

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

LUMARIE SOSTRE
Appellant,

CASE NO: G1-13-78

v.

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Frances King, Esq.
10 Tremont Street, Suite 3
Boston, MA 02108

Appearance for Respondent:

Meryum Khan, Esq.
Boston Police Department
1 Schroeder Plaza
Boston, MA 02120

Commissioner:

Paul M. Stein

DECISION

The Appellant, Lumarie Sostre, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.31, §2(b), claiming that she was unlawfully bypassed for original appointment to the position of police officer with the Boston Police Department (BPD). A pre-hearing conference was held on April 23, 2013. A full hearing was held on June 15, 2013 and continued on July 23, 2013. Witnesses were sequestered. Twenty-one (21) exhibits were introduced in evidence. The hearing was digitally recorded and CDs were provided to the parties. The parties submitted post-hearing briefs on August 23, 2013.

FINDINGS OF FACT

Giving appropriate weight to the documents in evidence (Exhibits 1 through 21), the testimony of the witnesses (Ms. Sostre, BPD Detective James Gould and BPD Sergeant Detective Norma Ayala), and inferences reasonably drawn from the evidence I find credible, I make the findings of fact stated below.

1. The Appellant, Loumarie Sostre, is a single mother in her mid-twenties. She is a life-long resident of Boston who currently lives in Jamaica Plain with her two young sons from a past significant relationship with KB. She ended that relationship in November 2012. She now sees KB only when she drops off their two children, or when he picks them up, for bi-weekly visits. (*Exhs 1 & 3; Testimony of Appellant*)

2. Ms. Sostre received an Associate's Degree in Criminal Justice from Quincy College in 2010 and Bachelor's Degree in Psychology from Curry College in 2012. She is fluent in Spanish. (*Exhs 1 & 3; Testimony of Appellant*)

3. Since August 2009, Ms. Sostre has been employed as a security officer at Newbridge On the Charles, a senior assisted living center in Dedham MA. (*Exhs. 1 & 3; Testimony of Appellant*)

4. Ms. Sostre took and passed the civil service examination for municipal police officer and received a score of 98. Her name appeared on Certification 202869 issued on April 18, 2012 by HRD for appointment of sixty (60) BPD police officers. (*Exh. 2; Testimony of Appellant; Undisputed Facts*)

5. On or about May 17, 2012, Ms. Sostre submitted the standard BPD Student Officer Application for appointment to the BPD, which included a 28-page form consisting of fourteen subparts, together with the required references from neighbors who

knew her, all of which were strongly favorable, as well as four separate employment references from managers at Newbridge On The Charles who had supervised her, all of whom also viewed her as an exemplary employee. (*Exhs. 1, 11, 12, 14; Testimony of Det. Gould & Appellant*)

6. Ms. Sostre's application was assigned to BPD Det. John Gould in the Recruit Investigations Unit, a twelve-year veteran of the department. Det. Gould initially met with Ms. Sostre and then conducted a home visit and interview with her landlord, contacted personal and employment references, and performed an independent background investigation that included examining Ms. Sostre's driving record, criminal history and financial records. Det. Gould reported the results of his investigation in a memorandum dated September 29, 2012 to Sgt. Det. Norma Ayala, the RIU Commanding Officer. (*Exhs. 3,13, 15 through 18*)

7. Det. Gould's report confirmed that Ms. Sostre was highly regarded by her neighbors and considered a stellar security guard by her supervisors at Newbridge On The Charles. Her home visit showed no concerns or evidence of illegal activity. (*Exhs. 3, 13, 15 through 18; Testimony of Det. Gould*)

8. In his initial summary, Det. Gould stated as to Criminal History: "None". The last three pages of his report, however, under the heading "Other", are devoted to describing a series incidents in eleven (11) Boston Police Reports in which Ms. Sostre is "listed". Det. Gould's report characterizes these incidents as follows:

- A 7/18/2004 BPD police report that involved an altercation in which Ms. Sostre was "beaten up" and Det. Gould stated that one of the assailants allegedly said to Ms. Sostre: "Get off your phone you're about to get your ass kicked because your friends killed my friend, that's why we killed your boy Eight Ball."

