

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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**GLENN GEORGE,** )  
Appellant )  
 )  
v. )                   **Case No. G1-05-435**  
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**CITY OF LYNN,** )  
Respondent )  
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)

Appellant's Attorney:

*Pro Se*  
Glenn George

Respondent's Attorney:

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Hearing Commissioner:

Daniel M. Henderson

**DECISION**

Pursuant to the provisions of M.G.L. c. 31 § 2(b), the Appellant Glenn George (hereinafter "George" or "Appellant") seeks review of the Personnel Administrator's decision to accept and/or approve of the reasons of the Respondent, City of Lynn (hereafter "Appointing Authority" or "City"), for bypassing him for original appointment to the position of permanent full-time police officer in the City of Lynn Police Department. The appeal was timely filed, and a full hearing was held on December 10, 2007 at the office of the Civil Service Commission

(hereinafter “Commission”). One (1) tape was made of the hearing and is held by the Commission.

**FINDINGS OF FACT:**

Six (6) Exhibits and one (1) stipulation were entered into evidence at the hearing. Based on the documents submitted into evidence, and the testimony of the Appellant, Glenn George, and Mark O’Toole, Lynn Police Captain (hereinafter “Captain O’Toole or O’Toole”), I make the following findings of fact:

**Regarding the first or prior Bypass, Docket No. G1-05-169, hearing on December 1, 2005:**

1. On February 23, 2005, the Appellant applied for the position of permanent, full-time police officer with the City of Lynn. (Exhibit 2)
2. The Appellant was required to fill out a standard employment application which asks each candidate to share their personal history. Such information includes place of residence for the past ten (10) years, military record, level of education, employment history, personal references, and family history. (Exhibit 2)
3. Included in the application was an “Agreement”, signed by the Appellant in the presence of a Notary Public, which stated in part: “I understand that knowingly withholding information, or giving false or misleading information on this application, or during any interview(s) conducted for the purpose of this background investigation will result in my being disqualified from further consideration and/or termination from employment with the Lynn Police Department.” (Exhibit 2, page 8)
4. Captain O’Toole commands the Lynn Police Department Professional Standards Bureau, (hereinafter “the Bureau”). The Bureau is responsible for, among other duties, conducting background investigations on candidates for the position of police officer. O’Toole testified

(at the first bypass hearing), that he has conducted over 200 such investigations since he took command of the Bureau in 1996. (Exhibit 1)

5. After the application was submitted, Captain O'Toole used the information provided as the basis for a background investigation on the Appellant. As part of this investigation, Captain O'Toole reviewed any past interactions the Appellant may have had with the Lynn Police Department. (Testimony of Captain O'Toole)
6. From this investigation, it was discovered that the Appellant was reported as being a suspect in an incident occurring on September 6, 1996. The Appellant had been accused of stealing from a previous employer, an Auto-parts company, (hereinafter "company"). This accusation was made by the company's owner, (hereinafter "owner"). (Exhibit 6)
7. Although this matter was brought before a Clerk Magistrate at Lynn District Court for a hearing on October 19, 1996, no probable cause was found to issue a complaint. (Exhibit 4)
8. Captain O'Toole testified that he was aware that the Clerk Magistrate's hearing had not lead to the issuance of a criminal complaint, but conducted no further investigation into the court proceedings. (Testimony of Captain O'Toole)
9. The Appellant did not list this employment at the Auto-parts Company on his application to the Lynn Police Department. Instead, the only employment he listed for that time period was a full-time position at Blockbuster Video, from 5/95 to 10/96. (Exhibit 2, Page 4)
10. Since the Appellant's answers did not correlate with the owner's statements in the police report (Exhibit 6), Captain O'Toole contacted the company owner. The owner informed him that the Appellant had been terminated from employment the same day, (9/06/96) he was accused of larceny. However O'Toole failed to contact the Lynn Police Officers who took

the report and he failed to contact the Clerk-Magistrate at Lynn District Court, who made the finding of No Probable Cause found. (Testimony of Capitan O'Toole)

11. On March 10, 2005, a five member Oral Board Interview was held as part of the Appellant's application process. O'Toole was a member of this five member Board. When the Appellant was confronted by the Board about the omission of listing employment at the auto-parts Company, he said he had left it out because it was brief. He also denied that he was fired, but had instead left or quit the position due to being falsely accused of theft. (Exhibits 1 & 4)

12. Lynn Police Officers responded to the auto-parts company on the day of the incident, September 6, 1996, and filed a report of the incident. The police officers advised the parties that they were going to seek a criminal complaint against the Appellant in Lynn District Court for Larceny Under \$250. The matter was brought before a Clerk for hearing on October 19, 1996 and after a hearing a finding of No Probable Cause was found. (Exhibits 1 & 4)

13. On May 4, 2005, the Appellant was notified that he was bypassed for appointment to the Lynn Police Department for the following reasons:

- i. "Refusal to complete a uniformly administered request for information such as a local application form. (Knowingly withholding information, providing false and misleading information on LPD Employment Application.);” This reason was provided by the fact that the Appellant had omitted his employment at Auto-parts Company, and that he denied ever being fired from any position on his application. (Testimony of Captain O'Toole)

ii. “Poor Oral Board Interview;” According to the Board Panel, the Appellant appeared deceptive in his responses regarding the incident at Auto-parts Company during his Oral Interview. (Testimony of Captain O’Toole)

14. The hearing officer at the first Commission hearing did not make a finding that the Appellant lacked credibility. However, that hearing officer clearly relied on the company owner’s version of events through Captain O’Toole, (theft and termination) and completely discounted the Appellant’s version of events, (false accusation and quit), despite the Appellant having the best corroboration of his version, a finding of No Probable Cause found after a Clerk-Magistrate’s hearing. That Commission hearing officer characterized the Appellant’s explanation of his omission of prior employers on the application, including the auto-parts company, as “inadvertent”, “...could escape his memory” or “No answer was offered”. However a review of the tape of that hearing does not show the Appellant ever using those words, phrases or concepts to explain the omissions on the first application. Instead the Appellant offers repeated denials of the theft and termination and he testified “I had no reason to withhold this information from a criminal standpoint”. “I was accused of something I never did”. “I was a suspect. It was brought to Court. I was cleared in Court, No Probable Cause found.” The Appellant even pointed out in his testimony that Captain O’Toole could have done a better investigation by checking out the criminal background of the person he believed could have committed the theft, if the theft did indeed occur. The Appellant testified: “I did not provide any false information”, “It was a relatively quick period of time to complete the application” and return it after receiving the application form. The Appellant testified that the omitted employment was brief (a few months) and part-time except for the auto-parts company, which was full time but also brief. The auto-parts

