the use of the records submitted as exhibits in this matter. The eighteen year elapse of time from the date of the incident, together with: the incomplete and/or sparse record, the indicia of an expedited practical and equitable disposition, the Appellant's first hand version of events (denial), the lack of a judge's colloquy or any findings, or any indication of sworn testimony or statement or cross-examination, the Appellant's exemplary background, with the other enumerated factors, clearly outweigh the stale, undocumented, and cold, hearsay record of his 1990 admission.

[4] This Decision does not question the use of true prior convictions as disqualifiers. The RPD 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 in this Decision, 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)

IN PARTICULAR, THE COMMISSION MAJORITY CONCLUDES THAT THE CREDIBLE EVIDENCE, FAIRLY CONSIDERED, DEMONSTRATES THE LACK OF A RELIABLE BASIS TO INFER UNTRUTHFULNESS ABOUT THE 18-YEAR OLD CHAPTER 209A MATTER, EITHER IN 1990 OR IN HIS RECENT RECOLLECTIONS AND TESTIMONY.

The Town and its investigation under Lt. Sullivan had an obligation to exercise due diligence and to fairly evaluate relevant and significant facts relating to its conclusion of lack of truthfulness on the part of the Appellant. Lt. Sullivan certainly had sufficient information available to him to be concerned or suspicious about the honesty and motivation of the plaintiff-girlfriend. He had the appellant's statements, the police narrative, Sgt. Emerson's report and other information. See Commonwealth v Olga Olivo 369 Mass. 62, 69 (1975) "It is equally well settled that "[n]otice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop." Essex Nat'l Bank v. Hurley, 16 F.2d 427, 428 (1st Cir. 1926), quoting in substance from Coder v. McPherson, 152 F. 951, 953 (8th Cir. 1907).; A party may not "shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received." NLRB v. Local 3, RWDSU, 216 F.2d 285, 288 (2d Cir. 1954), quoting from The Lulu, 77 U.S. (10 Wall.) 192, 201 (1869).

In considering an application for a c. 209A order, a judge must be alert against allowing the process to be used, as it sometimes is, "abusively by litigants for purposes of discovery and harassment." Szymkowski v. [5]Szymkowski, 57 Mass. App. Ct. 284, 287

[5]The charges that underlay the s. 51A complaint were substantially the same ones as those advanced in support of the application for a c. 209A order.

(2003) quoting from Jones v. Gallagher, 54 Mass. App. Ct.883, (2002) at 887 n.4. "In the instant case, there are distinct overtones of the use of c. 209A as a weapon in circumstances of reciprocal hostility between divorced parents and differences, as well as genuine concern, about how to deal with a child." Ibid. *Szymkowski* at page 287. The very nature of c. 209A proceedings "is intended to be expeditious and as comfortable as it reasonably can be for a lay person to pursue." Frizado v. Frizado, 420 Mass. at 598. "[T]he rules of evidence need not be followed, provided that there is fairness in what evidence is admitted and relied on . . . The process must be a practical one." Id. at 597, 598.

Many vacated 209A orders are vacated because of the victim's failure to prosecute. See Vaccaro v. Vaccaro, 425 Mass. at 158 n.5. Law enforcement officials will not be notified that the order was vacated because it was obtained by fraud on the court. Rather, they may presume it was vacated because of the victim's failure to prosecute or because of insufficient evidence. The perpetuation of a fraud amounts to a defiling of the court itself when law enforcement officials rely on inaccurate information produced by the court. See Winthrop Corp. v. Lowenthal, 29 Mass. App. Ct. at 184. or, as in Vaccaro, fail to present enough evidence to allow a court to continue the issuance of one. See Vaccaro v. Vaccaro, 425 Mass. at 158 n.5.

It has not been determined in this present case, that the plaintiff girlfriend committed fraud upon the court to obtain the initial protective order or the subsequent violation of protective order-criminal charge. However, there is some indication in the record that the Commonwealth witness, (Her or a Police Officer) failed to appear in court on November 28, 1990 and that the court expected said appearance. This failure to appear

may have denied the court and/or the defendant-Appellant the opportunity to inquire into the circumstances of the offense. Allowing the court to be manipulated by fraud poses a danger to its authority. See Commissioner of Probation vs. Amanda Adams, 65 Mass. App. Ct. 725, 728-737 (2006).