- A 8/11/2005 BPD motor vehicle accident report in which Ms. Sostre rear-ended another vehicle.¹
- A 2/9/2007 BPD police incident reports concerning an altercation involving Ms. Sostre and her brother Tommy. One report by the officers on scene alleged that Tommy has pistol-whipped alleged victim JL and Ms. Sostre had assaulted alleged victim JP. Det. Gould also described a supplemental detectives' report dated 2/11/2009 in Ms. Sostre had alleged she was assaulted by JP. Det. Gould stated that "detectives spoke to both parties and had planned to criminally charge both parties" but "no charges were filed against either party."
- A 12/29/2008 BPD police report that alleged Ms. Sostre "permitted [EV] to use her car" and that EV was subsequently arrested after a high speed chase and charged with various motor vehicle infractions, resisting arrest and trespassing.
- A 4/26/2009 BPD police report in which officers reported gunshots were fired into Ms. Sostre's parents' home while they were sleeping and who stated the shooter was probably the same unknown person who had stolen two bicycles from them a few days earlier.
- A 11/09/2009 BPD police report in which Ms. Sostre reported her wallet stolen.
- A 12/21/10 BPD police report in which Ms. Sostre and her mother reported that their cars had been vandalized in front of her parents' home.
- Two 11/7/2010 BPD police reports involving a police chase of a vehicle that resulted in the arrest of Ms. Sostre's former boyfriend KB after he was found in the vicinity of Ms. Sosta's parents' home with "fresh blood and wounds", a loaded revolver was found on the sidewalk nearby and Ms. Sostre reported he had hit her with a beer bottle earlier. Det. Gould states that following KB's arrest, Ms Sostre "drove to the police station to bail her boyfriend [KB] out of jail and, while there "became uncooperative", "refused to have her injuries photographed" and said she "didn't remember what happened, what she was hit with or by whom."
- A 5/2/2011 police report in which Ms. Sostre reported a possible employment scam she had come across.

(Exh.3)

9. Det. Gould's report also made note of the following two responses that Ms. Sostre gave to questions on the BPD Student Officer Application:

- She answered: "YES" to Question XII.A. (p. 22) Use of Alcohol – "Have you ever been involved in a fight while drinking?" and referred to the 2010 beer

¹ Det. Gould's report indicated that Ms. Sostre was found responsible and surcharged for this 2005 accident, and one other. Ms. Sostre's driving record was not considered a reason for bypass and is not further addressed in this Decision. (Exhs 2 & 3)

bottle incident in detail:

“I was at a gathering with [KB]. We got into a verbal argument. He followed me outside and . . .when I continued to ignore him and walk away he threw a bottle at the back of my head and continued to walk towards me. I threw the bottle back at him. I walked to my mother’s house to get away from the whole situation and [KB] was arrested for this incident.”

- She answered: “NO” to Question XIV.9 (p. 24) – Other Personal Declarations – “Have you ever been the victim of a violent crime?” Detective Gould contrasted this this answer to the police report about the beer bottle incident and her affirmative answer to Question XII.A. as previously noted.

(Exh.3; Testimony of Det. Gould)

10. Six of the eleven police reports mentioned in Det. Gould’s memorandum are in evidence. The reports establish the following:

- The 7/18/2004 Incident Report (No. 040376373) concerning the altercation establishes that the person to whom the statement implicating gang involvement as quoted by Det. Gould, in fact, was directed at “Victim 1”, not Ms. Sostre, who is identified in the report as “Victim 4”. *(Exh. 4)*
- The 2/11/2007 supplemental detective’s Incident Report (No. 070076150) establishes that after separately interviewing all of the involved parties and photographing their injuries, BPD Det. Walsh concluded that Ms. Sostre’s statements were credible, whereas JP and the other woman who alleged she had been assaulted by Ms. Sostre “gave inconsistent statements” and “did not appear to be truthful.” Det. Walsh intended to seek a criminal complaint against JP for Assault by Means of a Dangerous Weapon (Tire Iron) upon Ms. Sostre. *(Exh. 6)*

