COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

DAVID J. SUPPA,
Appellant

v.

CASE NO: G1-07-346

BOSTON POLICE DEPARTMENT,
Respondent

Appellant:	David J. Suppa, Pro Se 25 Hopedale Street Quincy, MA 02169
Boston Police Department Attorney:	Tara. L. Chisholm, Esq. Office of the Legal Advisor Boston Police Department One Schroeder Plaza Boston, MA 02120
Commissioner:	Paul M. Stein

DECISION

The Appellant, David J. Suppa, seeks review, pursuant to G.L.c.31, §2(b), of the action of the Personnel Administrator of the Massachusetts Human Resources Division (HRD) in approving the reasons proffered by the Respondent, Boston Police Department (BPD), as Appointing Authority, to bypass the Appellant for original appointment to the position of Boston police officer based on the Appellant's prior criminal history. A full hearing was held by the Civil Service Commission (the Commission) on August 6, 2008. BPD called two witnesses and the Appellant testified on his own behalf. Twelve (12) exhibits were received in evidence. The hearing was recorded on one audiocassette.

FINDINGS OF FACT

Giving the appropriate weight to Exhibits, testimony of BPD Human Resources Director Robin Hunt, BPD Detective Robert Tabb, and the Appellant, and inferences reasonably drawn from evidence I find credible, I make the following findings of fact:

Appellant's Background

1. The Appellant, David Suppa, is a 27-year-old resident of Quincy, Massachusetts. He was born in Quincy, Massachusetts, grew up in Pembroke and received his high school diploma from Silver Lake Regional High School in Kingston, MA where he was active in interscholastic sports.(*Exhibits 2, 12*)
2. Mr. Suppa has aspired to a law enforcement career from an early age. He completed the Tenth Annual Student Trooper Training Program sponsored by Massachusetts State Police and the Massachusetts American Legion. He has taken and passed the civil service examination for police officer every year since he was 19 years of age. (*Testimony of Suppa*; *Exhibit 3*)
3. In furtherance of his career goal, in August 1999 immediately after finishing high school, Mr. Suppa enlisted in the Massachusetts Army National Guard and was assigned to the U.S. Army Military Police School from which he graduated in December 1999. He later received diplomas for completing training in Military Police Investigation and Protective Services Operations (Basic and Advanced Courses). (*Exhibits 3, 12*)
4. Mr. Suppa served honorably and with distinction as a Military Police Officer and Military Police Team Leader, achieving the rank of Sergeant (E-5). He completed tours of duty with the Stabilization Force in Bosnia (August 2001 to April 2002) and

Afghanistan (July 2002 to March 2003). Among his duty assignments, he had responsibility for personal security of the Commander of the Stabilization Force in Bosnia, an Army Major General. Based on his military record and strong personal references, Mr. Suppa has clearly impressed his military commanders, friends and community leaders who know him, with his high level of professionalism, commitment to duty and personal integrity. The Commission notes that one of Mr. Suppa's letters of reference comes from Timothy J. Cruz, District Attorney for Plymouth County. (*Testimony of Tabb, Suppa; Exhibits 3, 4 & 5*)

Appellant's Criminal Record

5. On the evening of November 12, 2000, then 19 years of age, Mr. Suppa attended a large house party (about 75-100 people) in Pembroke, Massachusetts. An altercation broke out in which he became involved. (*Testimony of Tabb, Suppa; Exhibits 11, 12*)
6. According to Mr. Suppa: he had been at the party for about two or three hours, staying in the garage area where he had assumed the role of a "DJ", selecting the music to be played. Alcohol was being consumed, but he says he was not drinking because he was tired from working that day at the construction job on the Big Dig he then held and also needed to work early the next day. As Mr. Suppa exited the garage, he saw a fight in the driveway. As he approached the altercation, he saw that Paul G., a friend of his, was being restrained and hit by group of unknown men. He injected himself into the fray and pulled one of the men away from his friend, after which he was attacked from behind by an unknown male. He was then attacked by the same man whom he had pulled away from Paul G. and the two of them exchanged blows that left the other man unconscious. The fight broke up after drawing a large

crowd of attendees. Mr. Suppa was attacked by several of the original group attackers, he broke free, ran to his car and went home about 1:00 AM. (*Testimony of Suppa; Exhibits 11 & 12*)

