

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MARK CONLEY,

Appellant

v.

NEW BEDFORD POLICE DEPARTMENT,

Respondent

G1-14-224

Appearance for Appellant:

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

Appearance for Respondent:

Elizabeth Treadup Pio, Esq.
City of New Bedford
133 William Street
New Bedford, MA 02740

Commissioner:

Paul M. Stein

DECISION

The Appellant, Mark Conley, acting pursuant to G.Lc.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 October 10, 2014 and a full hearing was held on January 9, 2015 and February 24 & 27, 2015, all at the UMass School of Law in North Dartmouth.¹ Thirty-one exhibits (1 through 16, 18 through 27, 29 through 33) were introduced in evidence and three documents marked for identification (Exhs. 17ID, 18ID & 28ID). 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 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:

- NBPD Officer Nelson Goncalves
- NBPD Lieutenant Ricard Rezendes
- NBPD Captain Paul Oliveira
- NBPD Captain Steven Vicente
- NBPD Captain Joseph Cordeiro

Called by the Appellant:

- Mark Conley, 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 these facts:

Appellant's Background

1. The Appellant, Mark Conley is an African-American male in his mid-40s. He attended New Bedford High School (1983-1987) but did not graduate. He later received a GED in 2008. He lives in New Bedford with his girlfriend whom he has dated for the past seven years and who contributes to the household living expenses. He has three children (ages 9, 23 & 25). (*Exhs. 7, 9 & 11; Testimony of Appellant*)

2. Mr. Conley began working in the fitness industry in 2003 as a sales manager, and later sales/general manager at gym facilities owned by Work Out World (WOW), including in Fall River, Brockton and New Bedford. After an incident described later, he voluntarily left WOW in 2006 and worked at fitness gyms and other jobs until July 2009, when WOW recruited him to return as a general manager. In 2010, he applied to become a correction officer with the Bristol County Sheriff's Office and began academy training in November 2011. He resigned from the academy after two months and returned to WOW and became a regional manager supervising seven New England gyms and over 200 employees. (*Exhs. 7 & 9; Testimony of Appellant*)

Appellant's NBPD Application

3. Mr. Conley took and passed the civil service examination for municipal police officer administered by HRD on June 15, 2013, scoring a 94. His name appeared on the eligible list established on October 15, 2013. (*Exh. I: Testimony of Appellant*)

4. On December 13, 2013, HRD issued Certification #01446 to New Bedford for 18 new permanent full time Police Officers for the NBPD. Mr. Conley's name appeared 53rd of those who signed willing to accept appointment, tied with eleven other candidates. (*Exh.I*)

5. 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 must review and approve bypass decision of all candidates prior to appointment of other candidates. (*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*)

6. Mr. Conley qualified for minority status under the Castro Decree and he was listed as a "C" candidate accordingly on the Certification. (*Exh. I*)

7. Mr. Conley 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. 7 & 11*)

NBPD Background Investigation

8. NBPD Officer Nelson Goncalves was assigned to perform a background investigation on Mr. Conley. The investigation included verification of his residence, employment history and education, as well as interviews with references, landlords and neighbors, all of whom gave positive reports. He performed a home visit and interviewed Mr. Conley and his girlfriend who confirmed a stable and healthy relationship. (*Exh. 9; Testimony of Goncalves*)

9. Unbeknownst to Mr. Conley, Officer Goncalves also circulated an internal e-mail within the NPBD, including Mr. Conley's photo, inviting any comments "positive or negative" about Mr. Conley they thought relevant. He received confidential replies from thirteen NBPD officers all of whom highly recommended him. None were negative. Most offered to elaborate if further information was needed. The NBPD officers' responses stated:

- "He's a great guy. Known him for years."
- "Yesssssss . . . good guy! Fitness nut don't battle with him on the dance floor either."
- I knew this applicant since I was about 12 years old. . . . He would be an ASSET to this department."
- "Mark . . .would be a great addition to our department"; "Works out . . .good guy with a good head on his shoulders"
- "Mark is someone I have known for several years. We are currently training together in boxing . . . employed as the manager of WOW in New Bedford . . .but still finds time to devote and balance with his children."
- "[K]nown Mark for several years and he has always been a squared away person . . . the type to do what he can to help you."
- "This man is one of the finest gentlemen I have ever met. I have known him since we were children . . . he will be an outstanding . . . police officer without any doubt."
- "In addition to being a family member, Mark has been one of my closes [sic] friends growing up. There are a number of words one could use to describe his character, inspirational, compassionate, loyal and trustworthy to say the least."
- "I've known Mark for some time and I can truly say he . . . would be a great police officer and an asset to the department."
- "I have known Mark for many years. I have always known him to be of good character and integrity."
- "Mark is great . . . Known him . . . over 30- years."

(*Exhs. 3 & 9: Testimony of Goncalves & Appellant*)

Appellant's Driver's and Criminal History

10. Mr. Conley's Massachusetts Driver's History showed that he had been found responsible for the following citations and two surchargeable accidents from 1997 to 2008:

| | |
|------------|--------------------------------------|
| 04/10/1997 | Speeding - Lakeville |
| 10/24/1997 | Speeding - Raynham |
| 01/07/1998 | Illegal Operation – Dorchester |
| 01/24/1998 | No Inspection Sticker - Raynham |
| 11/07/1998 | Speeding -Dartmouth |
| 11/24/2000 | Surchargeable Accident – New Bedford |
| 05/15/2000 | Speeding – Fall River |
| 08/07/2002 | Failure to Stop - Dartmouth |
| 10/15/2003 | Speeding - Watertown |
| 10/24/2003 | Keep Right No View – Wellesley |
| 10/15/2004 | Speeding – Bridgewater |
| 07/07/2005 | Speeding –Fall River |
| 12/07/2006 | Failure to Stop – Dartmouth |
| 12/18/2007 | Surchargeable Accident – Saugus |
| 03/29/2008 | Failure to Stop – Fall River |

The driving record also shows suspension notices for non-payment in 1997, 1998, 2000 and 2007. (*Exhs. 9 & 16*)

11. Mr. Conley's Criminal History (BOP) contained six entries, all prior to 2000. The BOP also stated" "THERE IS AT LEAST ONE SEALED CASE ON FILE". (*Exhs. 9 & 16*)

12. The sealed criminal files involved three dismissed cases in which Mr. Conley had filed a Petition (pursuant to G.L.c.276, Section 100c), which was allowed on November 4, 2008. One of sealed cases involved a 2006 Complaint for Stalking a female WOW employee that was dismissed in 2007.³ In his petition to have that record sealed, Mr. Conley stated:

I've looked for employment with certain companies. . . [and] denied because of this false allegation against me. I don't feel that I should suffer for something that not only was

³ A person is guilty of stalking if he or she "willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury. . . ." G.L.c.265,§43(a). Both the felony offense of stalking, and its lesser included misdemeanor offense of criminal harassment under G.L.c.265,§43A (which does not require an "intentional threat" component, require that the Commonwealth must prove that the defendant engaged in at least three harassing incidents directed at the victim. See Commonwealth v. Walters, 472 Mass. 680,697-98 (2015) citing Commonwealth v. Welch, 444 Mass. 80, 89 (2005)

dismissed without prejudice but that I didn't do in the first place. . . . I ask that the Court will seal this accusation from my record so that I may better my family and my life."

(*Exhs. 4 & 18*)

13. In his Employment Application, Mr. Conley (truthfully) answered "NO" to questions VI.a .through VI.h. regarding criminal convictions. When Question VI.i. asked if he had been the subject of a c.209A restraining order, he answered "YES" and actually disclosed the docket number of the 1993 sealed criminal case related to that matter. He also referred to the sealed 2006 case when he wrote in the "Criminal Record Notes" at the end of Section VI:

"There was a frivolous allegation made by a subordinate employee within the company [where] I'm currently employed as a Regional Manager. The Complaint was dismissed without prejudice by the Proceeding [sic] Judge."