employment had occurred nine (9) years before the application. The Appellant also testified that “I’ve been working since age twelve”... many “different employments”. “I did try to contact the IRS to get W-2’s, to reiterate all my employment.” However, “I did not get the W-2’s from the IRS...for my first application”. But “I did receive” the W-2’s for “my second application.” If anything, the Appellant was verbose and detailed in his explanation, defense and challenges to the credibility or testimonial reliability of the accusing, company owner. He also challenged the adequacy of O’Toole’s investigation of the owner’s credibility. He challenged the owner’s statement to O’Toole that he, the owner, was not summonsed to Court nor had appeared for the Clerk-Magistrate’s hearing. The Appellant testified that he himself was summonsed and they both appeared at the hearing and testified on October 19, 1996. The Appellant pointed out that O’Toole admitted that when he contacted the owner he had to refresh the owner’s memory by reading the police report to him, then the owner affirmed –“That’s what happened.” The Appellant also pointed out another inconsistency, that the owner told O’Toole that he, (Appellant) had confessed to the theft before the police arrived. However the Appellant testified that he has always clearly denied the theft and never waivered from the denial. The Appellant cited Exhibits 2, 3, & 4 to corroborate his consistent denial and the owner’s inconsistency on these claims. No mention of a confession or the owner’s claim of a confession is contained in the contemporaneous police report. The Appellant emphatically testified – “I can back-up everything I said about the incident. How can they believe him, (owner)?”O’Toole when cross-examined about the Clerk-Magistrate’s finding, after a hearing of NO Probable Cause found, merely offered a defensive answer of “A. - “I can’t speculate as to the reasons for it.” (Exhibit 1, Administrative notice of tape of December 1, 2005 hearing)

15. The Appellant also challenged O'Toole on cross-examination by stating Q. - "...at the Oral Board... it was said I lied...I had nothing to hide? To which O'Toole answered; "I would say that it was something to hide because it was an adverse incident in your background. The Appellant retorted emphatically;—"Adverse, if I was found guilty." The hearing officer interrupted the Appellant at this point and cautioned him as a "Pro se", regarding his testifying during examination of the witness. The Appellant went on to cross-examine O'Toole on bias and having discussed the incident with the police officer who came down to get him and escort him to the Oral Board interview. The Appellant testified that the identified officer advised him to "fall on your sword"...Do you know what I mean?" To which the Appellant answered "No, I don't". The Appellant stated that "later on, I figured out what he meant". The Appellant then asked O'Toole Q. - "If I admitted at the Oral Board that I stole those items, would I have been good to go?" O'Toole answered A.- "No, no decisions are made until after the Oral Boards." The Appellant then asked Q. - "Was your mind all set that I stole, before I went in for the interview?" O'Toole answered A. - "No, it was not." At this point the Commission hearing officer is curious and asks O'Toole Q.- "How was he evasive in his answers?" O'Toole answered A.- "He wasn't forthcoming in his answers, the information, we had to pull out of him as far as the incident. He denied stealing from the Company. He blamed it on another employee. He said he quit, he wasn't fired but admitted if he didn't quit he would have been fired. We felt those were evasive answers. To follow up, I contacted the owner, to give Mr. George the benefit of the doubt after the interviews and again reviewed what he, (Mr. George) had said about another employee involved. The owner said there was not another employee involved in this incident." O'Toole then testified – "I

guess that bolstered our feelings of lack of credibility and evasiveness during the interview.”

(Exhibit 1, Administrative notice of tape of December 1, 2005 hearing)

16. The Complainant, Company owner or the Lynn Police Department who wrote an incident report and initiated the court, criminal, complaint process could have sought review or reversal of the Clerk-Magistrate’s finding of No Probable Cause found. It is a recognized practice in the District Courts to allow an appeal to a Justice, of a Clerk-Magistrate’s determination of No Probable Cause found. (Administrative notice)
17. The Auto-parts company owner did not testify at the December 1, 2005 Commission hearing and the City did not offer any excuse or explanation for his failure to testify. No summons was requested or served for his appearance as a witness. An adverse inference could have been drawn by the hearing officer due to these circumstances, but was not. (Exhibit 1, Administrative notice, administrative notice of tape of December 1, 2005 hearing)
18. The Appellant was not represented by counsel at the December 1, 2005 Commission hearing and represented himself, (pro se). This fact caused the hearing officer to caution the Appellant several times regarding testifying while examining the witness. The awkwardness continued and the fact of the Appellant testifying without being examined was addressed by the hearing officer. The Appellant presented his case as a lay person would and acknowledged this by prefacing his Opening Statement with the declaration – “I’m a little nervous.” (Exhibit 1, Administrative notice of tape of December 1, 2005 hearing)
19. The hearing officer at the first hearing relied heavily on the testimony of Captain O’Toole through whom the untested hearsay testimony of the owner of the auto-parts company was submitted as evidence. The hearing officer in effect made a determination in favor of the credibility of that missing witness, the auto-parts company owner, despite the Clerk-

Magistrate contrary determination and other apparent contradictions by the owner. That evidence is contrary to the Appellant's consistent, corroborated testimonial version of the events, which was subjected to cross-examination and observation by the hearing officer. The City substantially relied on the owner's version, through O'Toole, for its reasons for bypassing the Appellant for appointment. (Exhibit 1, Administrative notice of tape of December 1, 2005 hearing)

20. The hearing officer at the December 1, 2005 Commission hearing made the following magnanimous finding or appraisal, (page 7 No.25.), of Captain O'Toole's credibility and experience. However, it is noted that O'Toole's credibility determination cannot be transferred to or adopted by the missing witness. Finding on page 7 No. 25: "The testimony of Captain O'Toole at this hearing is considered to be very credible and is afforded a great deal of weight by the Commission. Captain O'Toole has a wealth of experience in investigating and evaluating candidates who seek to join the Lynn Police Department. By virtue of his designation to perform such a substantial role in compiling the reasons for the hire or the bypass of individual candidates, it is evident that he has the complete confidence of the Appointing Authority. He provided thoughtful and straightforward testimony. (Testimony of Captain O'Toole)". (Exhibit 1, Administrative notice of tape of December 1, 2005 hearing)

