

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MARIKA DuVAL,

Appellant

CASE NO. G1-16-082

v.

CITY OF SOMERVILLE,

Respondent

Appearance for Appellant:

Dennis M. Coyne, Esq.
McDonald, Lamond Canzoneri
352 Turnpike Road, Suite 310
Southborough, MA 01772-1756

Appearance for Respondent:

Shannon T. Phillips, Esq.
Assistant City Solicitor
City of Somerville
93 Highland Avenue
Somerville, MA 02143

Commissioner:

Paul M. Stein

DECISION

The Appellant, Marika DuVal, duly appealed to the Civil Service Commission (Commission), acting pursuant to G.L.c.31,§2(b), to contest her bypass by the City of Somerville (Somerville) for appointment as a permanent Reserve Police Officer with the Somerville Police Department (SPD).¹ The Commission held a pre-hearing conference on May 24, 2016, followed by three days of full hearings on July 28, 2016, September 14, 2016 and September 21, 2016 which were digitally recorded.² Fifty-nine exhibits (Exh.1 through Exh.59) were received in evidence at the hearing and three exhibits (PHExh.60 through PHExh.63 were received thereafter. On December 30, 2016, each party submitted a Proposed Decision.

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 Copies of the CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the stenographic or other written transcript of the 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:

- SPD Police Chief David Fallon
- SPD Police Captain Bernard Cotter
- SPD Police Lieutenant Timothy Mitsakis
- SPD Police Sergeant Michael Kiely
- Somerville Personnel Director William Roche
- Somerville HR/Civil Service Manager, Deborah (Debbie) Stein [no relation to CSC Commissioner Stein]

Called by the Appellant:

- Marika DuVal, 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:

1. The Appellant, Marika DuVal, is a Massachusetts citizen who has lived in Somerville for more than ten years. She grew up in Western Massachusetts and obtained her high school diploma from Wilbraham & Monson Academy in 2001. (*Exhs. 1 & 2*)

2. After high school graduation, Ms. DuVal attended Springfield Technical Community College for a year and took one semester at Colby-Sawyer College (English major) before she transferred to Johnson & Wales University, where she intended to earn a degree in Criminal Justice, but only finished two trimesters. She also took courses at Mass Bay Community College (General Studies). She never obtained a college degree. (*Exhs. 1, 8 & 13; Testimony of Appellant*)

3. Ms. DuVal began working for a dry cleaning chain's store in Wellesley MA in June 2003, initially, as a counter worker. She initially left that employer in March 2006 to work as a Loss Prevention Detective at a major retailer in Newton MA. In February 2007, she elected to return to the dry cleaner, where she became an assistant store manager, leaving that job in March 2008 to become the office manager for a Boston, MA automobile dealer's body shop, from which, unfortunately, she was laid off due to the recession. Her next full-time jobs were with a family

services agency in Somerville MA from August 2011 until May 2012, and as an administrative assistant for an industrial electrical contractor in Cambridge MA from May 2012 to October 2012. Since May 2013, Ms. DuVal has been employed full-time as a customer service representative for a florist in Cambridge MA. (*Exhs. 1 & 13*)

4. Throughout most of her career, Ms. DuVal held down a second or third part-time job working nights as a security/door manager at a number of different clubs in the Boston area. This work calls for regularly dealing with difficult, intoxicated, and impulsive people. Confrontation is routinely part of the job and calls for discretion to prevent injury and property damage. She regularly works side-by-side with the municipal police officers assigned to detail at the clubs.

- From 2006 through 2011 she worked, off and on, at Cambridge restaurant & Night Club. (Cambridge Restaurant/Night Club). She lost that job after she confronted a band manager when she observed him engaged in rude and inappropriate behavior toward staff, and told him she would have to have him removed from the club if he continued the behavior. The band manager complained to one of the owners, who terminated her.
- Ms. DuVal also worked at the [name redacted] Lounge in Cambridge (Cambridge Lounge) for about a year (2007-2008). She once refused entry to someone because the show was sold out and the club was at maximum lawful capacity. When he asked: “What do you mean sold out?” she replied: “What don’t you understand about sold out?” The man, who knew the owner, complained. The owner let his friend in and fired her.
- In 2011, she worked as a security guard for an Allston MA restaurant/bar. She left that job in August 2012 to take a door manager’s position at the [name redacted] Bar & Grille in Somerville (Somerville Bar & Grille) The Alston restaurant/bar asked her back in 2013, and she worked three jobs for a few months but found it too much to handle.