7. About two hours later, Sergeant Russell Jenness and Officer James Lanzillotta of the Pembroke Police Department responded to a call about the disturbance. They attended to an injured man with facial and head injuries (later identified as Tim H.) who was transported by ambulance to South Shore Hospital. Sergeant Jenness conducted an on-scene investigation, identified another slighty-injured victim (Joe C.) and other participants and witnesses (Chad V., Justin D., Andrew B., Jeremy B., Christine B.). (*Exhibit 11*)
8. Several days later, according to an unsigned report apparently prepared by Sergeant Jenness and/or an unnamed Pembroke Police Department "Detective", several follow-up interviews were conducted with Mr. Suppa, his friend, Paul G., Joe C. and other witnesses. Curiously, no information taken from the principal victim (Tim H.), either at the scene or afterward, appears in the police report. (*Exhibit 11*)
9. In his statement to the Pembroke Police, Mr. Suppa gave substantially the same description of the altercation as he later gave in sworn testimony. The other parties, however, provided a starkly different version, accusing Mr. Suppa of being an aggressor, saying he repeatedly head-butted his opponent and kicked and hit him even after the man fell bloody and unconscious. (*Testimony of Suppa; Exhibits 11 & 12*)
10. On December 6, 2000, on application of an officer of the Pembroke Police Department, a Criminal Complaint issued from the Plymouth District Court against Mr. Suppa charging him with three offenses: (1) assault and battery with a dangerous

weapon (shod foot), a felony; (2) assault and battery, a misdemeanor; and (3) assault with intent to maim, a felony. (*Exhibits 9, 10*)

11. After two pre-trial continuances, on August 14, 2001, on advice of his defense counsel, Mr. Suppa "admitted to sufficient facts", the court dismissed the assault to maim felony charge, the case was continued without a finding (CWOF) for one year and he was ordered to make restitution of $939 and placed on unsupervised administrative probation. On August 14, 2002, the case was dismissed upon the request of the Commonwealth. The Criminal Docket states that the judge delivered the appropriate C.W.O.F. colloquy and G.L.c.278,§29D warning, and I so find. (*Exhibit 10*)
12. Mr. Suppa says he did not clearly understand at the time what the implications of admitting to "sufficient facts" or paying "restitution" were. (He thought restitution meant "court costs" although he now knows it means payments to a victim or a victim assistance fund.). He says he told his defense counsel that he had aspirations to be a police officer and counsel assured him that the CWOF would not hinder his ability to become a police officer. Mr. Suppa's father contacted the defense attorney a few months after the disposition of the criminal case, after a conversation about his son with a State Trooper he knew. Mr. Suppa (Sr) explained that the Trooper has said the CWOF was definitely a problem and asked defense counsel to reopen the case, but the attorney said Mr. (David) Suppa had nothing to worry about. I also credit the evidence of these conversations as true. (*Testimony of Suppa; Exhibit 6*)
13. Mr. Suppa also testified that he was about to be deployed overseas in ten days (his first overseas duty in Bosnia began on August 25, 2001), and he felt considerable

pressure to end the criminal case because of his impending deployment. I also credit this testimony as true. (*Testimony of Suppa; Exhibits 8, 10*)

14. Mr. Suppa admits that he hit someone (whom he didn't know). multiple times with his fist, causing him to fall down unconscious or be knocked out from the impact of the fall. Mr. Suppa vigorously denies that he ever kicked the victim, claims all of his actions were in the "defense of another human being" and that most of the other people involved in the melee had been drinking. (*Testimony of Suppa; Exhibit 12*)
15. The version of the fight from other witnesses stated in the police report contradict Mr. Suppa. If those statements in the police report are believed, they certainly could support a guilty finding on a charge of assault & battery with a dangerous weapon. (*Exhibit 11*)
16. None of the other parties involved in the Pembroke party altercation have testified in the hearing before the Commission. There are clearly questions about the credibility of the statements made by the other parties involved in the Pembroke incident. For example, there is considerable inconsistency in the description of the fighting, how many separate fights occurred, how many "people" assaulted Tim H., and who hit whom first. (*Exhibit 11*)
17. It is also reasonable to infer that, most of the third-party witnesses who were interviewed and described Mr. Suppa's attack unfavorably (i.e., Joe C., Andrew B., Jeremy B., and Christine B.), knew Tim H. and Joe C. but did not know Mr. Suppa or his friend Paul G. The <u>one</u> witness (Justin D.) who appeared <u>not</u> to have known Tim H. or Joe C. by name, had a clear recollection that Mr. Suppa hit <u>only</u> with his fists and otherwise tended to confirm Mr. Suppa's version of the fighting. (*Exhibit 11*)

18. Based on the conflicting and limited information from and about the victims and the witnesses as stated in the police report, and the credibility issues presented by the report, no conclusion can fairly be drawn about what actually happened in Pembroke on the night of November 12, 2000 from the hearsay in that report. I have found nothing in the police report to corroborate that the witnesses against Mr. Suppa are more credible than he, and the totality of the evidence in the record tends to support his veracity over the hearsay evidence in the report. (*Testimony of Suppa; Exhibits 9, 11, 12*)

