

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

DANIEL ZAITER,

Appellant

v.

BOSTON POLICE DEPARTMENT,

Respondent

G1-16-070

Appearance for Appellant:

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Auburn, MA 02501

Appearance for Respondent:

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Commissioner:

Paul M. Stein¹

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Daniel Zaiter, appealed to the Civil Service Commission (Commission) from the decision of the Boston Police Department (BPD) to bypass him for appointment to the position of BPD Police Officer. A pre-hearing conference was held on April 19, 2016 and a full hearing was held on June 7, 2016 at the offices of the Commission.² At the full hearing, witnesses were sequestered, save for the Appellant. Sixteen exhibits (1 through 8 & 12 through 19) were introduced in evidence and six exhibits (9ID, 10ID, 11ID, 13ID, 14ID, 15ID) were marked for identification. The hearing was digitally recorded, with copies provided to the parties.³ Both parties submitted post-hearing proposed decisions.

¹ The Commission acknowledges the assistance of Law Clerk Brendan Rimetz in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Charisse Brittle-Powell, Detective, BPD
- Devin Taylor, former Human Resources Director, BPD

Called by the Appellant:

- Daniel Zaiter, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes the following facts:

1. Mr. Zaiter is a 39-year-old man who lives in the Dorchester section of Boston. He is a naturalized U.S. citizen who was born in Germany and emigrated with his family to the Boston area in 1988. (*Exh. 1; Testimony of Zaiter*)
2. Mr. Zaiter has served as a police officer for the Randolph Police Department (RPD) for the past nine (9) years. Prior to working for RPD, Mr. Zaiter was a campus police officer at Lasell College and Northeastern University. He served from 1997 to 2003 with the U.S. Marine Corps Reserves and received an honorable discharge. (*Exh. 1; Testimony of Zaiter*)
3. Mr. Zaiter holds a Bachelor's Degree in Criminal Justice from Northeastern University and a Master's Degree in Criminal Justice from Curry College. (*Exh. 1; Testimony of Mr. Zaiter*)
4. On June 15, 2013, Mr. Zaiter took and passed a civil service examination administered by the Massachusetts Human Resources Division (HRD) to become a BPD police officer which he called his "dream job". He scored a 99 and his name appeared on an eligible list established on October 15, 2013. (*Stipulated Fact; Testimony of Zaiter*)
5. On April 27, 2013, HRD issued Certification #02742 to BPD. Mr. Zaiter was ranked in the 49th tie group with 130 other candidates on the Certification. Seventy (70) candidates were

appointed from the Certification with thirty-six (36) of those candidates being ranked below Mr. Zaiter. (*Testimony of Zaiter; Stipulated Facts*)

6. By letter dated March 4, 2016 from BPD Acting Director of Human Resources Cathy Michaud, Mr. Zaiter was notified by BPD of the following reasons that he was bypassed:

The Department [BPD] has significant concerns with the detail surrounding the charges brought against you in 1995. These charges included 3 charges of malicious destruction of property over \$250, assault and battery, extortion and kidnapping. Despite the fact that you were not convicted, the underlying facts of this incident are of concern to the Department. The Department also has concern with the charge of motor vehicle homicide on your record. Following the incident, you were issued a citation for operating an unregistered motor vehicle and charged with operating to endanger and motor vehicle homicide by operating negligently. Again, despite the fact that the charges were later dismissed, the Department has concerns with the underlying facts. Your involvement in these incidents indicate poor judgment and disregard for the law, both of which are undesirable qualities for potential police officers.

