

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

TIMOTHY J. DETERRA,

Appellant

v.

NEW BEDFORD POLICE DEPARTMENT,

Respondent

G1-14-195

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Timothy J. DeTerra, acting pursuant to G.L.c.31,§2(b), appealed to the Civil Service Commission (Commission) from a decision of the City of New Bedford (New Bedford), reviewed and approved by the Massachusetts Human Resources Division (HRD), to bypass him for appointment as a Police Officer with the New Bedford Police Department (NBPD). A pre-hearing conference was held on September 12, 2014 and a full hearing was held on February 13, 2015, both at the UMass School of Law in North Dartmouth.¹ Ten exhibits (1a-1g, 2 through 5, 6a-6g, 7a-7b and 8 through 10) were introduced in evidence and HRD submitted a package of documents by letter (HRD Letter). The hearing was digitally recorded, with copies provided to the parties.² Both parties submitted proposed decisions.

¹ 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.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to use the copy of the CD to provide the court with a written 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:

- NBPD Detective Michael Lopes
- NBPD Lieutenant Ricard Rezendes

Called by the Appellant:

- Timothy J. DeTerra, 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:

Appellant's Background

1. The Appellant, Timothy J. DeTerra, is a New Bedford resident who grew up in the New Bedford area and graduated from the Old Rochester Regional High School in 1992. He currently lives with his girlfriend and their son, Jake. Mr. DeTerra's relationship with his current girlfriend began approximately eight years ago. (*Exhs. 2, 3 & 8; Testimony of Appellant*)

2. Mr. DeTerra also had a son from a prior relationship with a woman with whom he has a history of disputes, mainly over custody issues, which are described in detail in subsequent findings of fact. (See Findings of Fact Nos. 12 through 16, 23 through 38)

3. In 1994, Mr. DeTerra enlisted the United States Marine Corps Reserves and served honorably for six years until he transferred to the Army National Guard and served another four years. In April 2004, he entered active duty with the United Air Force, where he was sent to the Security Forces Academy and trained for his current mission with the Air Force Police Department, stationed at Otis ANG Base in Falmouth. He has been deployed to Iraq three times, most recently in 2010. At all times, his service was honorable. (*Exhs. 2 & 8; Testimony of Appellant*)

4. In March 2014, Mr. DeTerra's job was reclassified from an active duty military position to a civilian title of "Federal Technician Title 5", but his duties and mission did not change. Part of the 2014 reclassification process included an extensive background check and, as a result, his security clearance was upgraded from "Secret" to "Top Secret". (*Testimony of Appellant*)

5. Mr. DeTerra holds a number of special designations and licenses. He holds a license to carry a firearm issued by the NBPD. He is an Air Force Firearms Instructor, Combat Arms Trainer and Drivers Trainer (all motor vehicles from HUMV's to tractor trailers). He holds a CDL license, with bus, passenger, tankers and hazmat endorsements. (*Exh. 2; Testimony of Appellant*)

Appellant's NBPD Application

6. Mr. DeTerra took and passed the civil service examination for municipal police officer administered by HRD on June 15, 2013. His name appeared on the eligible list established on October 15, 2013. (*HRD Letter*)

7. On December 13, 2013, HRD issued Certification #01446 to New Bedford for 18 new permanent full time Police Officers for the NBPD. Mr. DeTerra's name appeared 14th of those who signed willing to accept, tied with two other candidates. (*Exh. 1e; HRD Letter*)

8. Mr. DeTerra completed a standard 24-page NBPD form of Employment Application, together with a five-page Personal History Questionnaire containing approximately 100 questions covering a variety of topics, including personal history, Employment history, Financial history, Motor Vehicle History, Organizations, Weapons Permits, Military Service, Criminal History, Licenses, Drug Use, and References, as well as releases to obtain personal, employment, credit and CORI information from third parties. (*Exhs. 2 & 3*)

9. In his Employment Application, Mr. DeTerra answered “YES” to Question III.b., which asked if he had ever been “fired or forced to resign because of misconduct or unsatisfactory employment”, and answered Question III.c., that he was not eligible for rehire, referencing that he had been “let go” from a job in 2004. He also answered “YES” to Question VI.i. regarding c.209A restraining orders and cited the Docket Numbers of two cases in 6/8/92 and 7/13/04. (Exh. 2)

10. In his Personal History Questionnaire, Mr. DeTerra answered “YES” to approximately 25 questions, including:

- Have you ever been terminated from a job?
- Have you ever received a reprimand from work?
- Have you broken any company rule?
- Have you ever had a traffic accident?
- Have you ever been given a traffic ticket?
- Have you ever been required to attend any (remedial) driver training class?
- Have you ever driven a car that was not properly registered/insured?
- Have you ever been the subject of any military discipline?
- Did you ever violate any military rule, procedure or order?
- Were you ever given a verbal or written reprimand while in the service?
- Have you ever been the subject of a restraining order, stay away, no contact, refrain from abuse, or similar order?
- Have you ever been detained by a law enforcement officer, game warden, animal control officer or military police officer?
- Have you ever been given an infraction ticket or misdemeanor summons for a non-motor vehicle offense?
- Have you ever hit another person in anger or been in a fight as an adult?
- Have you ever been the subject of any restraining/protective order?
- Have you ever been with someone when they committed a crime?
- Has anyone ever accused you of committing a crime?
- Is your name in a case report file with any police department or law enforcement agency that you are aware of?
- While in school were you ever the subject of school sanctioned discipline?
- Have you ever been in the presence of someone using or possessing any drug?