- The 12/29/2008 Incident Report (No.080740668) concerns the arrest of EV for driving with a suspended license after a high speed chase and pursuit on foot. Ms. Sostre is named in the report as the vehicle's owner. (*Exh. 8*)
- The 11/7/2010 Incident Report (No. 1000603381) establishes that, as a result of a prior complaint (No. 1000603245), two BPD officers stopped KB in the vicinity of Ms. Sostre's parents home, believing him to be a suspect who earlier fled the scene of a police pursuit, and who had cuts on his forehead, hands and clothing. He denied seeing Ms. Sostre that night. The officers then spoke to Ms. Sostre, who said she and KB had just argued at a block party and he struck her with a beer bottle. Ms. Sostre went to the police station and reported this information to a third BPD officer but did not go there to "bail out" KB. She declined to press charges on a domestic assault and left the station. (*Exh. 20*)

11. Ms. Sostre's application packet, including Det. Gould's investigative memorandum and the police reports to which he referred, was presented for review to the BPD "Roundtable", which is a panel of three members – a Deputy Superintendent, the BPD Human Resources Director, and the RIU Commander. Det. Gould was not present at the roundtable. (*Testimony of Det. Gould & Sgt. Det. Ayala*)

12. The Roundtable members unanimously decided to bypass Ms. Sostre because of the "large number" of police incident reports in which she had been named that had involved crimes of violence, "mutual assault" and gang activity. The BPD viewed this history of incidents to show a pattern of poor judgment, specifically, about "whom she associates with". (*Testimony of Det. Gould & Sgt. Det. Ayala*)

13. The Roundtable had available copies of all the police incidents in which Ms. Sostre was involved, but relied on Det. Gould's characterization of the incidents and did not examine all of the facts contained in the actual reports. In particular, Det. Sgt. Ayala had little recollection of the contents of the 2004, 2007 supplemental 2007 detective's report or the 2010 report, that contradicted the statements made by Det. Gould concerning those incidents. (*Exs. 4, 5,6,8,9, 20; Testimony of Sgt. Det. Ayala*)

14. The BPD does not, as a matter of course, call back applicants for an in-person interview after completing the background investigation and prior to consideration by the Roundtable. On some other occasions, however, the Roundtable has given applicants the opportunity for a "discretionary interview" to explain a specific issue that came up during the application process. (*Testimony of Sgt. Det. Ayala*)

15. In Ms. Sostre's case, the Roundtable "would have brought her in" for an interview to ask about the 2010 "beer bottle" incident and her apparent inconsistent answers to the application questions about that incident, and to ask her how she would explain why she apparently "lent her car to someone who wound up in a police chase", but that was not considered an option because there were "so many" other police reports and "so many things going on with her" that the sheer number of incidents, alone, was conclusive of poor judgment in the "type of people she is involved with". (*Testimony of Sgt. Det. Ayala*)

16. On January 14, 2013, BPD's Human Resources Director, Robin Hunt, wrote to Ms. Sostre to inform her that the Roundtable had decided to bypass her for appointment as a BPD officer. (*Exh. 2*)