(*Exh. 8*)(emphasis added)

7. On March 28, 2016, this appeal duly ensued. (*Claim of Appeal; Stipulated Facts*)

June 17, 1995 Charges

8. On June 17, 1995, Mr. Zaiter, then a high school senior, was arrested along with four other classmates after they were stopped by RPD Sergeant Arthur Sullivan (now an RPD Commander [Deputy Chief]), who responded to a report of a disturbance involving a group of male Randolph high school students. Mr. Zaiter has had no contact with any of these individuals in the 20 years since that incident. (*Exhs.3 & 7*)
9. Sgt. Sullivan's report contains nine pages of detailed narrative of his percipient observations and investigation. According to Sgt. Sullivan's report, the conflict began on Thursday, June 8, 1995, when TL decided to pick a fight with SH that was broken up by school officials. SH said, later that night, he received a telephone call from someone named "Johnnie" who demanded \$1,080 or they would "get him." (*Exh. 3*)

10. The next day, June 9, 1995, SH was walking home when he was picked up in a car driven by GC and taken to a secluded street where he was assaulted. Mr. Zaiter was driving a second car and followed GC to the scene. Also, placed at the scene were TL and boys named JD (“Johnie”), KL, VV (“Billy”), JC and DW. According to SH, Billy punched him “in the back of the head”, GC punched him “several times” and he was “kicked” by JC and another unnamed boy with “diamond stud” earrings. SH said “Daniel punched him in the side”. (*Exh. 3*)

11. On June 16, 1995, Billy accompanied by DW, appeared at SH’s home on two occasions to try to see SH. They had a confrontation with SH’s mother and one of SH’s relatives. Mr. Zaiter was not placed at the scene on either of these occasions. After Billy’s first visit, SH said he received a phone call from “Johnie” who reiterated the demand for money. (*Exh. 3*)

12. Later in the evening of June 16, 1995, Billy and DW returned to SH’s home, along with GC, TL, KL, JD (“Johnie”), AY and Mr. Zaiter. Sgt. Sullivan’s report noted that he observed the following damage to three vehicles:

- Broken rear window, broken rear tail light and dented trunk on 1989 Lincoln Town Car, also two flat tires.
- Broken left rear window a 1987 Nissan Maxima.
- Broken left rear window to a 1985 Nissan 200SX.

Neither SH nor any of his family witnessed who caused the vandalism to the vehicles. GC admitted to Sgt. Sullivan that he had slashed the tires. The only other person Sgt. Sullivan’s report identified to have caused damage to the vehicles was TL, whom KL said he saw smashing the cars with a bat. The only person to place Mr. Zaiter at the scene was KL’s hearsay statement “Dan had a bat but he did not believe Dan did any damage.” Mr. Zaiter said he never left his car. (*Exh.3*) (*emphasis added*)

13. Mr. Zaiter was charged, along with four others, with Malicious Destruction of a Motor Vehicle Over \$250, Assault and Battery, Kidnapping, and Extortion. No charges were pressed against one of the five students arrested after it was confirmed that he had not been present at any of the alleged crime scenes. (*Exhs. 2, 3 & 4; Testimony of Zaiter & Brittle-Powell*)
14. After taking Mr. Zaiter into custody, Sgt. Sullivan interviewed him. Mr. Zaiter who “denied doing damage to the vehicles. He stated he went to the house with the other boys but never got out of the car. Daniel also denied ever hitting [SH] and then said he did not want to say anything else.” (*Exh.3*)
15. On June 18, 1995, Mr. Zaiter pled not guilty to all charges. (*Exh. 4*)
16. On December 13, 1995, the charges against Mr. Zaiter for Malicious Destruction of a Motor Vehicle Over \$250, Kidnapping, and Extortion were dismissed. Mr. Zaiter initially pled guilty to the misdemeanor of Assault and Battery and was sentenced to one (1) year of probation, 120 hours of community service, restitution, and told to stay away from the victim. The evidence did not disclose what disposition was made of the charges against the other students. (*Exh. 4; Testimony of Zaiter & Brittle-Powell*)
17. On October 5, 1999, on Motion to Revise and Revoke, Mr. Zaiter’s guilty plea was changed to admission of sufficient facts and the charge was dismissed. (*Exhs. 2 & 4*)

