

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

CHRISTOPHER BARBOSA,

Appellant

v.

G1-15-34

NEW BEDFORD POLICE DEPARTMENT,

Respondent

Appearance for Appellant:

Christopher T. Saunders, Esq.
700 Pleasant Street, Suite 520
New Bedford, MA 02740

Appearance for Respondent:

Jane Medeiros Friedman, Esq.
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Commissioner:

Paul M. Stein

DECISION

The Appellant, Christopher Barbosa, acting pursuant to G.L.c.31,§2(b), appealed to the Civil Service Commission (Commission) from the 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 March 27, 2015 and a full hearing was held on July 21, 2015, both at the UMass School of Law in North Dartmouth.¹ Ten exhibits (1a-1g, 2a-2f, 3, 4, 5a-5g, and 6 through 10) were introduced into evidence. 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 Lieutenant Ricard Rezendes

Called by the Appellant:

- Christopher Barbosa, 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. The Appellant, Christopher Barbosa, is a New Bedford resident of Cape Verdean descent who grew up in New Bedford and graduated from New Bedford High School in June 2003. He purchased a home in 2008 with his current domestic partner and lives there with his son and a step-son. He is one of seven siblings, including a brother who is an NBPD Police Officer and two sisters who are correction officers. (*Exhs. 2a, 2b, 2c, 3, 4 & 6: Testimony of Appellant*)

2. Since April 2012, Mr. Barbosa has been employed by the State of Rhode Island as a Correction Officer. He holds a license to carry a firearm issued in 2012 through the NBPD. From 2005 to the present, Mr. Barbosa also worked a second job for South Coast Hospital Group, initially part-time, then full-time and, for the past four or five years, as a per-diem contractual employee, (*Exhs. 2a, 2c, 3 & 6; Testimony of Appellant*)

Appellant's 2003 Criminal Record

3. On December 13, 2003, Mr. Barbosa spent the afternoon and evening in Dartmouth, MA, riding as a passenger in a motor vehicle rented by and operated by his cousin. Until recently, Mr. Barbosa had not socialized with his cousin, whom he knew had a criminal record and was "always in and out of prison." Over the summer after he graduated from high school, he saw his

cousin at family events and began to spend more time to “try to get to know him better.” (*Exh. 2f; Testimony of Appellant*)

4. On the day in question, Mr. Barbosa’s cousin had picked him up about 3 or 4 P.M. At approximately 10 P.M., they were proceeding west along State Road (Route 6) in Dartmouth, a four lane divided highway).³ Mr. Barbosa’s cousin turned the car into a cut-off and continued in a westerly direction on the eastbound side (wrong way) of the road, to reach his destination, a motel located on the eastbound side of the highway. (*Exh. 2c: Testimony of Appellant*)

5. A Dartmouth Police Officer, whose cruiser had been parked in the entrance to the motel, spotted the traffic violation, pulled behind the vehicle and activated his overhead lights. Mr. Barbosa’s cousin continued a short distance, entered the motel parking lot and parked the car directly in front of the motel’s room #186. The motel is known by the Dartmouth Police Department as a location for drug-dealing. (*Exh. 2c*)

6. After the Dartmouth Police Officer approached the driver’s side of the car, he identified the operator and immediately smelled a “very strong odor of marijuana” and spotted other material consistent with marijuana use, and called for back-up. After the back-up officer arrived, the initially responding officer pat-frisked Mr. Barbosa and found a large amount of cash predominantly in the form of \$20 bills (eventually counted to be approximately \$2,300), along with a key to Capri Motel room #186, which he placed on the front seat of the car. Meanwhile, Dartmouth Police HQ had radioed that the cousin had “an extensive criminal record which included several firearms convictions as well as 94C [drugs]”. The back-up officer pat-frisked

³ Mr. Barbosa testified that he had a very clear recollection of the 2003 incident, but he could not remember exactly where they had been immediately prior to heading to the motel. He indicated that they had been car-shopping but had stopped looking for cars before dark. I take administrative notice that sunset on December 13, 2003 occurred at 4:14 P.M. and darkness descended at 5:54 P.M. (*Testimony of Appellant; Administrative Notice [http://www.almanac.com/astronomy rise/zipcode/02714/2003-12-13]*)