(Exh.3)

11. Mr. DeTerra answered “NO” to an Employment Application question: “Has your driver’s license in this state, or any other state, ever been suspended or revoked?” He answered

“NO” on the Personal History Questionnaire: “Have you ever had a driver’s license suspended or revoked?” (*Exhs. 2 & 3*)

NBPD Background Investigation

12. Det. Michael Lopes, a nine year veteran of the NBPD, was assigned to perform a full background investigation on Mr. DeTerra. As part of Det. Lopes’ investigation:

- He verified Mr. DeTerra’s New Bedford residency.
- He conducted a telephone interview with his prior landlords from 2004-2009: (a) A.R., “who is the applicant’s current girlfriend and [their] child’s mother [who] stated he was a great tenant . . . the rent was never late and that he kept the apartment and property clean”;³ and (b) an interview with D.A., who stated “the applicant was a model tenant.”
- He interviewed Mr. DeTerra’s three references, all of whom were law enforcement officers: (a) A Massachusetts State Trooper who had known Mr. DeTerra for 17 years and described him as “mature” and “respectful . . . with everyone” and “would make a great” police officer; (b) a New Bedford Police Officer who had known Mr. DeTerra for 20 years and described him as “very trustworthy” and a “hard worker”; (c) a Brockton Police Officer who also worked with Mr. DeTerra in the National Guard and called him “reliable and trustworthy” and a “good father to his two sons and a good boyfriend to. . .[A.R.]”. All references said Mr. DeTerra did not drink or do drugs and was known as a safe and courteous driver who served as the “designated driver on several nights out.”
- He spoke to Mr. DeTerra’s current supervisor at Otis Air Force Base who stated that Mr. DeTerra “goes above and beyond to do his job”, “has never heard anything negative” about him, and thought he “would be a great police officer confirmed that Mr. DeTerra was a firearms instructor.”
- He made attempts to contact all of the former employers listed on Mr. DeTerra’s Employment Applications back to 1990, but most employers did not respond or reported that they did not keep records dating back to his time of employment.
- He procured an RMV Driver History which listed numerous infractions, including several license suspensions, during a period from 1991 through 1999.
- He procured a Criminal History (BOP) which listed the following arraignments:
 - 06/08/92 – Abuse Prevention Act
 - 12/21/92 – Disorderly Person/Assault & Battery (three counts)
 - 10/05/94 – Compulsory Insurance Violation
 - 11/10/95 – Larceny [over \$250]/Malicious Destruction of Property (two counts)
 - 04/23/97 – Compulsory Insurance Violation/Attaching Wrong Plates
 - 05/01/00 – Assault & Battery

³ Mr. DeTerra moved into the condominium owned by A.R. and had paid her rent. (*Testimony of Appellant*)

- He procured the following police incident reports:
 06/08/92 – Rochester: Arrest for Harassment/Violation of 209A order
 04/28/00 – Fall River: Arrest for Assault & Battery [re: 05/01/00 arrest on BOP]
 07/10/01– NBPD: Ex-girlfriend reported child visitation dispute [No charges]
 08/27/02 – NBPD: Ex-girlfriend reported child visitation dispute [No charges]
 01/05/04 – NBPD: Acquaintance reported alleged B&E & Theft [No charges]
 06/11/11– NBPD: Ex-girlfriend reported child visitation dispute [No charges]
 11/25/11 – NBPD: Appellant’s tenant reported alleged property damage [No charges]
 09/10/13 – NBPD – Ex-girlfriend reported she had argument with Appellant [No charges]
- He procured a copy of a 209A Abuse Prevention Order entered on July 13, 2004 obtained by Mr. DeTerra’s ex-girlfriend, prohibiting contact with her and their son, modified on July 29, 2004 to allow Mr. DeTerra visitation rights with his son, and vacated on July 29, 2005 when no one appeared on expiration date.
- He interviewed Mr. DeTerra’s ex-girlfriend, who was “very reluctant to speak” and “had nothing positive to say.” She said she doesn’t speak to him and he only calls on their son’s cell phone. She mentioned one incident of alleged abuse when she was pregnant and the 2000 arrest.