17. The BPD's letter stated the following reasons for bypassing² Ms. Sostre:

The Department uncovered several Boston Police incident reports involving you that were of concern. Incident report #040376373 dated July 2004 notes a female yelling at you "get off your phone you're about to get your ass kicked because your friends killed my friend, that's why we killed your boy Eight Ball." You are listed as an offender in incident report #070076164 dated February 2007 where it is alleged that you and your brother pistol whipped and injured a male with a handgun while you cause hand, neck and facial scratches to the female. In incident report #080740688 dated December 2008, you allowed Mr. Velez to use your car and he subsequently started a police chase ending in his arrest. While still your residence, your home on Howard Street was shot at multiple times in April 2009 according to incident report #090223234. In incident report #100603381 dated as recently as November 2010 you state that you and your boyfriend at the time got into an argument while drinking and he struck you over the head with a beer bottle, causing a lump – something for which he was charged with a felony – assault & battery with a dangerous weapon. You repeated this information later at district B-2 to officer Dervan when you went to bail out your boyfriend, yet when Sgt. Gaines inquired about your injury and wanted photographs taken, you refused and stated that you didn't remember what happened, what you were hit with and how did it. You were non-compliant with police during the investigation. Furthermore, you replied no on your application to having been a victim of a violent crime on page 24, which contradicts your original statement to Officer Dervan. As a result of the above, the Department has questions about your ability to exercise good judgment.

(Ex. 2)

18. Ms. Sostre is a soft-spoken, sincere, and cheerful person. She provided the additional information about the incidents that formed the basis for her bypass that I find truthful. (*Testimony of Appellant*)

19. As to the 2004 altercation, Ms. Sostre was sixteen years old and was in the company of a number of other young women in a dance class in which she participated. She had no involvement in the fight and no association with any of the alleged gang members involved in the fight. She had forgotten the incident until it was mentioned by the BPD. (*Testimony of Appellant*)

20. As to the 2008 incident in which EV, an unlicensed driver, was arrested while using her car, Ms. Sostre acknowledged that her car was involved, but she had not "lent"

² The BPD hired twenty-one (21) candidates who were ranked below Ms. Sostre on the civil service certification. (*Undisputed Fact*)

the car to EV and had no prior knowledge that he had used it. Her prior boyfriend, KB, had taken the car the night before, so that he could pick her up from work. KB, not Ms. Sostre, had given EV the keys without Ms. Sostre's knowledge or consent. (*Testimony of Appellant*)

21. Ms. Sostre did still reside with her parents at the time of the drive-by shooting in April 2009. That is her only connection to the shooting. (*Testimony of Appellant*)

22. Ms. Sostre admitted that she had been struck by a beer bottle thrown at her during an argument with KB in 2010 and that she threw it back at him. When Ms. Sostre went to the station, the photographer told her that she did not have to have the pictures taken if she did not press charges. Ms. Sostre then declined to have pictures taken and simply said "NO" when asked to be a prosecution witness. (*Testimony of Ms. Sostre, Ex. 20*)

CONCLUSION

Summary

BPD failed to meet its burden to prove reasonable justification to bypass Ms. Sostre. As to the five incidents which the BPD claimed to show how Ms. Sostre failed to "exercise good judgment", BPD had misread or overlooked most of the relevant police reports about them, which, in fact, a careful investigation showed that Ms. Sostre was either a totally innocent bystander and/or a victim in all of them. Although she did give inconsistent answers to two questions on her application, that error was also an innocent mistake that had concealed nothing. Ms. Sostre's reluctance to press charges of domestic violence was an isolated example drawn from the unique circumstances of her personal life that does not translate into her present ability to exercise good judgment in her professional life, as to which there was compelling current, positive evidence.

Applicable Civil Service Law

Appeals from a bypass for original appointment to a permanent civil service position. are governed by 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] . . . the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest.”

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

“A bypass will not be permitted [without] . . . a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed . . . shall later be admissible as reason for selection or bypass in any proceedings before . . . the Civil Service Commission.”

The task of the Commission when hearing a bypass appeal is “to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the decision to bypass the candidate Reasonable justification in this context 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.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991) (discussing preponderance of the evidence test); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (same)

The 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) See also Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate reasons for the bypass”); Borelli v. MBTA, 1 MCSR 6 (1988) (bypass improper if “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.”)