Mr. Barbosa's cousin and discovered he had a "very heavy and thick bulge in all 4 pockets", interrupted the search and called for additional backup. (*Exh. 2c; Testimony of Appellant*)

7. Mr. Barbosa's cousin fled on foot. Both officers took chase. Mr. Barbosa was left alone. He, too, panicked and fled on foot. Neither man was caught. (*Exh. 2c; Testimony of Appellant*)

8. A search of the car found a bag of marijuana along with a semi-automatic pistol and a loaded large-capacity (approximately 30 round) magazine, the latter wrapped in a towel and tucked under the spare tire. A search of room #186 found additional marijuana, a quantity of cocaine, a digital scale and approximately \$300 of cash. (*Exh. 2c*)

9. Both Mr. Barbosa and his cousin were charged with firearms violations and unlawful possession with intent to distribute illegal drugs. After a bench trial on December 9, 2005, Mr. Barbosa was found "Not Guilty" on all charges. On December 9, 2006, a motion was allowed to return the cash (\$2,651.00) to Mr. Barbosa. (*Exh. 2c: Testimony of Appellant & Rezendes*)

10. Mr. Barbosa admits to smoking marijuana with his cousin and to carrying approximately \$2,000 in cash.⁴ He denies having any knowledge of the firearm in the trunk of the car, denies ever being in the hotel room, and denies ever having possession of the room key. (*Exh. 2f; Testimony of Appellant*)

11. Apart from the 2003 incident, Mr. Barbosa has no other criminal history. (*Exh. 2c*)

Appellant's Driver History

12. From October 2004 through March 2007, Mr. Barbosa's driver's license was suspended three times for having excessive motor vehicle violations. These include four speeding violations, three surchargeable accidents, and four other surchargeable events. (*Exh. 2c*)

⁴ The source of the cash is a matter of dispute. At the interview with Lt. Rezendes, and on cross-examination, Mr. Barbosa stated that he had earned the money while working at Twin River Technologies. In his direct testimony, however, Mr. Barbosa stated that his brother had given him the money. Mr. Barbosa's cousin claimed he had given Mr. Barbosa the money. (*See also Finding of Fact, Nos. 18 & 21*)

13. Since March 2007, Mr. Barbosa has maintained a clean driving record without any at-fault accidents, speeding tickets or other surchargeable events. (*Exh. 2c*)

Appellant's 2012 Application for Appointment to the NBPD

14. Mr. Barbosa first applied to the NBPD for appointment as a Police Officer pursuant to Certification #202611 issued by HRD in 2012. He completed the NBPD's standard 24-page Employment Application and 5-page Personnel History Questionnaire and went through a background investigation conducted by NBPD Lt. Ricard Rezendes. (*Exhs. 2a through 2e; Testimony of Rezendes*)

15. 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 placing 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. (*Exhs. 1e & 10; 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*)

16. Mr. Barbosa qualifies as a minority candidate under the Castro Decree. (*Exhs. 1e & 10*)

17. In the course of the background investigation into Mr. Barbosa's application, Lt. Rezendes contacted Mr. Barbosa's current employer (RI Department of Correction) and obtained a copy of his personnel file. He also contacted other prior employers, references, former girlfriends and neighbors, all of which provided positive opinions of Mr. Barbosa. Lt. Rezendes received responses from six NBPD officers to an internal departmental e-mail he circulated, all of whom indicated they knew Mr. Barbosa and all gave favorable reviews. (*Exh. 2c; Testimony of Rezendes*)

18. Lt. Rezendes made inquiry about the 2003 criminal charges that Mr. Barbosa had disclosed in his application. He obtained the police incident reports and court documents, and conducted an interview with Mr. Barbosa's cousin, then incarcerated at MCI Concord Correctional Center, Concord MA. During that interview, the cousin stated that Mr. Barbosa was aware that he (the cousin) had made a stop during the night in question to pick up a weapon and also stated that he had given Mr. Barbosa a "roll of money and a hotel key" when the officer had gone to call for back-up "so it would look better for him." (*Exh. 2c: Testimony of Rezendes*)