21. The hearing officer's determinations in the prior Commission bypass hearing may have affected by his erroneous consideration and citation regarding the Appointing Authority's discretionary latitude in these matters. The Conclusion of that decision begins as follows: "The CSC grants wide latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion. Callanan v. Personnel Administrator

for the Commonwealth 400 Mass. 597, 601 (1987).” However, the “broad discretion” referred to in the *Callanan* citation actually describes the personnel administrator of the Commonwealth’s discretion for scheduling civil service exams and establishing eligibility lists there from. (Exhibit 1, Administrative notice, administrative notice of tape of December 1, 2005 hearing)

22. The Commission affirmed the prior bypass by dismissing the appeal, Docket No. G1-05-169, by a decision dated May 18, 2006. (Exhibit 1)

**The Second Bypass, This Present Appeal, Docket No. G1-05-435, Hearing on December 10, 2007:**

23. The Commonwealth’s Human Resources Division, (HRD) did not have a representative appear at this hearing nor did it directly submit testimony or documentary evidence at this hearing. However, HRD did previously file some documents with the Commission and they are contained in Commission’s case file for this appeal. Those HRD and other documents are packaged together and shall be referenced here as case file docket entry. (Administrative notice case file docket entry)
24. The City filed a requisition with the Commonwealth’s Human Resources Division for a certified list of eligible candidates, for the appointment of 10 full-time, permanent police officers. On August 31, 2005, the Human Resource Division (hereinafter “HRD”) submitted Certification List No. 250899 (hereinafter “the Certification”) to the City of Lynn as requested. This certification carried the instruction to select 10 candidates of the 21 highest, who sign as willing to accept appointment. HRD supplemented the original certification with four (4) pages of additional named candidates, on September 6, 2005.(Exhibit 5, stipulation, case file docket entry and testimony)

25. The City intended to fill ten (10) vacancies in the position of permanent, full-time police officer from that certification. The certification allowed for the selection of ten (10) of the first twenty-one (21) persons whose names appeared highest on the list and who signed the document as willing to accept employment. The City did eventually select 10 candidates for appointment from that certification(Exhibit 5, stipulation, testimony of O'Toole)
26. The Appellant received a score of 94 on the civil service exam and received veteran's preference status from HRD. The Appellant's name appeared second (2<sup>nd</sup>) on the certification of the candidates who signed as willing to accept employment if selected. Therefore, the Appellant was bypassed for appointment, by at least nine (9) candidates who appeared lower on the certification. The Appellant was actually bypassed by ten (10) lower appearing candidates due to the fact that the one candidate, who appeared above him, withdrew from consideration. (Exhibits 4 & 5, stipulation, case file docket entry)
27. On September 17, 2005, the Appellant was directed to appear for Candidate Orientation, conducted by Captain O'Toole. The Appellant was given his (second) application, with instructions to complete and return it within a short period of time. He completed and returned the application, within the time requested to do so. (Testimony of Appellant and O'Toole, Exhibit 3)
28. The Appellant's second application was completed without any omissions regarding the listing of prior employment or other matters. The Appellant listed his prior employment at and explained his side of the incident at the auto-parts "Company", and included three (3) other short-term and part-time, prior employment positions (UPS, Precision Metal and Beven Liquors) which he had not included on his first application. Each of these three prior employments was for only 1 to 2 months and part-time. Also, Precision Metals and Beven

Liquors were no longer at their prior location or out of business. (Exhibit 3, Testimony of O'Toole and Appellant)

29. Captain O'Toole commands the Lynn Police Department Professional Standards Bureau, (hereinafter “the Bureau”). The duties and responsibilities of O'Toole in overseeing the Bureau include the oversight of the “Training Unit, Internal Affairs and Evidence and Court Operations.” The Bureau is also responsible for conducting background investigations on candidates for the position of police officer. O'Toole testified that he has conducted between 100 and 200 such investigations since he took command of the Bureau in 1996. O'Toole conducted both investigations on the Appellant’s two applications and was a member of both Oral Interview Boards which resulted in bypasses for the Appellant, based on O'Toole’s recommendations. (Testimony of O'Toole, Exhibit 4)
30. Captain O'Toole testified that as part of the Appellant’s background investigation for his initial application he had spoken with the auto-parts Company’s owner by telephone. After the Appellant’s second Board interview for his second application, O'Toole again contacted the owner over the phone for information on the Appellant’s work and the alleged theft incident at the Company. He made this second telephone contact to verify the information he had learned in the first telephone contact because he “...wanted to give Mr. George the benefit of the doubt.” The owner repeated the allegations of larceny and that the Appellant had been terminated from employment on the day of the incident. (Testimony of Captain O'Toole).
31. The Auto-parts company owner did not testify at the December 10, 2007 Commission hearing and the City did not offer any excuse or explanation for his failure to testify. No opportunity to confront and cross-examine that witness was afforded the Appellant. This

hearing officer was denied the opportunity to hear his testimony, observe his demeanor and evaluate and weigh the evidence in the face of the obvious contradictory versions of events. An adverse inference against the City's position is drawn from the failure of this critical witness to testify. It is inferred that in total, after cross-examination, the witness's testimony would have been unfavorable to the City. See Commonwealth v. Figueroa, 413 Mass 193, 199 (1992) and Commonwealth v. Zagranski, 408 Mass 278, 287 (1990). (Exhibits, testimony and demeanor of witnesses, reasonable inferences, administrative notice, administrative notice of case file)

32. O'Toole testified that the investigation process entails investigating and verifying information in the candidate's completed application and other documents. He also obtains each candidate's Criminal, Credit and Driving Histories. O'Toole testified that he personally did not contact any of the Appellant's three prior employers that had been omitted on the first application but included on the second one. He "believed Officer Emery had (contacted the three employers)...earlier, in 2005". . (Testimony of Captain O'Toole).
33. O'Toole testified in a manner to emphasize the seriousness of the alleged facts of the Appellant having been intercepted in the process of a theft from a prior employer, the auto-parts Company and been terminated because of it. O'Toole then acknowledged that a criminal complaint had been sought in that matter, in 1996, by the Lynn Police Department and "it was dismissed at the Magistrate's level" at Lynn District Court. Actually the matter was resolved in the Appellant's favor on October 19, 1996, after a Clerk-Magistrate's hearing and finding of No Probable Cause Found. O'Toole also admitted that the Appellant had consistently denied the theft and consistently claimed that he quit that job because of the false accusation of theft, by that employer. O'Toole acknowledged that the Appellant had

made the denial of theft and claim of quitting in both Oral Board Interviews and his second application by attaching a detailed written statement regarding it. The Appellant also had denied the theft in the original Lynn Police Department report of the incident, dated September 6, 1996. The Appellant emphatically denied the theft and claimed he quit due to the false accusation in his testimony at this Commission hearing. The Appellant admitted that he would have been fired if he had not quit; yet this is not an admission against interest but merely a realistic assessment of the situation.(Testimony of O'Toole and Appellant , Exhibit 6)