Addressing the c. 209A matters in this case called for more complete and accurate information. Here, the limited record shows that the information available to the court at the arraignment/disposition date 18+ years earlier appears to be both incomplete and inaccurate. The alleged victim is now deceased and may never have testified under oath or sworn to a written complaint against the Appellant regarding the original violation of c. 209A § 7 offense. The maintenance and dissemination of those stale and incomplete records now, serve no valid law enforcement purpose. Indeed, the availability of inaccurate and or incomplete information to law enforcement is an impediment to the fair administration of justice. It appears as if the Appellant's accuser, the plaintiff-girlfriend may have benefited from a complete lack of scrutiny by the court in 1990 and by the RPD in 2008. The Quincy Police had information and observations to at least suspect the girlfriend's child neglect and parental unfitness on the day of arrest but utterly failed to document it or act on it by at least a Care and Protection referral to DSS. In 2008, the RPD failed to even perform a CORI check on her. She was given a free pass in this investigation despite the conflicting versions of the parties and strong indications of her lack of character, lack of credibility and motivation to lie and/or retaliate.

There were strong indications in this present matter that the girlfriend-plaintiff had a problem with alcohol abuse, (several stays in detox. and abandoning a toddler child to get drunk on the day of the arrest). Her fitness as a parent was also raised by the fact

that she abandoned her child that day and that she did not have custody of her biological child, one of her sisters did. She and the Appellant had an ongoing disagreeable relationship over the care and custody of their child. Her background exhibiting a lack of responsibility, honesty and motive to lie and/or retaliate against the Appellant was outlined by the interview of his present wife Denise contained in Sgt. Emerson's report. Conversely, the Appellant's solid long term accomplishment, responsibility and his reputation for honesty and character was substantiated in his background investigation, including the interview of his present wife Denise and contained in Sgt. Emerson's report and corroborated by the personal experience of Officer Legrice an Investigator for the RPD.

Law enforcement professionals should be, as the courts are generally aware, that the circumstances surrounding child custody and domestic violence disputes, between parents can be conflicting, contradictory and of suspect motivation. Evidence of alcohol or drug abuse is relevant to a parent's willingness, competence and availability to provide proper care for a child. A criminal conviction or DSS referral, for this type of behavior or offense is important in determining a parent's fitness. A parent's character is itself in issue generally in every custody case or in any event reasonably related to it. For a discussion, *See* Care and Protection of Frank, 409 Mass. 492, 494-495 (1991) and Adoption of Irwin, 28 Mass. App. Ct. 41, 42-43 (1989). The courts have usually held that a person's character may be proved by evidence of specific acts of misconduct bearing on character. McCormick, Evidence Section 187 (2d ed. 1972)." Id. at 43. See also Care and Protection of Leo, 38 Mass. App. Ct. 237, (1995). Which considered the significance of the parent's opportunity to rebut hearsay reports through cross-examination and

consideration of certain inadmissible reports in evidence at a care and protection hearing, as not sufficiently prejudicial in view of other factors including the parent's lengthy criminal record. Here, in contrast, the Appellant had no opportunity to rebut the hearsay Quincy Police narrative of 1990, through cross-examination and the Town utterly failed to even attempt to determine what, if any, criminal record the plaintiff-girlfriend had.

Furthermore, even though the Respondent knew the identity of the Quincy police officers involved in the Appellant's arrest, it not only did not call them as witnesses, but it also did not attempt to interview them as part of the background investigation. This suggests either that the background investigation was inadequate or that the Respondent did not view the circumstances of the arrest as so serious as to warrant further investigation.

The Appellant presented compelling evidence of his honesty and integrity. Although the Appellant's memory of the 18-year old event may not be crystal clear, it would not be reasonable to infer based on this record that the Appellant had been untruthful about it, and especially, that he would testify falsely. The Appellant had an outstanding military record, including his entrustment with top secret national security information, as well as excellent references and a completely positive employment history The two Randolph Police Department investigating officers: Sgt. Emerson and Safety Officer Legrice wrote substantive positive reports in the Appellant's favor. Officer Legrice knew the Appellant personally for a long period of time and thought very highly of him. At a bare minimum, Officer Legrice should have been called as a witness to address the substantial error or "typo" contained in his report. There were strong indications in the record that the plaintiff-girlfriend had a problem history, was

irresponsible, was angry with the Appellant that day for telephoning her mother and had a motivation to lie to the police, to shift blame away from her, for abandoning her child to go out and get drunk. The versions of events between the Appellant and the plaintiff-girlfriend were highly disputed.. The Appellant repeatedly and consistently acknowledged that he had some physical contact with his girlfriend while resisting her assault on him, but he consistently denied that he had abused or assaulted the plaintiff-girlfriend, both on that date eighteen years earlier or at any other time.