(*Exh. 7*)

14. Officer Goncalves further investigated all three sealed cases. In particular, he secured copies of the court records, the Fall River Police incident report and other information concerning the 2006 alleged stalking of a female WOW employee. He obtained records of a related MCAD sexual harassment complaint brought by the alleged victim. He also conducted interviews with the alleged victim, one of the owners of WOW, WOW's HR manager, another WOW employee who was a percipient witness, the WOW attorney who handled the MCAD matter and Mr. Conley. (*Exhs. 4, 5, 9, 13 through 15; Testimony of Goncalves*)

15. The gravamen of the alleged stalking complaint concerned a confrontation in December 2006 between Mr. Conley and the female employee (a part-time desk clerk at WOW's Fall River gym). Mr. Conley had been pulled aside by the general manager who showed him a letter she had just received from the female employee that alleged the Mr. Conley had harassed her a few weeks earlier. Mr. Conley was not previously aware that the employee believed he had harassed her. The employee's letter was not produced. (*Exh. 9; Testimony of Goncalves & Appellant*)

16. As Mr. Conley read the employee's letter, the manager spotted the employee, who had been at the gym working out, walking past the office and she (the manager) told Mr. Conley. He took off with the letter and caught up with the employee in the parking lot, holding up the letter and demanding to know: "What is this" and: "Are you crazy I never said any of these things to you". The employee became agitated and told Mr. Conley to "get away before I call the cops". She departed and drove to the Fall River Police station where she made a complaint which resulted in Mr. Conley being charged with stalking. (*Exhs. 4 & 9; Testimony of Appellant*)

17. The employee's statement to the Fall River Police describes the harassment as "standing over her all day and kept saying little comments that made her feel uncomfortable." The Fall River Police incident report also states that another WOW employee had seen Mr. Conley standing over the female employee one day and "saying something to her on several occasions." Officer Goncalves sought out and interviewed this witness, who told him "Mark is a good guy" and called him "flirtatious", but thought "things may have been taken out of context" and "blown out of proportion." (*Exhs. 4 & 9; Testimony of Goncalves & Appellant*)

18. Officer Goncalves reported that the alleged victim told him that she did "feel like" Mr. Conley was harassing her by being "aggressive toward her and raised his hands toward her." She said she accepted a small settlement from WOW "because it was a process and she was stressed out" and claimed she "didn't want to face [Mr. Conley] again in fear of him" and "who he knows". She told him she "wouldn't want to be around his beat" and "ended by saying use caution with him around woman [sic] and his temper." (*Exh. 9; Testimony of Goncalves*)

19. The stalking complaint was dismissed "at the request of the Commonwealth" after the alleged victim repeatedly failed to appear in court. Lt. Rezendes, an experienced police prosecutor, called the complaint "not the strongest stalking charge". Based on the record, neither

he nor Officer Goncalves even would have sought such a complaint against Mr. Conley if they had been the investigating officer. (*Exhs. 4 & 9; Testimony of Appellant, Goncalves & Rezendes*)

20. The MCAD matter was removed to Superior Court and eventually settled for \$4,000. The WOW attorney saw no merit to the claim of harassment. He was prepared to vigorously defend the case. WOW settled only to save the cost of litigation. (*Exhs. 5, 9, 13; Testimony of Goncalves*)

21. Officer Goncalves's report notes that WOW did its own internal investigation of the harassment charges against Mr. Conley and "cleared him of any wrongdoing". The attorney told Officer Goncalves that Mr. Conley "enjoyed a good reputation" and was a "friendly outgoing guy who likes to hug" people (men and women) after a successful workouts or upon greeting. One of the co-owners of WOW also told Officer Goncalves that "it may have been a misunderstanding" and that Mr. Conley "is the best Regional Manager they have." (*Exhs. 5, 9 & 13; Testimony of Goncalves*)

22. The report prepared by WOW after its investigation states that, contrary to what she told Officer Goncalves, the alleged victim did not want to see Mr. Conley transferred, suspended or terminated and had told WOW that "she could work with [him]". WOW interviewed thirteen (13) WOW employees and one (1) manager (the majority of whom were women) and "none corroborated [the alleged victim's] allegations". Several employees "doubted that [Mr. Conley] was capable of sexual harassment and strongly supported him". According to WOW's attorney and the co-owner, "they never found anything credible and rehired Mark". Throughout the investigation, Mr. Conley "vehemently denied all allegations". He had become disgusted that WOW didn't immediately back him up as quickly and completely as he expected they should, so he resigned during the investigation. (*Exhs. 5, 9 & 13; Testimony of Appellant & Goncalves*)

Appellant's Credit History

23. Mr. Conley answered "YES" on the Personal History Questionnaire when asked if he was "ever" refused credit, filed bankruptcy, had property repossessed, had utilities shut off because of non-payment, been delinquent on any credit payments, utility bills, alimony, child support or tax payment, had his bill turned over to a collection agency and written a bad check. (*Exh. 11*)⁴

24. Mr. Conley also disclosed in his Employment Application an overdue excise tax bill then due to New Bedford of \$238.54 which he later paid in full. (*Exh. 7; Testimony of Appellant*)

25. Officer Goncalves' investigative report references receipt of the credit report that Mr. Conley submitted with his application, as required, and stated: "He does list that he has claimed bankruptcy twice." The specific details of the bankruptcy were not reviewed as part of the NBPD's investigation. (*Exhs. 9, 19 & 20; Testimony of Rezendes & Oliveira*)

26. Mr. Conley first filed a voluntary Chapter 13 bankruptcy petition in August 2006. He filed this petition because he thought (mistakenly) that it would stop a mortgage company from instituting foreclosure proceedings on his home. The petition proposed payment of all other claims in full. This petition was dismissed at his request in January 2007 after the mortgage company proceeded with the foreclosure. (*Exhs. 12 & 19; Testimony of Appellant & Rezendes*)

27. In May 2013, Mr. Conley filed a voluntary Chapter 7 bankruptcy petition. At the time, his primary debt was a \$52,000 deficiency from the 2007 mortgage foreclosure, \$32,000 in deficiency claims from 2005 and 2007 auto repossession, an income tax liability, primarily accrued interest (attributable to "1099 income" for which tax had not been withheld) that had accumulated over the years to \$37,000, and about \$5,000 in other debt, primarily medical costs.

⁴ Other questions asked on the Personal History Questionnaire to which Mr. Conley also answered "YES" ranged from admission that he had "made long distance phone calls at work that you were not authorized to make", "been involved in an act of vandalism", "stolen" something, "hit another person in anger", "threatened someone", "been terminated" or "walked off" a job, and had used or possessed illegal drugs. (*Exh. 11*)

His net income of \$3,600/month made it impossible to pay off these debts. He received a discharge of these debts in August 2013, save for a small amount of non-dischargeable principal of the tax claims for which he has an agreement with the IRS to pay off in monthly installment of about \$100/month. (*Exh. 7, 12 & 20; Testimony of Appellant, Rezendes, Oliveira*)

28. Mr. Conley had to an agreement with his former girlfriend to provide child support for his two oldest children until the youngest attained the age of 21. Those obligations had been fully satisfied in or about 2013, prior to his bankruptcy filing. (*Exh. 20; Testimony of Appellant*)