34. On October 13, 2005, the Appellant participated in a second Oral Board Interview; Captain O'Toole was again a member of the Board. The Appellant was asked again about his employment at the auto-parts company. The Appellant told the same story as he had told at his first Oral Board Interview: that he had neither stolen from his employer, nor had he been fired but had quit due to the false accusation of theft. The Appellant had also attached to his second application, a detailed written explanation of the incident and its aftermath.  
(Testimony of Appellant; Testimony of O'Toole, Exhibit 3)

35. O'Toole testified that at the second Oral Board Interview, "Some of the Board members tried to examine this (incident) further". That "a Board member tried to question ...we were under the impression that the Appellant was somewhat evasive on these questions". O'Toole admitted that "There was nothing else of significance at the Appellant's Oral Board Interview", other than this incident and the Appellant's answers to questions about it. O'Toole failed to identify the Board members who asked the questions, what answers were expected by the Board as "right answers", other than the Appellant's repeated and detailed denial of the theft. There was no audio or video recording of the interviews. No

documentation or list of questions asked and answers given, was kept. O'Toole's testimony is vague, impressionistic and hearsay as referring to alleged statements by the company owner and other unidentified Board members. (Testimony of Captain O'Toole, Exhibit 3)

36. Board member Officer Emery completed a form titled "Summary of Oral Interview" for the Appellant's October 13, 2005 Board interview. Regarding the Appellant's general appearance, he stated: "Mr. George was wearing a suit coat and tie. He appeared neat and professional." Under the category: Oral Board's Consensus Results of Candidate's Interview he states: "Mr. George appeared to be evasive regarding the incident at [the company]. He also stated he left this job off of his application because he thought it was irrelevant. He did provide what appeared to be solid answers to other questions." Another Board member, Officer Wojewodzid also completed such a form and stated under general appearance: "Suit and tie" and under the category: Oral Board's Consensus Results of Candidate's Interview he states: "Candidate's version of incident at [company] is in contrast (police) report and owner's story." (administrative notice case file docket entry)

37. O'Toole testified that this second bypass of the Appellant on his second application was not a predetermined result before the second Oral Board Interview. O'Toole claimed that the City was "required" to consider his second application fully. However, O'Toole testified otherwise during the hearing; he testified that the Appellant "didn't know but the omission (on the first application) was still considered bias on this (second) application." (Testimony of Captain O'Toole)

38. The City stated the reasons for the Appellant's bypass to HRD in a 3 page memorandum dated October 24, 2005, (Exhibit 4). However, there is no date stamping, signature or other indication that this memorandum was received by HRD in the normal course, within that

time framework. It is also noted that a representative of HRD did not appear at this hearing.

This memorandum states that the Appointing Authority decided not to appoint the Appellant due to his “I. - refusal to complete a uniformly administered request for information such as a local application form. (Knowingly withholding information, providing false and misleading information on Lynn Police Department Employment Application submitted on 2/26/05.)”

And “II. – Poor Oral Board Interview; Specifically...” Then the Appellant’s answers to the Board’s inquiry, regarding the auto-parts Company incident is described. The City relied in this determination, almost exclusively on the Appellant’s prior employment at the auto-parts Company, his failure to list it in his first application, the circumstances of his leaving its employ (alleged theft and termination vs. false accusation and quit) and his explanation of it at the Oral Board Interview. The City relied exclusively on the credibility of the company’s owner and therefore attributed a lack of credibility or evasiveness to the Appellant, in making its assessment. The City made this credibility determination despite at least two material inconsistencies on the part of the owner. First, the owner told O’Toole that he had not been summonsed and had not appeared at the Clerk-Magistrate’s hearing. The Appellant testified that he, himself had been summonsed and that he and the owner both had appeared at the hearing and testified. The Appellant even testified in detail to conversations he had with the owner both before and after that hearing. The Appellant’s version is corroborated by the Clerk-Magistrate’s finding of No Probable Cause found, which assumes a hearing and submission of some evidence, rather than a note that one or both parties failed to appear for the hearing. Second, the owner told O’Toole in a telephone conversation that after the incident, the Appellant had “...broke down and admitted stealing company merchandise.” However, the Appellant has consistently denied the theft and his denial without an alleged

confession is corroborated by the Lynn Police Department incident report, which was completed immediately after the alleged incident. Finally the Appellant stated at the Oral Board interviews and testified at this Commission hearing that he omitted the auto-parts company and three other prior employments “because he thought they were irrelevant.”

(Testimony of Appellant and O’Toole, Exhibit 4)

39. The Appellant testified at this Commission hearing that he omitted the auto-parts company and three other prior employers on the first application “because he thought they were irrelevant.” He described what he meant by “irrelevant”. They were all “temporary employment”, held for a “short time” and “two to three months, part-time”, a matter of months. He testified; “... in my mind ...I did not feel it was relevant”, “... I felt I gave them enough, (full-time jobs)”. “What could you get out of these, (employments)?” I worked another full-time job at Blockbuster, at the same time that I had those part-time jobs. I considered those part-time jobs as “secondary supplements”. I’ve been employed for a long time and had other full-time jobs. “I felt I gave them enough jobs, over ten years”. “The other candidates at the orientation didn’t have nearly the experience I had!” I’ve been employed by my current and then employer, “Lynn Ladder Co. for nine (9) years.” “I didn’t think [the auto-parts company owner] would even know me.” “I didn’t view the incident at the [auto-parts Co.] as a cloud but on a positive note, positive and move on.” This hearing officer examined the Appellant on this issue; The Appellant was asked if by “relevant” he meant that the City could gain something substantive from those employments regarding his employability? The Appellant answered “Yes” that is what I meant. The Appellant did admit in retrospect, after the problems he has had that “I made an error in judgment by omitting (those employments) from the (first) application.” (Testimony of Appellant)