The plaintiff-girlfriend's background and credibility received no scrutiny whatsoever from the Respondent during this investigation, not even a CORI check. This seems inexcusable under the circumstances. She received the benefit of doubt to the Appellant's detriment. For the reasons outlined herein, it has been determined that the Town's reliance on the disputed facts contained in the unsubstantiated, unsworn and unverified police narrative and/or sparse court docket violates basic merit principles.

Lt. Sullivan formed an opinion that the Appellant was not being truthful by refusing to admit that he had abused or assaulted his then live-in girlfriend more than eighteen years earlier. Yet the Appellant did consistently deny that he had abused or assaulted her on the day of the incident. He had disclosed that long ago incident on his employment application. He explained that he had admitted to sufficient facts on the advice of his attorney, subsequently deceased. He believed that the c. 209A violation he was charged with; was only being present on the same premises with her. Lt. Sullivan relied on the untested and unverified contents of the Quincy Police narrative, which the Appellant had never seen before and had been unaware of its contents. Lt. Sullivan made no attempt to verify or corroborate the hearsay contents of the police narrative. Lt.

Sullivan ignored the substantial positive background information garnered by his investigating officers which strongly refuted his own opinion of untruthfulness. Recording and documentation of the process was nonexistent, which was reflected in the poor memories, inconsistencies and other testimonial inadequacies of the Respondent's witnesses.

This is not a case in which there was ever any criminal conviction for violation of a Chapter 209A order. The Appellant did not plead guilty and had not been convicted of the c. 209A violation eighteen years earlier. He apparently admitted to sufficient facts to an unspecified violation of the c. 209A order. He admitted to sufficient facts on the advice of his attorney. The court disposed of the matter in a manner that indicated an equitable or remedial resolution and not a criminal or punitive one. The sparse court docket supports this view. The court did continue the matter without a finding (CWOF). He believed that the c. 209A order violation offense was for being present on the same premises as the plaintiff-girlfriend. He was not aware of the police narrative or its contents. There were no findings by the court against him, certainly none for assault, abuse or a similar offense, as Lt. Sullivan assumed. There is no record that the Appellant was provided the mandated judge's colloquy, necessary to substantiate a knowing and voluntary admission. He should not have had his character or credibility attacked in a surprise and suspect manner, based on Lt. Sullivan's undocumented questioning and his interpretation of the sparse and incomplete one-sided record of those very stale events. See Bums 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]

The Town chose an isolated and very stale event on which to fabricate an interpretive conclusion of untruthfulness. The Town conducted a one-sided investigation of this eighteen year old event, which results were used in a limited and selective manner, to the prejudice of the Appellant. The Town chose to completely ignore the substantial information discovered by its two Investigators, Sgt. Emerson and Safety Officer Legrice and contained in their reports. That substantial information favored the Appellant and a conclusion that he was honest and truthful, in character generally and regarding the eighteen year old event. The reasons as given for the bypass by the Town were insufficient and/or unsubstantiated, effectively rebutted by the Appellant, contrary to the Appellant's impressive background and evidence presented at this hearing and therefore undamaging to the ability of the Appellant to perform as a Police Officer.

After considering all the credible testimony and reliable evidence in the record, the majority concludes that the Town did not have sound and sufficient reasons for

bypassing the Appellant, Darren Woolf, for selection as a police officer in the Town of Randolph.

For all of the above reasons, the appeal under Docket No. G1-09-36 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, Darren Woolf 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 Randolph Police Department shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as a RPD police officer. The Commission further directs that, if and when Darren Woolf is selected for appointment and commences employment as a RPD 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 #280809, Finally, the Commission directs that the RPD or the Town of Randolph may not use the same reasons for bypass in any subsequent consideration opportunity.

For the majority,

Civil Service Commission,

Daniel M. Henderson,
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:
Frank McGee, Atty.
Robert M. Speigel, Atty.
John Marra, Atty. - HRD

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman - No, Henderson, Commissioner –Yes; Marquis, Commissioner – Absent; Taylor, Commissioner – Yes; and Stein, Commissioner - Yes) on March 11, 2010.

