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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 1684-CV02878-D

BOSTON POLICE DEPARTMENT

vs.

DANIEL ZAITER and MASSACHUSETTS CIVIL SERVICE COMMISSION

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

Introduction

The Boston Police Department (BPD) moves for judgment on the pleadings pursuant to G. L. c. 30A, § 14, requesting reversal of a decision by the Massachusetts Civil Service Commission (Commission), which granted the appeal of Defendant Daniel Zaiter after the BPD declined to appoint Zaiter as a Boston police officer. The Department found Zaiter, who is currently a Randolph police officer, to be an unsuitable candidate for BPD based on an incident of criminal charges in 1995, and a fatal accident in his driving history that same year.

The Commission Decision with one dissent<sup>1</sup> found that BPD had not met its burden to establish that its decision to bypass was made after a thorough review of the facts, and that the decision was reasonably justified. Decision at page 13. The Commission therefore ordered BPD to place Zaiter at the top of the current or future certification list for appointment. Following hearing June 14, 2017,<sup>2</sup> and for the reasons discussed here, BPD's Motion for Judgment on the Pleadings is ALLOWED.

<sup>1</sup> The dissent found that BPD was reasonably justified in bypassing Zaiter, based on what it described as an "extensive, detailed and well researched" investigation of his application. Decision, at page 19.

<sup>2</sup> Neither counsel for the Commission nor counsel for Zaiter appeared at the scheduled hearing before the court. The Commission informed the court by letter that it did not intend to appear. Counsel for Mr.

### Standard of Review

Pursuant to G.L. c. 30A, section 14(7), the court may reverse, remand, or modify an agency decision if that decision is unsupported by substantial evidence, or is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. The court's review is not de novo. G.L. c. 30A section 14(7); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003) ("The open question on judicial review is whether, taking the facts as found, the action of the commission was legally tenable."). The party appealing the administrative decision bears the burden of proving that it is invalid for any of these reasons. Merisme v. Bd. of App. of Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989).

The court examines the entirety of the administrative record to determine whether the Commission's decision is supported by substantial evidence. The agency is the sole judge of the credibility and weight of the evidence presented at the administrative proceeding, the court will not re-weigh that evidence, and the agency's judgment on questions of fact will enjoy the benefit of the doubt in close cases. The court may not substitute its fact-finding judgment for that of the agency. Cobble v. Commissioner of the Dept. of Social Servs., 430 Mass. 385, 390-91 (1999). "However, 'to the extent that an agency determination involves a question of law, it is subject to de novo judicial review.'" G.L. 30A, section 14(7); Merisme, 27 Mass. App. Ct. at 473 (citation omitted).

Defendant Commission was responsible in this case for determining "on the basis of the evidence before it whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority." Brackett v. Civil Service Comm'n, 447 Mass. 233, 241 (2006), citing

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Zaiter informed the session clerk by voicemail (and informed counsel for BPD by email) that his client waived oral argument and rested on the Commission's Decision.

Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303 (1997). The Commission was limited to considering whether there was reasonable justification “in the circumstances found by the Commission to have existed when the appointing authority made its decision.” Stratton, 58 Mass. App. Ct. at 728, citing Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). Reasonable justification in the context of the Commission’s review of an authority’s decision, 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.” Brackett, 447 Mass. at 241.

It is the Commission’s responsibility “to guard against political considerations, favoritism and bias in government employment decisions.” Cambridge, 43 Mass. App. Ct. at 304. “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Id.; accord, Police Department of Boston v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

Deference is particularly important with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates, and “[p]rior misconduct has frequently been a ground for not hiring or retaining a police officer.” City of Beverly v. Civil Service Commission, 78 Mass. App. Ct. 182, 188 (2010), citing Cambridge, 43 Mass. App. Ct. at 305. In this context reasonable justification is established “[o]nce the appointing authority demonstrated that it conducted an impartial and reasonably thorough review, and that there appeared to be a credible basis for the allegations against an applicant, which created legitimate doubts about the applicant’s suitability.” Id., at 189.<sup>3</sup> Thus on appeal, the appointing authority

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<sup>3</sup> G. L. chapter 31, the Massachusetts Civil Service Law, governs the selection and hiring of BPD’s employees. Section 6 mandates that an appointing authority making new appointments obtain from the

has the burden of proving by a preponderance that the reasons stated for the bypass are justified. Cf., Brackett, 447 Mass. at 241 (reviewing a challenge to promotion based on race and gender).