(Exhs. 4, 5, 6a-6g, 7a-7b & 8; *Testimony of Lopes & Rezendes*)

13. Detective Lopes submitted a written report dated 11/20/2013 containing his findings and conclusions to his supervisor, Lt. Ricard Rezendes, which stated, in relevant part, the following:

“ . . . DeTerra has 12 adult arraignments on his BOP [sic] it shows 1 restraining order as well. Deterra also has a past driver’s history that is checkered . . . he has had multiple infractions from speeding to no liability insurance. There are also infractions for attaching wrong plates, failure to obey police and a suspended license.”

“ . . . [T]he personal history questionnaire . . . asked if you have ever had your driver’s license suspended or revoked. This question also appears on the job application as well. The applicant answers no to this question on both . . . The applicant’s license was suspended on 07/26/94; this was verified by correspondence with the registry of motor vehicles⁴. . . It is my opinion that the applicant was not forthcoming on the questionnaire about his license being suspended.”

“The applicant has had domestic issues . . . with his older son’s mother. . . [who] stated that the applicant had a bad temper especially when things didn’t go his way.”

“The applicant also was the subject of a 209A order in 1992 in which he was arrested . . . The applicant was 18 at the time . . . The applicant also has other domestic reports on file with this department. One as recent as of 2013, in which he traveled to his ex-girlfriends and got into an altercation. . . .

(Exh. 8; *Testimony of Lopes*)

⁴ The RMV confirmed that the 7/26/94 suspension was due to “non-payment of a citation” and the license was reinstated on 8/19/94 when he paid the fine. (Exh. 4)

14. New Bedford is a “Consent Decree Community” under the so-called “Castro Decree”, which requires that, in appointment of Police Officers, preference in hiring be given to certain minority candidates (by seeding them on the Certification one for every three non-minority candidates) and also requires that HRD review and approve all bypass decisions prior to an appointment of other candidates. Mr. DeTerra is not a qualified non-minority candidate under the Castro Decree. (*HRD Letter; Administrative Notice [See “Police Officer Appointments—Consent Decree, <http://www.mass.gov/anf/employment-equal-access-disability/civil-serv-info/guides-and-publications/police-info/>]; Testimony of Rezendes*)

15. New Bedford appointed eighteen candidates from Certification #01446 (three qualified minority candidates and fifteen others), including three ranked above Mr. DeTerra (one a minority), two NBPD cadets⁵, and thirteen other candidates from tie groups 16 through 26 (two were minority) ranked below Mr. DeTerra on the Certification. (*Exh. 1g; HRD Letter*)

16. By letter to HRD dated March 26, 2014, drafted by Lt. Rezendes, New Bedford Mayor Jonathan E. Mitchell detailed the following three reasons for deciding to bypass Mr. DeTerra:

“False Information Provided.” . . . The following question was answered falsely by the applicant: “Has your license ever been suspended?” . . . The applicant answered “NO”. Investigators confirmed thru the Registry of Motor Vehicles that the applicant did have his license suspended on 7/26/94 for non-payment of a citation. The applicant’s license was reinstated on 8/19/94.”

Prior Domestic Related Concerns. . . . A records check on the applicant found several reported incidents in which the applicant has been involved in domestic related disputes. Of notable concerning [sic] is the following:

- On September 10, 2013. . . A report was filed concerning a domestic related disturbance between the applicant and his son. During the argument the applicant allegedly told his son that the argument would end . . . “*when we get to blows.*”
- On June 11, 2011. . . applicant was involved in a dispute with his ex-wife’s live-in boyfriend. In the report it stated that the applicant drove to his ex-wife’s residence for the sole purpose of causing a disturbance and to have a confrontation with her boyfriend. A police report was filed on the incident.

⁵ By virtue of special legislation, candidates who have completed the NBPD cadet program and have passed the civil service examination for Police Officer also receive preference in hiring. See G.L.c.147,§21A; St.1979, c.639.

- On July 13, 2004 . . . applicant was served with a 209A restraining order. The plaintiff in this order was the applicant's ex-girlfriend.
- On August 27, 2002, a Police report was filed on the applicant after he was involved in a domestic disturbance with his ex-girlfriend. The disturbance involved a custody issue. . . . [T]he applicant allegedly became "Very Angry" with his ex-girlfriend who as a result, called the police. No charges were sought.
- On July 10, 2001 a police report was filed as a result of the applicant threatening his ex-wife over the phone. He allegedly told his ex-wife over the phone that he would . . . "Kick her ass" if she didn't let [sic] have visitation with her son.
- On April 28, 2000, the applicant was arrested by Fall River Police following a domestic disturbance in the parking lot of a restaurant. The applicant was arrested for assaulting his girlfriend after an argument.
- On June 7, 1992 the applicant was arrested by the Rochester Police Department for Violation of a 209A protective order.