- Ms. DuVal still works for the Somerville Bar & Grille, where she has been promoted to the position of security manager, which includes responsibility for training staff and overall compliance with all licensing and liquor laws. Her only discipline was for once refusing to allow a woman to enter the premises because she had called Ms. DuVal a “bitch”, which required her manager’s intervention to resolve.

Between her full-time job at the Cambridge florist and her part-time job as security manager in Somerville, Ms. DuVal works 60 to 70 hours per week. (*Exhs. 1, 3 & 13; Testimony of Appellant*)

5. Ms. DuVal’s long working hours and multiple jobs were necessitated, in significant part, by two major setbacks in her personal life. In 2003, her parents separated, and, without financial support from her parents, Ms. DuVal was forced to interrupt her college education. When she returned from college, she found that her father had become unstable.³ Eventually, her father and brother moved to New York, where her father soon died of a terminal illness. Then, around 2014, the break-up of a long-time relationship left her alone in the apartment shared by the couple, once again, adding an unexpected financial burden of having sole responsibility for the rent and expenses. (*Exh. 8; Testimony of Appellant*)

6. On June 15, 2013, Ms. DuVal took and passed the civil service exam for municipal police officer. Her name was placed on the eligible list established by the Massachusetts Human Resources Division (HRD) on October, 15, 2013. (*Exh. 52; Stipulated Facts*)

7. In November 2014, pursuant to a request by Somerville to appoint ten (10) Permanent Full-Time Police Officers and eight (8) Permanent Reserve Police Officers, HRD issued certifications

³ On one visit home from college, Ms. DuVal’s father had entered her bedroom and refused to leave, causing her to “slap” him. The father called the police and Ms. DuVal was arrested and booked for assault and battery. The charges were dismissed less than a month later. This incident is the only entry on Ms. DuVal’s criminal history. The arrest, however, also factored into her leaving Johnson & Wales University as she learned that it would complicate the ability of the University to place her into a law enforcement agency. (*Exhs. 1, 2, 8, 13 & 16*)

#02466 and #02473 to the municipality. These certifications were later supplemented on December 5, 2014 with additional names, one of which was Ms. DuVal's. (*Exhs.17 & 52; Stipulated Facts*)

8. A total of 46 candidates signed the two certifications, of which 30 candidates were ranked in the 22nd place tie group and above, six candidates were tied with Ms. DuVal in 23rd place, and six candidates were ranked below Ms. DuVal in 24th place. (*Exh. 17 & 52*)⁴

9. On December 18, 2014, Ms. DuVal reported to the SPD headquarters for a candidates' orientation. She submitted the required application packet, including a 16-page "Recruit Candidate Information Form", a resume, letters of reference and credit reports from three major credit reporting agencies. She submitted to a hair drug test which she passed. (*Exh. 1; Testimony of Appellant*)

10. In the section of the application entitled "Education", Ms. DuVal accurately and fully described all four colleges that she had attended, noting she had never completed a degree. (*Exh. 1*)

11. In the section of the application entitled "Driving Record", Ms. DuVal accurately and full identified her one motor vehicle accident, in 2002, for which she was found responsible. Ms. DuVal has also been cited once for speeding in 2006, but she did not report that because the application asked only to list "all traffic citations you have received in the last five years." (*Exhs. 1 & 2*)

12. In the section of the application entitled "Employment", Ms. DuVal accurately and fully identified all of her full-time and part-time employment, noting, as required, a period of unemployment from full-time work from December 2008 until 2011. In particular, her disclosures accurately identified the reasons she was fired from the two Cambridge establishments and the written warning she once received from her current Somerville employer. She also discretely (but accurately) described why she left the family services agency after ten months (due to the program