November 7, 1995 Motor Vehicle Accident

18. On November 7, 1995, Mr. Zaiter struck a pedestrian while driving his father’s car home from work around midnight in Randolph. The pedestrian later died of her injuries. (*Exh.5; Testimony of Brittle-Powell*)

19. The narrative from the RPD responding officer's incident report states, in relevant part:

On the above date and time, cruisers were dispatched to the area of Conrad's Market on North Main St. on a report of a pedestrian accident. I arrived on scene and observed . . . a female on the ground. . . . While the fire dep't was working on the female . . . I identified the operator of the car involved. I placed him in the front seat of my cruiser and asked him to wait there until I returned. . . .

I returned to my cruiser and began to ask Daniel Zaiter what had happened. . . . I attempted to calm Daniel down for several minutes until he finally told me what happened. Daniel stated that he was returning from a friend's house when this occurred. He was traveling north on North Main St. in the passing lane when he struck the pedestrian. Daniel stated that he never saw her. I asked Daniel how fast he thought he was going and he stated between 30-35 MPH but no more. I asked him [what] color was his traffic light and he said green. I told Daniel to stay seated in my car until I returned.

At this point the Randolph Police Accident Investigation Team arrived and took over the accident scene. All my information regarding people at the scene and statements made were turned over to Sgt. Thistle and Officer Johnson. See the following reports for more details and statements.

Preliminary Facts of the Case

On Tuesday November 7, 1995 at approximately 11:53 PM, Mr. Daniel Zaiter was driving a 1989 Lincoln Continental . . . on North Main Street in the left lane northbound. . . . [The female pedestrian] was walking across North Main St. from west to east in front of the corner market. Mr. Zaiter did not see [her] in the roadway and failed to stop or go around her, striking her with his motor vehicle Mr. Zaiter then pulled his vehicle over to the side of the road and stopped. Mr. Zaiter was issued a citation for Operating an Unregistered Motor Vehicle, Operating to Endanger, Motor Vehicle Homicide by Operating Negligently

(Exh.5) (*emphasis added*)

20. Two eyewitnesses to the accident provided statements to the RPD that are included in the incident report. A taxicab driver reported:

I was coming up Pond Street . . . I stopped for the red light at the intersection of Pond Street and North Main Street in Randolph, when I noticed a person to my right walking across the street. I noticed this person had an umbrella, it was raining hard, visibility was bad. I looked to my left and before I moved, I heard a strange thump noise. I looked to my right again and saw the umbrella in the street, and I did not see the person any more. Then, I heard a man screaming "Oh my God, Oh my God, Don't let her be dead." I never saw the car that hit the woman pass in front of me while I was waiting at the red light, I don't know how fast he was going, but if he was going fast, the car would have come to my attention.

Another eyewitness saw the accident from his bedroom window overlooking North Main Street:

I saw a person get off the bus at the bus stop in front of the Piccadilly Pub. This person was standing on the sidewalk opening an umbrella. I then watched the bus go through the green light down North Main Street. A few seconds later I saw a van go through the green light . . . I saw a car coming up North Main Street towards my direction. I then saw the person who got off the bus, holding the umbrella over their head, as it was raining heavily. This person looked to his/her left and began crossing the street. I was watching this person cross when the vehicle coming up North Main Street struck him/her. This person was over half way across the street when struck. . . . The car stopped, the operator ran back to the person he had hit. He kneeled down. And reached toward the person he had hit then grabbed both sides of his head and began shaking it. . . . [A]sked . . . if he thought the car involved was speeding he said “No. It looked like he was doing the speed limit, which I think is 30-35 miles per hour.”