Appellant's Application for Appointment as a Boston Police Officer

19. Mr. Suppa's name appeared on Certification 270048 for the position of police office to the June 2007 class . (*Testimony of Hunt; Packet Submitted by HRD*)
20. On March 10, 2007, Mr. Suppa submitted his BPD Student Officer Application and met with BPD Detective Tabb of the BPD Recruit Investigations Unit (RIU) to review the application. (*Testimony of Suppa; Tabb; Exhibit 12*)
21. Detective Tabb thereafter conducted the customary background investigation performed on applicants, which included obtaining records concerning Mr. Suppa's criminal history, driver history, military history, employment history and financial history, as well as personal interviews with Mr. Suppa and his spouse at their home and three of Mr. Suppa's neighbors. Mr. Suppa also supplied written letters of reference. (*Testimony of Tabb; Exhibit 12*)
22. The information Detective Tabb collected about Mr. Suppa was mostly all positive. Detective Tabb specifically mentioned Mr. Suppa's record of military service and

noted that he had been assigned to protect a Major General in Bosnia. (*Testimony of Tabb*)

23. The one "red flag" was Mr. Suppa's criminal offender history record (CORI), which disclosed the charges against him for his part in the November 2000 fight that took place in Pembroke. (*Testimony of Tabb; Exhibits 9, 12*)

24. Detective Tabb and Mr. Suppa's discussed the Pembroke incident during their initial meeting, reviewing Mr. Suppa's explanation as set forth in his Student Officer Application. Mr. Suppa is reasonably sure he told Detective Tabb that he was pressured to agree to the CWOF because of his impending deployment. Thereafter, Detective Tabb obtained the police reports and the criminal docket records pertaining to the offenses. (*Testimony of Tabb, Suppa; Exhibits 10, 11*)

25. I found Detective Tabb to be a credible and candid witness who was reluctant to disparage Mr. Suppa. When questioned about whether he thought Mr. Suppa would be a "good police officer", Detective Tabb said that was a difficult question to answer, but he did say: "He guarded a general. I will leave it at that". Detective Tabb also stated that he saw the CWOF of assault and battery with a dangerous weapon as a disqualifier because if the BPD "set the stage" for Mr. Suppa, it would set the stage for others with a similar record. The evidence reasonably infers that Detective Tabb might have wanted to "pull for" Mr. Suppa's candidacy, but Detective Tabb was not the decision-maker. (*Testimony of Tabb, Hunt*)

26. Ms. Robin Hunt, BPD Director of Human Resources, testified that, in accordance with the customary procedures in the BPD, Mr. Suppa's application, including the results of Detective Tabb's investigation, were presented to a hiring committee, in

what is called the “roundtable” discussion, which included Ms. Hunt, the RIU Commander, a Deputy Superintendent from Internal Affairs, an attorney from the Legal Advisor’s Office. Detective Tabb did not personally participate in the ”roundtable” discussion but his detailed report was available. (*Testimony of Hunt*)

27. The procedure at the “roundtable” calls for review of the merits of each individual applicant’s positives and negatives, if any, taking from 15 to 40 minutes on each application depending on the issues. The “roundtable” acts as the decision-maker in recommending whether to hire or bypass each candidate. (*Testimony of Hunt*)
28. When it came to Mr. Suppa’s application, the members of the “roundtable” took note of the fact that he had served honorably with the National Guard as a military police officer and that all of his references were positive. The two CWOFs on Mr. Suppa’s record were the main focus of concern.
29. The “roundtable” appreciated that Mr. Suppa believed he had acted in self-defense and denied many of the more egregious details of the assault, as reflected in his Student Officer Application, but the “roundtable” rejected this explanation because there were multiple other witnesses interviewed by the Pembroke Police Department who had reported that Mr. Suppa had engaged in conduct that the “roundtable” found to be “brutal”, including head-butting the victim and kicking him repeatedly after the victim had fallen down and become unconscious. (*Testimony of Hunt; Exhibit 11*)
30. The “roundtable” did take into account the fact that many of the witnesses who reported seeing Mr. Suppa engage in this brutal behavior may have been intoxicated, but the “roundtable” also relied on the fact that Mr. Suppa’s “admission to sufficient facts” as to the felony charges of assault and battery with a dangerous weapon,

amounted to confirmation that even Mr. Suppa acknowledged the facts supporting the felony charges were true. (*Testimony of Hunt*)