29. The credit report Mr. Conley supplied to the NBPD with his application showed he then had two open credit accounts, both in good standing, one a credit card account with a balance of \$141 and a second \$24,843 balance on a car loan (2012 Chrysler 300 purchased in July 2013), on which he pays \$559/month and has never been late. The report also showed four other accounts in good standing, all prior car loans that had been paid, closed and “never late”. The report showed no “Negative Accounts” and “no Collection on file.” He had incurred no significant new debt other than the car payment since 2006. (*Exhs. 10 & 12: Testimony of Appellant & Rezendes*)

Captains Board Interview & Hiring Process

30. After completion of the background investigation, each candidate’s application package is reviewed by the NBPD Training Director, Lt. Ricard Rezendes, who determines whether the candidate should proceed to the next step in the hiring process by a “Captains Board” consisting of the Training Director and three NBPD Captains. (*Testimony of Lt. Rezendes*)

31. The NBPD’s Captains Board is a loosely structured oral interview meant to “get to know who the applicant really is”. Panel members assume that a candidate who makes it to a Captain’s Board is a “good person” and the panel looks at whether the candidate is a “good fit” for the NBPD and would make a “good police officer”, with particular focus on honesty, work history,

life experience and “moral compass.” Questions are posed that present ethical issues designed to test the limits of a candidate’s standards of truthfulness and honesty. Other questions are individually tailored to address specific concerns that appear in a particular candidate’s application and/or background report. Finally, because the NBPD makes a significant financial investment to select a candidate for one of the limited number of spaces allotted to NBPD recruits in any police academy class, the Captains Board looks at a candidate’s desire and initiative to become a police officer and whether he/she will survive the police academy’s rigorous physical and mental demands, as well as its academic challenges (a year-long college level training compressed into a 26-week course). Accordingly, the panel tries to “make it a little stressful.” (*Exhs. 6, 25 through 27; Testimony of Rezendes, Cordeiro, Vicente & Oliveira*)

32. Each interview is tape recorded. At the end of the interview, each panel member completes a form on which the member answers “YES” or “NO” to the question “WOULD YOU RECOMMEND FOR HIRE?” Candidates are evaluated based on their “total package” and “the whole ball of wax”. Panel members also rate each candidate on a scale of 1 (unsatisfactory), 2 (below average) 3 (average), 4 (above average) and 5 (excellent) on eight specific traits, but the individual scores are not tallied and are not factored into the ultimate recommendation. (*Exhs. 6, 25 through 27; Testimony of Rezendes, Cordeiro, Vicente & Oliveira*)⁵

33. The Captains Board is the final step in the NBPD’s evaluation process. In general, the NBPD Police Chief relies on the recommendations of the Captains Board with minimal further substantive review. Candidates recommended for hire by the Captains Board are presented to

⁵ The eight traits are: **1. Appearance, Manner, Bearing:** Does applicant measure up as a member of this department? **2. Alertness, Demeanor:** How does the applicant react, respond, understand? **3. Character, Personality:** Is the applicant communicative, friendly, frank? **4. Interest in the job:** Why does he want to work here: Money? To be a police officer? **5. Ability to converse:** Can applicant express himself logically, convincingly? **6. Self-control:** Is applicant comfortable? How does he/she react to personal questions? **7. Experience:** Does applicant have any special experience that makes him/her a better applicant? **8. Initiative:** What are applicant’s future plans? Continue education/college? Promotional Studies? (*Exhs. 6, 25 through 27*)

the Mayor of New Bedford, the NBPD Appointing Authority, and receive conditional offers of employment, subject to passing a Physical Abilities Test (PAT) and medical and psychological evaluations. As to candidates to be bypassed, Lt. Rezendes prepares a letter to HRD for signature by the Mayor stating the reasons for bypassing each of those candidates. (*Exh. 1; Testimony of Resendez & Oliveira*)

34. New Bedford appointed 18 candidates from Certification #01446 (3 qualified minority candidates and 15 others), including 13 ranked above Mr. Conley (2 of the 3 minorities), one candidate in the same tie group as Mr. Conley, two NBPD cadets⁶, and three candidates (one minority) who were ranked below Mr. Conley on the Certification. (*Exhs. 1 & 33*)

35. By letter to HRD dated April 10, 2014, drafted by Lt. Rezendes, New Bedford Mayor Jonathan E. Mitchell detailed the following three reasons for deciding to bypass Mr. Conley:

Issues pertaining to Poor Credit History

A credit report on the applicant showed that the applicant had filed for bankruptcy on . . . 5/29/13 and 8/23/06.

The Applicant indicated in his application that he owes back taxes and is currently on a payment plan in regards to his outstanding balance. The applicant also noted that he is delinquent on excise taxes and owes \$238.54 to the City of New Bedford.

Drivers History

. . . Since 1997 the applicant has been stopped and cited for speeding on seven different occasions. . . [F]rom 1993 to 2008, The applicant has been stopped and cited for Motor Vehicle infractions on 18 different occasions.

A previous license suspension was also noted on the applicants driver's history. The last infraction reported was on March 29, 2008.

Prior Complaint for Stalking

On December 13, 2006 . . . a female reported that the applicant had been allegedly harassing her over a period of time at their place of work. The applicant and this female were employed at "Work out World" in Fall River and the applicant was her supervisor.

As a result of the allegations made by this female, Fall River Police sought a warrant for the applicant's arrest charging him with the crime of "Stalking". This matter was later Dismissed on October 11, 2007.

⁶ Candidates who complete the NBPD cadet program and pass the civil service examination for Police Officer can be appointed outside the traditional civil service process. See G.L.c.147,§21A; St.1979, c.639.

The alleged victim in this case was interviewed by investigators. She acknowledged she received a small settlement from “Work out World”. She claimed she agreed to the settlement because of the Stress. She told investigators that the applicant had harassed her and . . . that they should use caution with him around women and his temper.

It should be noted that Work out World conducted an In-House investigation into the allegations made against the applicant and cleared him of any wrongdoing. He was rehired by this franchise where he remains currently in a Management Capacity.

Investigators completed their investigation into this matter however they did have some concerns regarding this alleged incident.

Formal Police Interview

. . . [T]he applicant was scheduled for a Captain’s Board for a formal interview. Sitting on the Interview panel were three Police Captains and one Police Lieutenant. . . . [I]t was unanimously agreed that the applicant not be hired following his interview. Candidates are judged in eight categories . . . He scored *Below Average* in several categories . . . and based on his performance, the interview panel recommended not to hire the applicant at this time.

(*Exhs. 1 & 33*) (emphasis in original); *Testimony of Rezendes*)

36. HRD requested additional information about the reasons for deciding to bypass Mr. Conley and, on October 24, 2014, Lt. Rezendes wrote the following in a letter to HRD:

Mark Conley. In regards to the . . . credit history as it relates to the position, Applicant’s credit reports are reviewed to see if applicants have shown poor judgment or irresponsibility in managing their personal finances. An argument can be made that a pattern of poor decision making or irresponsibility in . . . personnel life could transition over to a poor decision making as a Police Officer.

In regards to . . . drivers history, There have been no reported violation since 2008. However, as of July 24, 2014, The applicants license is active but Non Renewable.

The concerns in regards to the applicants performance during the interview is outlined in the Bypass letter dated April 10, 2014.

(*Exh. 33*)

37. By letter dated January 15, 2105, HRD informed Mr. Conley that the reasons stated were “acceptable for bypass”. (*Exh. 33*)

38. Mr. Conley filed this appeal on September 16, 2014. (*Claim of Appeal*)⁷

⁷ After learning through other sources that the NBPD had hired others ranked below him, Mr. Conley filed this appeal prior to having been informed of the actual reasons for his bypass. (*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.