Prior Criminal Arraignments . . . [T]he applicant has been arraigned as an adult numerous times. The applicant has never been convicted of any crime and the criminal matters were all later dismissed, however, the nature of the charges are of concern to investigators. The charges included criminal motor vehicle violations, incidents involving Assault and Battery charges and also a violation of a Restraining Order.

(*Exh. 9b*) (emphasis in original)

17. Prior to drafting the March 26, 2014 letter, Lt. Rezendes reviewed Det. Lopes's report and the documents he procured as part of his investigation. (*Testimony of Rezendes*)

18. By letter dated November 3, 2014, HRD informed Mr. DeTerra that HRD had determined that the reasons stated in Mayor Mitchell's letter are "acceptable for bypass" and informed him of his right to appeal the bypass decision to the Commission. (*HRD Letter*)

19. This appeal duly ensued. (*Exh. 10; Claim of Appeal*)⁶

Details Concerning the 1994 License Suspension

20. At the time Mr. DeTerra completed his NBPD Employment Application and Personal History Questionnaire, he did not remember that his license had been suspended in 1994. Prior to

⁶ NBPD previously drafted a letter to Mr. DeTerra informing him of the contents of Mayor Mitchell's letter to HRD, but that letter to Mr. DeTerra was never sent. After learning through other sources that the NBPD had hired others ranked below him, Mr. DeTerra filed this appeal in August 2014, prior to having been informed of the actual reasons for his bypass. (*Exh. 9a; Testimony of Appellant; Rezendes*) Although the appeal was technically premature, neither party has protested these procedural issues and Commission treats the appeal as timely and appropriate for a decision on the merits.

filling out his application, he did have a copy of his RMV Driver History and reviewed it together with a friend on the NBPD (whose name was not mentioned, but I infer it was the same officer he used as a reference). Neither of them understood that any of the entries meant he had ever actually lost his license. Lt. Rezendes agreed that the RMV Driver History is “confusing” and not “easy to read”. Even Lt. Rezendes needed to write to the RMV for an interpretation of the entries on the Driver History in order to determine whether or not Mr. DeTerra’s license actually had ever been suspended and, if so, when and how often. (*Exh. 4; Testimony of Appellant & Rezendes*)

21. Prior to this appeal, Lt. Rezendes had told Mr. DeTerra that one of the reasons he was bypassed was the failure to disclose a July 1994 license suspension, and he remembered that Mr. DeTerra looked “puzzled”. I also note that Det. Lopes agreed it was “fair” to assume that Mr. DeTerra had, in fact, just “forgotten” about that suspension twenty years earlier. (*Testimony of Lopes & Rezendes*)

22. The failure to disclose the 1992 license suspension was not the “sole reason” for deciding to bypass Mr. DeTerra but his alleged untruthfulness evidenced by the omission was a part of the “totality of the circumstances” that led to the decision that he was not a suitable candidate to be hired as a NBPD police officer. (*Testimony of Rezendes*)

Details Concerning the 1992 Restraining Order

23. The only information concerning the 1992 restraining order available to the NBPD was a June 1992 arrest report from the Rochester Police Department faxed to Det. Lopes. No further investigation of the incident was made. (*Exh. 6g; Testimony of Lopes*)

24. The restraining order itself was never produced, but Mr. DeTerra agreed that he had been under such an order and had disclosed it in his application. At the time, Mr. DeTerra was a high

school senior who had been dating another Rochester student with whom he still maintains a friendship. The order was initiated by the girl's parents who objected to Mr. DeTerra's dating their daughter and who preferred that she date an acquaintance that her brother wanted her to meet. When Mr. DeTerra came to the graduation ceremony at his girlfriend's school (also in Rochester where they each had mutual friends), the parents had him arrested. The Rochester Police Report confirms that the arrest took place at 1:30 p.m. on June 7, 1994, at the "Old Colony VoTech H.S." and the narrative of the report confirms that all the information about the alleged subsequent "harassment" at several house parties later that evening, which Mr. DeTerra denied, was based entirely on hearsay statements provided by the young woman's father. I note that Mr. DeTerra was not released from custody until the following day. (*Exh. 4; Testimony of Appellant*)

25. The charges for violation of the abuse prevention order were never prosecuted and eventually were dismissed. (*Exh. 5*)

Details Concerning the 2000 Arrest for Assault and Battery

26. On April 28, 2000, Mr. DeTerra's relationship with his prior girlfriend had deteriorated and he had moved out of her apartment and was living on his own. A friend suggested they double-date with two women he knew and they went to the 99 Restaurant in Fall River. The ex-girlfriend appeared at the restaurant and saw Mr. DeTerra. (*Exh. 6f; Testimony of Appellant*)