31. I infer (from the fact that Detective Tabb was not available to attend the roundtable and there appears no evidence other than Mr. Suppa's possible oral statements to Detective Tabb in this regard) that the "roundtable" did not take into account Mr. Suppa's claim that he made the "admission to sufficient facts" under duress due to advice of counsel and his impending deployment oversees and that he did not understand the "colloquy" he received from the Court nor the significance of agreeing to an order to make restitution. (*Testimony of Hunt, Tabb, Suppa; Exhibit 12*)
32. The BPD considers a felony conviction to be an automatic disqualifier for appointment as a Boston police officer. A CWOF is not an automatic disqualifier. Some successful applicants from the June 2007 class, in fact, may have had CWOFs on their record, but none would have had a CWOF involving admission to a felony of assault & battery with a dangerous weapon. All members of the "roundtable" agreed, that the circumstances surrounding the fight in Pembroke according to the details in the police report, together with the Mr. Suppa's "admissions and two CWOFs in August 2001 (one of which involved a felony) rendered him unsuitable for appointment to become a Boston police officer. (*Testimony of Hunt, Tab; Exhibit 8*)
33. The BPD requested a bypass of Mr. Suppa from HRD, based on the accounts of the witness to the fight as set forth in the Pembroke Police Department report and Mr. Suppa's "admission to sufficient facts" alleged in support of the felony charge. HRD approved the bypass and this appeal duly ensued. (*Exhibits 7, 8*)

Appellant's Testimony

34. I found Mr. Suppa to have represented himself well at the hearing. He appeared even-tempered and carried himself with self-confidence and dignified and percipient military bearing. He came well-prepared for the hearing, gave cogent testimony and posed thoughtful questions to the BPD witnesses. He struck me as exceedingly honest and very aware of both his strengths and his weaknesses. I never perceived his testimony to be blatantly self-serving, but entirely candid even to the point of admitting mistakes or doubting his own recollection if he could not be certain.

35. Mr. Suppa's testimony at the hearing before the Commission about the Pembroke fight and the circumstances of the criminal proceedings against him is largely consistent with his report to the Pembroke Police about the incident in 2000, and with his report to the BPD in his Student Officer Application (except that Mr. Suppa reports the event as December 6, 2000, the date of the Criminal Complaint, not the date of the incident itself). I found his candor and memory genuine. (*Testimony of Suppa; Exhibits, 10, 11,12*)

CONCLUSION

Applicable Standard of Review

In a bypass appeal, the Commission must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. E.g., City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, rev.den., 428 Mass. 1102, 687 N.E.2d 642 (1997) (Commission may not substitute its judgment for a "valid" exercise of appointing authority discretion, but the Civil Service Law "gives the

Commission some scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground."). See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001) ("The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles . . . . the commission acted well within its discretion."); MacHenry v. Civil Service Comm'n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to "review, and not merely formally to receive bypass reasons" and evaluate them "in accordance with basic merit principles"); Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) ("presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce 'sound and sufficient' reasons to justify his action"). See also, Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission "sufficient to satisfy due process")

It is well settled that reasonable justification requires that the Appointing Authority's actions be based on "sound and sufficient" reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. See Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214, 268 N.E.2d

346, 348 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 451 N.E.2d 443, 430 (1928). All candidates must be adequately and fairly considered. The Commission has been clear that it will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988).

A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315, 321, 577 N.E.2d 325, 329 (1991).

> *The greater amount of credible evidence must in the mind of the judge be to the effect that such action 'was justified,'* in order that he may make the necessary finding. If the court is unable to make such affirmative finding, that is, *if on all the evidence his mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined.* The present statute is different in phrase and in meaning and effect from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, 'unless it shall appear that it was made without proper cause or in bad faith.'

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*) The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001)

Summary of Conclusion

Applying these applicable standards in the circumstances of the present case, the Commission concludes that BPD's bypass of Mr. Suppa for appointment to the position of Boston police officer does not comport with basic merit principles and has resulted in harm to his employment status through no fault of his own. The BPD has not sustained its burden to prove the reasons proffered for the by-pass and approved by HRD are justified on this record. The Commission reaches this conclusion because it finds the BPD placed an inappropriate interpretation upon the disposition of the criminal charges against Mr. Suppa by "admission to sufficient facts", which renders the BPD decision to bypass Mr. Suppa on those grounds arbitrary as a matter of law and not supported by a preponderance of substantial evidence.