19. Lt. Rezendes made note of a number of discrepancies and omissions that Mr. Barbosa had made in the application process. These included:

- Although Mr. Barbosa did have a valid driver's license, he had attached a copy of an expired license with his application.
- He answered "NO" to the question "Do you personally know any police officers employed with the New Bedford Police Dept." on the Personnel History Questionnaire, although he did state in the Application that his brother was an NBPD police officer (and Lt. Rezendes had received six responses to his internal e-mail from other officers who knew him).
- He omitted listing a residence at which he had resided with a former girlfriend for approximately five months in 2003.
- He failed to mention that he had attended Bristol Community College for two semesters in 2004-2005, failing one course in the Fall Semester and withdrawing from the school in the Spring Semester.
- Mr. Barbosa's list of employers on his NBPD application was different from what he had listed in applications to the RI Department of Correction and the Bristol County Sheriff's Department. His NBPD application had omitted several prior jobs he had held, and the dates of employment shown for most of the employers conflicted with the other applications and with what the employers reported.
- In answer to one question in the Employment Application about other law enforcement positions for which he had applied, Mr. Barbosa listed the Marion Police Dep't, Lakeville Police Dep't, and the Bristol County Sheriff, but left off the Bristol County Sheriff's Office in a similar question on the Personnel History Questionnaire.
- In the section that requests three references "not relatives, in-laws, former or present employers, fellow employee or school teachers", Mr. Barbosa had listed a former supervisor and former or current co-workers from St. Luke's Hospital where was still employed (per diem).

- He answered “NO” to questions on the Personal History Questionnaire that asked if he had ever been “detained” by any law enforcement officer, “ever been with someone when they committed a crime”, and if “anyone ever accused you of committing a crime?”

(Exhs. 2a, 2b & 2c; Testimony of Rezendes)

20. The final step in Lt. Rezendes’s background investigation was an interview with Mr. Barbosa. During this interview, Mr. Barbosa acknowledged that he had not listed all of his prior employment because he thought that he only needed to list “professional” work. He also said that he had used his best memory on employment dates and knew they were not “100%”. *(Exhs. 2c & 2f; Testimony of Rezendes)*

21. As far as the 2003 criminal matter was concerned, Mr. Barbosa stated to Lt. Rezendes that he had no knowledge that his cousin had put a gun in the trunk of the car. He also denied ever having possession of the room key. He stated that the money found on his possession had come from working at Twin Rivers Technologies in Quincy, MA. He disputed the police report statement to the contrary, pointing to other “discrepancies” such as referring to his cousin as his uncle. *(Exhs. 2c & 2f; Testimony of Appellant)*

22. Lt. Rezendes prepared a written report containing the findings of his investigation. He also drafted a letter to be sent to HRD by the Mayor of New Bedford (the Appointing Authority) for approval of the reasons to bypass Mr. Barbosa from appointment in 2012. These reasons included: (1) information missing from Employment Application/dates of employment not accurate that shows poor attention to detail and an inability to follow instructions outlined in employment application; (2) the applicant failed to follow instructions outlined in the employment application regarding References: (3) applicant has an extensive driver’s history [and] applicant’s license has been suspended three times; (4) applicant previously charged with

possession of an illegal firearm and narcotics; (5) applicant falsely answered three questions on the Personal History Questionnaire. (*Exh. 2e; Testimony of Rezendes*)

23. Mr. Barbosa did not appeal from his non-selection in 2012. (*Administrative Notice[Commission Docket]*)

Appellant's 2014 Application for Appointment to the NBPD

24. On June 15, 2013, Mr. Barbosa again took and passed the civil service examination for municipal police officer. His name appeared on the eligible list established on October 15, 2013. (*Exh.10*)

25. On December 13, 2013, HRD issued Certification #01446 for appointment of eighteen (18) permanent, full-time NBPD police officers. (*Exhs. 1a through 1f & 10*)

26. Mr. Barbosa signed Certification #01446 as willing to accept appointment and submitted a new Employment Application and Personnel History Questionnaire. (*Exhs. 3 & 4*)