27. The Fall River Police were dispatched and found Mr. DeTerra and the ex-girlfriend outside the restaurant, along with several others. The police were not percipient witnesses to any of the altercation. The police incident report recounted that, the ex-girlfriend stated that, she had gone to the restaurant to attend a friend's birthday party and, when she attempted to leave the restaurant, Mr. DeTerra blocked her car from exiting, shoved her, took away her car keys,

removed the fuses from the car and chased her around her sister's car (whom she had called to come to her aid). According to the police report, Mr. DeTerra "told me almost the same story except leaving out the parts where he assaulted [the ex-girlfriend]." Mr. DeTerra was arrested, taken into custody and arraigned on May 1, 2000 on a charge of Assault & Battery. (*Exh. 6f*)

28. Mr. DeTerra's recollection of the incident departed significantly from the police report which he claimed was not accurate "in parts". He admitted to the verbal argument but denied any physical assault or violence. (*Testimony of Appellant*)

29. None of the witnesses present, neither those in the company of Mr. DeTerra nor those in the company of the ex-girlfriend, reportedly present according to the Fall River Police incident report provided statements to the Fall River Police. (*Exh.6f; Testimony of Rezendes*)

30. The ex-girlfriend was advised of her rights under Chapter 209A but declined to seek a restraining order. On August 4, 2000, the assault & battery charges were dismissed. (*Exh. 5*)

Details Concerning the 2004 Restraining Order

31. In July 2004, Mr. DeTerra's son related an incident that caused Mr. DeTerra to file a report to the Department of Social Services (DSS) that his son had been sexually abused, which prompted DSS to initiate an investigation. Shortly thereafter, the ex-girlfriend filed an abuse prevention complaint against Mr. DeTerra. Mr. DeTerra did not object to the order to stay away from the ex-girlfriend. He did arrange to have the order modified so that it did not prevent such visitations. He was preparing for an August 1, 2004 deployment to Iraq and would only see her when he returned and came to pick up his son. H returned to New Bedford on or about January 3, 2005. The order was vacated after one year when no one appeared at the hearing to request an extension. No violation of the order was reported at any time it remained in effect. (*Exhs 5 & 6c: Testimony of Appellant*)

Details Concerning the Other Arraignments on Mr. DeTerra's Criminal History (BOP)

32. Four other incidents appear on Mr. DeTerra's BOP involving arraignments from the 1990s: December 1992 charges of Disorderly Person and three counts of Assault & Battery; an October 1994 charge of Compulsory Insurance Violation, November 1995 charges for Larceny (Above \$250) and Malicious Destruction of Property; and April 1997 charges for a Compulsory Insurance Violation/Attaching Wrong MV Plates. The only information about these three other incidents is contained in the BOP. The NBPD conducted no further investigation into any of them. (*Exh. 5; Testimony of Lopes & Rezendes*)

33. None of these incidents resulted in a conviction. The December 1992 Assault and Battery charges were dismissed in January 1993; the Disorderly Person charge was continued without a finding and dismissed in February 1993. The 1994 Insurance Violation charge was dismissed (no date indicated). The April 1997 Insurance Violation/Attaching Wrong MV Plates was continued without a finding and dismissed in August 1997. The 1995 Larceny and Malicious Destruction charges were continued without a finding and dismissed in March 1999. (*Exh. 5*)

Details of Other NBPD Incident Reports

34. NBPD relied on four Incident Reports which involved disputes between Mr. DeTerra and his ex-girlfriend related to visitation issues with their son. None of these incidents resulted in any criminal charges or abuse prevention complaints. Lt. Rezendez described these incidents as "he said/she said" situations and there are "always two sides." The complaints were of concern, in and of themselves, however, because it confirmed to Lt. Rezendes that Mr. DeTerra was someone with a "track record" of domestic issues. (*Exhs. 6a, 6b, 6d & 6e; Testimony of Rezendes*)

35. The July 10, 2001 Incident. The NBPD responded to a call from the ex-girlfriend in the parking lot of a hardware store. She recounted that Mr. DeTerra had come to her home and taken his son which she didn't want him to do. The responding officer, assisted by another officer from the domestic affairs unit, located Mr. DeTerra with his son walking to a park where had planned to play with the boy for about 45 minutes and then return him to his mother. The domestic officer reported that she "felt that [the son] was in good hands with the father. Timothy DeTerra was cooperative with her and the child appeared to be happy that he was going to play on the swings at the park." The report indicates that the reviewing officer sought a summons against Mr. DeTerra charging him with threats to commit a crime for telling the ex-girlfriend over the telephone he would "kick her ass if she did not let him see her son." There is no evidence that any such summons was actually requested but, if it had been, it must have been denied at the clerk/magistrate's level for lack of probable cause. (*Exh. 6e; Testimony of Rezendes*)

36. The August 27, 2002 Incident. The NBPD responded to the ex-girlfriend's residence who stated that she had a custody dispute with Mr. DeTerra who had come to pick up his son and, when she refused to let him, he became "upset" and "very angry" so she called the police. Mr. DeTerra left shortly thereafter. The report was filed with "No warrants to either party" and "No offenses associated to this report." (*Exh. 6d*)

