

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Suffolk, ss.

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

MICHELANGELO RECUPERO,

Appellant

v.

CITY OF CHELSEA,

Respondent

Docket No.: G1-13-243

Appearance for Appellant:

Edward G. Seabury, Esq
67 Fowler Street
Mansfield, MA 02048

Appearance for Respondent:

Amy Lindquist, Esq
Assistant City Solicitor
Law Department
500 Broadway, Room 307
Chelsea, MA 02150

Commissioner:

Paul M. Stein

DECISION

The Appellant, Michelangelo Recupero, appeals to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), from the decision of the City of Chelsea (Chelsea), to bypass him for an original appointment to the position of Police Officer with the Chelsea Police Department (CPD). A full hearing on the appeal was held on February 25, 2014 at the offices of the Commission. Chelsea called three witnesses and the Appellant testified on his own behalf. The Commission received 33 exhibits in evidence and 1 was marked for identification. The hearing was digitally recorded and the parties were given copies of the recording. Proposed Decisions were submitted by Chelsea and the Appellant on April 4, 2014 and April 7, 2014, respectively.

FINDINGS OF FACT

Based on the Exhibits, the testimony of the witnesses (Appellant; Regina Caggiano, Assistant Director, Civil Service Unit, Massachusetts Human Resource Division (HRD); CPD Sergeant David Flibotte; and Chelsea Human Resources Director Robert Joy) and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences therefrom, I make the following findings of fact:

The Appellant's Background

1. Michaelangelo Recupero is an unmarried Hispanic male in his mid-20s who was born and raised in Chelsea MA with twelve (12) siblings. He has resided with his parents nearly all his life, save for about a year spent in East Boston in 2009-2010 as a caretaker for his grandparents, and a military deployment to Afghanistan in 2011. He has one young son and a daughter from a prior relationship, maintains a close, amiable relationship with them and supports them financially. He works with Chelsea youths at the Chelsea Boys Club and as a coach of Pop Warner football and basketball. (*Exhs.4, 8 & 13; Testimony of Appellant & Sgt. Flibotte*)

2. Mr. Recupero grew up in a “tough neighborhood” and, along with many of his childhood friends, compiled an extensive record with law enforcement in Chelsea as a troublemaker while a juvenile. Chelsea Police Chief Keyes wrote that Mr. Recupero was “in and out of court since 2004, when he was 16 years old”, including numerous motor vehicle infractions, a breaking and entering charge (dismissed) and two trespassing charges. (*Exhs 4 through 8,23ID & 34; Testimony of Appellant and Sgt. Flibotte*)

3. While in high school, Mr. Recupero was arrested twice in 2006, and once more in 2008 after he had dropped out. He was also charged at various times with driving infractions for which he was found responsible (failure to stop, seat belt violation and several equipment

infractions) and other charges that were dismissed. His last motor vehicle infraction for which he was found responsible and fined was in August 2008. He has since obtained his GED and has had a clean criminal and driving record since then. (*Exhs. 5 through 8, 11, 14, 16 through 18 & 34; Testimony of Appellant*)

4. The first arrest in February 2006 was the result of a State Police stop of a vehicle in which Mr. Recupero was a passenger in the rear seat. The Troopers noted a smell of “burnt marijuana”. The driver was searched and found with a “trafficking level” of cocaine on his person. Another smaller quantity of cocaine was found later in the driver’s side door pocket. One Trooper saw Mr. Recupero reaching under his shirt and requested him to exit the vehicle. Mr. Recupero complied and handed over a plastic bag he was holding containing marijuana. Another small quantity of marijuana was also found on his person. Mr. Recupero was placed into custody “without incident”. Although initially charged with various narcotics offenses, along with the other occupants, the Commonwealth elected not to prosecute him, and all charges against Mr. Recupero, including the marijuana offense, were dismissed. (*Exhs. 6 & 14; Testimony of Appellant & Sgt. Flibotte*)

5. The second arrest in April 2006 was the result of a scuffle with CPD police officers who had been dispatched to a scene where a young boy appeared to be panhandling for money at a bus stop (captured live on a Chelsea CATV camera linked to Chelsea Police Headquarters). Mr. Recupero, who arrived to catch a bus, knew the boy (named “Matthew”) from his work as a volunteer at the Chelsea Boys Club. He approached the boy with his hand in his right front pocket, intending to give the boy some money, when he was interdicted by police officers to keep away and remove his hands from his pocket. Mr. Recupero did not immediately comply but began to explain that he just wanted to give the boy some money. The police became

suspicious and moved in to restrain Mr. Recupero. A struggle ensued with the police, causing one officer to tear his trousers. Mr. Recupero was hand-cuffed and frisked, during which a “folding knife” was found in Mr. Recupero’s left front pocket. He was booked and charged with assault and battery on a police officer, resisting arrest, disorderly conduct and carrying a dangerous weapon. A request for the CATV videotape that had recorded the incident was made by defense counsel in his criminal case, but no tapes were ever found.¹ Mr. Recupero “admitted to sufficient facts” on the disorderly conduct charge and the dangerous weapons charge. The charges of assault and battery and resisting arrest were dismissed at the request of the Commonwealth. The case was continued without a finding (CWOFF) and dismissed in March 2008. (*Exhs. 6 & 16; Testimony of Appellant & Sgt. Flibotte*)

6. His last arrest in March 2008 was a result of an altercation with a group of men in a parking garage at the Square One Mall in Saugus. Mr. Recupero had gone there with his younger brother and a friend and saw that they were about to be attacked by a group of men, one who was wielding tire irons. Mr. Recupero grabbed the man with the tire irons, forcing the tire irons to the ground, apparently just as the police arrived on scene. The two groups continued fist-a-cuffs and screaming until broken up by the police, with the “level of force necessary”. Mr. Recupero, and one other male was arrested and Mr. Recupero’s younger brother was arrested on an unrelated outstanding warrant. The person who initially called in the incident to police had reported that he saw a man that appears to match Mr. Recupero’s description removing what he thought was a handgun from the trunk of a car, but police could not locate the witness, and the police report found that no handguns were involved. The police did not see, and the incident report does not identify, who had dropped tire irons during the fight. Mr. Recupero admitted to

¹ A similar request for the videotape of the April 2006 incident was made in this proceeding but no tape was produced. I infer that, until disposition of the criminal proceeding, the videotape would have been material evidence and should not have been destroyed, but I cannot make the same inference as of the time of the Commission hearing.

sufficient facts to a charge of disorderly conduct, the case was continued without a finding and dismissed in June 2008. (*Exhs. 6, 17 & 22; Testimony of Appellant & Sgt. Flibotte*)²

7. Toward the end of 2007, Mr. Recupero enlisted in the Army National Guard. He reported to basic training in August 2008 where he was “broken down and rebuilt”. He later received advanced specialty training in HVAC repair in 2009-2010. He currently holds the rank of Sergeant, and supervises two other soldiers in his National Guard unit. His assignments included domestic missions during snow and flood emergencies, security missions in Boston following the Marathon Bombing, and a 2011 deployment to Afghanistan where he volunteered for duty as an infantryman. He was awarded the Army Commendation Medal with two stars, which denotes a soldier who “distinguished himself by heroism, meritorious achievement or meritorious service.” (*Exhs. 4, 8 & 13; Testimony of Appellant; Administrative Notice [http://veteranmedals.army.mil/awardg&d.sf/374fbd6468877ab385256b6600590a90/5ab894da035badaf85256b660063f3a8!Open Document]*)

8. During his deployment to Afghanistan, Mr. Recupero conducted safety and security missions for government officials, protected and restored infrastructure, and interacted with local Afghan citizens. His duties and responsibilities paralleled those of a municipal police officer in many respects. Mr. Recupero’s military service provided him extensive opportunity for operating military vehicles and advanced weapons training and taught him discipline, poise and techniques for conflict resolution, skills that he admits he lacked prior to joining the Army National Guard. (*Testimony of Appellant*)

9. In 2012, after returning from Afghanistan, Mr. Recupero obtained a constable’s license issued by the City of Chelsea, and signed by the CPD Police Chief Brian Kyes. (*Exhs. 4 & 8*)