27. Mr. Barbosa's 2014 Employment Application differed in certain respects from his 2012 application, including, in part:

I. PERSONAL HISTORY

- h. Inserted entry for residence at [address redacted] (07/03 -12/03) omitted from 2012 application
- r. Added details to "YES" answer regarding suspension of driver's license
- s. Changed details to "YES" answer regarding "any employment" application with City of New Bedford from "Police Cadet" to "New Bedford Police Dept June 2012"
- t. Failed to list 7/2011 application to Lakeville Police Dept shown on 2012 application

II. EDUCATION

- a. Added attendance (1 semester) at Bristol Community College
- f. Changed proficiency in foreign languages: Spanish ("None" to Understand "Good"); Portuguese (Speak, Understand, Read, Write "Good" to Speak & Understand "Good"); Cape Verdean (Speak & Understand "Fluent", Read & Write "Good" to Speak & Understand "Fluent" & Read "Good")

III. EMPLOYMENT HISTORY

- a. Inserted four employers omitted from 2012 application and changed dates of employment for previously listed employers listed on 2012 application; omitted reference to summer jobs in high school mentioned in Employment History Notes in 2012 application

V. REFERENCES

a. Substituted three personal friends for workplace acquaintances list in 2012 application

VI. CRIMINAL HISTORY

Criminal Record Notes – Added narrative concerning 2003 criminal charges

VII. LICENSES

d. Changed answer from “NO” to “YES” as to issuance of a Firearms Identification Card and supplied issue date of 4/6/12 and referenced license number above

(Exhs. 2a & 3)

28. Mr. Barbosa also changed his answers to seven questions in the Personal History

Questionnaire:

| | 2012 | 2014 |
|---|------|------|
| Have you ever had utilities shut off because of nonpayment? | No | Yes |
| Have you ever been convicted of a misdemeanor offense? | No | Yes |
| Have you ever been detained by a law enforcement officer, game warden, animal control officer or military police officer? | No | Yes |
| Have you ever been with someone when they committed a crime? | No | Yes |
| Has anyone ever accused you of committing a crime? | No | Yes |
| While in school were you ever the subject of school sanctioned discipline? | No | Yes |
| Have you applied to any other law enforcement agencies during this process? | Yes | No |

(Exhs. 2b & 4)

29. Lt. Rezendes reviewed Mr. Barbosa’s 2014 Employment Application and Personal History Questionnaire and reviewed certain information in Mr. Barbosa’s 2012 application folder but did not otherwise conduct further investigation into his 2014 application packet. (Testimony of Rezendes)

30. By letter to HRD dated March 11, 2014, drafted by Lt. Rezendes, New Bedford Mayor Jonathan E. Mitchell detailed the following three reasons for deciding to bypass Mr. Barbosa:

Previous Bypass in 2012

Mr. Barbosa previously . . . was bypassed following a background check by police investigators. . . . Reason for the Bypass were identified as the following:

- Information missing from . . .Application/Dates of . . . employment were not accurate
- Poor attention to detail/Failure to follow instructions concerning employment packet
- Poor Drivers History
- Previous criminal charges concerning Firearm/Drug charges

- False answers provided by applicant in answering the Police Departments Personnel History Questionnaire

Additional false answers in current application

In light of the above, Mr. Barbosa was given another employment packet to complete [and] a Personal History Questionnaire. The questionnaire instructs applicants to answer all questions truthfully. . . . The applicant falsely answered the following questions on the questionnaire:

“Have you ever been convicted of a misdemeanor offense?” – The applicant answered “Yes”
“Is your name in a case report file with any Police Department or Law Enforcement Agency that you are aware of?” . . . The applicant answered “NO”
“Have you withheld information or lied on a Job Application or during an employment Interview?” . . . The applicant answered “NO”

In the employment packet the applicant submitted to our department in 2012, The Applicant falsely answered questions in the Department Personal History Questionnaire . . . to the following questions:

- Have you ever been detained by a Law Enforcement Officer, Game Warden, Animal Control Officer or Military Police Officer?
- Have you ever been with someone when they committed a crime?
- Has anyone ever accused you of committing a crime?