A true record. Attest:

Commissioner

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DARREN WOOLF,
Appellant

v.

G1-09-36

TOWN OF RANDOLPH,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The majority's reasons for rejecting the magistrate's recommended decision are contrary to years of precedent-setting judicial decisions and a series of recent Superior Court decisions in which this same majority has been admonished for making the same errors contained here.[1]

While begrudgingly recognizing that it is not within its authority to substitute its judgment about a valid exercise by the Town of Randolph of its discretion in making hiring determinations, the majority does just that.

The Appellant was bypassed because of his untruthfulness regarding a past domestic violence incident. The seriousness of the underlying incident can not be overstated. A Quincy police officer penned the following report: "At approximately 1504 hrs on 7/30/90 (Monday) myself and officer R. Johnson were dispatched to [address omitted] in regard to violation of a 209A. Upon our arrival we were met by a [name of female omitted] + a Darren Woolf who both reside

[1] See Boston Police Department v. Suppa, Suffolk Super. Ct. No. 08-5237 (2010); Town of Reading v. Civil Service Commission, Middlesex Superior Court No. 09-CV-0111-F (2009); Boston Police Department v. Plaza, Suffolk Super.Ct. No. 2008-03620 (2009); Town of Shrewsbury v. LaFlamme, Worcester Super. Ct. No. 2008-02124 (2009); City of Beverly v. Civil Service Commission, Essex. Super. Ct. No. 08-1794 (2009)

at this address. They are boyfriend – girlfriend. [Name omitted] stated that Darren had struck her in the face. I observed that [name omitted]'s eye was red and swollen. Darren admitted to me that he did hit her because she had left their child in the house alone while she went to the liquor store. [Name omitted] has a 209A in effect which runs out tomorrow. The docket # is 8260 on this 209A. I placed Darren under arrest for violating the 209A to wit abusing the plaintiff. I also filed a dove report." (emphasis added) The Appellant admitted to sufficient facts to violating the restraining order.

After giving the Appellant multiple opportunities to explain what occurred regarding this incident, the Town concluded that he was not being fully forthcoming and bypassed him for his lack of truthfulness. After hearing the Appellant's live testimony at a de novo hearing, the magistrate reached the same conclusion as the Town regarding the Appellant's untruthfulness and upheld their decision to bypass him.

The majority, none of whom served as the hearing officer or were even present at the hearing, erroneously make their own independent credibility assessment of the Appellant. Remarkably, the majority then seeks to re-litigate the criminal matter and independently determines that the Appellant acted in self-defense against the female victim (now deceased) who the majority has concluded, exhibited a "lack of responsibility, honesty and a motive to lie." This is disturbingly similar to a recent Commission decision in which the same majority discredited the domestic abuse allegations of a bypassed candidate's ex-wife. (See Cyrus v. Town of Tewksbury, CSC Case No. G1-08-07 (2010)).

The magistrate, after a full hearing, concluded that the Town presented sound and sufficient reasons for its decision to bypass the Appellant. There was ample evidence in the record to support his well-reasoned decision. The majority erred by substituting its judgment for that of the Town and rejecting the magistrate's recommended decision.

For these reasons, I respectfully dissent.

Christopher C. Bowman
Chairman
April 21, 2010

THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
ACTING CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-727-7060
FAX: 617-727-7248

January 4, 2010

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: ***Darren Woolf v. Town of Randolph***
DALA Docket No. CS-09-125

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

If either party files written objections to the recommended decision, the opposing party may file a response to the objections within 20 days of receipt of a copy of the objections

Sincerely,

Richard C. Heidlage

Richard C. Heidlage
Acting Chief Administrative Magistrate

RCH/jb

Enclosure

cc: Frank J. McGee, Esquire
Robert M. Spiegel, Esquire

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

DARREN WOOLF,
Appellant,

v. Civil Service Case No.: G1-09-36
DALA Docket No. CS-09-125

TOWN OF RANDOLPH,
Appointing Authority

Appearance for Appellant: **Dated:** January 4, 2010

Frank J. McGee, Esq.
1952 Ocean Street
Marshfield, MA 02050

Appearance for Appointing Authority:

Robert M. Spiegel, Esq.
Deutsch Williams Brooks DeRensis & Holland, P.C.
One Design Center Place
Boston, MA 02210

Administrative Magistrate:

Richard C. Heidlage

SUMMARY OF RECOMMENDED DECISION

The Appointing Authority was justified in bypassing the Appellant for the position of police officer because he was not fully forthcoming and candid concerning a domestic abuse incident in his past.