² The case was “brought forward” and dismissed ahead of its originally scheduled November 2008 date to accommodate Mr. Recupero’s military enlistment and basic training commitment. (See Finding No. 7) (*Testimony of Appellant & Sgt. Flibotte*)

10. On March 31, 2013, Mr. Recuperero and a companion were driving through his neighborhood when he spotted a vehicle being driven by another acquaintance (Mr. D), with whom he had not spoken since his return from Afghanistan. Mr. Recuperero waved him down and Mr. D stopped in front of a nearby residence where some of Mr. D's family lived. Mr. Recuperero pulled in behind him. Mr. Recuperero's intention was to talk with Mr. D and lay to rest certain rumors that Mr. Recuperero was suspected of having designs on Mr. D's wife. Mr. Recuperero had known Mr. D for years and they played sports together as youths, as well as after this incident. As the men left their vehicles, Mr. D approached Mr. Recuperero and, before Mr. Recuperero had spoken a word, to Mr. Recuperero's surprise, Mr. D. took a swing at him and Mr. D's brother, who was standing in front of the residence, tackled Mr. Recuperero, at which point, Mr. Recuperero's companion, who had been sitting in Mr. Recuperero's vehicle, came to his aid. No weapons were involved. Other relatives of Mr. D had gathered and one of them told Mr. Recuperero to leave and he agreed. He was in the process of departing when the Chelsea police arrived. Mr. Recuperero was ordered out of his car and he fully complied. He was frisked and allowed to call his father and then left the scene. Neither Mr. Recuperero nor his companion was questioned at length. Mr. Recuperero was the only percipient witness to the March 31, 2013 events to testify at the Commission hearing. (*Exh. 18; Testimony of Appellant*)

11. None of the four parties involved in the March 2013 incident sought medical aid and they all stated they did not want to press charges or pursue the matter. Since the police had not witnessed the fight, no arrests were made. The police report does not single out Mr. Recuperero as the aggressor but listed all the combatants as both "victims" and "suspects". The CPD sought criminal complaints against all four men, all of which were denied after the probable cause hearing before a Clerk-Magistrate. (*Exh. 18; Testimony of Appellant & Sgt. Flibotte*)

12. Mr. Recupero's father, Giovanni, was elected to the Chelsea City Council in 2011 and, in March 2013, was serving his second term. As a member of the City Council, in April 2013, following the Marathon Bombing, Councilman Recupero had advocated enforcement of a "ten mile" residency rule, requiring police officers to reside within ten miles of the city, which many police officers opposed. (*Testimony of Appellant*)

13. On April 4, 2013, Mr. Recupero received a \$25 parking ticket from Chelsea, which he paid on April 24, 2013. (*Exh.10; Testimony of Appellant*)

14. Also, on April 4, 2013, a criminal complaint issued against Mr. Recupero for failure to report for jury duty in June 2011. The complaint was dismissed as Mr. Recupero showed he was deployed in Afghanistan when called for jury duty. (*Exh. 26; Testimony of Appellant & Flibotte*)

The 2013 Police Officer Application Process

15. Mr. Recupero signed up to take the April 2011 civil service examination for Municipal Police Officer but was deployed in Afghanistan at the time the examination was given. He took and passed a military make-up examination after he returned from deployment, scoring a 95%, and was placed on the active eligible list. Mr. Recupero also took and passed the civil service examination for municipal firefighter. (*Exh. 19; Testimony of Appellant, Joy & Caggiano*)

16. At some time in late February or early March 2013, Mr. Recupero's father had a telephone conversation with Chief Kyes. Mr. Recupero was present and heard his father's side of the conversation. Based this conversation with Chief Kyes, Mr. Recupero's father told Mr. Recupero that, Chief Kyes remembered that Mr. Recupero had been "caught with drugs" and "no one will have him with that kind of record." According to Councilor Recupero, there was "no way" Chief Kyes would recommend Mr. Recupero for appointment as a CPD Police Officer and

he told his son he would be wasting his time to pursue an appointment to the CPD. (*Testimony of Appellant*)

17. On or about March 25, 2013, Chelsea requisitioned, and HRD issued Certification No. 00511 for appointment of one CPD Police Officer. After a CPD Captain retired in June 2011, the requisition was expanded to two positions but no further names were requested from HRD to be added to the Certification as there had already been sufficient names provided under the “2n+1 formula” to cover the appointment of more than one candidate. (*Exhs. 1 & 19; Testimony of Sgt. Flibotte, Joy & Caggiano*)

18. Chelsea is a “Consent Decree Community” subject to federal court orders entered in the cases of NAACP v. Beecher and Castro v. Beecher, which prescribe special hiring procedures and priorities designed to remediate past discriminatory hiring practices that had disadvantaged African-American and Hispanic candidates for appointment to municipal public safety positions in the past. In Chelsea’s case, a majority of its residents are minorities, while the percentage of minority police officers, especially Hispanics, remains “very low”. Essentially, the court orders require that black and Hispanic candidates be placed in a Certification so that they receive priority consideration in a ratio of at least one minority for every three non-minority candidates. The priority for consideration does not guarantee appointment, however, although the court orders (and civil service rules) do require that reasons for bypass must be “specific, factual and detailed”, that HRD approve the reasons for bypassing any minority candidates, and that a bypassed minority candidate must be notified in writing of the reasons given for non-selection and all applicable appeal rights. (*Exhs. 31 & 32; Testimony of Caggiano, Sgt. Flibotte & Joy*)

19. On March 28, 2013, Mr. Recupero’s name appeared on Certification 00511 as a minority (or “C”) candidate, with veteran and Chelsea residential preferences, and he was the top-ranked

candidate who signed willing to accept appointment. Two other lower-ranked minority (“C”) candidates, one veteran and one non-veteran, and two lower ranked non-minority (or “D”) candidates, one veteran and one non-veteran, were included among the five (5) candidates within the “2n+1 formula” eligible for appointment. (*Exhs. 1 & 31; Testimony of Caggiano*)

20. Before Mr. Recupero even had submitted an Application or signed a release to obtain records, Sgt. Flibotte, provided, apparently at Chief Kyes’s specific request, a summary of Mr. Recupero’s driving record. Not all the driving infractions are supported by source documents and Sgt. Flibotte described the record as “confusing.” (*Exhs. 5 & 8; Testimony of Sgt. Flibotte*)

21. On or about April 10, 2013, Mr. Recupero completed the required CPD employment application package. His application provided full disclosure of his criminal record (he incorrectly misstated that the 2008 drug trafficking charge was disposed as a CWOFF, when it was, in fact, dismissed for failure to prosecute), admitted his two year experimentation with marijuana, acknowledged his past poor driving record and his failure to finish high school (noting he later obtained his GED) and disclosed the \$25 parking ticket he had just received (which he said he was appealing). (*Exh. 4; Testimony of Appellant*)

22. On May 15, 2013, Sgt. Flibotte submitted to Chief Kyes the complete background investigation report he had made about Mr. Recupero. Eleven (11) of the seventeen (17) pages in the report are lengthy narratives about Mr. Recupero’s criminal record and driving history, including his two juvenile arraignments, seven other incidents in his juvenile history, the 2006 and 2008 arrests, and the 2013 fighting incident. The report also questioned Mr. Recupero’s residency status, noting he lived in East Boston from March 2010 to February 2011, references the outstanding parking ticket, and a credit report that indicated two delinquent accounts (Sprint-\$583 and T-Mobile-\$417). (*Exhs. 8 through 10; Testimony of Appellant & Sgt. Flibotte*)

23. As part of the background investigation, Sgt. Flibotte contacted Mr. Recupero's ex-girlfriend and reported she had "nothing negative to say" and confirmed Mr. Recupero's regular payment to her of child support every two weeks. (*Testimony of Sgt. Flibotte*)

24. In describing the February 2006 drug incident, Sgt. Flibotte's report makes clear that Mr. Recupero had possessed only marijuana and not any of the cocaine for which other occupants "took full responsibility". He incorrectly recites Mr. Recupero's statement in his application that all charges against him were "continued without a finding", when, in fact, as to him, as the court records show, they were dismissed outright. (*Exhs. 4, 6, 8 & 14; Testimony of Sgt. Flibotte*)