40. The Appellant's appearance, dress and demeanor were appropriate. He did not try to exaggerate or embellish his answers. He was straightforward, direct and prompt in his answers. He testified sometimes with a layperson's language or expression which seemed genuine and heart-felt. His testimony was consistent with all of his prior written and oral statements on the issues and corroborated by the best available sound evidence, such as police and court records. He promptly provided details when asked or stated that he didn't know the answer, if it was beyond his purview of knowledge. He admitted that the omitted information was an error of judgment. He also admitted that it was likely that he would have been fired if he had not first quit. His detailed employment applications provided no negative background information while providing a long history of documented success. He graduated from High School and was a member of the National Honor Society. He took courses at three different colleges, including Northeastern University. He is a veteran of the US Air Force serving as A Military Police, (MP) from May 1992 to October, 1994, then receiving an Honorable Discharge. He listed, as required three personal references, on each application, including a retired Lynn Police Officer and the owner of Lynn Ladder Company, his then current employer for whom he had been employed since October, 1996. I find the Appellant's testimony to be honest, accurate and reliable. He is a credible witness, whose testimony is attributed great weight. (Exhibits, testimony, reasonable inferences and demeanor of witnesses)

41. The City, as part of its investigation contacted the Appellant's then current employer, Lynn Ladder Company. The Appellant had been employed there since October, 1996. The Sales Manager, who supervised the Appellant, described him as a "great worker, who is one of the company's best sales persons", with an excellent attendance record and an employee he

would hate to lose. The Sales Manager wished he had more employees like the Appellant. The Appellant also listed the owner of Lynn Ladder Company as a personal reference on his application. Lynn Ladder Company is a well known and long established Company and the Appellant, a long term employee. This owner would have been a more reliable source of information regarding the Appellant's character and conduct than the owner of the auto-parts company, whose motive, credibility or reliability is suspect. (Exhibit 4, Exhibits and testimony, testimony of O'Toole)

42. The omission of information provided to an inquirer might be an indication of an attempt to deceive, mislead or otherwise deprive the inquirer of relevant and material information, which the inquirer might use for some legitimate purpose, e.g. as here, a determination of his qualifications for a police officer position. I find that the Appellant's omission of prior employment on his initial application was not intended to deceive, mislead or deprive the City of information that might reasonably lead to information that could be used to determine his qualification for employment. In other words, he was not trying to hide negative information that might disqualify him from this employment opportunity. The Appellant gave spontaneous, descriptive, plausible layperson, state of mind explanations for the omissions that are reasonable and believable in the context of his work experience and background. His answers rang true. The omission of prior employers seems to be the Appellant's interpretive application of the language, in his attempt to provide "relevant" and material information. He admitted, in retrospect that he made a mistake of judgment. (Administrative notice, exhibits, testimony, reasonable inferences and demeanor of witnesses)

43. O'Toole was in charge of both background investigations for the Appellant and sat as a member of both Oral Boards for his interviews. O'Toole testified at the Commission hearing and claimed that it was not the Appellant's specific answers to interview questions but "in general" that the Board determined him to be "evasive". O'Toole often qualified his answers with the preface; "I believe..." O'Toole admitted that nothing negative was learned from any of the omitted employers other than the alleged theft incident. O'Toole admitted that he did not know what the Appellant's motive was, for omitting the prior employers on the initial application. O'Toole admitted that the owner told him that he did not receive a summons to appear at the Clerk-Magistrate hearing and therefore did not appear. O'Toole testified that he did not know whether either the owner or the Appellant appeared at that hearing. O'Toole did not testify that he made any attempt to contact the Lynn Police Officers who wrote the incident report, The Clerk-Magistrate's office regarding the details of the finding of No Probable Cause found or the owner subsequent to his conversation regarding the owner's claimed non-appearance at the Clerk-Magistrate's hearing and the Appellant's alleged confession. O'Toole did not testify that he made any investigation into the criminal background of the co-worker the Appellant told him, might have committed the theft, if indeed a theft had occurred. O'Toole admitted that the Appellant was not required to do anything beyond receiving a finding of No Probable Cause found from the Clerk-Magistrate, to determine the matter to be resolved in the Appellant's favor. ( Exhibits, testimony, demeanor, reasonable inferences, Testimony of O'Toole)

44. Captain O'Toole by his own testimony has great experience in conducting background investigations on candidates for the position of Lynn Police Officer. He has commanded the Lynn Police Department Professional Standards Bureau, which conducts these background

investigations, since 1996, ironically the same year of the alleged theft which is pivotal in this bypass matter. The duties and responsibilities of O'Toole in overseeing the Bureau also include the oversight of the “Training Unit, Internal Affairs and Evidence and Court Operations.” O'Toole testified at the Commission this hearing, on December 10, 2007 that he had conducted between 100 and 200 candidate background investigations since he took command of the Bureau in 1996. However, he also previously testified at the earlier Commission hearing on December 1, 2005, that he had over 200 such investigations, at that point in time. O'Toole conducted both investigations on the Appellant’s two applications and was a member of both Oral Interview Boards which resulted in the bypasses for the Appellant, based on O'Toole’s recommendations. It is clear that O'Toole believed the accusation against the Appellant of theft was true, despite the Lynn District Court Clerk-Magistrate’s finding of No Probable Cause found, after a criminal complaint application hearing. O'Toole refused to believe the Appellant’s repeated, emphatic, detailed oral and written denials of the theft. O'Toole refused to believe the Appellant’s denial despite the documented inconsistencies in the accusing owner’s version. Those inconsistencies are: the owner’s claim that he did not receive a summons and therefore did not appear at the Clerk-Magistrate’s hearing and the owner’s claim that the Appellant admitted to the theft at the time of the incident. The Appellant’s testimony is corroborated by the court record and the Lynn Police Department report on the day of the incident, which contradicts the owner’s version. O'Toole’s apparent failure to investigate the inconsistencies with the Clerk-Magistrate’s office and the Lynn Police Officers involved and his choice to rely instead, on the suspect credibility of the owner, shows a profound lack of curiosity if not a willful disregard for the truth of this pivotal alleged theft incident. Contrary to O'Toole’s testimony