RECOMMENDED DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Darren Woolf, is appealing the decision of the Appointing Authority, Town of Randolph, to bypass him for initial appointment to the Randolph Police Department. The Human Resources Division ("HRD") found that the reasons for bypass were valid. The Appellant received notice of the bypass from the HRD on December 29, 2008, and he filed a timely appeal. I held a

hearing on June 24, 2009. As no notice was received from either party, the hearing was declared private.

The Appointing Authority presented two witnesses, Arthur Sullivan, Detective Lieutenant, Randolph Police Department and Paul Porter, Chief, Randolph Police Department. The Appellant testified on his own behalf.

The following exhibits were admitted into evidence:

1. Civil Service Bypass Appeal Form (13 Pages);

2. Certification List 280809 (10 Pages);

3. Background Investigations (2 Pages);

4. Notice from HRD regarding nonselection and Letter from Appointing Authority (5 pages);

5. Form 14 (5 pages);

6. Restraining Order and Summons, including Quincy Police Report and Quincy Court Docket Report for Docket # 9056 CR 6621 (6 pages);

7. CORI (1 page);

8. Letter of Recommendation (1 page);

9. Application for Employment;

10. Release of Information Agreement.

The hearing was recorded digitally and by audiotape. Both parties filed proposed decisions on July 28, 2009.

Findings of Fact

Based on the documents entered into evidence (Exhibits 1 –10) and the testimony of the witnesses referred to above, I make the following findings of fact:

1. The Appellant is a veteran of the United States Army. He served for 18 months active duty in Kosovo in support of Operation Enduring Freedom. Ex. 1, 9;

Testimony. He received an honorable discharge from the U.S. Army, and has served and continues to serve in the National Guard. Ex. 9; Testimony of Appellant. His military record is exemplary. For examples, he received the Army Achievement Medal, the Army Commendation Medal for service in Kosovo, the Army Good Conduct Medal, a Certificate of Achievement and was promoted to the rank of Staff Sergeant. Ex. 1.

2. In or about mid-August, 2008, the Town of Randolph, Massachusetts sought to hire 8 permanent full-time police officers. Testimony; Ex. 2.

3. Detective Lieutenant Arthur Sullivan is in charge of the Bureau of Detectives for the Randolph Police Department. He has held many positions in the Randolph Police Department throughout his 29-year career. In his current position, he oversees the operations of the detective unit. (Testimony of Sullivan)

4. Lt. Sullivan is involved in the background investigation and interview process when the Town seeks to appoint new police officers. Once the Town receives a certified list of candidates from the HRD, it determines which candidates on the list are willing to accept appointment if selected. The list of candidates who sign indicating that they are willing to accept a position is forwarded to the Chief of Police. The Town then asks the willing candidates to fill out an application for employment. (Exh. 10; Testimony of Sullivan).

5. On August 15, 2008, the Commonwealth's Human Resources Division ("HRD") issued Certification No. 280809. Ex. 2. The Appellant was tenth on the list, and fifth on the list of those who signed the certificate to indicate they would accept the position if offered. Ex. 2.

6. The Appellant submitted his Application for Employment as a regular police officer to the Town of Randolph on or about August 22, 2008. Ex. 9. With regard to Part VI, Criminal Record, of the Application, Mr. Woolf answered "yes" to Question j, relating to whether the applicant had ever been subject to an order issued pursuant to G.L. c. 209A. He further disclosed that the ordered had been issued in 1991 and that its status is "Dismissed."

7. Following receipt of the applications from the candidates, the Department conducts a background investigation of each applicant's criminal history, RMV history, and residential history. (Testimony of Sullivan). This included ordering and review of a CORI report for each candidate. The report for the Appellant included a notation of a Continuation Without a Finding and Dismissal of an Abuse Prevention Act matter in 1990. Ex. 7.