The circumstances surrounding the incident . . . on December 13, 2003 conclude [sic] that the applicant provided false information in his previous employment packet in 2012.

(Exh. 7) (emphasis in original)

31. By letter dated November 3, 2014, HRD informed Mr. Barbosa 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. *(Exhs. 8, 9 & 10)*

32. New Bedford appointed eighteen candidates from Certification #01446 (three qualified minority candidates and fifteen others), including five ranked above Mr. Barbosa (one a minority), three tied with him (one a minority), two NBPD cadets⁵, and twelve other candidates (one a minority) ranked below Mr. Barbosa on the Certification. *(Exhs. 1e, 1g, & 10)*

33. This appeal duly ensued. *(Exh. 9; Claim of Appeal)*

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.

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 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); City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 187 (2010). 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.’ ” 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 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); City of 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

New Bedford has established reasonable justification to bypass Mr. Barbosa for appointment as an NBPD police officer based on the conclusion that his lengthy trail of errors and omissions in the information provided during the course of his application, coupled with a lack of candor in explaining his involvement in the 2003 incident with his cousin, pose a substantial risk for inattention to detail, inability to follow instructions and potential untruthfulness that are unacceptable qualities in a police officer.

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).⁶ In addition, “[p]olice work frequently calls upon officers to speak the truth when doing so might put into

⁶It bears notice that the jurisprudence of the Commonwealth 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)

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 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 MCRS 567 (2011); Gallo v. City of Lynn, 23 MCSR 348 (2010). Thus, an Appointing Authority is as equally entitled to impose discipline upon a police officer whose credibility can be questioned by a demonstrated lack of objectivity as it is upon an officer who knowingly distorts the truth through lying. See Robichau v. Town of Middleborough, 24 MCSR 352 (2011) and cases cited.

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 characterization of past medical history)

Applying these principles to the facts of this appeal, I conclude that the pattern of carelessness in Mr. Barbosa's responses to questions in the NBPD Employment Application and Personal History Questionnaire, coupled with the NBPD's legitimate doubts about his candor in explaining the incident in December 2003 in which he and his cousin were charged with firearms and drug trafficking, established a level of inattention to detail and potential untruthfulness that justified the NBPD's determination that he was not presently suitable for appointment to the NBPD.

First, Mr. Barbosa's errors and omission in the application process went well beyond the level of a few isolated, honest mistakes.⁷ For instance, he left out certain employers from his early years because he claimed he understood that he was only being asked for professional or career jobs that he had held, yet, in his 2012 application, he specifically noted at least one "summer job". He also switched his answers about conviction of a misdemeanor and having had been disciplined in school from "NO" to YES". He did not explain why his application stated that he did not know any NBPD police officers, but six officers responded to Lt. Rezendes's internal messages to say they did know (and recommended) him.

⁷ I do agree that some of the criticism about Mr. Barbosa's responses to questions was, indeed, unfounded. For example, there is certainly some ambiguity about whether "former co-workers" could be used as references, and whether the question "Is" your name in a police file called only for disclosure of pending matters. In reaching my conclusion, I have not held these "honest" mistakes against him.

Perhaps the clearest example of Mr. Barbosa's extreme carelessness in completing his application are the significant discrepancies in his employment history from his applications to the NBPD in 2012 and 2014, as well as his applications to other employers, specifically the Bristol County Sheriff and RI Department of Correction, as well as what prior employers verified to have been his actual employment history. The chart below illustrates these discrepancies:

| Employer | Employment Verified Per Background Check | Appellant's 2012 Application | Appellant's 2014 Application | Appellant's Bristol Sheriff Application | Appellant's RI DOC Application |
|-------------------------|--|------------------------------|------------------------------|---|--------------------------------|
| New Directions | N/A | Summer 1988-2001 | Omitted | N/A | N/A |
| Nice & Clean Car Wash | 6/2002 – 9/2002 | Omitted | 1/2003-2/2004 | Omitted | Omitted |
| SJR Food | 6/2002 – 9/2002 | Omitted | Omitted | Omitted | Omitted |
| Benjamin Moore (Rogers) | 5/2005 – 8/2005 | Omitted | 02/2004–06/2004 | Omitted | Omitted |
| Lord Phillips Condos | 9/2005 | Omitted | 02/2005-04/2005 | Omitted | Omitted |
| New Bedford Waste | 6/2004-4/2005 | Omitted | 4/2005-9/2005 | Omitted | Omitted |
| Twin Rivers Technology | 7/2003-12/2003 | 3/2004-8/2006 | 7/2004-12/2004 | 2/2004-4/2006 | 2/2004-4/2006 |
| St. Luke's Hospital | 11/2005-Present | 10/2007-Present | 4/2005-Present | 10/2004-Present | 10/2004-Present |
| Stoughton Recycling | 11/2008-4/2009 | 8/2006-10/2007 | 9/2010-4/2011 | 5/2006-10/2007 | 5/2006-10/2007 |
| RI DOC | 2/2012-Present | 1/2012-Present | 4/2012-Present | N/A | N/A |

Second, the NBPD viewed Mr. Barbosa as less than truthful in how he explained his involvement in the 2003 incident in which he was charged with firearms and drug trafficking offenses, along with his cousin, a known felon. To be sure, the incident itself occurred over a

decade earlier and what mattered here was not Mr. Barbosa's behavior at the time (arguably "youthful indiscretion" from which he had grown) or the fact that he was acquitted.⁸ Rather, it was his statements about the incident in his 2012 and 2014 applications, as well as what he told Lt. Rezendes during the 2012 interview that NBPD rightly perceived to be untruthful. The inconsistencies and gaps in Mr. Barbosa's otherwise very clear recollection raise legitimate concern about his candor, at a minimum, and his truthfulness as well. For, example, he claimed that the \$2000 in small bills found on his person came from his job at Twin Rivers Technologies, but he was employed for five months at \$10/hr. (He temporarily changed his story during direct examination at the Commission hearing to say that the money came from his brother, before reverting to his original story on cross-examination.) The NBPD had sound reason to doubt this explanation, based on the Dartmouth Police Department's incident report, the cousin's statement, the hotel key that was found along with the cash, and the significant interval of time between when the two men had been pulled over and the pat-frisk that occurred. (I infer that, whether or not Mr. Barbosa knew there was a room key with the cash, the NBPD had plenty of reason to believe that Mr. Barbosa received the cash from his cousin.)

In addition, NBPD had good reason to doubt the claim that the two men were out car shopping. According to Mr. Barbosa, his cousin picked him up between 3 PM to 4 PM, which was less than an hour before sunset. Despite Mr. Barbosa's statement that he had a good recollection of the incident, he could not account for their whereabouts after it got dark – a period of nearly five hours. This additional discrepancy further justified the NBPD's conclusion that Mr. Barbosa was withholding information or knowingly lying about what actually occurred, believing it might implicate him more deeply in knowing about the illegal firearm or other illegal

⁸ The Supreme Judicial Court has only just recently reminded that "racial profiling" remains an issue in our communities and a member of a minority class who flees from the police is not necessarily showing an indicia of guilt. See Commonwealth v. Warren, 475 Mass. 530, 539-40 (2016)

activities in which he cousin was engaged. It is not necessary that NBPD prove that Mr. Barbosa engaged in misconduct but “whether the city put forth a sufficient quantum of evidence to substantiate its legitimate concerns” about his truthfulness. See City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 188-89 (2010)

I have not overlooked that Mr. Barbosa has a strong and sincere desire to follow in his three siblings’ footsteps in public safety and law enforcement. He certainly brings several good qualities to his quest to achieve this goal. Perhaps, after he gains further experience under his belt at the RI Department of Correction and takes steps to improve his due diligence, candor and accuracy in his attention to detail, he may gain the confidence of the NBPD or another agency that is needed to be given the chance for the career advancement that he seeks.

CONCLUSION

For all of the above stated reasons, the bypass appeal of Christopher Barbosa, under Docket No. G1-15-195 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)(1), 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:

Christopher T. Saunders, Esq. (for Appellant)
Jane Medeiros Friedman, Esq. (for Respondent)
John Marra, Esq. (HRD)