25. In describing the March 2008 incident at Square One Mall, Sgt. Flibotte states that the mall's video surveillance "observed a person matching the description of [Mr. Recupero] open the trunk of a vehicle prior to the fight". There was no evidence that Sgt. Flibotte actually viewed the video and it was not produced. The police report indicates the description was given by an unknown party and there is no evidence that fairly infers that Mr. Recupero was the person seen on that video. (*Exhs. 8 & 17; Testimony of Appellant & Sgt. Flibotte*)

26. In describing the March 2013 street fight, Sgt. Flibotte's report omits the fact that no criminal complaint issued as all charges were dismissed at the Clerk-Magistrate's hearing on probable cause. (*Exh. 8*)

27. Sgt. Flibotte scheduled an interview of Mr. Recupero for June 4, 2013 before an Oral Board of the CPD. Mr. Recupero was in Vermont performing National Guard duty. Initially, his father tried to reschedule for him, but his First Sergeant agreed to drive him and he attended, coming directly from training in his military uniform. Sgt. Flibotte remarked to Mr. Recupero that he was "surprised you made it." (*Exh. 30; Testimony of Appellant & Sgt. Flibotte*)

28. The Oral Board interview was held before CPD Capt. Batchelor, Capt. Dunn and Sgt. Flibotte. Capt. Dunn prepared a written report of the interview to Chief Kyes, but no recording was produced of the interview, nor any specific rating system or systematic questionnaire used. The Oral Board focused on the 2006 drug arrest and the March 2013 incident with Mr. D. As to the latter, Mr. Recupero clearly remembers making it clear that the CPD police report was not entirely accurate, describing how he and Mr. D had known each other a long time, played sports together and how Mr. D's unprovoked attack was not something he expected. In retrospect, he recognized how he misjudged the situation. The Oral Board spent very little, if any, time with Mr. Recupero addressing the positive aspects of his record. When Mr. Recupero tried to get into the details of his military service that he believed demonstrated his personal and professional growth, he was told that military service and the work of being a police officer were "different". (Exh. 11; Testimony of Appellant & Sgt. Flibotte)

29. Capt. Dunn's interview report, dated June 5, 2013, stated under "Issues":

Mr. Recupero "has a lengthy driving history" which "in and of itself would cause a disqualification"

Mr. Recupero's "a propensity for violence" and "poor decision making" citing:

- The 2006 drug incident as to which he told the Board he only had "weed", which was "different" explanation in Sgt. Flibotte's report that he had been found with "94c" in his shirt pocket;
- The March 2013 incident as to which Mr. Recupero "took issue with the Chelsea Police report" and said he was "trying to resolve an on-going disputes that had arisen a day earlier" when the other person "assaulted him first and he was defending himself". The report also notes: "Mr. Recupero also admitted when challenged by Sgt. Flibotte that he did tell responding officers to call his father"; and
- Mr. Recupero was involved in unidentified "other incidents" in which he "seems to have a propensity to be involved in physical confrontation" and "more than one circumstance involve [sic] using a weapon."

(Exh. 11) (emphasis added)

30. The Oral Board's members said they "respect and appreciate" Mr. Recupero's National Guard service, but ". . . due to his poor driving history, propensity for poor decision making and

physical confrontation the board must recommend a bypass.” The Board stated: “Should Candidate Recupero come before this board again in four to five years without any new incidents the recommendation could possibly be different. (Exh. 11) (emphasis added)

31. By letter dated June 17, 2013, through HR Director Robert Joy to Chelsea City Manager Jan Ash (the Appointing Authority), Chief Kyes recommended that Mr. Recupero be bypassed for appointment. Chief Kyes cited the following reasons for his recommendation:

- A “previous drug arrest” for which he “admitted to sufficient facts” and then claiming “he had no knowledge of drugs in the vehicle” even though “a quantity of drugs . . . was found on his person”
- Inability to produce documentation supporting his disputed phone accounts
- The “only job” he has had since 2008 is as a member of the National Guard and has “never held a full time job”
- A demonstrated propensity for violence and a history of disregarding the rule of law, having “been in and out of court since 2004, when he was 16 years old”
- A February 2006 incident in which he was charged with operating with a suspended license and failure to yield, which was dismissed upon payment of \$100 costs, but noting that such dispositions were “routine” in Chelsea District Court
- The March 2006 “panhandling” incident involving his alleged assault and battery of a Chelsea Police Officer for which he admitted sufficient facts on charges of disorderly conduct and carrying a dangerous weapon
- An incident in March 2006 in which Mr. Recupero was crossing the street on his way to high school when he was nearly struck by a car in the crosswalk and “yelled at the driver” who rolled down his window and Mr. Recupero “reached in” after which the unknown suspect “spun the car in front of the HS nearly pulling [Mr. Recupero] with him” and almost striking him a second time, all of which was witnessed and corroborated by the Chelsea Superintendent of Schools in the police report.
- The March 2008 fight at the Square One Mall during which “a person matching [Mr. Recupero’s] description” was filmed by the mall security removing an object [implied to be a tire iron] from the trunk of a car”
- The August 2008 stop for, again, operating with a suspended license and failure to yield, which he admitted to the trooper had been “stupid” behavior and he showed up one day late for his court appearance, getting the suspended license charge dismissed and paying a \$100 fine after being held responsible for failure to yield
- The 2013 street fight, referring to Mr. Recupero as the “aggressor” and the other participant as the “victim”, citing the Chelsea Police Report of the incident.
- Mr. Recupero’s untruthfulness about his Chelsea residency when records indicated he lived in East Boston during the one year prior to the April 30, 2011 civil service examination for police officer that was administered on April 30, 2011.

(Exhs. 7, 8 & 15; Testimony of Joy)

32. On July 22, 2013, after the two selected candidates completed the medical and PAT screening, City Manager Ash appointed those two non-minority (“D”) candidates as CPD police officers, both Chelsea residents, one a veteran and one a non-veteran. Both candidates were ranked below Mr. Recupero on Certification 00511. Although one candidate had not “self-disclosed” as Hispanic, and was considered a “D” candidate for Consent Decree purposes, in fact, that candidate happened to be of Hispanic ethnic background and is treated as Hispanic by the CPD. (*Exhs.1 & 3; Testimony of Caggiano, Sgt. Flibotte & Joy*)

33. Due to an administrative error, as of the time of the appointment of the two candidates from Certification 00511, City Manager Ash had not reviewed or approved the recommendation for bypass of Mr. Recupero. He did not do so until two months later, on or about September 14, 2013. Also, due to administrative error, no bypass recommendations were submitted to HRD for approval, in advance, as required. (*Exhs. 2 & 3; Testimony of Caggiano & Joy*)

34. On or about October 13, 2013, although no notice of bypass had been issued to him, Mr. Recupero obtained a copy of Chief Kyes letter to City Manager Ash recommending Mr. Recupero’s bypass. This appeal duly ensued. (*Claim of Appeal; Testimony of Appellant & Joy*)

35. After this appeal was filed, HR Director Joy came to learn that Chelsea had failed to provide the required bypass reasons for review and approval by HRD and he finally did so by letter (undated) in or about January 2014. These reasons included:

- Mr. Recupero’s documented home of record is questionable . . . on May 10, 2010 he changed his address with the Registry of Motor Vehicles to . . . East Boston and on February 15, 2011 he again uses the address of . . . East Boston on his Tax Returns. For anyone to get residents preference in Chelsea for this entrance level exam, they would need the requisite documented proof that their home of record to be Chelsea from April 30, 2010 – April 20 2011.
- The background investigation revealed that it is apparent that Mr. Recupero does not take personal responsibility for his actions:
 1. In his background reply about his previous drug arrest for which he admitted to sufficient facts for a finding of guilty in Chelsea District Court, he stated that he

has no knowledge of drugs in the vehicle even though a quantity of drugs, which were prohibited by law, were found on his person and the vehicle in which he was a passenger had a strong order [sic] burnt marijuana according to the police report by the Massachusetts State Police.