Details Concerning Appointed Candidates Who Bypassed Appellant

39. Three candidates who received offers of employment and were appointed to the NBPD were ranked below Mr. Conley on the Certification, referred to as Candidates A, B & C. (*Exh. 1*)

40. Candidate A is a single, white male in his mid-twenties who had worked for the NBPD as a civilian dispatcher for the past 2½ years. He graduated from high school and had enrolled in community college but discontinued his education after taking the dispatcher job at the NBPD. He had started to study business administration but found the curriculum “too broad”, so he switched to accounting until he realized that “wasn’t for him” because he didn’t want to have to work “cooped up in an office.” (*Exh. 26; Stipulated Facts*)

41. Candidate B is a 34-year-old divorced male of Cape Verdean descent with three children. He qualified as a minority candidate, but was listed in a lower tie group below Mr. Conley, due to a lower civil service examination score. He holds an Associate’s Degree in Criminal Justice but said he had no intention of continuing his education further. He currently worked as a technician for DishNetwork. He was fired from a prior job for what he called “personal issues with a co-worker.” He was hired by the Rhode Island State Police but withdrew because he was unable to take the PAT due to the flu. He also was hired by the Newport Rhode Island Police Department but failed the running component of the PAT. He was passed over by the NBPD in 2012 because of a poor Captains Board interview and “credit problems”. (*Exhs. 1, 23 & 25; Stipulated Facts; Testimony of Rezendes*)

42. Candidate B lost his home to foreclosure in October 2011. An Instrument of Taking was filed in November 2011 by the City of New Bedford on other property owned by Candidate B for non-payment of \$457.41 in property taxes. Executions obtained against Candidate B remain on record for \$4,427.10 owed to CACH, LLC as of September 29, 2009 and for \$7,853.06 owed

to Capital One Bank (USA) NA as of June 2010. Candidate B filed personal bankruptcy in 2012. (*Exhs. 29 through 32; Testimony of Rezendes, Oliveira & Cordeiro; Stipulated Facts*)

43. Candidate C is a white male in his mid-thirties. He is a naturalized U.S. citizen born in Portugal. After completing vocational-technical high school in 1998, he went directly to work because college “wasn’t for him.” Since 2010, he has worked at a hotel in Providence RI, beginning as valet and working up to bell captain, which is a supervisory, but not a management position. His prior employment history (listed in chronological order from earliest up to his current hotel job) includes seven other employers:

- 2 yrs – Gas Station Attendant
- 1 yr – Roofer
- 2yrs – Kelly Services – Temporary employee
- 5 yrs – [Name Redacted] – Construction/Maintenance
- 5 mos – Unemployed
- 1.5 yrs – Mortgage originator (2 companies)
- 1 yr – Rent-A-Car attendant

(*Exh. 25; Testimony of Oliveira*)

44. Candidate C also filed for bankruptcy in 2009. While employed at [Name Redacted], Candidate C had been injured on the job and was out of work for 9 to 10 months. After returning to work, he was fired for protesting the denial of a pay raise which resulted in his asserting a discrimination claim. When the discrimination claim was settled, all the proceeds were used to pay off his creditors and legal fees associated with the bankruptcy. (*Exh. 25*)

Details Concerning the Captains Board Interviews

45. CD transcriptions of Mr. Conley’s Captains Board and the Captains Board interviews for Candidates A, B & C were introduced in evidence, along with score sheets for each candidate. All of the NBPD officers who sat on each of those interviews testified before the Commission,

save for one Lieutenant who filled in for an absent Captain in one of the interviews. (*Exhs. 2, 6, 21 through 25: Testimony of Rezendes, Oliveira, Vicente & Codeiro*)⁸

46. The panel members' scoring of Mr. Conley and the three candidates who bypassed him are summarized below:

| Category | Lt. Rezendes | | | | Capt. Cordeiro | | | | Capt. Vicente | | | | Capt. Oliveira/ Lt. Ledo | | | | Average | | | |
|-----------------------------------|--------------|-----|-----|-----|----------------|-----|-----|-----|---------------|-----|-----|-----|-----------------------------|-----|-----|-----|---------|------|------|------|
| | MC | A | B | C | MC | A | B | C | MC | A | B | C | MC | A | B* | C | MC | A | B | C |
| Appearance, Manner, Bearing | 5 | 5 | 5 | n/a | 5 | 5 | 5 | 5 | 3 | 4 | 3 | 3 | 3 | 4 | 4 | 4 | 4.0 | 4.5 | 4.3 | 4.0 |
| Alertness, Demeanor | 3 | 4 | 3 | n/a | 3 | 3 | 3 | 4 | 2 | 4 | 2 | 3 | 3 | 4 | 3 | 3 | 2.8 | 3.8 | 2.8 | 3.3 |
| Character, Personality | 3 | 4 | 3 | n/a | 3 | 3 | 3 | 4 | 2 | 3 | 3 | 3 | 4 | 4 | 4 | 4 | 3.0 | 3.5 | 3.3 | 3.7 |
| Interest in the job | 3 | 3 | 3 | n/a | 3 | 3 | 3 | 3 | 1 | 4 | 3 | 3 | 2 | 3 | 3 | 4 | 2.3 | 3.3 | 3.0 | 3.3 |
| Ability to converse | 4 | 4 | 3 | n/a | 3 | 3 | 3 | 3 | 3 | 4 | 3 | 4 | 3 | 4 | 4 | 3 | 3.3 | 3.8 | 3.3 | 3.3 |
| Self- Control | 3 | 3 | 3 | n/a | 4 | 3 | 3 | 3 | 2 | 3 | 3 | 3 | 3 | 4 | 3 | 3 | 3.0 | 3.3 | 3.0 | 3.0 |
| Experience | 2 | 4 | 3 | n/a | 3 | 3 | 3 | 3 | 1 | 3 | 3 | 2 | 2 | 3 | 3 | 3 | 2.0 | 3.3 | 3.0 | 2.7 |
| Initiative | 2 | 3 | 3 | n/a | 3 | 3 | 2 | 2 | 1 | 4 | 2 | 3 | 2 | 3 | 3 | 3 | 2.0 | 3.3 | 2.5 | 2.7 |
| OVERALL | 25 | 30 | 26 | n/a | 27 | 26 | 25 | 27 | 15 | 29 | 22 | 24 | 22 | 27 | 27 | 27 | 22.3 | 28.5 | 25.0 | 26.0 |
| RECOMMEND (YES NO) | NO | YES | YES | YES | NO | YES | YES | YES | NO | YES | YES | YES | NO | YES | YES | YES | NO | YES | YES | YES |

- 1 Unsatisfactory
- 2 Below Average
- 3 Average
- 4 Above Average
- 5 Excellent

*Lt. Ledo sat in for Capt. Oliveira

(*Exhs. 2, 21 through 24*)

Mr. Conley's Interview

47. The interview with Mr. Conley began with a standard question: Why do you want to be a New Bedford Police Officer?", Mr. Conley said that he sees many young adults whom he thinks he could teach how to conduct themselves and get them off the streets. He was good at sizing up people and "picking up traits" and while on patrol would reach out rather than "just driving by." He was told that "usually we interview 23 and 24-year-old kids" and was asked why he was

⁸ Due to a technical error, only about half of Candidate C's interview was recorded and the score sheet prepared by Lt. Rezendes for Candidate C could not be found. In addition, by coincidence, the CDs included an interview with another hired candidate (whom I designate Candidate D) who had preference over Mr. Conley (*Exhs. 6, 25; Testimony of Rezendes*)

applying at “this point of life”? His response was that he had been something of a “wild kid” and poor student who had dropped out of school, but he had matured and become more grounded and decided a couple of years ago this was a way to “make a difference” and give back to the “city I love”. *Exhs. 6 & 25*)