The BPD's Undue Reliance on Appellant's "Admission To Sufficient Facts"

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

In other circumstances, however, especially in cases involving administrative review of agency decisions concerning the use of a CWOF in an employment context, an "admission to sufficient facts" that is followed by a CWOF and later dismissed without any guilty plea or finding is explicitly held "*not the entry of a formal guilty plea* and is, therefore, not a conviction",[1] specifically, distinguishing the G.L.c.278, §29D line of cases. E.g., Fire Chief of East Bridgewater v. Plymouth Co. Ret. Bd., 47 Mass.App.Ct. 66, 71n13, 710 N.E.2d 644, 647 (1999) citing Commonwealth v. Jackson, 45 Mass. App.Ct. 666, 700 N.E.2d (1998).

Thus, in the Fire Chief of East Bridgewater case, the Appeals Court states:

> [T]he [retirement] board rejected Chief Pratt's assertion that Smith's admissions to sufficient facts rose to the level of conduct unbecoming because it was equivalent to his pleading guilty. *The board correctly determined that Smith's admission was not akin to a guilty plea and*, further, that *if Smith completed his probationary period* without violating the terms of his probation or committing another offense, *all charges against him would then be dismissed* and he would have no criminal conviction on his record."

Id. 47 Mass.App.Ct. at 647, 710N.E.2d at 671. (*emphasis added*)

In Wardell v. Director of Div. of Empl. Sec., 397 Mass. 433, 436-37, 491 N.E.2d 1057, 1059-60 (1986) (*emphasis added*), the Supreme Judicial Court similarly held:

> *An admission to sufficient facts, absent a subsequent finding of guilt, does not constitute substantial evidence* from which a finder of fact in a collateral civil proceeding can determine *that the alleged misconduct has indeed occurred*.

[1] This Decision does not question the use of true prior convictions as disqualifiers. The BPD stands on clear footing to disqualify a candidate who *was* convicted of a serious crime. The Commission notes that police officers may, in the course of their duties, be called to testify in court, where a felony *conviction* could be used to impeach the officer's testimony. See, e.g.., Commonwealth v. Fano, 400 Mass. 296, 302-303, 508 N.E.2d 859, 863-64 (1987) ("earlier disregard for the law may suggest to the fact-finder similar disregard for the courtroom oath"); Brillante v. R.W. Granger & Sons, Inc., 55 Mass. App.Ct. 542, 545, 772 N.E.2d 74, 77 (2002) ("one who has been convicted of crime is presumed to be less worthy of belief that one who has not been so convicted') As discussed in this Decision, however, these policy reasons do not apply where the disposition does not amount to a conviction. See Commonwealth v. Jackson 45 Mass.App.Ct. 666, 670, 700 N.E.2d 848 (1998) (admission to sufficient facts not a conviction for purposes of statute allowing impeachment by prior conviction); Commonwealth v. Petros, 20 Mass.L.Rptr. 664, 2006 WL 1084092*4n3 (2006) (same)

> *Factors other than consciousness of guilt – including expedience or avoidance of publicity – may motivate a defendant to admit to sufficient facts* in exchange for a continuance and eventual dismissal. *Criminal charges not resulting in conviction do not provide adequate or reliable evidence that the alleged crime was committed. To the extent that the 'deliberate misconduct' relied upon by the board refers to the alleged criminal act of the employee, there was no substantial evidence on the record to warrant his disqualification* [from receiving unemployment benefits]."

See also Burns v. Commonwealth, 430 Mass. 444, 449-451, 720 N.E.2d 798, 803-805 (1999) (State Police trial board's discipline based on officer's admission to sufficient facts and resulting CWOF on the underlying charges was reversed as legal error); Santos v. Director of Div. of Empl. Sec., 398 Mass. 471, 474, 498 N.E.2d 118, 120 (1986) ("The record reflects that the plaintiff claimed he was innocent; for all that is shown in the record, he may have admitted to sufficient facts to avoid the expense, publicity, and notoriety which a full trial might engender")

The Commission recognizes that there are another handful of appellate cases which have held that an "admission to sufficient facts" may be introduced as a "testimonial admission" in a collateral civil case, citing language that such disposition is the "functional equivalent of a guilty plea", but those cases also appear to involve situations in which the defendant actually did plead guilty or was found guilty, as opposed to CWOF cases that were later dismissed without any guilty plea or finding. See, e.g., Peabody Properties, Inc. v. Sherman. 418 Mass. 603, 604-606, 638 N.E.2d 906, 907-909 (1994) (defendant admitted to sufficient facts, found guilty of drug charges and sentenced to six months in prison; "plea-taking colloquy admissible" as evidence of "current" drug use); Hopkins v. Medeiros, 48 Mass.App.Ct. 600, 612-13, 724 N.E.2d 336, 345-4 (2000) (unclear whether defendant pleaded guilty but court refers to a "conviction"); Davis v. Allard, 37 Mass.App.Ct. 508, 510-11, 641, N.E.2d 121, 122-23 (1994), rev'd other

grounds sub nom Davis v. Westwood Group, 420 Mass. 739, 652 N.E.2d 567) (admitted documents that "substantiated the facts of Allard's admissions and the subsequent entry of convictions")