8. Because of the number of candidates, Lt. Sullivan assigned groups of two officers to conduct the background investigations, with each group conducting the background checks for at least five candidates. Sergeant Robert Emerson and Safety Officer Robert LeGrice conducted the background investigation of the Appellant. Emerson and LeGrice prepared reports of their background investigations. (Ex. 3; Testimony of Sullivan). Although Officer LeGrice's report contains the statement "Woolf's neighbors have reason to believe he would not make a good police officer," the parties stipulated that this was a typographical error and that the intent of the statement was to the effect that Mr. Woolf's neighbors did *not* have any reason to believe he would not make a good police officer. The investigations as reflected in the reports did not

reveal anything that would disqualify Mr. Woolf from employment as a police officer. Ex. 3.

9. Following the background investigations, the Department conducted interviews with the candidates. The interview process included Lt. Sullivan and two other members of the police department. For the Appellant, Safety Officer LeGrice and Lt. Richard Crowley participated in the interview. During his first interview, Lt. Sullivan asked the Appellant to explain the 1990 incident listed on the CORI report. In response, the Appellant stated that he was arrested in 1990 for violating the 209A order, but stated that he was arrested because he was not supposed to be on the property. He did not say anything about being arrested for hitting his girlfriend. (Testimony of Sullivan).

10. After the first interview with the Appellant, Lt. Sullivan requested that the Quincy Police Department and Quincy District Court provide him with any information having to do with Darren Woolf and the abuse prevention act violation. In response to that request, Lt. Sullivan received a copy of the police report. (Ex. 6; Testimony of Sullivan). The report of the arresting officer, Robert Costa, states:

> At approximately 1504 hrs on 7/30/90 (Monday) myself & officer R. Johnson were dispatched to 43 Cross St. in regards to violation of a 209A.
>
> Upon our arrival, we were met by a [redacted] & a Darren Woolf who both reside at this address. They are boyfriend-girlfriend.
>
> [redacted] stated that Darren had struck her in the face. I observed that [redacted] eye was red and swollen. Darren admitted to me that he did hit her because she had left their child in the house alone while she went to the liquor store.
>
> [redacted] has a 209A in effect which runs out tomorrow. The docket # is 8260 on this 209A.

> I placed Darren under arrest for violating the 209A to wit: abusing the plaintiff. I also filed a dove report.

Ex. 6.

11. The Docket for this matter in the Quincy District Court indicates that the Petitioner admitted to sufficient facts as to the offense of violation of a protective order pursuant to c. 209A and that the matter was continued without a finding until February 2, 1992. The disposition section of the docket form has the entry "eval re: alcohol & Emerge prg." Ex. 6.

12. The Appellant's understanding of the purpose of the Emerge program was to counsel batterers in alcohol abuse issues.

13. After receiving the police report, Lt. Sullivan interviewed the Appellant a second time. In the second interview, he asked the Appellant specifically whether he had struck [redacted] during the 1990 incident. The Appellant responded that he had not. Lt. Sullivan asked the Appellant again for an explanation as to why he was arrested. The Appellant stated again that he was arrested because he was not supposed to be on the property, but that he had gone there to check on his daughter. Lt. Sullivan then showed him the narrative from the arresting officer and asked him to explain it to him, specifically, why the police officer would write that [redacted] stated that she was struck by him, that her eye was red and swollen, and that he admitted that he struck her. (Ex. 6; Testimony of Sullivan).

14. The Appellant's response was that the police officer did not put in his report that his girlfriend was drunk and that she struck him with a telephone. (Testimony of Sullivan).

15. On November 20, 2008, David Murphy, Executive Secretary for the Office of the Board of Selectmen for the Town of Randolph sent the HRD documentation for its selection of ten new police officers. Ex. 4. Included with this letter is a letter dated October 31, 2008 from Detective Lieutenant Arthur Sullivan to Police Chief Porter. In the letter, Lieutenant Sullivan states:

> After reviewing all relevant materials concerning this applicant I find reason to bypass. Therefore, Mr. Woolfe is not recommended for appointment.
>
> During this background investigation Officers learned that Mr. Woolfe had been arrested for violation of a Protective Order (209A restraining order), in July of 1990. During three separate interviews, conducted by Safety Officer LeGrice, Detective Lieutenant Sullivan and members of The Board of Selectmen, Mr. Wolfe never revealed the fact he had been arrested for assaulting his girlfriend, the mother of his child. Mr. Woolfe stated, during these interviews, he was arrested for being at his girlfriend's home in violation of the order but that she had told him the order was no longer in effect.
>
> On October 28, 2008, I had occasion to review the Quincy Police report on this case. The report, prepared by Quincy Police Officer Robert Costa, details the fact Mr. Woolfe admitted striking his girlfriend in the face. The Officer also detailed his observations of her eye being red and swollen. The Officer also detailed his observations of her eye being red and swollen. The Officer indicated the 209A order (docket#8260) was due to expire the next day.
>
> On October 29, 2008, I met with Mr. Woolfe again. During this interview I asked Mr. Woolfe, specifically, if he had struck his girlfriend. Mr. Woolfe told me he had not. I then showed him the Quincy Police report and asked him to explain the Officer's statement that he had admitted striking her in the face. I also showed him a copy of Quincy Court docket sheet indicating he admitted to sufficient facts on this case and had agreed to an alcohol evaluation and batterer's program. Mr. Woolfe responded with the statement "I guess I'm screwed aren't I?" He then stated the police report left out the fact his girlfriend was very drunk and that she had hit him with a telephone. I explained these details have nothing to do with the fact he was untruthful about striking her in the face.
>
> Mr. Woolfe's untruthfulness, about this domestic assault, seriously questions his ability to perform as a public safety employee.

Ex. 4.

16. On December 29, 2008 the HRD sent Mr. Woolfe a letter informing him that it had determined that the Town of Randolph's reasons for bypassing him were acceptable. Ex. 4.

17. Mr. Woolfe submitted his appeal on February 11, 2009. Ex. 1.

DISCUSSION

The issue for determination in this appeal is "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken." *City of Cambridge v. Civil Service Commission,* 43 Mass. App. Ct. 300, 304 (1997). "Reasonable justification" is defined as "adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Selectmen of Wakefield v. Judge of First District Court of East Middlesex,* 262 Mass. 477, 482 (1928) and *Commissioners of Civil Service v. Municipal Court of the City of Boston,* 359 Mass. 214 (1971). Pursuant to M.G.L.c. 31 § 2(b), the Appointing Authority must prove by a preponderance of the evidence that the reasons assigned for the bypass were "more probably than not sound and sufficient." *Mayor of Revere v. Civil Service Commission,* 31 Mass. App. Ct. 315 (1991).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates. The Civil Service Commission is not to decide a bypass appeal based on its own preferences about candidates, but to determine if the facts show a reasonable justification for the decision made about the candidate based on the information the Appointing Authority had at the time of its decision. *Watertown v. Arria*, 16 Mass.App.Ct. 331, 334 (1983). *See, Civil Service*

Commission v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and *Leominster v. Stratton,* 58 Mass.App.Ct. 726, 727-728 (2003). However, personnel decisions that are not grounded in sound reasons represent occasions for the Civil Service Commission to overturn a bypass decision. *Cambridge, supra* at 304.

Honesty and integrity generally and honesty with one's superiors in particular are essential attributes of the position of a police officer. *See, Mazzola v. City of Worcester*, G1-06-216 (Civil Service, July 23, 2009)("The position of a police officer also requires that the individual is honest and forthcoming. . . . Appellant was warned before the completion of the employment application that truth telling was an essential element of the permanent police officer position.") There is a heightened scrutiny that is rightly imposed upon police officers. *Police Commr. of Boston v. Civil Serv. Commas.*, 22 Mass. App. Ct. 364, 370 371 (1986). Whatever the facts may have been with respect to the July 31, 1990 incident, the Appellant was not totally candid with the employing authority as to what occurred. I find that the incident involved some form of physical abuse and that, as a result of the incident, the Appellant was required to undergo abuse prevention training. Based on the foregoing, I find that the appointing authority officials involved in this matter reasonably believed that the Appellant had not been totally truthful in his explanation of the July 31, 1990 incident.

This decision does not minimize the positive aspects of the Appellant's background. As reflected above, the Appellant has an outstanding military record, excellent references and a positive employment history. However, the Respondent acted within its sound discretion in choosing to bypass the Appellant for the position of police

officer. A police department can not be seen to condone a lack of truthfulness in its officers. The Appointing Authority, for all the above stated reasons, was justified and did have sound and sufficient reasons to bypass the Appellant for this appointment.

Wherefore, for all of the above, I recommend that the Appellant's appeal be dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Richard C. Heidlage
Acting Chief Administrative Magistrate

Dated: January 4, 2010