48. The panel asked Mr. Conley if he was responding to a robbery at a convenience store and saw his partner take a pack of gum, would he “rat him out?” Mr. Conley did not hesitate and said “There’s no excuse” for it and he would “have to” report it. When asked what he would do if he saw a fellow officer smoking marijuana at an off-duty party, he said he would “verbally” report that to a supervisor and that, if he were the one caught smoking, he would “expect him to do it to me.” When pressed to give an example of a real-life situation in which he had actually “ratted out” anyone, he spoke of several occasions at WOW where employees had been caught breaking the rules, including two instances in which he wrote up his own daughter for violating the company policy about using a phone in the babysitting room for personal calls. (*Exh. 6 & 25*)

49. Other standard questions posed to Mr. Conley asked him for his strongest (“confidence”) and weakest (“patience”) traits, and to describe something that he was most proud of (“my kids”) and something for which he was least proud (“financially bad decisions”). (*Exh. 6 & 25*)

50. The remainder of the hour-and-a-half interview focused mainly on specific inquiries about Mr. Conley’s employment and personal history. During these areas of inquiry, some of the panel members repeatedly raised their voices, used profanity and occasionally yelled at Mr. Conley and disparaged him for such things as the nickname given to him by one of the other NBPD officers who knew him (and recommended him for employment). One panel member became irate because Mr. Conley asked to know his first name before starting to answer the question he was asked (yelling at Mr. Conley that he had never been asked that question in over

a hundred interviews, said that it “really tuned him off” and in a paramilitary organization he was to be addressed as “Captain”). When Mr. Conley named his cousin as the one NBPD officer he knew that he would like to emulate, the panel pressed him to name the NBPD officer that he least admired and when he demurred (“I cannot do that”), he was told that, unless he named someone, “this interview is over.” He then gave a name and was asked: “Who is your next pick?”, forced to name another officer and then asked to explain why that person was not a good officer. He again didn’t want to say, as he didn’t know the man’s police work, but said he noticed less “energy and focus” than with others he saw at WOW, to which the follow up was: “What percentage of effort does he give” and “If you were Chief would you keep him on the job?” The panel called his reticence in this line of inquiry “dancing with them”. (*Exh. 6 & 25*)

51. Mr. Conley was asked at length about his job at WOW, and especially the “Stalking” complaint that resulted in his resignation in 2006. One panel member expressed concern that his record put the NBPD at risk should a female ever file an MCAD complaint against him for his conduct as an officer and the NBPD would be asked: “What the hell were you thinking?” (by hiring him). His explanation, which tracked his testimony before me, was an emphatic denial of the truth of the allegations against him “from A to Z”. The panel told him there had to be some truth to the allegations and asked how he thought he would do on a polygraph test, to which he replied, without hesitation: “I will do it today.” He did agree it had not been the best judgment to confront the employee alone in the parking lot but otherwise he had “nothing to hide.” (*Exhs. 6 & 25; Testimony of Appellant*)

52. The panel members delved deeply into Mr. Conley’s financial situation and repeatedly expressed considerable concern about the \$45,000 in “back taxes” he owed, as well as his purchase of a “fancy new car” right after going bankrupt. The panel members also expressed

concern that Mr. Conley could not “financially afford” to become a NBPD officer, noting that he was currently earning about \$52,000 a year and a rookie NBPD officer’s starting pay was only about \$41,000,⁹ and there would be the cost of uniforms and community to the police academy in Plymouth. One panel member said the only thing worse than a history of “that kind of debt” was being a “former drug addict” and if either one came across “dirty money” during a drug bust, they might pocket it. Mr. Conley replied that “I am not a thief” and explained how his bankruptcy had eliminated most of his prior debt obligations, he no longer had to pay child support that his children were older, and that he had saved money in anticipation of the costs of the academy. (*Exhs. 6 & 25; Testimony of Appellant, Rezendez, Oliviera, Cordeiro, Vicente*)

53. The panel members also expressed concern that Mr. Conley had quit his job with the Bristol County Sheriff’s Department just before completing the sheriff’s academy in 2010 and returned to his job at WOW. Mr. Conley explained that he made that decision for two reasons: (a) he had never been exposed to a correctional institution and, after seeing it first-hand, he realized that he couldn’t spend his career “behind the wall” and (b) he had misunderstood the pay structure of the job, believing that, because of the recent state takeover of certain county correctional facilities (including Bristol County), county correctional officers would be raised to be in parity with state correctional officers. Mr. Conley also explained that he had excelled at the academy and “led the class” and that his financial situation was now quite different than it was in 2010. This explanation did not satisfy the panel, one of whom testified that he saw Mr. Conley’s quitting the sheriff’s academy as typical of someone who had “eight jobs in eight years”, showed “no interest in any job” and seemed to regard the NBPD as just “another convenience job.” One

⁹ In his interview, Candidate D was told that a NBPD officer’s pay might actually be closer to \$46,000, with shift differential (new officers generally work night shifts). Also, the opportunity to earn “detail” pay, and possibly overtime, would become available to enhance the base pay. (*Exh. 6, 25 & 27; Testimony of Rezendes*)

panel member testified that Mr. Conley's explanation made "zero sense." (*Exhs. 6 & 25*:

Testimony of Appellant, Rezendes, Oliveira & Vicente)

54. Mr. Conley's age came up on several occasions. In addition to being asked, as noted earlier, why he had decided to become a police officer so late in life, he also was asked about retirement, noting that mandatory retirement for an NBPD officer was 65, so that he could not work until age 70 as he said he had planned. In addition, at the end of the interview he was told: "Maybe you have more baggage because you are a little older." (*Exh. 6 & 25*)

55. I listened to the interview recording carefully and I never once heard Mr. Conley raise his voice or show any signs of intemperate behavior, no matter how heated the panel's interrogation became. I observed the same respectful, composed demeanor during his appearance and testimony at the Commission hearing. (*Exhs. 6 & 25; Testimony of Appellant*)

Interview with Appointed Candidate A

56. Candidate A had worked as a NBPD dispatcher for the past 2½ years at the time of his interview. He was asked why he now wanted to make the leap to a police officer. He stated that, although he did not believe he had the physical ability to be a police officer when he first applied for the dispatcher's job, he mother encouraged him and he thinks he is now ready and "wants to make his mother proud." His belief that he once thought he "couldn't do it" was the thing about which he was the least proud. He had been enrolled community college but, due to the demands of his dispatcher's job, he decided not to pursue his education any further. (*Exh. 26*)

57. Candidate A said he considered himself a "10" when it came to truthfulness. He said the last lie he told was to his mother about who he was dating. When he could not come up with the "worst" lie he had ever told, he was asked to name the worst dispatcher at the NBPD to which he replied "I would have to say me, that's how much I respect my colleagues." He was criticized

for “short-changing himself”. He eventually admitted that saying he was the worst was a “white lie.” He also admitted to breaking NBPD rules about using cell phones and eating on duty and, after being asked. When presented with the ethical scenarios, he said he would report the officer for stealing the gum only because “I would not want to lose my job” over that. When asked what he would do if he saw an off-duty officer doing cocaine at a party, he would “smear the drug off” and make it clear that the officer should not be doing that, but would not come out and say he would report it, referring to “professional courtesy”. He also admitted to letting friends drive who were drunk. He had a difficult time describing a time when he “led someone to do the right thing.” (*Exh.A*)

58. As the interview with Candidate A concluded, one panel member said “I have concerns about you” and “I now think you need to be watched” after admitting to violating NBPD rules and regulations. One member said he wasn’t the “10” on truthfulness that he claimed and had been “dancing with the Captain here.” He was told he was “too trusting” and would “follow the herd”. He was told he “had a ways to go” and needed to “be a man” and “get some balls.” Another said he was “close to the bottom” of the applicant pool. (*Exh. 26*)

59. In response to a question about his car, Candidate A said he drives a 2013 Toyota Camry and has an outstanding car loan of about \$15,000. (*Exh. 26*)

Interview with Appointed Candidate B

60. The interview with Candidate B followed immediately after Mr. Conley’s interview. The panel made several references to Mr. Conley during the interview with Candidate B, stating:

- “Sorry for the delay.” The prior interview “went a little long”
- “The last guy took [us] so much time to cut through the bullshit. . .you don’t even know how much chain saw bullshit we had to cut through”

- When Candidate B said he was making \$31,000 a year at DishNetwork and would not be taking a pay cut, one panel member said: “The last guy was making over 50.”
- A panel member remarked that they “were tired from the last one”.