(Exh. 5) (*emphasis added*)

21. On November 29, 1995 the Driving to Endanger and Negligent Vehicular Homicide charges were dismissed at the Clerk/Magistrate’s hearing for lack of probable cause. Mr. Zaiter was found responsible for a civil infraction of operating his father’s motor vehicle with an expired registration. (Exhs. 6 & 7; *Testimony of Zaiter & Brittle-Powell*)

22. Following the decision of the Clerk/Magistrate to dismiss the criminal charges against Mr. Zaiter, a reconstruction team re-investigated the accident. The RPD then concluded that Mr. Zaiter’s explanation was “plausible”,⁴ concurred with the findings of the Clerk/Magistrate and chose not to appeal the dismissal. (Exh. 7; *Testimony of Brittle-Powell*)

23. The November 1995 incident is the only motor vehicle accident listed on Mr. Zaiter’s driving record. He has maintained a clean driving record since 2005 when he was last cited for a “Display Number Plate” violation. Mr. Zaiter had no on-duty cruiser accidents in his nine years as an RPD police officer. (Exhs 1, 6 & 7; *Testimony of Zaiter & Taylor*)

⁴According to the police report and the testimony, North Main St. is a four lane road, running in north to south. The police report states that the pedestrian was crossing “in the roadway” from west to east (not placing her in a cross-walk), looking left as she stepped off the curb into the southbound lane, wearing dark blue clothing with an umbrella over her head. She was struck half-way across the road in the northbound passing lane (i.e., Mr. Zaiter would have come from her right passing through a green light at the intersection.. (Exh. 5: *Testimony of Zaiter & Brittle-Powell*)

Mr. Zaiter's 2015 BPD Application

24. On or about May 29, 2015, Mr. Zaiter submitted the required Student Officer Application for appointment as a BPD Police Officer, including 87 pages of information. (*Exh. 1*)
25. The application included assessment forms from neighbors who knew him and two personal references all of which reported “overwhelmingly positive” impressions of his character and work for the RPD. He also received uniformly positive assessments from his current supervisors at the RPD who described him as a “model employee and one of his top performers” and “a well-respected and mentor for other officers” who was “always professional and follows the chain of command in all situations”. The application also contained reports from supervisors in his two prior public safety jobs at Northeastern University and Lasell College, who described him as “dependable and a solid employee with no issues or concerns”, “well-liked”, “able to resolve and de-escalate many situations” and “a good fit in any department.”. (*Exhs. 1, 7 & 18*)
26. The references provided by Mr. Zaiter's RPD peers and superior officers contain specific percipient examples of Mr. Zaiter's positive traits that he demonstrated on the job, including his strong communication skills in dealing with co-workers and in handling of domestic calls, as well as “a good working knowledge of diversity among all ethnic groups.” He was commended in 2012 for his courageous actions as the scene of a motor vehicle accident in which he placed his life at risk to save the operator despite the danger of fire posed by leaking gasoline from the vehicle's gas tank that was saturating the unconscious victim, and again in 2014 for his skill in handling a number of emergency medical situations. (*Exhs. 14 through 18*)

27. Mr. Zaiter supplied a detailed explanation of the two 1995 incidents in which he was involved as a teenager.

- June 1995 Arrest – I was arrested when I was 17 years old. I was young, stupid and hung with the wrong crowd. The incident (#111291) is attached to this application. Although I regret this incident, it set me straight and I’ve used it as a learning point. When I make arrests on the job, especially when it is a juvenile, I reflect back on my stupidity and make some genuine connections with my arrestees.
- November 1995 Motor Vehicle Crash – Please see attached incident report (#118154) I was involved in a motor vehicle crash versus pedestrian. This was the absolute worst day of my life. I was working at the cinema in Braintree and due to the weather, I had given a coworker a ride back home (South Randolph). On my way back to my house (North Randolph), I struck a woman that ran in front of my car. I believe Randolph had a clerk magistrate hearing to determine probable cause (I was young and unsure of the court process at the time.) I remember the clerk magistrate asking the officers “why is he here right now?” I only mention this because witnesses and the investigation concluded that I was not driving to endanger.