37. The June 11, 2011 Incident. The NBPD responded to the ex-girlfriend's home who recounted that she had gone to Mr. DeTerra's residence to pick up her son and was told he was not ready and, after waiting for several minutes, she began to honk her horn. This caused a disturbance that brought neighbors out of their homes. After the boy left, Mr. DeTerra went to the ex-girlfriend's house. When he arrived, she refused to come out of the house and

Mr. DeTerra got into a verbal argument outside the apartment with the ex-girlfriend's current boyfriend, who ordered Mr. DeTerra to leave, which he did. After Mr. DeTerra was interviewed the following morning and the incident report was filed with the Status: "No Crime Involved". (*Exh. 6b; Testimony of Appellant*)

38. The September 10, 2013 Incident. The ex-girlfriend came to NBPD headquarters to report that her son (now a young teen) had called her from Mr. DeTerra's residence after having an argument with his father. According to the ex-girlfriend, Mr. DeTerra had bought his son some movies but told the boy he would not be allowed to watch them until he got onto the track team. The son protested and got into a verbal argument with his father who said "this is going to end when we get to blows." Mr. DeTerra then left for work and the boy called his mother to come pick him up. The report was filed "No Crime Involved". Mr. DeTerra was never interviewed at the time. (*Exh. 6a*)

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 if the candidate should have been bypassed. Rather, the Commission determines whether, by a preponderance of evidence, the decision 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) [“Beverley”] See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991) (appointing authority must establish, by a preponderance of evidence, that the reasons assigned to justify the bypass were “more probably than not sound and sufficient”); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (same)

“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.’ ” 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 selecting public employees of skill and integrity, appointing authorities are vested with a certain degree of discretion. City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997). In deciding “whether there was reasonable justification” shown for an appointing authority’s exercise of discretion, the Commission's primary concern is to ensure that the 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); Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 188 (2010);

City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997); MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635 (1995), rev.den., 423 Mass. 1106 (1996); 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.” G.L.c.31,§1.

The commission, however, is not required to find that the appointing authority acted “arbitrarily and capriciously.” Rather, the governing statute, G.L.c.31,§2(b), gives the commission broad “scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground.” City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997). Although it is not within the authority of the commission “to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority”, when there are “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.” Id. (*emphasis added*)

ANALYSIS

The NBPD’s decision to bypass Mr. DeTerra is not reasonably justified to the extent it relies on his alleged one false answer to a question asked in the application process and upon the mere fact that he has a prior criminal history. As to the domestic abuse and related other aspects of Mr. DeTerra’s background, however, that pattern of behavior provides reasonable justification for the bypass decision. Although it would have been preferable that the Appointing Authority had produced evidence to show that the bypass was made after a through review of all of Mr. DeTerra’s qualifications, both positive and negative, after they had been presented to and

weighted by the actual decision-maker (i.e. the Mayor of New Bedford who is the legally authorized Appointing Authority), under the circumstance of this case, the negative behavior shown by the preponderance of the evidence is sufficient to warrant the NBPD's conclusion that Mr. DeTerra is an unsuitable risk, despite those positive attributes.

False Information on the Application

The duty imposed upon a police officer to be truthful is one of the most serious obligations he or she assumes. An officer who has a demonstrated record of untruthfulness may compromise the officer's ability to serve as a credible witness in the prosecution of a criminal case. See generally, United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976), citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). See also Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985).⁷ In addition, any Appointing Authority is well within its rights to take disciplinary action when a police officer has "a demonstrated willingness to fudge the truth in exigent circumstances" because "[p]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer." Falmouth v. Civil Service Comm'n., 61Mass. App. Ct. 796, 801 (2004) citing City of Cambridge v. Civil Service Comm'n., 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) ("The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances

⁷It bears notice that the Commonwealth's jurisprudence has taken a somewhat different path in the type of exculpatory evidence that must be disclosed in a criminal prosecution and, in particular, evidence "beyond information held by agents of the prosecution team", including, in particular, internal affairs investigatory material, does not generally come within the sweep of the "Brady" test, but is subject to other, stricter rules. See, e.g., MASS.R.CRIM.P. 14(a)(1)(A); Commonwealth v. Laguer, 448 Mass. 585 (2007); Commonwealth v. Tucceri, 412 Mass. 401 (1992); Commonwealth v. Daye, 411 Mass. 719 (1992); Commonwealth v. Gallerelli, 399 Mass. 17 (1987); Commonwealth v. Wilson, 381 Mass. 90 (1980) See also Commonwealth v. Wanis, 426 Mass. 639, 643-44 (1998); Reporter's Notes – Revised, 2004, *Subdivision (a)(1)(A)*, MASS.R.CRIM.P. 14(a)(1)(A); Commonwealth v. Thomas, 451 Mass. 451 (2008)

was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.”) See, e.g., Desmond v. Town of West Bridgewater, 27 MCSR 645 (2014); Ung v. Lowell Police Dep’t, 24 MCSR 567 (2011); Gallo v. City of Lynn, 23 MCSR 348 (2010).