that the alleged theft was an “adverse incident” for the Appellant, and therefore something to be hidden, it was finally determined by the Clerk-Magistrate, in favor of the Appellant. O’Toole, the City’s sole witness, did not present any evidence that he followed-up with a criminal background check of the co-worker named by the Appellant as a likely suspect for the claimed theft. Instead, O’Toole took the Appellant’s suggestion of a likely suspect, if indeed a theft had occurred, as an attempt by him to deflect blame. O’Toole took the Appellant’s suggestion of another suspect as further evidence of the Appellant’s “evasiveness” and lack of credibility. In effect, O’Toole would not accept any statement by the Appellant about the alleged theft, as truthful, except an admission to the crime. O’Toole did not testify that he contacted the retired Lynn Police Officer or others listed as references on the Appellant’s application, in his investigation of the Appellant’s credibility. O’Toole did testify that he did not learn anything negative from any of the other prior employers. O’Toole serving two roles in each bypass; that of investigator and Oral Interview Board member seems to be at least a potential conflict of interest. It seems that he would seek as a Board member to affirm the conclusions of his own investigation. O’Toole’s testimony in this matter is unreliable. Although O’Toole may not have intended to be untruthful, his unjustified haste, his acts and omissions, especially those leading to his decision to believe the owner and disbelieve the Appellant exhibit a willful disregard for the truth under the circumstances of this case. O’Toole’s shortcomings heretofore described, are tantamount to a lack of good faith and denied the Appellant an opportunity for fair consideration. (Exhibits, testimony, reasonable inferences, testimony and demeanor of O’Toole)

45. On November 14, 2005, the Appellant was notified of his bypass in a letter from the City of Lynn. The letter stated the reason for the bypass was that the Appellant “failed to meet the requirements of the Board of Background Review”. (Case file docket entry)

46. On November 14, 2005, The City of Lynn sent a letter to the personnel administrator, (HRD), stating that the “bypass reasons” for the Appellant and four (4) other candidates. That they “failed to meet the requirements of the Board of Background Review.” (Case file docket entry)

#### **HEARING COMMISSIONER’S OPINION (Commissioners Henderson and Taylor)**

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331,334 (1983). See Commissioners of Civil Servo V. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster V. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). The appointing authority is expected to exercise sound discretion under the circumstances of the particular appointment, whether it is

a promotional or original appointment. The appointing authority may select, in the exercise of a sound discretion, among persons eligible for promotion or may decline to make any appointment. See the following line of cases cited in Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666 (1971) Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv., 348 Mass 184, 187-193 (1964). See also Corliss v. Civil Serv. Commrs. 242 Mass. 61, 65; Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356; Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431. Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572. A judicial judgment should "not be substituted for that of . . . [a] public officer" who acts in good faith in the performance of a duty. See M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272." The discretionary acts of a public official are predicated on the fundamental expectation that the acts are made with honesty and good faith. The Appeals Court stated clearly on this presumption "We are not unmindful of the presumptive good faith and honesty that attaches to discretionary acts of public officials, see Foster from Gloucester, Inc. v. City Council of Gloucester, 10 Mass. App. Ct. 284, 294 (1980), but that presumption must yield to the statutory command that the mayor produce "sound and sufficient reasons" to justify his action." Foot note 11. Mayor of Revere vs. Civil Service Commission & others, 31 Mass App Ct 315, 321 (1991)

However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Commission to act. City of Cambridge, 43 Mass. App. Ct. at 304. All candidates must be adequately and fairly considered. The Commission will not uphold the bypass for 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). G.L. c. 31, s. 2(b) requires that bypass cases be determined by a preponderance of the evidence. 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 probable than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991); G.L. c. 31, § 43.

In the present case, the City of Lynn failed to show that the Appellant's second bypass was reasonably justified. The Appellant was bypassed the first time due to the omissions of prior employers on his first application. Those omitted employers were part-time temporary or short-term employment, while he worked another full-time job. The City believed on the first application, that the Appellant omitted his short term employment at an auto-parts company because the company's owner had accused him of theft and terminated his employment because of it.

The Appellant's omission of employment information in his first application, namely his position at the auto-parts Company - tainted or created "bias" against the Appellant on his second application, thus he was not afforded a fair opportunity to explain himself on his second application. The City, (Captain O'Toole), had already made up its mind that it would bypass the Appellant even before the second Oral Board Interview. The second Oral Board Interview was a sham. The City could not identify what answers regarding the pivotal, alleged auto-parts company theft would have been acceptable, other than the Appellant's admission to the crime. The Appellant was deemed to be evasive or lacking in credibility for refusing to admit to the theft. The Appellant did not commit the theft and he quit that job due to the owner's false accusation, nine years earlier. The Appellant persistently and emphatically denied the theft and

job termination both verbally and in writing. The Appellant's repeated testimonial denial of the crime and other related circumstances is substantiated and corroborated by the contemporaneous, court records and Lynn Police Department reports of the incident. No Probable Cause was found by the Lynn District Court Clerk-Magistrate, on a complaint application, after a hearing.

Captain O'Toole, the City's sole witness and operative in this matter testified that he gave the Appellant "the benefit of the doubt" in the face of the persistent, opposing versions of the theft incident, between the Appellant and the Company owner. The City argued that the Appellant intentionally omitted his prior employment at the auto-parts Co. due to the "adverse" incident, associated with leaving that employment. The City argued that the omission was a matter of "untruthfulness" and motivated by a desire to remove an impediment to his employability. However, the circumstances as found here show O'Toole's reckless indifference to the Appellant's corroborated version of events. O'Toole refused to believe the Appellant's denial despite the documented inconsistencies in the accusing owner's version. Those inconsistencies are: the owner's claim that he did not receive a summons and therefore did not appear at the Clerk-Magistrate's hearing and the owner's claim that the Appellant admitted to the theft at the time of the incident. The Appellant's testimony corroborated by the court record and the Lynn Police Department report on the day of the incident, contradicts the owner's version. O'Toole's apparent failure to investigate the inconsistencies with the Clerk-Magistrate's office and the Lynn Police Officers involved and his choice to rely instead, on the suspect credibility of the owner, shows a profound lack of curiosity if not a willful disregard for the truth of this pivotal alleged theft incident. O'Toole's haste, negligence, unsupported assumptions, acts and omissions in this matter is tantamount to a lack of good faith in his investigation of and the substantiation of the stated reasons for bypass.

The background investigation completed by Captain O'Toole for the Appellant's second application was insufficient to support a finding that the Appellant had indeed committed larceny at Auto-parts Company, and was later terminated and lied about it or omitted it to hide it from the City.