(Exh. 1: Testimony of Zaiter)

28. In accordance with Standard Operating Procedures (SOP) of the BPD’s Recruit Investigations Unit (RIU), Mr. Zaiter’s application was assigned to RIU Det. Charisse Brittle-Powell to conduct a background investigation, including an initial interview with the applicant to review the completed application,⁵ conduct a review of the candidate’s criminal history and driving records, and confirm the information provided by the candidate’s family, neighbors and employers. *(Exhs. 7 & 12; Testimony of Brittle-Powell & Taylor)*

29. In accordance with the SOP, Det. Brittle-Powell prepared a written report of her findings, called a PCM. The PCM is supposed to report factual findings only. The RIU investigator is not a decision-maker and the SOP prohibits her from expressing any opinion as to whether a candidate should be hired or not. After review of the PCM by the RIU

⁵ At the initial interview, if a candidate’s application indicates he/she fits an “EXCLUSION”, the detective, in consultation with the RIU commander or supervisor, advises the candidate of “viable steps”, including “if a candidate will benefit from withdrawing at this time”. “Exclusions” include automatic disqualifiers such as a felony conviction, lack of a high school diploma or GED or not a U.S. citizen or Boston resident, as well as other “red flags”, such as a CWO (continued without a finding) to a felony and an OUI or domestic violence record within the past ten years, that “could exclude a person from the job” absent “extenuating circumstances.” None of these “exclusions” applied to Mr. Zaiter’s application. *(Exhs. 1 & 12; Testimony of Taylor)*

Commander/Supervisor, the complete file is forwarded, together with a “synopsis of the candidate” for “roundtable approval”. (*Exhs. 7 & 12; Testimony of Brittle-Powell & Taylor*)

30. The roundtable is a bi-weekly meeting attended by the BPD Deputy Superintendent for the Bureau of Professional Standards (BPS), the Director of Human Services, Legal Department representative, Medical Unit representative, RIU Detective and RIU Commander/Supervisor. (*Exh. 12: Testimony of Taylor & Brittle-Powell*)

31. The SOP also provides for a “discretionary interview” conducted by the RIU investigator with the BPS Deputy Superintendent and the RIU Commander/Supervisor in attendance in which “candidates are given the opportunity to explain a negative(s) issues(s) discovered during their background investigation.” There was no discretionary interview conducted with Mr. Zaiter. (*Exh. 12; Testimony of Zaiter, Taylor & Brittle-Powell*)

32. Mr. Zaiter’s application was first discussed at a roundtable meeting on September 3, 2015. Det. Brittle-Powell summarized verbally the contents of the PCM, focusing on the 1995 incidents. Other roundtable members had a written synopsis of the PCM (not presented in evidence). The full application file was brought to the roundtable but each member does not have a copy. The details of the application packet, such as the actual content of the police reports, the written employment recommendations and letters of commendation, as well as Mr. Zaiter’s personal explanation for the two 1995 incidents as related in his application, were not included in the roundtable presentation. (*Testimony of Taylor*)

33. At the first roundtable meeting, Det. Brittle-Powell was asked to gather additional information about the 1995 motor vehicle accident, which Ms. Taylor consistently referred to in her testimony and in the bypass letter as a “vehicular homicide”, and was asked to determine whether any civil litigation had ensued. (*Testimony of Brittle-Powell & Taylor*)

34. A second roundtable meeting convened on September 15, 2015, at which time Det. Brittle-Powell submitted a follow-up to her PCM, reporting that court records disclosed no litigation had been brought and the insurance company did not retain records that would disclose whether any insurance claims had been paid. Ms. Brittle-Powell then tracked down the deceased pedestrian's sister and reported that their mother had "died with a broken heart" after she hired an attorney who stopped returning phone calls and eventually dropped the case, believing that the "suspect's father was a well-known businessman with money" and his status was the "cause of the police keeping them in the dark." Mr. Zaiter was not contacted as part of this follow-up investigation. (*Exh. 19; Testimony of Brittle-Powell, Taylor & Zaiter*)
35. On September 15, 2015, after receiving Det. Brittle-Powell's follow-up report, the roundtable reached a consensus that Mr. Zaiter be bypassed. (*Testimony of Taylor*)
36. The ultimate decision to appoint a BPD police officer or to bypass a candidate rests with the Boston Police Commissioner. No evidence was produced to establish when the Police Commissioner made the decision to bypass Mr. Zaiter or what information was presented to the Police Commissioner upon which the bypass decision was approved. (*Testimony of Taylor*)