BPD argues in this case that the Commission exceeded its statutory authority and therefore committed an error of law, and that the Commission's Decision is not supported by substantial evidence.

### **Record Facts**

The facts of Zaiter's application and BPD's bypass procedures are not in dispute.

Zaiter's name appeared on certification list number 02742 for Boston police officers. Pursuant to BPD's standard procedures,<sup>4</sup> an experienced detective investigator was assigned to conduct the background investigation. The investigator's practice is first to review the employment application and any supplementation by the applicant. She then attempts to verify the information provided by an applicant. Verification includes at a minimum searching BPD's internal databases, criminal records and driver history. It is undisputed that two serious incidents which occurred back in 1995 were flagged as of concern to this investigator as a result of the verification searches.

### **The Assault and Battery**

First, Zaiter's Board of Probation report contains three charges for malicious destruction of property over \$250, kidnapping, extortion, and assault and battery, all stemming from a series of incidents in June, 1995. The BPD investigator obtained a copy of the Randolph Police Department report which details the following: During the same month Zaiter was graduating

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Massachusetts Human Resources Division (HRD) a certification list of eligible candidates. The appointing authority must hire from the beginning of the list, starting with those individuals with the highest scores. Id. Individuals from the certification list are offered a position, which is contingent upon satisfying medical and physical fitness requirements described in HRD's regulations. G. L. c. 31, § 61A.

<sup>4</sup> Recruit Investigations Unit Standard Operating Procedures, Commission Hearing Exhibit 12.

from high school, one of his friends was involved in a dispute with another high school student. Some of Zaiter's friends (not Zaiter) waited after school to fight the student; but the fight was stopped by the headmaster. Later that night the student victim received a threatening phone call from someone who claimed to be "Johnie," threatening to "get him" if he did not pay \$1080. The next day, two cars approached the victim while he was walking home from school. Zaiter was a passenger in one of the cars and was among the group of friends who allegedly made the victim get into one of the cars. The two-car group then drove the victim to a dead-end street in a secluded area, assaulted him, and left him there. The victim stated he was punched in the back of the head and kicked by some of the participants, and that Zaiter was a person who punched him in the side. One of the perpetrators reported to police that the victim was told he had one week to pay them \$1080.

Approximately one week later, several of Zaiter's friends (but not Zaiter) went to the victim's house in an effort to speak with him. The victim closed the door and declined to speak. Soon thereafter, "Johnie" called and told the victim since he was not going to pay "I guess we will have to bring your family into this." Within less than two hours, two of the young men went back to the victim's house and pushed their way in, but then left. The victim's mother was allegedly injured during this second visit.

Later that same night a group, this time including Zaiter, returned to the victim's home. Car windows were smashed, tires were slashed, and other damage was done to vehicles in the yard. One of the perpetrators later told police Zaiter "had a bat." Police arrived and arrested the group, including Zaiter, who was charged with the crimes listed above. The adult Zaiter has admitted on this record: that he was present at the time of vandalization of vehicles; that he knew his friends were demanding money from the victim; and that he pleaded guilty to assault

and battery for the allegation that he punched the victim in the side on the dead-end street. The plea entered December, 1995, the other charges were dismissed, and Zaiter was sentenced to probation and community service. Four years later, the guilty plea was changed to a CWO, and then ultimately dismissed.