2. His credit report shows that he is in collections on the only two entries on the report. He states that he is disputing them. Sergeant Flibotte asked for the documentation to verify that he was disputing them; he stated he did not have any.
 3. He owes the City of Chelsea a \$25.00 parking ticket, which he informed Sergeant Flibotte on April 23, 2013, that he is appealing. As of April 24, 2013, when Sergeant Flibotte checked, he had not yet filed an appeal.
- Mr. Recupero has a demonstrated propensity for violence and a history of disregarding the rule of law. He has been in and out of court since 2004, when he was 16 years old, having 15 different charges brought against him from 8 separate incidents. Most recently in May of 2013 he was summonsed to Chelsea District Court for a fight . . . in which he followed the victim from one location to another in his vehicle, then . . . initiating what turned out to be a mutual assault.
 - On March 8, 2008 he admitted to sufficient facts on charges of Disorderly Conduct and Carrying a Dangerous Weapon and “received a CWO” on charges stemming from the March 2006 [panhandling] altercation in which a Chelsea Police Officer “received injuries to both hands and his right knee as well as his uniform pants were damaged”.
 - Some twenty days later, on March 28, 2008, Mr. Recupero was arrested by the Saugus Police Department and charged with Disorderly Conduct.
 - Mr. Recupero has an extensive driver’s history, being issued 13 citations, totaling 22 separate charges. His license to operate a motor vehicle “has been or was scheduled to be suspended approximately 20 times [citing in particular the incident in which he was stopped by the State Police for “an aggressive lane change” in 2008] . . . His driving history justifies disqualification and presents reasonable concerns about his judgment, respect for law and prudent operation of a motor vehicle.

(Exh. 20; Testimony of Joy) (emphasis added)

36. On January 9, 2014, HRD requested additional information regarding the bypass decisions concerning Mr. Recupero and another bypassed minority (“C”) candidate. (Exh. 21; Testimony of Joy)

37. On January 10, 2014, Sgt. Flibotte responded to HRD’s request confirming the following information concerning HRD’s questions pertaining to Mr. Recupero:

- None of the criminal cases involving Mr. Recupero had resulted in a guilty finding.
- Two cases had resulted in CWOs and were dismissed, the March 2006 “panhandling” incident and the March 2008 Square One Mall incident.

- The March 2013 incident was dismissed because the “combatants/defendants” refused to testify at the May 2013 Clerk-Magistrate’s hearing.
- A list of Mr. Recupero’s driving record for the past five (5) years (last incident date was Sept. 2008)

(Exh. 22; Testimony of Joy & Sgt. Flibotte)

38. By letter dated January 16, 2014, HRD informed Mr. Joy that the expanded bypass information regarding Mr. Recupero was “accepted”. *(Exh. 2; Testimony of Joy)*

39. Mr. Recupero first received correspondence between Chelsea and HRD containing the reasons for his bypass in the course of the Commission hearing. *(Testimony of Joy & Appellant)*

Mr. Recupero’s Application for a License to Carry

40. While his application to the CPD was pending, Mr. Recupero applied to the CPD for a license to carry (LTC) a firearm. *(Exh. 27; Testimony of Appellant)*

41. By letter dated July 22, 2013, Chief Kyes informed Mr. Recupero that his LTC application was denied. The denial letter recited, substantially verbatim, the reasons (albeit then unknown to Mr. Recupero) that had been set forth for recommending Mr. Recupero’s bypass in Chief Kyes letter a month earlier to City Manager Ash on June 17, 2013. *(Exh. 27)*

42. Mr. Recupero appealed the denial of his LTC application for judicial review to the Superior Court. By order dated December 10, 2013, the petition was denied. *(Exhs. 24 & 25)*

Other Evidence Presented at the Commission Hearing

43. Mr. Recupero introduced copies of the CPD applications of the two candidates hired by the CPD who had bypassed him. The applications disclosed that one of the selected candidates had been fired from a job in 2005 for financial misconduct (giving a coworker an illegal discount) and had his driving license suspended for 30 days for a drag racing in December 2006. *(Exhs. 28 & 29; Testimony of Caggiano & Sgt. Flibotte)*

44. Chelsea did not find the negative employment and driving record of that other candidate disqualifying, although “drag racing” was a more serious driving offense than anything with which Mr. Recupero had been charged, because the other candidate had been a teenager, had since served five years in the military, had taken driving classes to improve his driving ability, and had an otherwise completely clean criminal record. (*Testimony of Sgt. Flibotte & Joy*)

45. Chelsea does not dispute that Mr. Recupero had been deployed on active military duty in Afghanistan but, according to Sgt. Flibotte, Chelsea does not consider that ten month deployment the equivalent of having a “full time job” and stands by the statement to that effect by Chief Kyes in his June 17, 2013 letter to City Manager Ash. (*Exhs. 13; Testimony of Appellant & Flibotte*)

46. According to HRD Civil Service Unit Deputy Director Caggiano, a juvenile record should never to be used “under any circumstances” as grounds to bypass a candidate. Also, according to Deputy Director Caggiano, HRD does not generally accept reliance on a driving record older than a “five year window” absent more recent evidence of a continuing pattern of irresponsible behavior. Sgt. Flibotte agreed that Mr. Recupero’s four-plus years of good driving did demonstrate a change in his driving behavior. Similarly, Mr. Joy agreed that he would hire someone who had “matured” and kept a clean record even after having “been a bit of trouble in their past” and, in fact, such a person could actually make a good police officer because “he understands the real world out there”. (*Exh. 21; Testimony of Caggiano & Sgt. Flibotte & Joy*)

Applicable Civil Service Law

The authority to bypass a candidate for appointment to a civil service position derives from G.L.c.31, Section 27, which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the 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 . . . a written statement of his reasons for appointing the person whose name was not highest.”

The appointing authority’s reasons for “bypassing” a candidate favor of a lower ranked candidate must be “reasonably justified”, based on a “thorough review”, and supported by a preponderance of the evidence, when weighed by an unprejudiced mind, guided by common sense, and correct rules of law. See, e.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited; Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182 (2010); 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). See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991) (“discretionary acts of public officials . . . must yield to the statutory command that [they] produce ‘sound and sufficient’ reasons” consistent with basic merit principles and protected from arbitrary and capricious actions). See also Personnel Administration Rules, PAR.08(4) (bypass reasons limited to those stated in notice to applicant)

In reviewing a bypass decision, “[t]he commission’s primary concern is to ensure that the appointing authority’s action comports with ‘basic merit principles,’ as defined in G.L.c.31,§1.” Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) citing Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban , 434 Mass. 256, 259 (2001). In conducting this inquiry, the Commission “finds the facts afresh”, and is not limited to the evidence that was before the appointing authority. E.g., Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (appointing authority must proffer “objectively legitimate reasons” for bypass); Borelli v. MBTA, 1 MCSR 6 (1988) (bypass improper if 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”);

MacHenry v. Civil Service Comm'n, 40 Mass.App.Ct. 632, 635 (1995), rev.den., 423 Mass. 1106 (1996) (duty to “review, and not merely formally to receive” bypass reasons and evaluate them “in accordance with basic merit principles”). See also Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65, 748 N.E.2d 455, 462 (2001) (“The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses . . . [T]he commission acted well within its discretion.”); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (Commission does not substitute its judgment for a “valid” exercise of appointing authority discretion, but 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.”)

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. In the event of a failure of proof, the commission has the power to reverse the bypass decision. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001) Id. It is the function of the hearing officer to determine the credibility of evidence presented through witnesses who appear before the Commission. See 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).

Minority Opinion of the Hearing Officer (Commissioner Stein)

Chelsea failed to meet its burden to establish reasonable justification for its decision to bypass Mr. Recuperero. Through a cumulative series of factual and procedural mistakes, Chelsea’s decision to bypass Mr. Recuperero was unlawfully tainted by a result-driven and less

than careful reliance on selective negative aspects of his history as a juvenile and teenager and numerous other reasons based on clearly erroneous mischaracterizations of the facts in the record. For these reasons, although he is not guaranteed appointment, Mr. Recupero is entitled to receive at least one new consideration that is free of those defects. Accordingly, I would allow this appeal and, pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, order that the name of the Appellant, Michelangelo Recupero, be placed at the top of all future certifications for original appointment to the position of Police Officer for the City of Chelsea until he is selected for appointment or bypassed and, if and when Mr. Recupero were selected for appointment, his civil service records should be retroactively adjusted to show, for civil service seniority purposes only, as his starting date, the same date of other persons appointed from Certification #00511.