APPLICABLE CIVIL SERVICE LAW

This appeal involves a bypass for original appointment to a permanent civil service position of police officer. This process is governed by G.L.c.31, Section 27, which provides:

"If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest."

Pursuant to the Personnel Administration Rules (PAR) promulgated by HRD, the statement of reasons must be specific and complete:

“Upon determining that any candidate on a certification is to be bypassed . . . an appointing authority shall, immediately upon making such determination, send . . . a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked. . . . Such statement shall indicate all . . . reasons for bypass on which the appointing authority intends to rely or might, in the future, rely to justify the bypass. . . . No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed . . . shall later be admissible as reasons for selection or bypass in any proceeding before the . . . Civil Service Commission.” PAR.08(4)

When a candidate appeals from a bypass, the Commission's role is not to determine whether that candidate should have been bypassed. Rather, the Commission determines whether, by a preponderance of the evidence, the decision to bypass the candidate, here, for appointment as a police officer, was made after an “impartial and reasonably thorough review” and that there was “reasonable justification” for the decision. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Brackett v. Civil Service Comm’n, 447 Mass. 233, 241 (2006), citing G.L.c.31, § 2(b); Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 187 (2010)

The “preponderance of the evidence test” requires an appointing authority to establish that the reasons assigned to justify the bypass were “more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (*emphasis added*)

“Reasonable justification in this context means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited; Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

In determining whether the department has shown a reasonable justification for a bypass, the Commission's primary concern is to ensure that the department's action comports with “[b]asic merit principles,” as defined in G.L.c.31,§1. See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, (2001); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991). “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L.c.31,§1. When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission. City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997).

ANALYSIS

Applying the applicable principles to the credible evidence presented in this appeal, the BPD did not meet its burden to establish that the decision to bypass Mr. Zaiter was made after a thorough review of the facts and that the decision was reasonably justified. The bypass was based entirely on two 1995 examples of behavior by Mr. Zaiter as a teenager growing up in Randolph MA, i.e., admitting to once hitting another youth in a fight between two groups of Randolph high school students and once having struck a pedestrian who died after she stepped in front of the car he was driving on a dark, rainy night a few months later. The preponderance of the evidence established that the BPD’s decision was uninformed, was made without an impartial and reasonably thorough review of either incident, without knowledge of Mr. Zaiter’s maturely-stated current explanation for his actions and with only limited information about his subsequent well-documented adult record as solid citizen, respected neighbor and distinguished law

enforcement professional, including nine years of skilled and, at times heroic, service as a “model employee” and “top performer” in his current position as a police officer for the Town of Randolph.

First, the manner in which information about Mr. Zaiter’s 1995 incidents was filtered from the RIU investigator to the BPD roundtable denied Mr. Zaiter the opportunity for his application to be considered upon a full and accurate account of these incidents which is essential to making an appropriate judgment about the factual “concerns” that became the basis for Mr. Zaiter’s bypass.

Devin Taylor (then) the BPD HR Director and one of the members of the roundtable, was the only witness to testify who had any direct role in the decision-making process. (The RIU investigator is expressly precluded from offering any opinion about a candidate under the BPD’s SOP.) Ms. Taylor’s testimony made clear that the synopsis provided to the roundtable about the 1995 incidents revealed only a condensed characterization of the facts related to those incidents which led to a mistaken impression of Mr. Zaiter’s actual behavior. As to the fight between the students, Ms. Taylor had concluded that Mr. Zaiter had “tormented” one of the students and, as to the automobile accident; she called it a “vehicular homicide.” The actual police reports, however, did not support either conclusion.