Zaiter also stated in his BPD application and again at the Commission hearing that he was "young," "stupid," and "hung with the wrong crowd," and that as a police officer he uses this experience when working with juveniles "to make some genuine connections with my arrestees."

#### The Fatal Car Accident

Zaiter's driving history contains entries for the charges of motor vehicle homicide and driving to endanger. According again to reports of the Randolph Police Department, Zaiter was the driver in a November, 1995 automobile accident that resulted in the death of a pedestrian. The victim was more than half-way across the four-lane roadway (not at a traffic light or in a crosswalk) when she was struck by Zaiter, on a late, rainy evening. The Randolph Police Department investigation initially found that, had Zaiter operated the vehicle safely, he would have avoided the pedestrian and she would not have been fatally struck and killed. However, the criminal charges were dismissed at a Clerk Magistrate hearing following reconstruction of the accident by the testifying Lieutenant. The only remaining charge was the civil infraction for operating an unregistered motor vehicle (owned by Zaiter's father). Following a second reconstruction of its own, the Randolph Police Department did not appeal the magistrate's ruling. As to this event, Zaiter stated in his application that "it was the absolute worst day of my life."

In December, 2008, the Randolph Police Department hired Zaiter; he had worked there successfully with commendation and without complaint for eight and one half years at the time of the Commission hearing.

#### BPD Review

Zaiter reported these two 1995 Randolph events on his Boston application. In accordance with BPD procedures his application file was assigned to an experienced investigator who wrote a Privileged and Confidential Memorandum detailing the results of her research. This material was presented to the group of BPD officials known as the "Roundtable" who are responsible for reviewing the findings of all recruit investigations, and determining whether or not to move each candidate forward. The Roundtable includes command level officials from the Internal Affairs, Legal Advisor, Human Resources and Recruit Investigation divisions of BPD, and this part of the process is followed for every applicant. When an applicant successfully completes this background investigation portion of the process, s/he moves on to the medical and psychological screenings.

The two 1995 incidents concerned the Roundtable because of the importance of good judgment and respect for the law in the work of a police officer. The Roundtable asked the investigator to obtain more information about the dismissal of the motor vehicle charges and whether a civil lawsuit had been filed about the accident. The investigator filed a supplemental memorandum reporting that, based on her telephone conversations with two people who had been close to the accident victim, no civil suit was filed. On September 15, 2015, following review of the supplemental memorandum, the Roundtable decided to bypass Zaiter. For reasons addressed before the Commission but not material to this appeal, the "bypass letter" did not issue until March 4, 2016.

## Discussion

### The Commission's Decision

The Commission found BPD had not met its burden for the following reasons: BPD's decision was "uninformed;" was made "without an impartial and reasonably thorough review of either incident;" and "without knowledge of Mr. Zaiter's maturely-stated current explanation for these actions and with only limited information about his subsequent well-documented adult record as solid citizen, respected neighbor and distinguished law enforcement professional." Decision, at pages 13-14. The Commission found that the positive aspects of Mr. Zaiter's application "stand[s] in stark contrast to the two stale isolated incidents of alleged teenage 'poor judgment' used to bypass him." Decision at page 16.

First, the Commission found that the information "filtered" from the detective investigator to the Roundtable was only a "condensed characterization" of the facts of the two events, "which led to a mistaken impression of Zaiter's actual behavior." In particular, the Commission took issue with the investigator's report, and one Roundtable member's testimony, that Zaiter "tormented" his fellow student, and that the car accident was a "vehicular homicide." With respect to the student events, the Commission found Zaiter to have been a "minor participant," not "an instigator or ringleader." Decision, at page 14. In response to this portion of the Commission's Decision, BPD argues that the Commission's claim of "filtering" is not supported by any record evidence, relying on the text of the investigator's Memorandum and the underlying Randolph Police Department reports.