Likewise, an Appointing Authority is well within its rights to bypass an individual for “purposefully” fudging the truth as part of an application process for the position of police officer. See, e.g., Minoie v. Town of Braintree, 27 MCSR 216 (2014) (multiple omissions about prior domestic abuse restraining orders and residences); Noble v. Massachusetts Bay Trans. Auth., 25 MCSR 391 (2012) (concealing suspension from school for involvement in criminal activity); Burns v. City of Holyoke, 23 MCSR 162 (2010) (claiming he ‘withdrew’ from another law enforcement application process from which he was actually disqualified) Escobar v. Boston Police Dep’t, 21 MCSR 168 (2008) (misrepresenting residence)

The corollary to the serious consequences that flow from a finding that a police officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. See, e.g., Boyd v. City of New Bedford, 29 MCSR --- (2016) (honest mistakes in answering ambiguous questions on NBPD Personal History Questionnaire); Morley v. Boston Police Dep’t, CSC No. G1-16-096, 29 MCSR --- (2016) (candidate unlawfully bypassed on misunderstanding appellant’s responses about his “combat” experience); Lucas v. Boston Police Dep’t, 25 MCSR 420 (2012) (mistake about appellant’s prior medical history)

In the present appeal, Mr. DeTerra established that the allegedly untruthful responses on his application which were the sole reason for his bypass were not purposeful omissions designed to

“fudge the truth” or conceal something negative in his record. The only allegedly false answer provided in the entire application was his answer “NO” to the question on the Personal History Questionnaire about whether his driver’s license had ever been suspended. His negative answer to that question was incorrect, but it does not raise any legitimate doubt about his truthfulness, which is thoroughly and credibly established through all other aspects in the application packet, which includes the facts that Mr. DeTerra is a combat veteran and has been employed as a member of the Air Force Police and currently holds a “Top Secret” security clearance. In addition, the preponderance of the evidence presented at the Commission hearing confirmed that Mr. DeTerra took care to answer the question involved, along with all other questions. When he was first apprised by Lt. Rezendes that his answer was wrong, Mr. DeTerra was truly “puzzled”. Det. Lopes agreed that it was reasonable to assume that Mr. DeTerra truly had forgotten about the suspension nearly twenty years earlier and honestly believed that he had never actually lost his license. This honest mistake does not rise to the level of prevarication that may properly serve as a basis for “reasonable justification” to bypass Mr. DeTerra.

Prior Criminal Arraignments

The NBPD bypass letter states that Mr. DeTerra “has never been convicted of any crime and the criminal matters were all later dismissed” but “the nature of the charges are of concern to investigators.” The NBPD cites incidents in which Mr. DeTerra had been criminally charged with “motor vehicle violations”, “Assault and Battery” and a “violation of a Restraining Order.”

The Commission is mindful that “[p]olice officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Attorney General v. McHatton, 428 Mass. 790, 793 (1999). See also McIssac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 475 (1995) (“An officer of the law carries the burden of being expected to comport himself or herself

in an exemplary fashion.”); Police Comm’r v. Civil Service Comm’n, 22 Mass.App.Ct. 364, 371, rev.den., 398 Mass. 1103 (1986) (“Police officers . . . are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather they compete for their positions. In accepting employment . . . they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.”)

An appointing authority is afforded considerable discretion to bypass a candidate whose checkered-past can reasonably be found to present a continued, unacceptable present risk of misconduct that an appointing authority should not be required to take. See City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189-90 (2010) [“Beverly”]. See also Town of Reading v. Civil Service Comm’n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914,(2004) (rescript opinion); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305 (1997); Massachusetts Dep’t of Corrections v. Anderson, Suffolk Sup. Ct. No. 2009SUCV0290 (Memorandum of Decision dated 2/10/10), reversing Anderson v. Department of Correction, 21 MCSR 647, 688 (2008).

That discretion, however, is not absolute or unreviewable by the Commission. An appointing authority may rely on information, including allegations of misconduct obtained from third-party sources, as the basis for bypassing a candidate, provided it was lawfully obtained and subjected to an “impartial and reasonably thorough” independent review. See Beverly.78 Mass.App.Ct. 182, 189 (2010). Although an appointing authority is not required “to prove to the commission’s satisfaction that the applicant in fact engaged in the serious alleged misconduct”, there must be a “credible basis for the allegations” that present a “legitimate doubt” about a candidate’s present suitability, Id., 78 Mass.App.Ct. at 189-90.