(*Exh. 25*)

61. Candidate B was questioned extensively about his physical training and how he could expect to pass the PAT after failing the mile-and-a-half run in Rhode Island. He said that he was “ready” and “really wants this job”. After telling the panel that he had not actually been running more than a mile and had last trained more than a month ago, one panel member said his lack of preparation meant that he “lied” about being ready for the job. When asked about other lies he had told, Candidate B said the “last lie” was when he told his wife she had cooked a good meal when she didn’t. He said his “biggest” lie was when he told the panel in his 2012 interview that he would have given his mother a speeding ticket. (*Exhs. 23 & 25*)

62. On ethical scenarios, when pressed to distinguish why he would not arrest an officer who he witnessed commit a crime for which he would arrest a private citizen, he said police officers deserved “special consideration” and would “want to talk to someone” after seeing an officer do something wrong before acting. He would not “do anything” if he saw off-duty officers doing drugs at a party unless it was a “huge bag” but “one or two lines” he “can brush off.” He said he probably would give a warning to a Captain’s son stopped for doing 60 MPH in a school zone if it was only a first offense. He also seemed to suggest that he would hope another officer would “come to me and tell me my kid was doing cocaine” before arresting him. (*Exh. 25*)

63. Candidate B was asked about his credit and said that he had paid down his debt and only had a \$1,500 balance outstanding on his credit cards. He was not asked specific questions about his bankruptcy, foreclosure, or recorded tax title taking. He was asked if he was a “good father”

but not queried about his child support obligations. He was not asked about the investigator's concerns regarding his "dominance character". (*Exh. 25; Testimony of Cordeiro & Vicente*)

64. Candidate B was asked what type of car he drove (2004 Audi) and whether he had any car payment ("paid off"), and one panel member said; "Good for you."

Interview with Appointed Candidate C

65. Candidate C was asked what made him decide to become a police officer at age 34, never having any prior experience in that field. He explained that he had been extremely overweight and a smoker, but now he believed "I can do it" and it was his "last chance or never." He was asked about his physical training and said that he was running every day and could do a ten-minute mile, but had not reached the point that he was able to do the PAT run (a mile-and-a-half in 12 minutes). (*Exh. 25*)

66. The panel ran through Candidate C's work history as a bell captain and three of his prior jobs. When asked how long he had worked as a mortgage originator he paused, said "I don't want to lie" and then stated it had been two or three years.¹⁰ He explained how he was injured at work, had brought a discrimination complaint after he was fired upon return to work and, by the time the case was settled, he had filed bankruptcy and the settlement all went to pay creditors and his lawyer. (*Exh. 25*)

67. When the panel asked Candidate C about the ethical scenarios, Candidate C initially told the panel that if he saw a fellow officer stealing a pack of gum he would make him put it back, or else would "rat him out" to a superior. When later asked what his last lie had been, he responded: "The gum", meaning he would not really rat out an officer for stealing a pack of gum. He was asked about a real-life situation at his place of employment where he reported an

¹⁰ As previously noted, Candidate C's employment as a mortgage originator actually spanned a period of a year-and-a-half, split between two different companies. (*Finding of Fact No. 43; Exh. 25; Testimony of Oliviera*)

employee for stealing and he mentioned a case in which a valet had pocketed some money and was caught on camera. When asked if he would have reported it if there hadn't been any cameras, he said he wasn't sure. He also indicated that he would not take action against an off-duty officer whom he saw smoking marijuana at a party, but he would call a superior and report an officer who he saw stealing a \$10,000 ring during a response to a jewelry store break-in. This prompted further questioning as to "what dollar amount" of theft he would report, when the interview recording abruptly ended. None of the panel members testified to any specific recollection of what was said thereafter. (*Exh. 25: Testimony of Rezendes*)

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 a bypass, the Commission's role is not to determine whether 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). 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)

It is the purview of the hearing officer to determine the credibility of the testimony presented through the witnesses who appear before the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing

ANALYSIS

The NBPD did not establish by a preponderance of evidence that its decision to bypass Mr. Conley was reasonably justified and based on an impartial and reasonably thorough review of his

candidacy. The reasons provided for the bypass, standing alone, or as a “total package”, were shown to be unsupported by the facts and legally flawed under basic merit principles of civil service law. In particular, the NBPD wholly misconstrued Mr. Conley’s employment record and credit status after bankruptcy and erroneously assumed that his current financial situation was a legitimate reason to disqualify him. The NBPD also failed to establish a reasonable justification to rely on the 2006 criminal charges against Mr. Conley, which were dismissed and the record sealed, and as to which the credible evidence failed to substantiate the underlying charges and failed to present any legitimate basis to make the grave inference that Mr. Conley presented a risk as a stalker or sexual harasser. Similarly, the NBPD’s interview process was so patently subjective that the NBPD’s characterization of Mr. Conley’s allegedly unsatisfactory interview performance is neither legally sound nor credible. Finally, indicia of age bias and other evidence of disparate treatment taints the decision and requires that Mr. Conley be granted relief so that he is considered for appointment free of the factual and procedural errors that were used to disqualify him in this case.

Credit History

The NBPD’s assessment of Mr. Conley’s credit history reflects several erroneous assumptions. First, he went through bankruptcy only once, not twice. Second, he did not come out of bankruptcy with a large (“\$45,000”) tax debt as most of the interview panel assumed. Rather, consistent with the whole purpose of bankruptcy as a “fresh start”, he had been relieved of most of his past debt, and, after having the interest forgiven, was paying the small remaining tax balance of about \$2,900 at \$100/mo. Although his excise tax bill was overdue at the time he submitted his application (as he disclosed), he paid it in full soon thereafter. All of his other past debt was attributable to the foreclosure deficiency on his “upside-down” mortgage and other

older debt. He had incurred no new debt that he couldn't pay since 2006 and was current on all existing loans at the time of his application. His credit rating of about 650 put him in an average category. In sum, Mr. Conley's credit, on its face, reflected a person who had finally worked his way out of the financial hole into which he had been put by not having enough taxes withheld from his 2003 "1099" income, and losing his house to foreclosure in 2007. Although Mr. Conley did leave his job at the Bristol Sheriff's Department, in part, for financial reasons, his financial situation had changed dramatically for the better since 2010. He was virtually debt-free, except for the car loan, no longer had child care obligations for his adult children, and his girlfriend also worked and contributed to the family living expenses.¹¹

In fact, it was not Mr. Conley's credit that the NBPD found problematic. His credit history and current creditworthiness is indistinguishable from the credit history and credit standing of at least two of the candidates who bypassed him and were appointed. Both Candidates B and C had also filed bankruptcy. Candidate B had a home foreclosure along with a tax lien and other unsatisfied judgments on file. Candidate A, who worked as an NBPD dispatcher also had recently purchased a new car and was also paying off a substantial balance on his car loan.