Both the Appellant and accusing owner appeared at the Clerk Magistrate's hearing (Testimony of the Appellant). The Clerk Magistrate heard the testimony of both of them, was able to assess their credibility and the evidence presented to him, and found No Probable Cause to issue a complaint. Captain O'Toole's investigation of the alleged larceny was limited solely to his conversations with the owner. He did not attempt to corroborate either party's version of events by conducting in-person interviews, or examining police and court documents of the Clerk Magistrate's hearing.

Instead of conducting a meaningful investigation of the incident, the City decided to surprise the Appellant with its knowledge of the incident, at the first Oral Board Interview. The circumstance of five seasoned police officers surprising a young eager applicant with such a serious accusation is daunting. Yet, the Appellant held up well and maintained his denial in the face of superior numbers. However, the Oral Board refused to accept his assertion of false allegation of theft and quitting. The Board instead, labeled his persistent denial of any wrongdoing as evasiveness and a lack of credibility, bypassing him for that reason.

The difference between the Appellant and the owner's version of what took place warranted a further investigation. It would have been optimal for both testimonies to be heard-in the presence of the Appointing Authority and the Commission. By failing to call the owner as a witness in the hearing on behalf of the City of Lynn, the Commission infers that the owner's testimony, after cross-examination, would not have been favorable to the City.

The reasons submitted by the City of Lynn were not sound and sufficient, as they were not supported by a preponderance of the credible evidence as presented; the City did not have a reasonable justification for bypassing Appellant.

Commissioners Henderson and Taylor recommend the following relief:

Pursuant to the powers inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts and Resolves of 1993, the Commission should grant equitable relief to the Appellant and order HRD to place the Appellant's name at the top of the current and/or next certification list for the position of permanent full-time police officer that is requested by the City, so that he receives at least one opportunity for consideration. The City shall not use the same reasons for bypass on any subsequent appointment considerations. If appointed to the position, the Appellant should receive a seniority date for civil service purposes, back to the date of this unjustified bypass.

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Daniel M. Henderson, Commissioner

## **PREVAILING OPINION**

**(Commissioners Stein and Marquis)**

The Appellant has failed to persuade a majority of the Commission that any action or failure to act by the Massachusetts Human Resources Division (HRD) in approving the City's reasons for bypassing the Appellant on these two occasions was erroneous. The commissioners who have not been persuaded to grant the Appellant relief take a different view of the evidence and the applicable law than expressed by the Hearing Commissioner in several respects: (1) there is too little distinction between the facts supporting the City's May 2005 by-pass of the Appellant, which a prior Commission decision has determined to be justified, and the City's October 2005 bypass of the Appellant, to warrant any different conclusion by the Commission as to the second bypass only a few months later; (2) an adverse inference should not be drawn from the failure of the City to call the Appellant's former employer (who had accused him of theft) to testify before the Commission; and (3) although the City's selection process could have been more thoroughly documented<sup>1</sup>, the evidence does not warrant an inference that the City's investigation was tainted by "willful disregard for the truth" that is "tantamount to a lack of good faith" as the Hearing Commissioner concludes.

It is undisputed that the Appellant, while employed full time at Cooper-Lewis, Inc., an auto body supply shop in Lynn, was accused of stealing three boxes of auto body sanding discs worth \$203.55. The owner of the auto body supply shop contacted the Lynn Police Department which sought a criminal complaint for Larceny Under \$250. A Clerk-Magistrate subsequently found no

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<sup>1</sup> Going forward, the Commission strongly encourages appointing authorities who use interview panels to ensure that the interview process is transparent and appropriately documented so as to ensure that candidates are treated equally and support the conclusions of the panel can be supported as credible, precisely to minimize the risk of differences of opinion that have arisen in this case. See, e.g., Moses v. Town of Winthrop, 21 MCSR 420, 426-27 (2008)

probable cause to issue the complaint. (There is a question whether the evidence warrants the inference that a Cooper-Lewis, Inc. officer testified before the magistrate or not.)

Finally, it is undisputed that the Appellant, in his first application for employment with the Lynn Police Department in 2005, failed to include his Cooper-Lewis, Inc. full time employment and also failed to include three other part time jobs in 1996, despite the clear and unambiguous written instructions to list ALL places of employment and account for ALL time periods.

The City subsequently bypassed the Appellant, citing (1) his “refusal to complete a uniformly administered request for information such as a local application form”; and (2) the fact that he appeared to be untruthful in his responses when addressing his employment at the auto body shop. The City found that, “Given that George failed to disclose this employment in his Employment Application, his responses in addressing the employment lacked credibility”.

The Commission, in a unanimous Decision (including present Commissioners Taylor and Marquis and Bowman) adopted the findings and conclusions of Hearing Commissioner Guerin, and concluded after a full evidentiary hearing that the City had sustained its burden of proving reasonable justification for bypassing the Appellant and unanimously denied (and dismissed) the Appellant’s first bypass appeal filed under Docket No G1-05-169.

Among the findings and conclusions adopted by the Commission in its Decision accepting the City’s justification for the Appellant’s first by-pass:

- “[T]he Appellant . . . stated that he did not list the employment [at Cooper-Lewis, Inc.] because it was brief. . . . [H]e acknowledged that he would likely have been fired had he not quit. . . . The Appellant was asked several times how this most glaring employment incident could escape his memory when he filled out his application. No answer was offered.”
- “The testimony of Captain O’Toole at this hearing is considered to be very credible and is afforded a great deal of weight by the Commission. . . . He provided thoughtful and straightforward testimony.”

