COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

DAVID SUPPA,
Appellant
v.

CASE NO: G1-07-346

BOSTON POLICE DEPARTMENT,
Respondent

Appellant, Pro Se:	David J. Suppa, Pro Se 25 Hopedale Street Quincy, MA 02169
Boston Police Department's Attorney:	Shelia B. Gallagher, Esq. Office of the Legal Advisor Boston Police Department One Schroeder Plaza Boston, MA 02120
HRD's Attorney:	Martha Lipchitz O'Connor, Esq. Human Resources Division One Ashburton Place Boston, MA 02108
Commissioner:	Paul M. Stein

DECISION ON MOTIONS FOR RECONSIDERATION

On November 21, 2008, with leave granted by the Civil Service Commission (Commission), the Massachusetts Human Resources Division (HRD) filed a Motion for Reconsideration of the Decision of the Commission, dated October 30, 2008, allowing the appeal of the Appellant, David Suppa (Decision). The Boston Police Department (BPD) joined in supporting HRD's Motion. After careful review, the Commission majority has determined that the Motion for Reconsideration fails to identify a clerical or mechanical error in the Decision or a significant factor the Commission or the presiding officer may have overlooked in deciding the case, as prescribed by 801 CMR 1.01(7)(l).

HRD's Motion for Reconsideration contends that the Decision fails to apply the appropriate standard of review and leaves the parties with inconsistent case law upon which to rely. The Commission majority disagrees and believes that the Decision stands as a cogent and consistent application of the civil service law to the facts of the case. However, in the interest of clarity, the Commission majority makes the following additional points out of respect for HRD's expressed concerns.

As to the standard of review in a bypass case, HRD states the standard narrowly as limited to guarding against "political considerations, favoritism, and bias". Those factors are certainly an important part of what the Commission must consider, but there is more to the merit principle of the civil service law, in general, and to the affirmative burden of proof imposed upon an appointing authority to present "sound and sufficient reasons" for seeking to justify the bypass of a candidate whose score on the applicable civil service examination places him above another candidate whom the Appointing Authority prefers to hire. See G.L.c.31, §§1, 26. For example, the principal appellate decision involving a police officer bypass cited by HRD, City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, 925-927, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997), contains this synopsis of the applicable legal standards and the variety of factors which are in play:

> The commission . . . was not bound to declare that the city had acted arbitrarily and capriciously. Rather the governing statute, G.L.c.31,§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. [Citations] The 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. [Citations}

In City of Cambridge, the Commission acknowledged that the applicant's undisputed misconduct admittedly demonstrated risky behavior, i.e., perpetrating a cover-up to take a "rap" for her boyfriend about a shooting incident, including false statements in court, as well as a second incident of domestic abuse five years later. The Commission erred, however, in "substituting its judgment" for the appointing authority by concluding that "she was worth [the] risk" because of the applicant's subsequent favorable employment references. Id., 43 Mass.App.Ct. at 305, 682 N.E.2d 923.

In the present appeal, the Commission majority has taken an entirely different decision. If the BPD had, in fact, presented substantial and credible evidence that persuaded the Commission majority of Mr. Suppa's alleged "brutality", "beating" and "attacking" an unconscious man, and fleeing the alleged "crime scene" without reporting the incident to the police, the Commission majority could have agreed that BPD sustained its burden of proof. (See Decision, Finding No. 15) The problem, however, was that the evidence presented to the Commission did not, in the Commission majority's view, establish that the misconduct (alleged as the basis to disqualify Mr. Suppa) had, in fact, occurred, according to the required standard of proof, i.e., "upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law."

In particular, the majority's Decision found that the two pieces of information (non-eyewitness police report containing unreliable multi-level hearsay and a CWOF

"admission" to unspecified facts without any finding of guilt) upon which the BPD relied to reach its conclusions were each legally deficient, and especially in combination, to satisfy the test of substantial and credible evidence, particularly in view of the credible and consistent testimony by Mr. Suppa at the hearing.

As the majority Decision noted, the multi-level hearsay contained in the police report was rife with deficiencies that persuaded the Commission majority that it did not possess the indicia of reliability required, such as, the report was not signed; one of the officers who prepared the report was not identified; the police were not percipient witnesses and arrived on the scene hours after Mr. Suppa had departed; the "victim" was either not interviewed or his statement was omitted from the report; and witnesses gave conflicting statements of the incident (the one "neutral" witness who did not know Mr. Suppa confirmed his version). (See Decision, Finding Nos. 7-9, 14-18) This finding that the hearsay in the Pembroke police report was not reliable and should not be credited is hardly an unprecedented or game-changing conclusion. See, e.g, Murphy v. Superintendent, Mass. Correctional Institution, 396 Mass. 830, 843, 489 N.E.2d 661, 663-64 ((1986) (distinguishing uncontradicted "reliable" hearsay and "unreliable" disputed hearsay in investigative report); Edward E. v. Department of Social Services, 42 Mass.App.Ct. 478, 484-85, 687 N.E.2d 163, 167-68 (1997) (multi-level hearsay not reliable); cf. Commonwealth v. Nunez, 446 Mass. 54, 841 Mass. 1250 (2006) (hearsay reliably corroborated by percipient police observations and other evidence); Commonwealth v. Given, 441 Mass. 741, 808 N.E.2d 788 (2004) (noting that statutory exception for admission of hearsay in police reports in sexually dangerousness case is "a very radical departure" from ordinary evidentiary rules); Commonwealth v. Durling, 407