The Commission Decision makes a separate finding about the pedestrian death. It "infer[red] that Mr. Zaiter's allegedly poor teenage driving record twenty years ago was not the real determining fact, but rather, the roundtable's 'concerns' with the horror of the fatality and



the deceased family's unsubstantiated (indeed, wholly speculative) animosity toward Mr. Zaiter, rather than taking an impartial and objective view of the actual facts." Decision, at page 16.

Here again, BPD points to the Randolph Police Department records themselves in support of its decision making.

### Ruling

I accept the Commission's findings that Zaiter was not a ringleader in the high school student events, and that BPD was concerned with the horror of the pedestrian's death and its impact on her family, as both being supported by substantial evidence. City of Beverly, 78 Mass. App. Ct. at 188. But these findings do not establish that BPD lack reasonable justification for the bypass as a matter of law. Two significant themes driving the Commission's Decision must be addressed by a reviewing court.

The Commission disapproves of BPD's procedures for arriving at a bypass decision, as expressed by three points. The Commission faults the fact that an investigator presents a synopsis to the Roundtable. Although an applicant's entire file is available to the Roundtable participants, the Roundtable members do not necessarily review it. Decision, at pages 9-10; 14-15. In this case the unimpeached testimony is that all of the Roundtable members did not review Zaiter's entire file.<sup>5</sup> The Commission also notes that nothing in the record demonstrates when, if, or how the Police Commissioner himself (the appointing authority responsible for the decision to bypass) reviews the work of the Roundtable: "[T]he evidentiary trail of the deliberative process that resulted in Mr. Zaiter's bypass stopped with the roundtable. Although the Police

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<sup>5</sup> BPD Recruit Investigations Unit Standard Operating Procedures state that "the Commander/Supervisor [presumably of the Unit] shall review all files creating a synopsis of the candidate." This record does not include a written synopsis, but does include the two Private Confidential Memorandum (PCM) written by the investigator, who testified before the Commission that she read her PCMs to the Roundtable. No uniformed command staff member of the Roundtable testified before the Commission.

Commissioner is the ultimate decision-maker in this process, the evidence did not provide any information as to when or what information was actually provided to the Commissioner in this instance.” Decision, at page 17. And third, the Commission questions the fact that this candidate was not offered a “discretionary interview” to address the Roundtable’s concerns. (“Nor was there any explanation for why no “discretionary interview” was conducted with Mr. Zaiter, which would have permitted him to speak directly with, at least, one member of the commissioner’s Command Staff (the BPS Deputy Superintendent). While it may not be important for the Commissioner or a senior Command staff officer to “eyeball” every candidate, I find it problematic that such an interview would not have been conducted in the present case.”) Decision at page 17.

This critique of BPD’s established procedures, however, does not comport with the Commission’s “role [which is] relatively narrow in scope” to review “the legitimacy and reasonableness of the appointing authority’s actions.” City of Beverly, 78 Mass. App. Ct. at 187. The procedural concerns raised on this record do not constitute substantial evidence to support the conclusion that reasonable justification was lacking for the bypass. Cambridge, 43 Mass. App. Ct. at 304; Stratton, 58 Mass. App. Ct. at 728, 733. HRD regulations establish procedures for bypass of an individual for a position, and a department has the discretion to do so, provided it has a legitimate reason. The Police Commissioner has discretion to evaluate whether and what sort of investigation the Department needs to conduct into a candidate’s background. St. 1962, c. 322 section 1. An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. City of Beverly, 78 Mass. App. Ct. at 189.

The Roundtable format discussion and the discretionary interview are just that — approaches to decision making which are discretionary with the appointing authority. It is not for the Commission or a court to reverse a bypass decision because not everyone involved with the process read every aspect of the application, or because a candidate did not receive a discretionary interview.<sup>6</sup> To the extent the Commission's Decision is based on these perceived procedural failings, it constitutes an error of law.