- “The testimony and statements of the Appellant at this hearing, for the most part, lacked credibility. His insistence that he was now prepared to stand tall and provide all pertinent information necessary, only served to shine a brighter spotlight on his attempts to gloss over past transgressions. . . .His accounts of these critical aspects of this case resonated more as self-serving declarations than a genuine attempt at redemption.”
- “The [City] presented strong and credible evidence in this case to prove that the Appellant was untruthful in preparing his employment application to the Lynn Police Department. . . . The Appellant stated he did not include it on his application because the employment was so brief. . . On this point, the Appellant lacks credibility. . . .It is quite clear that the Appellant deliberately withheld this information on his application so he would be viewed in the best possible light by the [City].”
- “The Appellant did have something to gain by being untruthful in this regard. . . [I]t is more likely than not that the Appellant was terminated or, at the very least, forced to resign . . . [H]e knowingly withheld critical information on his application. . . .”
- “Relative to the [City’s] assertions that the Appellant gave evasive answers regarding the circumstances of his employment at Cooper-Lewis. The testimony and statements of the Appellant . . . for the most part, lacked credibility. . . [a] preponderance of the evidence and testimony adduced at the hearing before the Commission shows it is more likely than not that the Appellant lacked credibility and was evasive in his answers to the Oral Interview Board.”
- “[U]ntruthfulness is the main issue . . . The untruthfulness of evading discussion of the circumstances relative to Cooper-Lewis, Inc. was seen by the [City] as being a worse misdeed than the circumstances themselves. Police officers are routinely called upon to prepare reports, provide sworn testimony, make public statements and mediate disputes. Integrity must necessarily be a trademark feature of anyone aspiring to work in law enforcement. Credibility is a paramount characteristic.”

The Appellant then applied for the position of police officer in Lynn as part of the next hiring cycle in 2005, and his name again appeared on the civil service certification list of eligible candidates. The Appellant listed all of the four employers, referenced above, that were missing in his previous application. After reviewing his application for a second time, granting him another interview, and conducting further follow-up with the former employer who had accused him of stealing, the City bypassed him again for the same reasons as he was bypassed five months earlier.

The Appellant appealed his second bypass to the Commission and was again granted a full evidentiary hearing. This time, however, the hearing officer, based on essentially the same facts

presented in the first appeal, has concluded that the City did not have reasonable justification to bypass the Appellant, and recommended that the Appellant's name be placed at the top of the next list used to hire police officers, prohibiting the City from using the same reasons for bypass again.

We are not persuaded that the evidence impels the Commission to jettison the findings and conclusions of a prior Decision and reach what seems to be a directly inconsistent conclusion. Indeed, there is some reason to conclude that the City had good reason to expect that the Commission's prior decision was preclusive of the issues that were actually litigated, including the Appellant's lack of credibility, untruthfulness and evasiveness about his employment at Cooper-Lewis, Inc. See, e.g., In Re Brauer, 452 Mass. 56, 890 N.E.2d 847 (2008) (conditions for issue preclusion); Jarosz v. Palmer, 436 Mass. 536, 766 N.E.2d 482 (2002) (same) Moreover, whether or not a party is legally precluded from re-litigating an issue previously decided by the Commission, parties that come before the Commission should be able to rely on some level of consistency and predictability in regard to the decision-making process and to impugn the Commission's prior Decision involving the same issues and the same parties undermines those principles.

The Hearing Commissioner chooses to focus on the fact that a Clerk-Magistrate found no probable cause that the Appellant allegedly stole merchandise from the auto body parts shop. The City had good reason to question the Appellant's credibility in regard to the allegation itself. The Hearing Commissioner missed the point in suggesting that omission of four prior employers, one of which ended after the Appellant was accused of theft “seems to be the Appellant's *interpretative application of the language*, in his attempt to provide ‘relevant’ and material information.” (Finding #42, emphasis added) The plain language of the employment application

directed applicants to list ALL places of employment and account for ALL time periods, not those deemed “relevant and material” by the applicant. (The actual text of the employment application instructions provides for the word “ALL” in capitals.) The Appellant failed to comply with these direct instructions. As the Commission noted in its prior by-pass decision, by his poor judgment in self-sanitizing his employment record, the Appellant demonstrated that the City was reasonably justified to conclude that he lacks the degree of honesty and truthfulness to which a police officer may be held.

We also differ with the Hearing Commissioner for chastising the City for not calling a witness from Cooper-Lewis, Inc., as a witness and for drawing an adverse inference against the City because of it. An adverse inference should be drawn from the failure of a party to call a witness only sparingly, and we would not draw such an inference in the circumstances of this case. The City had already persuaded the Commission on the issue and there was no reason to think that the Commission would be aided by such testimony the second time around. Moreover, there is nothing in the evidence that persuades us that Cooper-Lewis, Inc. would have appeared without subpoena and that the witness, thus, was not equally available to be called by either party. Cf. Commonwealth v. Figueroa, 413 Mass. 193, 198-99, 595 n.e.2D 779,783-84 (1992) (“missing witness” instruction is a matter of discretion not “of right” and should be given only in “clear cases” and not “where a witness is equally available to both sides”)

Finally, the conclusions made about the motivations of Lynn Police Captain Mark F. O’Toole directly conflict with the findings and conclusions of the Commission’s prior decision and do not appear to be supported by any substantial evidence in the record. The record shows that O’Toole is a career law enforcement official with decades of experience in the field. However, the

Hearing Commissioner charges that:

- O'Toole "show[ed] a profound lack of curiosity if not a willful disregard for the truth of this pivotal alleged theft incident." (Majority Decision at p.21);
- O'Toole "...may not have intended to be untruthful, [but] his unjustified haste, his acts and omissions, especially those leading to his decision to believe the owner and disbelieve the Appellant exhibit a willful disregard for the truth under the circumstances of this case." (Majority Decision at p.22);
- O'Toole "show[ed] reckless indifference to the Appellant's corroborated version of events." (Majority Decision at p.26)
- "O'Toole's haste, negligence, unsupported assumptions, acts and omissions in this matter is tantamount to a lack of good faith in his investigation of and the substantiation of the stated reasons for bypass." (Majority Decision at p.26)

To the extent that the Hearing Commissioner's recommendation is grounded on these conclusions, we have not been persuaded that they should be adopted.

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Paul M. Stein, Commissioner

A True Record. Attest:

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Commissioner

By a vote of the Commission on November 20, 2008, two Commissioners voted in favor of the Hearing Commissioner's conclusion (Henderson, Taylor) and the other two Commissioners present (Stein, Marquis) voted against the conclusion of the Hearing Commissioner. G.L. c. 31, § 2(b) requires the vote of three Commissioners to reverse a decision of the Personnel Administrator approving a request for bypass of a candidate for original appointment. Therefore, the Appellant's appeal fails and, for all of the reasons referenced in the prevailing opinion above, the Appellant's appeal is hereby **dismissed**.

By vote of the Civil Service Commission (Henderson {aye}, Taylor [aye], Stein [nay], Marquis [nay], Commissioners; Bowman, Chairman [absent]) on November 20, 2008.

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. C. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:  
Glenn George  
David F. Grunbaum, Atty.  
John Marra, Atty. HRD