For example, completely missing from the RIU investigator’s synopsis of the altercation among the two groups of students as described in the court documents and extensive police report and witness statements was the fact that Mr. Zaiter, was, for the most part, a minor participant. There was no evidence that he was an instigator or a ringleader. He was not present for all of the alleged interactions, most of the other students knew him only by his first name “Dan”, and the victim stated that he struck him a single blow “on the side”. In particular, I find no credible evidence that reasonably warrants an inference that Mr. Zaiter was responsible for

any other threat, damage or injury to person or property, as confirmed by the fact that he was excused from all charges, save his admission to facts sufficient to prove the misdemeanor offense of committing a “straight” assault and battery. The information presented to the roundtable significantly blurred these important distinctions.

In addition, the roundtable did not examine any part of Mr. Zaiter’s application in which he explained that his one brush with the law “set me straight” and he now “reflects back on my stupidity and make some genuine connection” with juvenile offenders whom he arrests as a RPD police officer. I also find it indicative of a less than thorough review that BPD relied solely on the court record and police report of the 1995 criminal matter and never thought to inquire of the investigating officer, (then) RPD Sgt. and (now) RPD Commander [Deputy Chief] Sullivan, on this matter, although Commander Sullivan also would have been Mr. Zaiter’s superior officer for nine years and even though the RIU investigator’s PCM reports that she did speak with Commander Sullivan as part of her investigation about the other “concern” expressed by the roundtable, namely, the issue involving the 1995 automobile accident.

Similarly, the RIU investigator’s report of the automobile accident was a synopsis of the police report and provided none of the detail contained in the highly relevant witness statements which strongly supported Mr. Zaiter’s “plausible” explanation that the accident was just that, an unavoidable accident. Nor did the roundtable know of Mr. Zaiter’s own narrative in his application in which he stated the accident was “the absolute worst day of my life”. In fact, the percipient witness statements, that the roundtable did not consider, substantially corroborate Mr. Zaiter’s descriptions and point out the pedestrian’s own inattention to traffic as she tried to navigate across a four-lane road, late on a dark, rainy night, wearing a dark blue uniform, with an umbrella reducing her visibility, looking left but never looking to her right, as the major

contributing cause of the accident, not Mr. Zaiter, who had just passed through a green light at the nearby intersection, was prudently travelling at or below the speed limit and fully cooperated with the authorities. Ms. Taylor offered no explanation as to why the roundtable discounted the Clerk/Magistrate's dismissal of the driving to endanger and negligent vehicular homicide charges for lack of probable cause and the RPD's concurrence in that conclusion after a complete accident reconstruction had been performed without ever having seen the actual police report, eyewitness statements or Mr. Zaiter's own written explanation that were available to them. Even more inexplicable, when the follow-up report disclosed no civil liability either, that information seemed to confirm, rather than allay, the roundtable's "concerns" about Mr. Zaiter's culpability. In fact, I infer that Mr. Zaiter's allegedly poor teenage driving record twenty years ago was not the real determining factor, but rather, the roundtable's "concerns" with the horror of the fatality and the deceased family's unsubstantiated (indeed, wholly speculative) animosity toward Mr. Zaiter, rather than taking an impartial and objective view of the actual facts.

Second, the roundtable relied only on a verbal synopsis of Mr. Zaiter's personal and professional references. The roundtable did not know any of the specifics provided in those references and did not learn about all the commendations Mr. Zaiter had received as a police officer or that he had never been involved in any cruiser accidents in his nine-year career with the RPD. This omission is particularly relevant given the specific and percipient nature of many of the statements offered by his neighbors, peers and supervisors, all of which stands in stark contrast to the two stale, isolated incidents of alleged teenage "poor judgment" used to bypass him. No "impartial and reasonably thorough review" of Mr. Zaiter's application can rationally be justified when these relevant facts that directly bear on any fair and impartial assessment of his current character and reputation in the community were not part of that review..