Residency Requirement

Chelsea's first ground for bypassing Mr. Recupero was a false claim to a residency preference in Chelsea, because he had been untruthful in claiming that he resided in Chelsea for one year prior to the April 2012 entry level municipal police officer examination. It was Chelsea's position that, this untruthfulness, alone, justified bypass.

In fact, as Sgt. Flibotte and Mr. Joy were obliged to admit at the Commission hearing, at the time it decided to bypass Mr. Recupero, Chelsea inexplicably misconstrued the evidence and misunderstood how residency requirements applied to military veterans. In fact, Mr. Recupero resided in Chelsea his entire life, save for a brief period prior to his deployment to Afghanistan in 2011. It is not disputed that he resided at his parents' home in Chelsea immediately prior to deployment and that, immediately upon his return from deployment, he moved back there and resided since ever since. Thus, under rules for residency applicable to military personnel

established by HRD, Mr. Recupero qualified to claim Chelsea residency under the traditional one-year rule measured from the date he actually took the make-up examination. Alternatively, a veteran deployed during the one year period prior to a scheduled civil service examination, may claim residence either in the town in which he or she resided prior to deployment OR the town in which he or she established residence within 90 days after return from deployment.

<http://www.mass.gov/anf/employment-equal-access-disability/civil-serv-info/vet-and-active-duty-military-info/residency-pref-claim-info-for-military/> Thus, Mr. Recupero was clearly entitled to claim residency in Chelsea. He was erroneously bypassed for being considered to have been untruthful for making a false claim of residency preference.

Financial Responsibility

Chelsea raised three negative indicia of Mr. Recupero's alleged financial irresponsibility: (1) his driving record showed a series of license suspensions for non-payment of child support from approximately September 2008 through November 2008 and a series of license suspensions associated with his accumulation of excessive surchargeable events; (2) a record of two delinquent cell phone accounts on his 2013 credit report; and (3) non-payment of a \$25 parking ticket issued in April 2013. A thorough review of the record leaves no basis on which to support a claim that Mr. Recupero is not financially responsible for any of the reasons provided.

As to the brief 2008 child support default, as Mr. Recupero explained in his application and Sgt. Flibotte confirmed in his background interviews, this was an isolated situation that arose when Mr. Recupero's ex-girlfriend lost her job and went on welfare, prompting the welfare department to press demands on him for support. His private, voluntary record of child support for more than five years since then has been exemplary and was documented in Sgt. Flibotte's investigation report. As to the license suspensions, the record shows that the initial incidents

were triggered by automatic entries stemming from accumulation of excessive surchargeable events as an inexperienced driver. Once Mr. Recupero was apprised of how the system worked, he took action to address them, eventually clearing his record after a hearing in August 2008. The final suspension in 2009 was initially triggered by a final incident for which Mr. Recupero was eventually found not responsible, and his record was cleared in February 2009. There is no indication that since then, Mr. Recupero has had any driving infractions, suspensions or payment defaults. I also note that these stale child support issues and the license suspensions in the driving record were not cited as reasons in Chelsea's letter to HRD requesting bypass approval.

The only specific justifications Chelsea provided in Chelsea's letter to HRD for the conclusion that Mr. Recupero was financially irresponsible consisted of the reference in his credit report to two phone accounts in collection, as to which Sgt. Flibotte notes Mr. Recupero disputed, and his April 2013 parking ticket which he paid almost immediately. In fact, as to the former, Sgt. Flibotte's criticism was that Mr. Recupero could not produce documents to support his contention that he disputed these debts. As to the parking ticket, by the time Mr. Joy submitted his letter to HRD for approval of the bypass, Mr. Recupero had long-ago cleared this matter, something Mr. Joy's letter did not mention. Chelsea provided no persuasive reason why these facts reasonably justify concluding that Mr. Recupero is not financially responsible, when he was otherwise shown to be meeting all of his other current financial obligations.

Lack of Job History

Among the reasons he recommended bypassing Mr. Recupero, Chief Kyes letter to City Manager Ash stated that "Mr. Recupero has never held a full time job" and Chelsea persisted in this claim at the Commission hearing. This reason also was not one, however, stated in Chelsea's letter to HRD, and, for that reason alone, cannot support the bypass. Even assuming

that the reason had been disclosed in the bypass letter, I find no rational justification and know of no basis to require prior employment as a minimum requirement for an entry level civil service position, even that of a police officer, when the candidate has taken and passed the requisite civil service qualifying examination and meets all other minimum requirements to take the examination prescribed by HRD. Moreover, Mr. Recupero's application, in fact, does list several prior employers while in high school; the fact that Chelsea could not find anyone at those establishments to confirm his tenure does not mean he never worked those jobs. Even more troubling is the contention that Mr. Recupero's nine months' combat deployment, and his regular National Guard duties (as a result of which he attained the rank of Sergeant) does not count as "full time" work. Chelsea's reliance on a lack of an adequate prior employment record is not, under basic merit principles of civil service law, a legitimate reason to bypass an otherwise qualified candidate.

Driving Record

The CPD Oral Board claimed that Mr. Recupero's driving history "in and of itself" disqualified him, and the same assertion was made by HR Director Joy in his letter to HRD stating: "His driving history justifies disqualification and presents reasonable concerns about his judgment, respect for law and prudent operation of a motor vehicle." The preponderance of evidence at the Commission hearing, however, did not prove this claim and, in fact, showed an undisputed, recent pattern of good driving over five years that proves just the opposite.

Mr. Recupero admitted that he compiled a lengthy record of driving infractions as a teenager over a three-year period prior to January 2008, during which time he was cited on ten (10) occasion for sixteen (16) driving violations, and found responsible for thirteen (13) of them. Since then, he was stopped twice, once in August 2008 for an "aggressive lane violation"

violation for which he was found responsible and one month later, in September 2008, for allegedly leaving the scene of a property damage accident and related infractions, for which he was ultimately found not responsible. It is not disputed that he has maintained a clean driving record since September 2008, when he turned 21 and, by the time of his bypass he was one month shy of five full years of incident free driving. His experience in the National Guard has included substantial responsibility for operating military vehicles for which he frequently was responsible for the safety of six or more fellow soldier passengers facing hostile enemy fire.

To be sure, an appointing authority is justified to disqualify a candidate as unsuitable to serve as a police officer upon proof that the candidate's driving history shows a present, continuing pattern of imprudent motor vehicle operation. Here, however, Mr. Recupero's driving record does not prove this to be true. By standards HRD typically applied to review of bypass reasons, a candidate's past driving record is not disqualifying unless it shows a pattern of irresponsible behavior in a five year window prior to the application. Sgt. Flibotte agreed that even a four year period of good driving behavior is enough to demonstrate that a candidate had changed his behavior and would warrant discounting older infractions. Chelsea provided no sound explanation, and I find none in this record, to show why Mr. Recupero was held to a higher standard, and the undisputed evidence credibly showed his continuous pattern of good driving, having been involved in not a single accident or surchargeable incident for more than five years preceding the Commission hearing. I conclude that, as with Mr. Recupero's early criminal record discussed below, Chelsea's rationale evidences a result-driven approach, unlawfully tainting Chelsea's view of what would normally be discounted as a stale driving history.

Criminal History

A prior negative criminal history, alone, also, is certainly a legitimate reason to question the suitability of a candidate for appointment to the position of a municipal police officer. The Commission recognizes that police agencies should be accorded substantial deference in assessing such a risk. As Chelsea acknowledges, however, having a criminal record (absent a conviction for a felony which is a statutory disqualification), does not necessarily warrant disqualification. Rather, it is the indicia that a candidate evidences a continuing inability to conform one's behavior to the requirements of the law through a underlying pattern of unacceptable behavior, as shown after a reasonable and through investigation of the candidate's entire record, that justifies using such an un-remediated pattern as a disqualifying factor. This principle is now embedded in the mandates prescribed by statute and executive orders pursuant to recent reform of the Criminal Offender Record Information (CORI) law. Specifically:

In connection with any decision regarding employment ... a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession ... prior to questioning the applicant about his criminal history... . If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession

G.L.c.6, §171A. St. 2010, c. 256.