The Commission must take account of all credible evidence in the record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001) It is the purview of the hearing officer to determine the credibility of the witnesses who appear before the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (decision relying on an assessment of the relative credibility of witnesses cannot be made by someone who was not present at the hearing)

Failure to Exercise Good Judgment

Ms. Sostre's background investigation showed that her name came up in eleven BPD police reports of various incidents going back to 2004. The investigation concluded that, five of these incidents involved poor judgment on Ms. Sostre's part and the sheer number of incidents was of serious concern about "who she chose to associate with." While taking notice of the volume of incident reports is understandable, especially when making appointments to public safety positions, the mere presence of such reports is not sufficient to justify the conclusion that a candidate used poor judgment. The contents of these reports do not impugn Ms. Sostre's judgment, nor do they suggest gang affiliation. Moreover, the BPD's conclusions were based upon erroneous reading and an incomplete investigation.

2004 Incident

Ms. Sostre, then sixteen, was returning from an event with a dance group. Some of the members of her dance class got into a fight with another group of girls. Ms. Sostre was caught in the middle and listed as a "victim" of the ensuing brawl, not a participant. BPD's concern that this event implies gang associations is clearly unwarranted. BPD claimed that a female yelled at Ms. Sostre to "get off your phone you're about to get your ass kicked because your friends killed my friend, that's why we killed your boy Eight Ball." In fact, the evidence established that a careful reading of the report indicated that the statement in question actually had not been directed to Ms. Sostre but someone else. As such, the conclusion that this implies Ms. Sostre's gang affiliation is erroneous, as it is based upon a misreading of the report. Moreover, this event was nearly a decade old at the time of the bypass.

2007 Incident

In the course of an assault committed by Ms. Sostre's brother on a male victim with a pistol, Ms. Sostre herself was attacked by another female. The incident ultimately resulted in Ms. Sostre's brother turning himself in to police and a recommendation to charge the other female with assault against Ms. Sostre. BPD, in considering this incident, relied on the initial police report in which the officer on scene had reported the other females had claimed to have been assaulted by Ms. Sostre and upon a mischaracterization of the final report. In fact, after the incident was investigated by a BPD detective, a supplemental report declared Ms. Sostre credible, found her a "victim" and cleared of any misconduct. The evidence established that the BPD's bypass decision was made without knowledge of the details of the detective's second report, which Det. Gould misquoted. The evidence that was available to the BPD about this incident is not sufficient to infer misconduct or poor judgment upon Ms. Sostre's part. In fact, the BPD investigation actually established her as an innocent party whose credibility had been confirmed by the investigation BPD detective.

2008 Incident

A man named EV, whose driving license had been suspended, was arrested after a chase while driving what turned out to be Ms. Sostre's car, which had not been reported stolen. BPD assumed, without any evidence in the police report or otherwise, that this meant that Ms. Sostre must have lent EV the car without having checked to see that he had a valid license and knowing that he was a reckless person inclined to commit crimes and evade arrest. However, Ms. Sostre's credible testimony illuminates the actual situation. Ms. Sostre had no contact with EV or gave him access to her car. Rather, she

gave the car to KB, her then, but now former, boyfriend who would later meet her after work. KB allowed EV to drive the car, without Ms. Sostre's prior knowledge or consent. Nothing in the police report, itself, about this incident supported the erroneous assumption made by the BPD about Ms. Sostre's conduct or poor judgment.

2009 Incident

In the early morning hours of April 26, 2009, several gunshots were fired into Ms. Sostre's parent's home by an unidentified person. Ms. Sostre lived with her parents at that time. At the hearing, Det. Gould claimed that this shooting was in retaliation for the Ms. Sostre's involvement in the 2007 incident earlier described above. However, this theory was pure speculation and contradicted the police incident report, in which Ms. Sostre's parents had reported they believed the violence was connected to a theft from their property a few days earlier. Nothing in this incident, or the incident report, reflects in any way upon Ms. Sostre.