The Commission does not read these impeachment cases to sweep away public policy that presumes innocence until proven guilty and predicts that, if the precise issue came before the Supreme Judicial Court, the court would distinguish the impeachment line of cases and affirm its position that an admission of sufficient facts, in the *absence* of a guilty plea or conviction, is *not* substantial evidence of the facts "admitted" or of a defendant's "consciousness of guilt". cf. Commonwealth v. Angelo Todesca Corp., 446 Mass. 128, 154n20, 842 N.E.2d 930 (2006) (Cordy,J. dissenting in 4-3 decision, favorably citing Wardell for proposition that "admission to sufficient facts, absent a subsequent finding of guilt, does not constitute substantial evidence from which a finder of fact . . . can determine that the alleged misconduct has indeed occurred."); Commonwealth v. Bartos, 57 Mass.App.Ct. 751,n 754-757, 785 N.E.2d 1279, 1283-84, rev.den., 439 Mass. 1106, 790 N.E.2d 1089 (2003) (noting that cases "conflating of admission to facts with guilty plea [and] occasional characterization of admission as 'functional equivalent' of a guilty plea . . . should be read as shorthand for admission followed by finding and sentence for breach of the conditions of continuance"). Compare Mass.G.L.c.278,§18 and Mass.R.Crim.P. 12 (c) (allowing defendant to "*tender a plea of guilty* together with a request for a specific disposition" which may include that "the case be continued without a finding to a specific date thereupon to be dismissed") with

Mass.R.Civ.P.12(a)(2) ("a defendant, may, *after a plea of not guilty*, admit to sufficient facts to warrant a finding of guilty")[2]

This appeal is not a case in which the BPD was presented with an applicant whose background investigation revealed an undisclosed prior criminal record or contained other credible, corroborating evidence that inferred a "patterns" of criminal or other unsuitable traits or behavior. cf. Henrick v. City of Methuen, 20 MCSR 215 (2007) (failure to disclose prior charge); Tracy v. Cambridge Police Dep't, 18 MCSR 221 (2005) (multiple charges exhibits "patterns of behavior"); Thames v. Boston Police Dep't, 17 MCSR 125 (2004) (improper to bypass based on pending charges, but bypass upheld based on long history of arrests and applicant's own testimony); Soares v. Brockton Police Dep't, 14 MCSR 109 (2001) (numerous criminal charges and motor vehicle violations); Lavaud v. Boston Police Dep't, 12 MCSR 236 (1999) (five prior criminal charges); Brooks v. Boston Police Dep't, 12 MCSR 19 (1999) ("considerable criminal history").

Rather, Mr. Suppa's brush with the law was an isolated incident completely out-of-character in an otherwise positive record. He was forthcoming about the incident to the BPD and to the Commission. The BPD relies on solely on the act of Mr. Suppa's "admission to specific facts" as its justification to disbelieve him and to validate selected hearsay statements attributed to certain witnesses contained in an unsigned, non-eyewitness police report, despite equally credible statements of other witnesses in support

[2] The criminal record does not indicate under which provision of the law Mr. Suppa's admission to sufficient facts was taken, or which specific "facts" out of the conflicting evidence he supposedly admitted to in court. (*Exhs.10, 11*) This lack of specificity is further reason to discount the weight given to such generic "admissions". cf. Commonwealth v. Duquette, 386 Mass. 834, 845, 438 N.E.2d 334, 341-42 (1982) (urging that "whenever an admission to sufficient facts is used . . . those facts should be formalized in written stipulations which can then be filed with the papers in the case" for future reference to what exactly was admitted)

of Mr. Suppa's position in the same police report, as well as Mr. Suppa's credible, persistent protestation of innocence and explanation why his "admissions" were motivated by reasons other than "consciousness of guilt". (*Testimony of Suppa; Exhs. 6, 10 & 12*). But for his ambiguous "admissions", no other substantial evidence or circumstances stand in the record to permit BPD reasonably to conclude that Mr. Suppa engaged in more than a fist-fight while coming to the defense of a friend on this occasion.