On January 11, 2008, the Governor issued Executive Order Number 495, Regarding the Use and Dissemination of Criminal Offender Record Information by the Executive Department:

... WHEREAS, the existence of a criminal record should not be an automatic and permanent disqualification for employment, and as the largest single employer in the Commonwealth, state government should lead by example in being thoughtful about its use of CORI in employment decisions;

...

WHEREAS, educating individuals about their legal rights regarding their court records will improve their prospects for employment and housing; ...

NOW, THEREFORE, I, Deval L. Patrick, Governor of the Commonwealth of Massachusetts, by virtue of the authority vested in me by the Constitution, Part 2. c. 2, § 1, Art. 1, do hereby order as follows:

Section 1. It shall be the policy of the Executive Department with respect to employment decisions that a criminal background check will only occur, and its results will only be considered, in those instances where a current or prospective employee shall have been deemed otherwise qualified and the content of a criminal record is relevant to the duties and qualifications of the position in question. Such instances will include, without limitation, those in which a criminal conviction creates a statutory disqualification for the position, or the position requires interaction with vulnerable populations and a criminal background check is necessary to ensure that the applicant does not pose a public safety risk.

In implementing this policy, the employer should consider the nature and circumstances of any past criminal conviction; the date of the offense; the sentence imposed and the length of any period of incarceration; any reasonably available information concerning compliance with conditions of parole or probation, including orders of no contact with victims and witnesses; the individual's conduct and experience in the time since the offense, including, but not limited to, educational or professional certifications obtained since the time of the offense or other evidence of rehabilitation; and the relevance of the conviction to the duties and qualifications of the position in question. Charges that did not result in a conviction will be considered only in circumstances in which the nature of the charge relates to sexual or domestic violence against adults or children, consistent with Executive Order No. 491, Establishing a Policy of Zero Tolerance for Sexual Assault and Domestic Violence, or otherwise indicates that the matter has relevance to the duties and responsibilities of the position in question.

Exec. Order No. 495 (Jan. 11, 2008) (*emphasis added*).

803 CMR 2.00 prescribes procedures for accessing CORI for employment or professional licensing, including the iCORI system, the internet-based system for access to CORI and to obtain self-audits, in order to access criminal records. 803 CMR 2.00 applies to *all* users of the iCORI system including employers, governmental licensing authorities, and individuals with a criminal history. The steps for a “reasonably thorough review” are included in 803 CMR 2.17

Adverse Employment Decision Based on Criminal Offender Record Information (CORI):

Before taking adverse action on an employment applicant's application for employment based on the employment applicant's CORI, an employer shall:

- (1) comply with applicable federal and state laws and regulations;

- (2) notify the employment applicant in person, by telephone, fax, or electronic or hard copy correspondence of the potential adverse employment action;
- (3) provide a copy of the employment applicant's CORI to the employment applicant;
- (4) provide a copy of the employer's CORI Policy, if applicable;
- (5) identify the information in the employment applicant's CORI that is the basis for the potential adverse action;
- (6) provide the employment applicant with the opportunity to dispute the accuracy of the information contained in the CORI;
- (7) provide the employment applicant with a copy of DCJIS information regarding the process for correcting CORI; and
- (8) document all steps taken to comply with 803 CMR 2.17.

803 CMR 2.17 (issued pursuant to G.L.c.6, §§167A, 172 & G.L.c.30A) See, e.g., Gore v. Department of Correction, 27 MCSR 582 (2014), citing, Conner v. Department of Correction, 27 MCSR 556 (2014) (DALA Magistrate's decision, adopted by the Commission, analyzing the requirements of a "reasonable review" of criminal record, with specific reference to changes in the CORI law and regulation, including the Governor's Executive Order applicable to public employment). See also, Rodrigues v. Department of Correction, 26 MCSR 574 (2014) (no automatic disqualification for five year old larceny arrest); Leguerre v. Springfield Fire Dep't, 25 MCSR 549 (2012) (no automatic disqualification); Hardnett v. Town of Ludlow, 25 MCSR 286 (2012) (single decade-old conviction); Monagle v. City of Medford, 23 MCSR 275 (2010) and cases cited (discussing parameters that distinguish justified reliance on a pattern of continuing misconduct demonstrating direct disrespect of law enforcement, evidenced by a recent incident, from unjustified reliance on "past indiscretions" that are outweighed by "redeeming factors [that] must be given added weight")

In the circumstances of this case, I find Chelsea's use of Mr. Recupero's alleged criminal history problematic for three reasons: (1) unjustified reliance on juvenile records; (2) serious mistakes and mischaracterizations about the underlying facts and lack of a thorough review of

the incidents and (3) the indicia of Chelsea's result-driven approach to find him disqualified due to misinformed opinions about his prior record.

First, contrary to the general rule, Chelsea placed significant reliance on the fact that Mr. Recupero had been "in and out of court" since he was sixteen, highlighting several juvenile "arraignments", described only as involving stealing and trespassing. The underlying facts of these charges is unknown and none resulted in any convictions and the nature of the juvenile charges shows no obvious "pattern" to any of the adult offenses that later arose. No proper justification has been provided that would warrant use of such a juvenile CORI, especially in the context of consideration of a minority candidate in a Consent Decree community such as Mr. Recupero.

Second, Chelsea is mistaken about the actual facts involved in Mr. Recupero's adult CORI in several material respects, which, in some cases, ventured into mere speculation:

- As to the 2006 incident in which Mr. Recupero admitted he was "*caught with drugs*", Chelsea takes considerable liberty with the facts to suggest that Mr. Recupero was culpable as charged and still refuses to take responsibility for his behavior, erroneously claiming such denials are inconsistent with his allegedly receiving a CWOFF. As the police reports and court records show, Mr. Recupero's only offense was possession of a small quantity of marijuana. He never denied this and, in fact, fully disclosed his teenage experimentation with marijuana in his CPD application. *There was no CWOFF*. Rather, when it was clear that Mr. Recupero was not involved in any of the serious offenses of possession and trafficking in cocaine found after a search of the vehicle, which is what he denied knowing anything about, the

- Commonwealth, believing Mr. Recupero voluntarily dropped all the charges against him. Chelsea's documentation of this incident repeatedly blurs these distinctions.
- Similarly, the CPD Oral Board erroneously claimed that Mr. Recupero had a lengthy record of violent behavior, including multiple occasions that involving "use of a weapon". In fact, NONE of the CORI reports charge, or even accuse, Mr. Recupero of ever using a weapon against anyone. Mr. Recupero was arrested in the 2006 drug bust "without incident". In the 2006 "panhandling" incident, the police report makes clear that the scuffle ensued only after the officer "grabbed" Mr. Recupero. A search of Mr. Recupero, after he was arrested, produced a folding pocket knife in his left front pocket. The police report clearly states that, what allegedly put the police in fear was Mr. Recupero's failure to take his hands out of his right front pocket – clearly no intent to use, much less actually using, any weapon is inferred under those circumstances. Similarly, contrary to how the 2008 Square One Mall incident is described in the letter to City Manager Ash, the police report states that, the police observed other "unknown" males swinging tire irons (consistent with what Mr. Recupero said when he testified) and contains no basis to conclude that Mr. Recupero had used such implements or any other weapon. The police report of the March 2103 incident expressly states that no weapons were involved and the combatants suffered only minor injuries that did not require medical attention.
 - In his bypass recommendation letter to City Manager Ash, in further support of Mr. Recupero's alleged violent tendency, Chief Kyes also mentioned the 2006 incident in which Mr. Recupero "reached into" a vehicle and "grabbed" the driver. Chief Kyes account fails to mention that Mr. Recupero was the "victim" in that scenario, the

driver had nearly run Mr. Recupero over, then slowed down, turned the car around and almost struck Mr. Recupero again, to which the Chelsea Superintendent of Schools was a percipient witness.