Finally, the evidentiary trail of the deliberative process that resulted in Mr. Zaiter's bypass stopped with the roundtable. Although the Police Commissioner is the ultimate decision-maker in this process, the evidence did not provide any information as to when or what information was actually provided to the Commissioner in this instance. I infer that further review, if any, of Mr. Zaiter's application was, at best, based on the same flawed synopsis presented at the roundtable, as described above. Nor was there any explanation for why no "discretionary interview" was conducted with Mr. Zaiter, which would have permitted him to speak directly with, at least, one member of the Commissioner's Command Staff (the BPS Deputy Superintendent). While it may not be important for the Commissioner or a senior Command Staff officer to "eyeball" every candidate, I find it problematic that such an interview would not have been conducted in the present case. After all, the decision, ultimately, turns on making a highly critical and informed high-level decision affecting both the BPD and Mr. Zaiter's future as to whether or not to hire or bypass a candidate who demonstrated nothing but "overwhelmingly positive" credentials as a career police officer, or to disqualify him solely for one minor criminal offense while in high school and a single automobile accident (the only one he ever had) more than twenty years ago. The BPD did not claim, and presented no evidence that could support an inference, that either of these stale examples, alone or collectively, reasonably suggest a pattern or risk of problematic behavior as an adult or as a police professional. Clearly, there is nothing apparent in Mr. Zaiter's subsequent life history that warrants any such inference.

In sum, I find that the process that BPD employed in arriving at the decision to bypass Mr. Zaiter falls short of the requirements established under basic merit principles of civil service law and rules which strictly prohibit an appointing authority from denying a candidate the opportunity for appointment without reasonable justification after a fair and reasonably thorough

review of all the available facts and circumstances relevant to his ability to perform the job of a BPD police officer.

CONCLUSION

For all of the above stated reasons, the bypass appeal of Daniel Zaiter, under Docket No. G1-16-070 is *allowed*. Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that HRD or the BPD in its delegated capacity shall:

- Place the name of Daniel Zaiter at the top of any current or future Certification for the position of BPD Police Officer until he is appointed or bypassed.
- If Mr. Zaiter is appointed as a BPD Police Officer, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 02742..This retroactive civil service seniority date is not intended to provide Mr. Zaiter with any additional pay or benefits including, without limitation, creditable service toward retirement.

Civil Service Commission

/s/ Paul Stein

Paul Stein
Commissioner

By 4-1- vote of the Civil Service Commission (Bowman, Chairman{ AYE}; Ittleman [NO], Camuso [AYE],, Stein [AYE] & Tivnan [AYE], Commissioners) on August 18, 2016.

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

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

David Cortese, Esq. (for Appellant)
Peter Geraghty, Esq. (for BPD)

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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DANIEL ZAITER,
Appellant

v.

G1-16-070

BOSTON POLICE DEPARTMENT,
Respondent

DISSSENT OF COMMISSIONER ITTLEMAN

I concur with the majority that although the Appellant was involved in a couple of horrible events twenty odd years ago when he was in high school, he appears to have redeemed himself as an upstanding long-term member of the Randolph Police Department. As the Commission ruled in a different case, a respondent does not establish reasonable justification for bypass when it relies solely on a criminal record that is nearly three decades old, without a reasonable review of the criminal matters, and without consideration of other appropriate factors. Benevento v. Springfield Fire Department, 25 MCSR 537 (2012).

However, with all due respect to the majority, I cannot conclude, based on the record in the instant case, that the Boston Police Department did not conduct a reasonably thorough review as required under Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 187 (2010), in concert with our decision in Benevento. The record here indicates that the Respondent's investigation was extensive, detailed and well researched, in full satisfaction of the Beverly requirement. For this reason, I dissent.

/s/ Cynthia A. Ittleman