2010 Incident

In this 2010 event, Ms. Sostre and KB, then her boyfriend, got into an argument at a block party which led KB to throw a beer bottle at Ms. Sostre, striking her. She threw it back and walked back to her parent's home "to get away from the situation." They both had been drinking. Subsequently, as a result of a search for suspects who had fled the scene of an unrelated auto accident which had done significant property damage, KB was found nearby with blood-stained clothes along with a discarded, loaded pistol. The officers learned from Ms. Sostre that he also had assaulted her, arrested him and transported him to the police station. I credit Ms. Sostre's testimony about what happened when she went to the police station. Ms. Sostre did not go to the police station

to “bail him out”, as the investigator’s report stated, and, in fact, BPD acknowledged that would not be possible for an alleged victim to do so. Ms. Sostre was asked to have her injuries photographed, but was told her that she did not have to have the pictures taken if she did not press charges. Ms. Sostre was repeatedly encouraged to press charges but she said ‘NO’ and declined to have pictures taken. The BPD report indicates that there was independent evidence that implicated KB in the unrelated motor vehicle accident but does not explain why he was only arrested on the domestic violence charge.

Unlike other incidents, Ms. Sostre did have an active, personal role in the 2010 fight and subsequent interaction with the BPD at the police station. Ms. Sostre’s behavior at the block party consisted of participating in a fight while drinking and throwing back the beer bottle that KB had thrown at her, before she walked away. This single outburst, prompted by an assault on her, while not admirable, falls short of credible evidence of a pattern of poor judgment. Similarly, while her decision not to agree to get involved a prosecution of KB for domestic assault could be criticized, the preponderance of the evidence does not establish that her conduct was fairly described as “uncooperative”, as Detective Gould’s report characterized it. While her actions were not ideal, they were, at most, a singular lapse in judgment after being a victim of domestic violence, nearly three years before her bypass. I cannot find her behavior on this one occasion in her personal life, in the unique circumstances that a victim of domestic violence regrettably must navigate, to prove any material deficiency in her otherwise strong record of good character and judgment in her professional life. Therefore, I cannot accept the premise that her “Hobson’s Choice” in this situation fairly can be used as the grounds to disqualify her from consideration to become a BPD police officer.

The Application Inconsistency

On page 24 of her Student Application, Ms. Sostre was asked if she had ever been a victim of a violent crime. She answered “no.” However, on page 22, Ms. Sostre had just answered “yes” to a question asking if she had ever been in a fight while drinking. She provided a detailed narrative of the events of the 2010 fight between her and KB during which she admitted to being a victim of his domestic assault. BPD points out that these two answers are inconsistent, and that answer on page 24 was untruthful. I do not agree.

The alleged untruthfulness of the answer on page 24, as stated in the bypass letter, is based on solely the fact that Ms. Sostre had, indeed been involved in at least one physical assault against her, i.e., the 2010 incident that she had just disclosed in the application two pages earlier. The application does not clearly describe why such a fact was relevant to assessing the suitability of a candidate for appointment as a BPD police officer. BPD suggested this question had some bearing on the medical clearance of the applicant which, by law, cannot be considered prior to a conditional offer. Regardless, it is clear that Ms. Sostre had no intention of concealing past incidents in which she was a victim of a physical assault such as the most recent incident in 2010, and she did so in the application. Her negative response to the question on page 24 was nothing more than an inadvertent misreading of the question.

Ms. Sostre deserves the opportunity to receive another, proper consideration for appointment as a BPD police under the appropriate standards prescribed by merit principles of civil service law.

Relief to be Granted

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the name

of the Appellant, Lumarie Sostre, be placed at the top of future certifications for original appointment to the position of Police Officer in the BPD until she is selected for appointment or bypassed. If and when Ms. Sostre is selected for appointment and commences employment as a BPD police officer, her civil service records should be retroactively adjusted to show, for civil service seniority purposes, as her starting date, the earliest Employment Date of the other persons employed from Certification 202869.

For the reasons stated above, the appeal of the Appellant, Lumarie Sostre, is hereby, *allowed.*

Civil Service Commission

Paul M. Stein
Commissioner

By 3-2 vote of the Civil Service Commission (Bowman, Chairman [AYE]; Ittleman [NO]; Marquis [NO], McDowell [AYE] & Stein [AYE], Commissioners) on October 17, 2013.