Although a criminal conviction is not necessarily a prerequisite to taking account of facts that tends to establish that a candidate has a history of prior misconduct, the mere “nature” of charges brought, alone, do not provide the necessary foundation to justify a bypass. In the one incident that the NBPD took any steps to investigate was the alleged violation of a June 1992 abuse prevention order for attending a high school graduation ceremony where his girlfriend was present, a matter that was never prosecuted. Similarly, the NBPD had no information about any other criminal charges except what appeared on the BOP report run during the application process, all of which also occurred decades earlier and all were dismissed. The NBPD did not obtain any information about the actual underlying facts associated with these charges which, in this case, are so old that the underlying facts may well be unknowable. Rather, NBPD was relying entirely on the singular fact that charges had been filed. In this respect, the NBPD’s use of Mr. DeTerra’s record of arraignments, alone, does not represent a “credible basis for the allegations” that present a “legitimate doubt” about Mr. DeTerra’s present suitability and cannot form the basis of a “reasonable justification” for his bypass. See, e.g., Gore v. Department of Correction, 27 MCSR 582 (2014); Conner v. Department of Correction, 27 MCSR 556 (2014) (DALA Magistrate’s decision, adopted by the Commission, analyzing the requirements of a “reasonable review” in detail, with specific reference to the recent “sweeping changes in the CORI law” and the Governor’s Executive Order No. 495 regarding agencies use of CORI information See G.L.c.6,§171A, St.2010, c. 256; Exec. Order No. 495 (Jan. 11, 2008) (a CORI record “should not be an automatic and permanent disqualification for employment”); 803 CMR 2.17 (notice to applicant is now required prior to taking adverse employment action)

Prior Domestic Related Concerns

The NBPD's reliance on Mr. DeTerra's history of domestic-related disputes does provide a reasonable justification for his bypass. The record of his relationship with his ex-girlfriend is well-documented and NBPD's investigation did seek to ascertain the underlying facts involved. The most serious incidents occurred in 2000, when Mr. DeTerra was charged with Assault and Battery, and in 2004 when Mr. DeTerra's ex-girlfriend obtained a domestic abuse restraining order against him. Mr. DeTerra asserted plausible explanations for his conduct in both cases. I found his testimony at the Commission hearing on this subject largely credible, particularly as to the fact that the 2004 restraining order was taken out after Mr. DeTerra had made a report of child abuse to the DSS. The opinion of one of the investigating officers regarding the July 2001 incident when Mr. DeTerra had taken his son for a visit to a neighborhood park, actually support his good behavior as a father. Had there been nothing else, I would be inclined to conclude that these rather old incidents do not justify a present concern for a "track record" of domestic-related violent behavior.

However, the conflict between Mr. DeTerra and his ex-girlfriend did not end in 2004. It erupted twice more, in 2011 and again as recently as 2013. Although neither of these more recent incidents resulted in any charges or call for police assistance, I agree that the NBPD is justified to consider them in assessing whether Mr. DeTerra is a suitable candidate.

The NBPD contends that Mr. DeTerra's record of domestic issues was only one of the factors in the "totality of the circumstances" that led to the decision to bypass Mr. DeTerra, along with its "concerns" for his other criminal history and his alleged false answer to one of the questions in his application packet. Nevertheless, in the circumstances of this case, Mr. DeTerra's pattern of domestic-related issues alone, which includes a one-year restraining order and a credible

charge of assault and battery, together with the evidence of a continuing pattern of conflict, is sufficient to establish that there is reasonable justification to conclude that Mr. DeTerra remains an unsuitable risk for appointment to the NBPD.⁸

CONCLUSION

For all of the above stated reasons, the bypass appeal of Timothy J. DeTerra, under Docket No. G1-14-195 is *dismissed*.

Civil Service Commission

/s/ Paul Stein

Paul Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein & Tivnan, Commissioners) on October 27, 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:

Jenessa E. Gerard-Pateakos, Esq. (for Appellant)

Jane Medeiros Friedman, Esq. (for Respondent)

John Marra, Esq. (HRD)

⁸ Had this been a closer case, I believe that it would have been useful for New Bedford to have made it clear that Mr. DeTerra's bypass decision was based on a reasonably thorough review of all of his credentials, both positive and negative, by the actual Appointing Authority (i.e., the Mayor of New Bedford), which, in this case, included an unblemished career as a military police officer with a current "Top Secret" clearance and numerous positive references from law enforcement personnel, as opposed to what appears to have been a process in which the Mayor was presented with a draft bypass letter which only stated the negative reasons for the bypass. That process seems to have provided the actual Appointing Authority (or even the NBPD Command Staff) a limited opportunity to fairly assess these negative facts together with the "totality" of the positive circumstances bearing on Mr. DeTerra's suitability before exercising the judgment to bypass him in favor of a lower ranked candidate. See generally, Zaiter v. Boston Police Dep't, CSC No. G1-16-70, 29 MCSR --- (2016); Rousseau v. Department of Correction, 27 MCSR 457 (2014).