Similarly, relying entirely on the CPD Incident Report of the March 2013 incident without conducting any other reasonable and thorough review of this very recent incident, Chelsea made that one episode the lynch-pin for its conclusion that Mr. Recupero continues to have a propensity for violence and justifying resurrecting his otherwise stale prior criminal history. Neither the CPD incident report, nor other evidence, however, supports Chelsea's largely speculative conclusions that Mr. Recupero followed "the victim" and, then, "initiated" a fight with him, or that he was responsible for "escalating the violence", or that discredits Mr. Recupero's percipient testimony on this matter to the contrary.

The CPD incident report was prepared by officers who responded, after the fact, and contains only what they "apparently" learned from unspecified sources. On its face, it shows that it primarily recites mainly what Mr. Recupero's adversaries had told them. Mr. Recupero and his friend were not asked for their version at the time. Even so, the report makes no conclusion as to who was more credible or who initiated the fight. The Clerk-Magistrate decided that there was insufficient evidence to support a criminal complaint against any of the four combatants who were "allegedly involved." Although the incident was less than a month old at the time, Chelsea did nothing further to investigate or verify what had actually happened although the officers on scene were clearly available to provide clarity to the very ambiguous circumstances involved..

The only percipient evidence of the 2013 incident was provided by Mr. Recupero at the Commission hearing. He gave a very plausible description of the altercation at the Commission hearing, essentially repeating what he had told the Oral Board. I accept as true his claim that he

and his friend acted in self-defense because Mr. D approached Mr. Recupero and, before any words were exchanged, Mr. D. took a swing at him as Mr. D's brother tackled him to the ground. Mr. Recupero admitted that he had spotted Mr. D while they were both driving and got his attention, wanting to talk but intending no violence. He explained that he thought his long-time acquaintance with Mr. D would allow him to discuss his concerns as one friend to another. He admitted that he had misjudged the situation and, in retrospect, took his prior relationship too much for granted and should have known that he was inviting a confrontational situation. In making its bypass decision, Chelsea did not raise Mr. Recupero's truthfulness as an issue and, specifically, Chelsea offered no reason to discredit his testimony about the March 2013 incident or provide any credible basis to believe that he, as opposed to his adversary, "initiated" the altercation. While I agree that Chelsea is entitled to consider this incident an example of poor judgment (which Mr. Recupero admits), he was never charged with any crime and there is nothing in the incident to suggest a disrespect for law enforcement (the contrary is more evident) and this one incident does not in any way rationally justify a conclusion that Mr. Recupero has persisted in a present pattern of disqualifying violent behavior. In this regard, Mr. Recupero's lapse of judgment is distinguishable from other cases that have been considered by the Commission to justify a bypass, such as those in which the candidate took a "CWOFF" in a case in which he was charged with kicking a victim unconscious, or resisting arrest and lying to police about his actions.

Third, the undue reliance on Mr. Recupero's juvenile record and the numerous mischaracterizations of his prior adult record up to and including the March 2013 episode, do not stand alone, but must be viewed in the context of Chelsea's clear result-driven approach. I do not believe that the fact that Mr. Recupero's father had advocated for a police department

residency requirement that was resisted by many in the CPD was the source of animus by those involved in the selection process. I do conclude, however, that Chief Kyes, and others who were involved in the selection process, carried a negative impression about Mr. Recupero into that process that was based, in part, on stale and mistaken recollections of events, exacerbated by repeated mistaken and exaggerated characterization of his record, all of which fell short of a fair and reasonable assessment of his current fitness for appointment. For example, Mr. Joy said his review of the record showed that Mr. Recupero had “never stopped” misbehaving and showing poor judgment and disrespect for the law, a clearly unwarranted exaggeration of the facts. As previously noted, Mr. Joy (and the Oral Board) also stated, without any support in the evidence, that Mr. Recupero past history of violence included “use” of a weapon, and, on that basis alone, recommended his bypass. The Oral Board also claimed that Mr. Recupero told the officers on scene to “call his father”, when, in fact, what Mr. Recupero said, and what he did was to call his father himself. Sgt. Flibotte agreed that the excerpt in Chief Kyes’s letter to City Manager Ash about the 2006 incident in which Mr. Recupero had “grabbed” a motorist was plainly misleading, as it failed to provide the context that the motorist twice side-swiped Mr. Recupero, the Superintendent of Schools was a witness to the fact that Mr. Recupero clearly was the victim, not a perpetrator of violence, and it was not considered, even by Chelsea, as evidence of Mr. Recupero’s alleged “propensity to violence”.

I credit Mr. Recupero’s account of his conversation with his father early in the application process, when Councilor Recupero conveyed his understanding that Chief Kyes would never recommend him and he should give up any thought of being a CPD police officer. The somewhat “preemptive” search of Mr. Recupero’s driving history, even before getting his release, further confirms my belief that Mr. Recupero was being set up; his driving record was

repeatedly cited thereafter as reason “alone” to bypass Mr. Recupero, disregarding his recent impeccable driving record, both personally and in the military, since 2008. Chief Kyes, among others, mischaracterized Mr. Recupero’s being “caught with drugs” by inferring it meant he admitted to knowing about the cocaine and then denied it. I credit Mr. Recupero’s testimony that this misperception of the drug bust based on faulty recollections that caused Chief Kyes to view Mr. Recupero as irreparably damaged goods. While one such misperception might be discounted as an honest mistake, the cumulative record of such mistakes here is a tell-tale sign that Chelsea did not provide Mr. Recupero with the objective and thorough review to which he is entitled.

An appointing authority is entitled to exercise sound judgment, after a thorough and reasonable review of the record and based on true and accurate facts, to conclude that candidates presents unacceptable risks that disqualifies them for appointment to public safety positions. I distinguish the present case, however, because there are far too many examples of erroneous fact-finding and other indicia of pre-disposition, whose cumulative effect leads me to conclude that Mr. Recupero’s bypass, here, was not the result of such the thorough review and fair and objective analysis of all of the relevant facts to which he was entitled. Mr. Recupero deserves another opportunity for consideration that is based on such a fair and objective review, that is free of such cumulative and erroneous conclusions and not result-driven, and consistent with basic merit principles under civil service law.

Consent Decree Violations

The Appellant correctly argues that Chelsea’s appointment of two police officers from Certification 00511 failed to comply with the procedures prescribed by HRD’s Personnel Administration Rules (PARs) and the federal court Consent Decree Community requirements set forth in NAACP v. Beecher and Castro v. Beecher. In particular, prior to appointing those

candidates, Chelsea needed to obtain approval from HRD to bypass Mr. Recuperero (and one other minority candidate who was bypassed) and to inform the parties to the federal court of the reasons for bypassing the two non-selected minorities. I am persuaded that this error was not intentional but due to a miscommunication between the CPD and Mr. Joy, who had recently assumed his position as Chelsea's HR director, leading Mr. Joy to believe that the CPD, not him, was responsible to process the bypass paperwork through HRD. While HRD might have invalidated the appointments due to this procedural error, HRD did not do so but, rather, approved the appointments and the bypass reasons retroactively. To be sure, these circumstances clearly put HRD in a difficult spot, giving it the Hobson's choice to retroactively approve the bypass or to be required to invalidate appointments of CPD officers who had already served six months on the job. I find no prejudice to the Appellant from this result, however, as the Appellant was not impeded from diligently pursuing this appeal and, ultimately, demonstrated that he is entitled to relief on the merits. Accordingly, the Consent Decree and related PAR procedural issues are moot and need not be considered further by the Commission.

License to Carry

One final matter bears notice. Although the Commission is empowered to require that Mr. Recuperero be considered anew through a process free of error and consistent with basis merit principles of civil service law, such reconsideration does not, necessarily, guarantee his appointment, and does not prevent Chelsea from deciding to bypass him for reasons that are sound and sufficient. In this regard, a candidate for appointment as a police officer must be authorized to carry a firearm in order to perform the essential duties of the position. At the time that Chief Kyes's initial letter to City Manager Ash, Chief Kyes had not denied Mr. Recuperero's LTC application, and the denial of the LTC was not included as a reason for the current bypass

in the Chief Kyes's letter to City Manager Ash or Mr. Joy's letter to HRD. Thus, this reason is not one that was, or, then, could properly be used as the basis for upholding the 2013 bypass that is currently before the Commission.