A True Record. Attest:

Commissioner

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 the 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 a Civil Service Commission's final decision.

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:

Frances King, Esq. (for Appellant)

Meryum Khan, Esq. (for Respondent)

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place - Room 503
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(617) 727-2293**

LUMARIE SOSTRE
Appellant,

CASE NO: G1-13-78

v.

BOSTON POLICE DEPARTMENT,
Respondent

CONCURRING OPINION OF CHRISTOPHER BOWMAN

I concur with the conclusion of the hearing officer to allow this appeal, but for somewhat different reasons.

I do not believe that the BPD has the burden of substantiating *each* of its stated reasons for bypass in order to justify its decision to bypass Ms. Sostre.

While the hearing officer's well-reasoned decision provides ample reason for rejecting some of the reasons for bypass (i.e. – errors or omissions in the investigator's background summary), other stated reasons, standing alone, could justify the decision to bypass Ms. Sostre. That is especially true regarding any reason that calls into question the candidate's truthfulness. "Police work frequently calls upon officers to speak the truth when doing so might put in question a stop or a search or might embarrass a fellow officer. It requires no strength of character to speak the truth when it does not hurt." Cambridge v. Civ. Serv. Comm'n, 43 Mass.App.Ct. 300, 303 (1997).

Here, one of the BPD's stated reason for bypass was related to Ms. Sostre's truthfulness. Of particular concern was Ms. Sostre's alleged statements and actions surrounding a 2010 incident with the father of her two (2) children.

A November 7, 2010 BPD Incident Report, admitted as Exhibit 20, states that Ms. Sostre first told Boston police officers that her boyfriend “pushed her and struck her with a beer bottle over her head, causing a lump to the right side of her head.” According to the same incident report, Ms. Sostre recanted her story later that night, stating that she “[didn’t] remember what happened, what she was hit with or by who.” In her application to the BPD, Ms. Sostre states that she was indeed struck by a beer bottle that night – and adds that she, in turn, threw a beer bottle at her boyfriend. The hearing officer implicitly discredits the latter part of the police incident report (related to Ms. Sostre recanting her statement) based on Ms. Sostre’s live testimony before him.

I am troubled that an Appellant’s self-serving testimony, three years after the event occurred, is used to discredit the incident report of sworn Boston police officers who were percipient witnesses to Ms. Sostre’s statements at the time. “Police reports . . . bear sufficient indicia of reliability to be considered as evidence of the conduct alleged.” Boston Police Dept. v. Suppa, 79 Mass. App. Ct. 1121 at 1 (2011).

Further, I think the decision here comes dangerously close to erroneously placing the added evidentiary burden on the BPD of proving that the alleged conduct (untruthfulness) actually occurred. Applying the precedent-setting principles of the Beverly decision, the BPD is *not* required to do so. Rather, the BPD must only show that, after a reasonably thorough review, they had reasonable justification for bypassing Ms. Sostre.

Here, however, I am persuaded by the hearing officer’s findings and conclusions that the BPD’s review of Ms. Sostre’s candidacy fell short of the type of thorough review that is warranted. As referenced above, there were several errors in the investigator’s summary related to other reasons put forward to justify Ms. Sostre’s bypass. Further, the

BPD acknowledges that had the reasons been limited to one incident, they likely would have offered Ms. Sostre the opportunity to address this one incident as part of a discretionary interview.

The relief offered here does not require the BPD to appoint Ms. Sostre as a police officer nor does it limit their ability to again consider Ms. Sostre's alleged untruthfulness. Rather, it simply provides Ms. Sostre with the right to be reconsidered and the opportunity for the BPD to conduct a more thorough review of her candidacy. If, after conducting that more thorough review (i.e. – actually interviewing Ms. Sostre), the BPD provides reasonable justification for bypassing her, then no appointment would be required.

For these reasons, I concur with the decision to allow Ms. Sostre's appeal.