Rather, what mainly motivated the NBPD to disqualify Mr. Conley for being an alleged financial risk (that one Captain's Board member equated to a former drug addict who might even steal "dirty money" confiscated as evidence during a raid), was what all the NBPD evaluators considered poor judgement in purchasing a "fancy car" on which he paid \$559/month. Although Mr. Conley never missed a payment since he purchased the car, the NBPD had concern that he couldn't "afford" it once he had to take a pay-cut (from his current annual salary of \$52,000 to

¹¹ Mr. Conley took the job thinking the 2010 state-takeover of the county correctional system [see Acts of 2009, c. 61] meant that Bristol County Correction Officers would have their pay increased to parity with Massachusetts DOC officers, and when he learned during the academy that this was not the case, he realized he could not then make enough. His other reason for leaving was discovering that he could not imagine a career "behind the wall", meaning isolated from the community, which would not be the case in a job as a NBPD police officer..

the \$42,000 base pay of an NBPD rookie, plus the cost of commuting to the police academy for 26 weeks and having to purchase uniforms.¹² This bald, factually problematic speculation, never specifically mentioned in the bypass letter, is not a “reasonable justification” to bypass Mr. Conley.

Complaint for Stalking

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

¹² As noted in the findings, according to what NBPD told Mr. Conley and other candidates, the actual “pay cut” would likely be less than half what NBPD claimed, after considering “detail” and shift differential pay. (*Finding No. 52, fn. 9; Exhs. 6, 25 & 27; Testimony of Rezendes*)

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.

Measured by these standards, I conclude that the NBPD’s contention that the 2006 criminal complaint against Mr. Conley does not provide reasonable justification for his bypass. This appeal is strikingly distinguishable from the Beverly case, which upheld the bypass of a candidate based on the appointing authority’s independent review of the circumstances of a candidate’s termination by a prior employer for misconduct (invasion of other employees’ privacy). Here, Mr. Conley was exonerated by his employer, whose extensive investigation found no employee or manager who corroborated the alleged victim’s allegations. To the contrary, several employees “doubted that [Mr. Conley] was capable of sexual harassment”, WOW “never found anything credible” and “cleared him of any wrongdoing”. He was rehired in 2009 and has since served five years with WOW in management positions without a scintilla of evidence that he was every accused, let alone found responsible for, any form of workplace harassment. The sole indicia that questioned this substantial evidence of innocence are some vaguely worded statements by the alleged victim, which her own statements during the WOW

investigation had contradicted. The NBPD is to be credited for making a “thorough review” of the stalking charge. I cannot conclude, however, that its reliance on one person’s statements about this decade-old disputed incident, for which there was no record or other evidence of the actual facts that were alleged to have occurred at the time, while discounting all of the overwhelming contemporary evidence to the contrary, presents the “legitimate doubt” that creates a “credible basis for the allegations” that is sufficient evidence to justify the bypass in the particular circumstances of this case.. In this regard, I also take account of the evidence that, in other ways, Mr. Conley was not considered on a “level playing field” and, in particular, the NBPD interview panel seemed particularly skeptical of Mr. Conley’s emphatic claim of complete innocence (save for his admission that he had acted inappropriately by trying to confront the employee immediately after hearing about her accusations) and implied that nothing short of passing a polygraph would persuade the NBPD otherwise.¹³

Moreover, the criminal charge of stalking was, on its face, always problematic, as even the NBPD witnesses agreed. There was no percipient witness capable of establishing any pattern of “multiple” incidents necessary to prove that any crime was committed. Also, as the case file was sealed by court order, a serious question could be presented as to whether the NBPD was permitted to rely on such charges in any way as a matter of law. See G.L.c.151B,§4(9); Salbia v. City of Worcester, 29 MCSR 41 (2016). See also Gore v. Department of Correction, 27 MCSR 582 (2014) citing 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

¹³ Although Mr. Conley readily agreed to take a polygraph test, to require a candidate for employment to submit to polygraph as a condition of employment is, of course, illegal. G.L.c.149, §19B(2)

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 based on a CORI review)

In sum, the preponderance of the evidence does not establish that NBPD had made the “impartial and reasonably thorough independent review” necessary to establish a “credible basis for the allegations” of stalking or workplace harassment that present a “legitimate doubt” about Mr. Conley’s present suitability. Thus, the NBPD’s reliance on the 2006 stalking complaint does not provide reasonable justification for his bypass.

Captains Board Interview

Police departments and other public safety agencies are properly entitled, and often do, conduct interviews of potential candidates as part of the hiring process. Some degree of subjectivity is inherent (and permissible) in any interview procedure, but care must be taken to preserve a “level playing field” and “protect candidates from arbitrary action and undue subjectivity on the part of the interviewers”, which is the lynch-pin to the basic merit principle of civil service law. E.g., Flynn v. Civil Service Comm’n, 15 Mass.App.Ct. 206, 208, rev.den., 388 Mass. 1105 (1983). The Commission’s decisions have commented on a wide range of interview plans, some of which are commendable and some more problematic. Example of the former: Anthony v. Springfield, 23 MCSR 201 (2010), Gagnon v. Springfield, 23 MCSR 128 (2010); Boardman v. Beverly Fire Dep’t, 11 MCSR 179 (1998). Examples of the latter: Daley v Town of Wilmington, 28 MCSR 466 (2015); Morris Jr. v. Braintree Police Department, 27 MCSR 656 (2014); Monagle v. City of Medford, 23 MCSR 267 (2010); Mainini v. Town of Whitman, 20 MCSR 647, 651 (2007); Belanger v. Town of Ludlow, 20 MCSR 285 (2007); Horvath v. Town of Pembroke, 18 MSCR 212 (2005); Fairbanks v. Town of Oxford, 18 MCSR 167 (2005);

Saborin v.Town of Natick, 18 MCSR 79 (2005); Sihpol v. Beverly Fire Dep’t, 12 MCSR 72 (1999); Bannish v. Westfield Fire Dep’t, 11 MCSR 157 (1998); Roberts v. Lynn Fire Dep’t, 10 MCSR 133 (1997).

Here, to its credit, NBPD did audio record the interviews and, despite the technical glitches that cut off one interview with an eventually selected candidate half-way through, the recordings provide a valuable and efficient aid to the Commission’s consideration of an appeal in which the interview process has been challenged. However, NBPD took few additional steps to insure that the interview process was reasonably structured and capable of meaningful objective review. The panel’s numerical scoring was not specifically tied to responses to specific interview questions but rated the candidates on a variety of general characteristics and personality traits. The numerical scoring of these traits was not used to produce an overall score, and the scoring did not enter into the ultimate, wholly subjective independent recommendation to hire or not hire the candidate. The interviews frequently strayed from the “standard” types of questions into areas, often problematic for a public safety selection process, such as inquiry into physical ability, an inquiry that demanded that a candidate disparage members of the NBPD, and, at times, even sanctioning occasional insulting and profane colloquy. Other than the bypass letter itself, there is no record whatsoever of the information provided to, or the assessment by, the NBPD Police Chief or New Bedford Mayor Mitchell (the Appointing Authority) of any of the candidates.

Thus, the NBPD’s decision to bypass Mr. Conley was a judgment that was made through a fundamentally flawed process that depended entirely on an unduly subjective, relative assessment of his interview performance that cannot be fairly compared to the performance of others. The red flags that appear in this record bear particular notice, given the age and racial disparity between Mr. Conley and the three selected candidates and the disparate treatment of

Mr. Conley compared to the selected candidates, which has been noted more specifically elsewhere in this decision. The appearance of bias raised by these facts underscores why civil service appointments based on unduly subjective assessment of interview performance is not reliable and must be discouraged.

Thus, here, the NBPD's reliance on an interview performance to distinguish which candidates make the cut and which do not is also problematic because the evidence demonstrates that the Captain's Board panel members' level of subjectivity crossed the line and demonstrably violated basic merit principles in a number of ways.