The basis for the denial of Mr. Recupero's LTC was essentially identical to the reasons for his bypass. Although I have concluded that, on this record, these reasons are insufficient to justify the bypass, Mr. Recupero's appeal from the denial of the LTC was upheld upon judicial review. While I would hope and expect that, following this decision, Chelsea would find it appropriate to revisit the LTC issue as well, the Commission lacks authority to override the Superior Court's decision in this regard. Thus, should Mr. Recupero intend to pursue his interest in appointment as a Chelsea Police Officer, unless Mr. Recupero is able to resolve the LTC issue, this decision notwithstanding, an inability to obtain an LTC, alone, may become an insurmountable impediment to his future consideration.

Opinion of Chairman Bowman for the Majority (Chairman Bowman; Commissioners Ittleman & McDowell)

A review of the entire record shows, by a preponderance of the evidence, that the City conducted a reasonably thorough review here that resulted in multiple valid reasons to bypass Mr. Recupero for the position of police officer. Further, a review of the record does not, in my view, sufficiently support the conclusion that the decision to bypass Mr. Recupero was the result of any personal or political bias. For these reasons, and because of the substantial deference that is due to cities and towns when making public safety appointments, the decision to bypass Mr. Recupero should be affirmed and his appeal should be denied.

Similar to all other candidates, the City completed a background investigation of Mr. Recupero that included a review of his criminal history record; military service; education and

work history; driving record; and a local check within the City related to such things as taxes, parking citations, etc. A background investigator also conducted interviews with the candidate's references, neighbors and others. The review did not end there. Mr. Recupero, like all other candidates was given the opportunity to appear before an Oral Board where he was given an opportunity to address the negative aspects of his background investigation.

That background investigation showed that Mr. Recupero had twelve (12) adult criminal charges against him, most of which were dismissed. Rather than rely solely on the Board of Probation (BOP) report, the background investigator obtained and reviewed the arrest and incident reports related to those charges. Mr. Recupero was then given the opportunity to address the incidents before the Oral Board.

In regard to the February 2006 incident, Mr. Recupero was the passenger in a vehicle that was pulled over by a State Trooper. According to the Trooper's report, the driver of the vehicle was in possession of cocaine and Mr. Recupero was in possession of marijuana. Members of the Oral Board were concerned that Mr. Recupero, as of the date of his interview, was still not taking responsibility for his actions, as he had written on his application that "Somebody I was in the car with was holding an illegal substance. They charged everyone in the vehicle with the same charge. I was unaware they had anything." Members of the Oral Board gave Mr. Recupero an opportunity to address this issue during his interview and apparently found his answer that he "smoked weed back then" to be dismissive, rather than taking responsibility for his own actions in which he was admittedly in possession of an illegal substance. To me, that is a well-reasoned, supportable judgment call on behalf of experienced superior police officers that should not be disturbed, or second-guessed by the Commission.

In regard to the April 2006 incident, even though the BOP shows that Mr. Recuperero admitted to sufficient facts to two (2) criminal charges, the City looked behind the BOP and reviewed the underlying police report, penned by a Chelsea police officer. That report states in part: “Mr. Recuperero struggled violently with Officers and was trying to flee from the scene and from the Officers. During the struggle myself and [other police officer] were shouting verbal commands to stop resisting and to get on the ground. After several times Mr. Recuperero still refused as he was attempting to flee. [Other police officer] at one point during the struggle was thrown violently on the ground by Recuperero’s actions causing minor injury to [other police officer]. At this time we managed to get the suspect on the ground but was still unable to place handcuffs on him due to his aggressive behavior toward the Officers.” One of the police officers received injuries to his right and left hand, received a cut to his right knee and had his uniform pants torn during the struggle. Mr. Recuperero received a CWOFF for disorderly conduct and carrying a dangerous weapon (a 9-inch pocket knife). It was appropriate for the City to weigh this troubling incident when deciding whether Mr. Recuperero should join the Chelsea police force.

The background investigation was not limited, however, to these and other negative aspects of Mr. Recuperero’s background. Rather, it appropriately references Mr. Recuperero’s service in the Army National Guard including his tour of duty in Afghanistan from March to December 2011; the positive statements from his parents and ex-girlfriend; and the positive reference from his supervisor in the National Guard, where he reports one weekend a month for drills. It is clear that, while the City considered these positive aspects, they ultimately concluded that the negative aspects of Mr. Recuperero’s background, in their judgment, outweighed the positives. It is also clear from my reading of the record that the City appropriately considered the length of time that had elapsed from his prior adult criminal charges and the date of his application.

However, they were troubled, and rightly so, by more recent events that appeared to give them pause about Mr. Recupero's judgment. On March 31, 2013, three (3) days after Mr. Recupero's name appeared on the Certification for which he was notified, he was once again the subject of an incident report written by a Chelsea Police Officer which paints a picture of Mr. Recupero escalating a situation that eventually resulted in a physical altercation involving Mr. Recupero and others. Again, Mr. Recupero was given an opportunity to address this very recent incident as part of the Oral Board. Based on Mr. Recupero's own testimony before the Commission, he did not handle the situation properly. While less significant, Mr. Recupero's credit report revealed two (2) accounts that were delinquent at the time of his application and it was also determined that, while his application was pending, he had an outstanding parking ticket with the City. Although he told the investigator that he was appealing the ticket, the investigator could not find any evidence that an appeal had been filed regarding this ticket, which was paid shortly thereafter. Finally, although there were no entries on Mr. Recupero's driving history since 2009, it was littered with multiple citations and suspension notices prior to that.

Individually, and collectively, the reasons cited by the City are valid reasons to bypass a candidate for the important position of police officer.

That leaves the issue of whether there was any political or personal bias against Mr. Recupero. The hearing officer points to a conversation between Mr. Recupero's father and the City's Police Chief as evidence that the City's decision to bypass Mr. Recupero was pre-determined. First, based on Mr. Recupero's testimony, his father, *while serving as an elected member of the Chelsea City Council and the Council's Public Safety Committee*, initiated this phone conversation with the City's Police Chief to inquire about his son's candidacy for police officer. The Appellant also referenced "many" other calls between his father and the Police

Chief about his candidacy during his testimony before the Commission. First, Councilor Recupero should have no involvement, including phone calls with the City's Police Chief, regarding his son's application for employment as a police officer. Second, the Appellant acknowledges that, although he was in the room, he did not hear what the Police Chief said to his father, who was not called as a witness before the Commission. In my view, this falls far short of the type of sufficiently reliable evidence required to draw the sweeping conclusion that the hiring process here was infected with political or personal bias. Even if the conversation, as purportedly conveyed from father to son did take place, it raises more questions about the actions of Councilor Recupero than the City's Police Chief. Going forward, I would urge Councilor Recupero to seek guidance from the State Ethics Commission regarding his obligation to avoid, at best, the *appearance* of a conflict of interest when his son is a candidate for police officer (or firefighter) in the City of Chelsea.

In summary, the City, after conducting an objective and thorough review, provided valid reasons for bypassing Mr. Recupero that were not the result of any political or personal bias against Mr. Recupero or his father.

Conclusion

For the reasons stated in the Chairman's Opinion for the Majority, the City's decision to bypass Mr. Recupero is affirmed and his appeal under Docket No. G1-13-243, is *denied*.

(Minority Opinion)

/s/ Paul M. Stein

Paul M. Stein
Commissioner

(Majority Opinion)

/s/ Christopher Bowman

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission to dismiss the appeal (Bowman, Chairman [AYE]; Ittleman [AYE], McDowell [AYE] and Stein [NO], Commissioners) on March 5, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:

Edward G. Seabury, Esq. [for Appellant]

Amy Lindquist [for Respondent]

John Marra, Esq. [HRD]