Mass. 108, 551 N.E.2d 1193 (1990 (reliable hearsay from percipient, consistent police reports from two different officers); Commissioners of Civil Service v. Municipal Court, 369 Mass. 166, 338 N.E.2d 829 (1975) (receiving multi-level hearsay was not an abuse of discretion because Commission relied on other substantial evidence including eyewitness accounts that corroborated such hearsay statements)

Similarly, the majority Decision's interpretation of the legal effect of a CWOF "admission" without any finding of guilt is not a radical departure from established principles. While the majority Decision acknowledges that the language in some prior cases has invited confusion about how such a disposition may be treated in a collateral civil or administrative matter, the majority Decision means to put to rest any ambiguity in how the matter must be handled in the context of a bypass decision under the civil service law. Simply put, in the absence of a finding of guilt, or some other reliable extrinsic evidence in addition to the "admission" itself, the majority of the Commission determined that a generic CWOF disposition, alone, while some indicia that a person accepts responsibility for his actions, will not suffice as proof of any specific acts that would put an appointing authority at risk, unless those acts can be corroborated by other substantial and credible evidence or inferences reasonably drawn from such extrinsic evidence. Nothing cited by HRD in the Motion for Reconsideration leads the Commission majority to conclude that its decision is inconsistent with relevant prior precedent. See, e.g., Commissioners of Civil Service v. Municipal Court, 359 Mass. 211, 268 N.E.2d 346 (1971) (upholding discharge of police officer involved in two assaults on a fellow officer);. Commissioner of Metropolitan Dist. Comm'n v. Director of Civil Service, 348 Mass. 184, 203 N.E.2d 95 (1964) (pardon of convicted felon did not

preclude consideration of his participation in an armed robbery); Nahim v. Boston Police Dep't, 20 MCSR 232(2007) (assault & battery, coupled with subsequent domestic abuse restraining orders and "lengthy" history of driving offenses, for which applicant failed to accept responsibility); Malone v. Boston Police Dep't, 13 MCSR 102 (2000) (separate charges of assaults on police officers two years apart, corroborated by percipient police officers' reports, on one of which the appellant was initially found guilty in the district court); Frangie v. Boston Police Dep't, 7 MCSR 252 (1994) ("Mr. Frangie's background investigation revealed a history of adverse involvement with the police and . . . multiple incidents where he had been involved in threats to commit physical harm to others")

Finally, HRD contends that the findings of fact and conclusions of the majority's Decision are not supported by the record. The Commission reviewed this contention and the Commission majority finds no error. In particular, as to the criminal proceedings, the Decision assumes that Mr. Suppa's "admissions" were "voluntary" and made after colloquy. The point, however, is that such a generic "admission to sufficient facts" (standing alone or in combination with other evidence presented) did not rise to the level of substantial and reliable evidence, as a matter of law or of evidence, and did not refute Mr. Suppa's assertion of innocence based on his testimony that he had acted in self-defense and did not use unreasonable force. (See Decision, Finding Nos. 6-7, 14-18, 34-35) As to the assertion that Mr. Suppa fled the scene without calling the police, BPD did not include that assertion in the reasons for the bypass submitted to HRD, nor does the Commission majority find that such an inference is properly to be drawn, given Mr. Suppa's credible testimony that he left the scene (about 1:00 am) several hours before the police arrived (about 3:00 am) and because he was about to be attacked again and feared

for his own safety. (Decision, Finding Nos. 6-7). Similarly, the Decision did not conclude that Mr. Suppa "attacked" another person (i.e., was the aggressor), or that he was observed "repeatedly beating" and "kicking" someone "into unconsciousness", which are inferences based solely on unreliable, multi-level hearsay statements of some supposed eye-witnesses that were contradicted by others and which the Decision concludes were not reasonably justified from the evidence presented. (See Decision, Finding Nos. 6-9, 14-18)

Accordingly, for the reasons stated above, the BPD's and HRD's Motion for Reconsideration are hereby ***denied***.

Civil Service Commission

Paul M. Stein
Commissioner

By 2-2 vote of the Civil Service Commission (Stein and Taylor, Commissioners); Bowman, Chairman & Marquis, Commissioner [dissenting]; Henderson, Commissioner [absent] on December 18, 2008.

For all of the reasons cited in the Chairman's dissent, the minority (Bowman, Marquis) is in favor of HRD's Motion for Reconsideration and believes the majority's decision should be reconsidered - and reversed.

A True Record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or 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:
David Suppa (Appellant)
Shelia B. Gallagher, Esq. (for Appointing Authority)
Martha Lipchitz O'Connor, Esq. (for HRD)