The Commission does not treat this appeal as a forum to litigate or decide the original criminal case. The Commission is charged only to decide whether hearsay allegations of "brutality" in the Pembroke police report, together with Mr. Suppa's ""admissions", constitute the "substantial evidence" required for the BPD to meet its burden to establish "sound and sufficient" reasons to bypass of Mr. Suppa. The "admission" becomes the lynch-pin of the BPD's case, because the police report, standing alone, cannot constitute such substantial evidence, in the absence of some further corroborating testimony or circumstantial evidence that justifies treating "totem pole" hearsay assertions in such a report as reliable and worthy of weight as for the proposition they are proffered to support. See Doe v. Sex Offender Reg. Bd., 70 Mass.App.Ct. 309, 312-313, 873 N.E.2d 1194, 1196-97 (2007) and cases cited, rev.den., 450 Mass. 1110, 881 N.E.2d 1142 (2008) (providing examples of the corroborating circumstances necessary to permit an administrative agency to accept hearsay statements in a police report as "substantial evidence")

The BPD should be well-positioned to gather the corroborating information needed to assess a candidate who "admitted sufficient facts" but was never found guilty. In the rare case where the background investigation reveals such a history, the BPD might access the

judicial transcript or other record of the "admissions" actually made in court (which likely may differ materially from what an initial police report contains) and make such diligent inquiry of the candidate and other relevant circumstance that would justify giving due weight to the "admissions" and/or the police report in any particular case. [3]

The problem, here, is that the BPD did not inquire further, but simply stopped at the paper record, which public policy, as expressed in the case law, clearly precludes from being used as determinative. Thus, by drawing an impermissible inference of "consciousness of guilt" from Mr. Suppa's "admissions" alone, contrary to the clear precedent that warns against such arbitrary inferences, the BPD has employed an unlawful artifact as the basis for relying upon unsigned, totem-pole hearsay as the basis to justify bypassing Mr. Suppa. The Commission concludes, therefore, that the BP's decision violates the merit principle, its justification for the bypass is arbitrary, it is not based on "substantial evidence" and it may not stand. See Cesso v. City of Revere, 9 MCSR 13 (1996) (applicant's prior "admission to sufficient facts" stemming from an assault and battery on a police officer while attending a college party insufficient to justify bypass of otherwise exemplary candidate)

Voluntariness of Admissions

The Commission distinguishes its conclusion above from the related, but different, claim that Mr. Suppa's "admissions" should be disregarded because he was

[3] The Commission recognizes that passage of time may be a factor in assaying the circumstances of an applicant's "admissions" in a long-past dismissed matter. However, if underlying circumstances are as stale as to be incapable of the appropriate quantum of reasonable corroboration, that fact, alone, may invite discounting the incident entirely. See, Ramirez v. Springfield Police Dep't, Case No. G-3568, 10 MCSR 256 (1997) (denied bypass for criminal record, but appointing authority may be required to provide additional reasons in future by-pass to rebut appellant's claim of rehabilitation); Radley v. Brookline Police Dep't, Case No. G-3414(B), 10 MCSR 289 (1997) (noting appellant's "redeeming factors must be given added weight" and "past indiscretions should play a lessened role")

duped into making them. The Commission is persuaded that Mr. Suppa presented a credible and viable claim that the criminal disposition of his case was likely based on his uninformed and involuntary decisions in circumstances that question effectiveness of his counsel. Nevertheless, the Commission concludes that collateral attack on the voluntariness of a criminal disposition is not a matter that is properly before the Commission or one that the BPD is required to consider. The Commission believes that the merit principle does not go so far as to preclude the BPD (or the Commission) from relying on the presumption of regularity or the specific entry by a clerk of court as to a judge's actions that are reflected on the official criminal docket, or otherwise to require an independent or de novo determination of the voluntariness of the admissions. The Commission deems that only proper venue for Mr. Suppa to adjudicate the issue of voluntariness is by direct request to the criminal court that entered the disposition

The Commission notes that it would still appear open to Mr. Suppa to withdraw his admission if the facts of his case warrant it. The courts have been liberal in permitting a defendant to challenge his criminal disposition as entered in violation of procedural and constitutional rights and to permit withdrawal of a guilty plea even after substantial passage of time. See, e.g., Commonwealth v. Estrada, 69 Mass.App.Ct. 514, 868 N.E.2d 1259 (2007) (challenged admission to sufficient facts and effectiveness of counsel three years later); Commonwealth v. Casimir, 68 Mass.App.Ct. 257, 861 N.E.2d 497 (2007) (suggesting motion to withdraw admission to sufficient fact possible even more than 18 years later); Commonwealth v. Jones, 417 Mass. 661, 632 N.E.2d 408 (1994) (allowing withdrawal of admission to sufficient facts made 11 years earlier)

However, the fact that the Commission must assume Mr. Suppa's "admissions" are voluntary unless vacated by the court in which they were entered, does not alter the Commission's analysis as to the ultimate disposition of this appeal. The point of the public policy that prevents undue inferences from a defendant's "admission to sufficient facts", assumes that the admissions may be "voluntary", but, as noted above, warns that there are often concomitant reasons for a defendant to make even "voluntary" admissions wholly without any inference of a "consciousness of guilt". In sum, the BPD's misstep here is not in treating Mr. Suppa's "admission" as voluntary, but in giving the admissions improper weight in the circumstances beyond the limits that the law fairly allows them to bear.