The second theme reflected in the Decision is that the Commission disagrees with BPD's weighing of the arguable strengths and weaknesses of Zaiter's application. As to this point, I concur that reasonable minds could well differ. The serious events occurred more than twenty years ago in Randolph, a community that has nonetheless seen fit to hire Zaiter as a member of its own police force. The evidence is undisputed Zaiter had served Randolph well for more than eight years at the time of his application to BPD. Nonetheless, re-weighing an application based on undisputed facts amounts to usurpation of the appointing authority's policy-making prerogative, by substituting the Commission's judgment of a candidate's respective strengths and weaknesses for the judgment of the appointing authority itself. Cambridge, 43 Mass. App. Ct. at 304.

The Commission criticizes BPD for obtaining insufficient information about the student events, because BPD consulted the criminal records and police reports without speaking to Randolph Police officers. Decision at page 15. But BPD is correct that there is nothing inadequate or wrong as a matter of law about relying on court records for these investigations. Conversely, the Commission criticizes BPD for attempting to reach beyond the automobile accident reports to determine if civil litigation had occurred. Decision at page 16. In short, the

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<sup>6</sup> Here, the record reflects that Zaiter took the initiative to address the circumstances of his criminal and driving history in his application, and spoke with the investigator about her research as it was ongoing.

Commission found BPD's bypass decision was not "reasonably justified" because the Commission believes BPD relied on wrong or incomplete information, or came to an unreasonable judgment based on the information it did possess. As a matter of law, I cannot agree.

Nothing in this record demonstrates or even suggests that BPD bore unfair animus or bias against Zaiter as a particular individual. Compare, Police Department of Boston v. Kavaleski, 463 Mass. 680, 692-695 (2012). Likewise nothing in this record supports a finding that any of the "political considerations, favoritism and bias" against which it is the Commission's responsibility to guard were at play, infecting BPD's assessment of the merits of Zaiter's application with prejudiced minds. Collins, 48 Mass. App. Ct. at 412-413. The investigator accurately reported within her memoranda the facts represented by the official records and the additional percipient witnesses. There is no evidence that the investigator's choice of the words "tormented" or "homicide" unfairly influenced the experienced members of the Roundtable in the face of the detailed and undisputed facts reported by the Memoranda.<sup>7</sup>

Simply put, the Decision as a whole makes clear that the Commission majority believes BPD gave the 1995 events undue weight in comparison to the rest of Zaiter's application. This is precisely the sort of substitution of judgment that the Cambridge court found to be impermissible. 43 Mass. App. Ct. at 305. Whether the Commission or the court would arrive at the same conclusion about Zaiter's record that BPD did is immaterial. Absent substantial evidence that BPD acted unreasonably, we are "bound to defer to the Department's exercise of

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<sup>7</sup> The investigator testified at the Commission hearing that, consistent with the Standard Operating Procedures, she does not offer her opinions about candidates to the Roundtable. In contrast, the former Human Resources Director for BPD and a member of the Roundtable testified before the Commission that she did hold an opinion about Zaiter's application, and that in her view the information she reviewed reflected Zaiter's participation in tormenting his schoolmate.

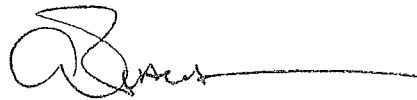
its judgment.” Watertown, 16 Mass. App. Ct. at 334. The Commission’s Decision to the contrary therefore exceeded its authority.

I agree with the Commission dissent that BPD’s investigation of Zaiter’s application was “extensive, detailed and well researched,” and therefore met the standard of being “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Cambridge, 43 Mass. App. Ct. at 304. Based on the entire administrative record before me, I rule BPD has carried its burden to establish by a preponderance that it was reasonably justified in exercising its discretion to bypass Mr. Zaiter by relying on the procedures and the materials it did.

#### Conclusion

For the reasons stated, Plaintiff’s Motion for Judgment on the Pleadings (Paper 10) is ALLOWED and, pursuant to G.L. c. 30A section 14(7), the Commission Decision is reversed and vacated.

Dated: August 3, 2017



Christine M. Roach