First, viewing the numerical scoring assigned to the interviews – the only objective measure of interview performance provided – the ratings provided to Mr. Conley and the three selected candidates who bypassed him are virtually indistinguishable. All four candidates received mostly average or above average ratings in most categories and, overall, the cumulative and average scores for all candidates placed all of them in the “average” range overall; no candidate achieved an “above average” cumulative or average score (8×3 [average] = 24; 8×4 [above average] = 32). The only exception was Mr. Conley’s rating of 15 by one Captain, who was the one who berated Mr. Conley for asking his first name, said that had “really turned him off”, said that Mr. Conley’s interview performance was the worst he had ever seen and was the only Captain to rate Mr. Conley “Unsatisfactory” in “Interest in the Job”, “Experience” and Initiative”.

Second, the numerical scores assigned by the panel members also are often significantly inconsistent. Two panel members rated Mr. Conley’s “Appearance, Manner, Bearing” (“Does the candidate measure up as a member of this department?”) as “Excellent” and two said it was “Average”; yet one Captain who rated him Average, also rated him “Above Average” in “Character, Personality”, while all other Captains rated him “Average” or “Below Average” in

that category, as well only “Average” in “Alertness, Demeanor.” Similarly, one Captain rated Mr. Conley “Above Average” in “Self-Control (a higher rating than that Captain gave to all other three selected candidates) and gave Mr. Conley a cumulative score equal or higher than the three candidates he recommended should be hired. Plainly, as most of the panel members acknowledged during their testimony, the numerical ratings were, in fact, entirely subjective and largely irrelevant to the ultimate recommendation whether to hire a candidate or not.

Third, although all the Captains Board members touted honesty and trustworthiness as one of the top, if not the top, quality they were looking for, not one of the rating categories is specifically assigned to an assessment of that category. The closest might be “Appearance, Manner, Bearing” (“Does the candidate measure up as a member of this department”), for which Mr. Conley received two “Excellent” ratings and two “Average”.

Fourth, it is clear from the testimony of the Captains Board panel members that they had little present recollection of the interviews and their memory was limited largely to self-serving snippets of the hour-and-a-half session. Little memory remained of the positive aspects of Mr. Conley’s performance (standing alone as well as compared to the performance of the other candidates) that I heard when I listened to the interview recordings. In particular, I took note of Mr. Conley’s very respectful demeanor in the face of some highly critical inquiry, through which he demonstrated a remarkable balance between knowing when to be discrete and show respect and when to stand his ground, which the panel members either had forgotten or chose to ignore.

In sum, the interview recordings themselves, the documentary record of the interviews and the testimony presented to me at the Commission hearing, collectively demonstrated that the NBPD’s interviews are not a reliable measure upon which to compare candidates or to decide whether Mr. Conley, or any other candidate, was worthy of appointment or not.

Other Evidence of Bias and Disparate Treatment

It is a fundamental element of “basic merit principles” under Massachusetts civil service law that candidates must be fairly and equivalently considered. Evidence of undue political influence is one relevant factor, but it is not the only measure of unjustified decision-making by an appointing authority. The Commission has construed its obligation to prohibit the bypass of an appellant where it finds that “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.” Borelli v. MBTA, 1 MCSR 6 (1988). See Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate reasons for the bypass”)

Regrettably, although not necessarily intentionally, NBPD’s rationale for bypassing Mr. Conley does not hew to these standards. In some respects, the impermissible factors used to weigh his candidacy are documented. The repeated attention given to Mr. Conley’s age, alone, have tainted this matter to the point that the bypass cannot be legally supported. In addition, the disparate treatment given to Mr. Conley in contrast to the three other selected candidates, whether attributable to an unconscious age or racial bias, or merely personal animosity, demonstrate that his application was not considered on a level playing field. For example:

- Mr. Conley’s driver history, although replete with numerous violations from 1997 to 2008, had been clean for the most recent six years. Other candidates also had a spotty driver history, although shorter than Mr. Conley’s (who had “more baggage because he was a little older”).
- At least two other candidates had experienced a negative financial history, including bankruptcy and foreclosure, but they had turned themselves around and were hired,

while Mr. Conley was deemed a financial risk who couldn't afford to make ends meet on a police officer's pay.

- Although the panel concluded that Mr. Conley lacked initiative to improve himself and showed little interest in academic advancement after he dropped out of high school, he got little credit for returning to school ten years later to get his GED, for his advancement in business, or for achieving a passing score (94) on the civil service police examination. None of the other lower ranked, hired candidates expressed any interest in continuing their education either, but that was not held against them.
- In Mr. Conley's responses to the interview questions on ethical dilemmas, he stood head and shoulders above the other candidates. He was unwavering in stating his strong and unequivocal moral compass, both in response to all of the hypothetical questions as well as in pointing to actual instances in which he applied his ethical principles in real life. The same cannot be said of all the hired candidates.

Finally, although none of the NBPD witnesses professed any racial bias, I cannot overlook the fact that New Bedford remains a Castro "Consent Decree" community which continues to be subject to the mandate to increase the number of African American and Hispanic officers appointed to serve within the ranks of the NBPD.

CONCLUSION

For all of the above stated reasons, the bypass appeal of Mark Conley, under Docket No. G1-14-224 is *allowed*. Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that HRD and/or the NBPD in its delegated capacity shall:

- Place the name of Mark Conley at the top of any current or future Certification for the position of NBPD Police Officer until he is appointed or bypassed after consideration consistent with this Decision.

- If Mr. Conley is appointed as an NBPD Police Officer, he shall receive a retroactive civil service seniority date of 9/14/14, the same date as the candidate ranked in the same tie group as Mr. Conley who was appointed from Certification No. 01446. This retroactive civil service seniority date is not intended to provide Mr. Conley with any additional pay or benefits including, without limitation, creditable service toward retirement.

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 13, 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:

Christopher T. Saunders, Esq. (for Appellant)
Elizabeth Treadup PIO, Esq. (for Respondent)
John Marra, Esq. (HRD)

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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MARK CONLEY,

Appellant

v.

G1-14-224

NEW BEDFORD POLICE DEPARTMENT,

Respondent

CONCURRING OPINION

We concur with the well-reasoned decision of Commissioner Stein, including his conclusion that the appeal here should be allowed.

We base this, however, primarily on the deeply-flawed interview process that, at times, bared no resemblance to the type of professional, merit-based process that is required. Among the (many) problems with the interview were the direct and/or indirect references to Mr. Conley's age, including asking Mr. Conley why he chose to become a police officer "so late in life"; that he had more "baggage" because he was older; and references to the mandatory retirement age.

Further, the casual use of vulgarities, both during and after Mr. Conley's interview added to what, at times seemed more like a raucous social gathering, as opposed to a professional interview process.

Finally, the hypothetical "ethical questions" seemed to result in rewarding those candidates who would give special consideration to police officers and their friends and relatives.

On a going forward basis, including when Mr. Conley's application is reconsidered, we expect the City to address these glaring problems.

To ensure clarity, however, we find the allegations raised by a former female co-worker of Mr. Conley to be of serious concern. The NBPD, in our opinion, fully investigated this matter, including speaking directly to the female co-worker, who, even years later, was troubled by the

interactions she had with Mr. Conley, including when he admittedly followed her to the parking lot and began screaming at her in anger. This is not acceptable behavior, particularly for a person seeking to be a police officer, and the NBPD was warranted in considering this as part of its decision-making process here.

However, since NBPD's review here was so deeply compromised by the interview process, we concur that reconsideration, using a more professional, merit-based protocol is warranted.

Civil Service Commission

/s/ Christopher C. Bowman

/s/ Cynthia A. Ittleman

/s/ Paul A. Camuso