RELIEF TO BE GRANTED TO THE APPELLANT

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs the name of the Appellant, David Suppa be placed at the top of the eligibility list for original appointment to the position of police officer so that his name appears at the top of any current certification and list and/or the next certification and list from which the next original appointment by the BPD to the position of police officer shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as a BPD police officer. The Commission further directs that, David Suppa may not be bypassed for appointment as a BPD police officer for the same reasons which have been determined unlawful under this Decision.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (AYE: Henderson, Stein and Taylor, Commissioners; NAY-Bowman, Chairman; Marquis, Commissioner on October 30, 2008.

A True Record. Attest:

_____
Commissioner

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

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

Notice to:
David J. Suppa (Appellant)
Tara Chisholm, Esq. (Appointing Authority)
John Marra, Esq (HRD)

COMMONWEALTH OF MASSACHUSETTS

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

DAVID J. SUPPA,
Appellant

v. G1-07-346

BOSTON POLICE DEPARTMENT,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The instant appeal involves an original appointment to the position of police officer in the City of Boston (hereinafter "City"). The City bypassed the Appellant in 2007 for reasons related to the Appellant's involvement in a violent incident in 2000.

The seriousness of this incident, which occurred while the Appellant was attending a house party in Pembroke sometime after 2:00 A.M. on November 12, 2000, can not be understated. The Appellant acknowledges that he repeatedly struck another male at the party "until the other male was unconscious." (Exhibit 24; Page 24A)

Four witnesses interviewed by the Pembroke Police Department stated that they saw the Appellant repeatedly strike the victim, leaving him with a damaged ear; an eye swollen shut; several cuts on his face and numerous bruises on his face and head. (Exhibit 11)

Although the Appellant argues that he was initially acting in defense of his friend - and later in self-defense, he did not report the crime to the police that morning. Despite knocking another individual into the state of unconsciousness, the Appellant appears to have left the party that morning with no intention of either notifying police or calling for medical assistance. In fact, he only spoke to police when approached two days later by a Pembroke police sergeant investigating the incident.

After the Pembroke police completed their investigation, the Appellant was arrested and charged with Assault and Battery with a Dangerous weapon (a felony), Assault and Battery (a misdemeanor) and Assault to Maim (a felony).

After the Appellant admitted to sufficient facts to the offenses of Assault and Battery and Assault and Battery with a Dangerous Weapon, the case was continued without a finding for one year. The matter was continued without a finding for one year and the Appellant was ordered to pay approximately $1,000 in restitution. The majority concludes that the City's decision to bypass the Appellant was not supported by a preponderance of the evidence and was arbitrary as a matter of law. The relief ordered by the majority requires the City to again consider the Appellant for appointment as a police officer and prohibits the City from using "the same reasons which have been determined unlawful under this Decision".

I disagree with the majority's conclusion and the relief ordered for the following reasons.

First, there is nothing in the record that concludes or suggests political overtones or personal bias on the part of the City. Rather, the decision to bypass the Appellant was a valid exercise of judgment, reached after a thorough background investigation by a

Boston Police detective and a vetting of the Appellant's application and background information by a roundtable of veteran law enforcement and human resource officials.

Second, the Commission has long held that an applicant's arrest record, even in the absence of a conviction, is entitled to some weight by the Appointing Authority in making its decision. Frangie v. Boston Police Dep't, 7 MCSR 252 (1994). Brooks *v.* Boston Police Dep't, 12 MCSR 19 (1999). Soares v. Brockton Police Dep't, 14 MCSR 168 (2001); Thames v. Boston Police Dep't, 17 MCSR 125, 127 (2004).

In addition to reviewing the ultimate outcome of the criminal court case against the Appellant, the City also reviewed the lengthy police report written about the crimes to which the Appellant subsequently admitted sufficient facts. They also reviewed the Appellant's own statement in which he acknowledges striking several blows upon another individual, ultimately knocking him unconscious.

Finally, and more broadly, the decision appears to be establishing a new and indecipherable standard for civil service communities in regard to the weight they should assign to various aspects of an applicant's background investigation, including, in this case the Appellant's admission to sufficient facts to serious criminal offenses.

For all of the above reasons, I respectfully dissent.

_____

Christopher C. Bowman
Chairman