⁴ Somerville processed the full-time and reserve appointments simultaneously, eventually hiring ten (10) full time officers in May 2015, all of whom ranked in the 21st tie group or above. The selection of reserve officers then considered those candidates who had not been "reached" for full-time appointment, which included ten remaining candidates in the 21st and 22nd tie groups ranked above Ms. DuVal, the six candidates tied with Ms. DuVal in the 23rd tie group, and six candidates ranked below her in the 24th tie group. (*Exhs. 17, 55 & 56; Testimony of Stein & Roache*)

director's "inappropriate behavior") and the electrical company after six months (did not enjoy the clerical work for that commercial lighting company). She estimated that she had taken approximately 12 sick days and had been tardy 10 times in her career. In response to a question which asked: "Which of your past positions has best prepared you to become a police officer and Why?" Ms. Duval stated: "*All of my Door and Security positions. You get used to dealing with people in stressful and difficult situations and learn how to stay calm.*" (Exh. 1)

13. In the section of the application entitled "Criminal Record", Ms. DuVal accurately responded "YES" to questions which asked: "Have you ever been arrested for violation of a criminal statute?", "Have you ever been arrested but never tried for a criminal offense?" and "Have you ever been arrested".⁵ She accurately answered "NO" to all other questions about past or pending criminal or civil actions against her. (Exhs. 1 & 2)

14. In the section of the application entitled "Financial Record" Ms. DuVal accurately listed her two credit card accounts and the current balances on each account. She answered "YES" to the question: "Has your credit ever been considered unsatisfactory?" and answered "NO" to all other questions, including the question: "Have you ever been sued or had your wages garnished?" and all questions concerning any current financial debt, including, "Are you now over 180 days delinquent on any loan or financial obligation?" (Exh.1) (*emphasis added*)

15. As required, Ms. DuVal also attached complete copies of the credit reports (dated 12/12/2014) that she had obtained from Experian (overall credit "fair"), TransUnion (overall credit "D" ["A" best, "E" worst], and Equifax (overall credit "average"). The credit reports show Ms. DuVal current on all outstanding debt, the bulk of which (approximately \$8,000) are college student

⁵ Ms. DuVal answered "YES" to these questions, although the form gave her the option to answer "NO RECORD" to the first two. The form did not provide any option to answer "NO RECORD" to the third question. Compare G.L.c.31,§20 with G.L.c.151B, §§9 & 9½

loans. She was reported delinquent 120 days or less in the past, and had one account for a \$280 telephone bill referred to collection in 2011 and closed in 2014. (*Exh. 1*)⁶

16. In the section of the “application entitled “Miscellaneous”, Ms. DuVal truthfully and accurately answered YES to the following questions, among others:

“Have you ever used Marijuana? If YES, how many times and when was the last time you used, explain the circumstances. *Probably 6 or 7 times, 1st time was probably 6 or 7 years ago at a party.*”

“Have you ever used any other illegal drugs, such as oxycontin, ocycondone, methadone, steroids, hashish, opiates, cocaine, pills, etc.? *Have taken a xanax from friends before, but not in a very long time.*”

“Do you drink alcoholic beverage? If YES, to what degree? *A couple times a week, a couple glasses of wine.*”

(*Exh. 1*)

17. Ms. DuVal attached five letters of reference to her application, from her current employer, two former employers, one former colleague, and an SPD police officer who knew her:

C.M.[name redacted], General Manager, Somerville Bar & Grill

“Marika has been an employee under my supervision . . . for over two years now. . . .[S]he has been the most important member of my security team. . . . checking guests for proper identification . . . crowd control management and maintaining standard security measures to assure all guests are safe. . . . I never have to question her decision making . . . If Marika is at the door, I know for a fact that a fake ID [or] intoxicated person is not getting into our building. She is strict yet extremely thorough . . . She is constantly dealing with intoxicated patrons or young college kids questioning her decision. . . . [S]he is fair and honest with all guests and every decision she makes is always in the best interest of our bar.

“I know that Marika has wanted to be a Somerville police officer for some time. . . . She is loyal, dependable, and above all else a leader. . . . I would put Marika at the top of my list for promotion [within the company] . . . I will be sad to see her go . . . [M]y loss will be your gain. My only hope is that she could come work detail shifts on the weekends [here] once she is a Somerville police officer.”

J.S.[name redacted], Owner, [Cambridge] Restaurant and Night Club

“It is my pleasure to endorse Marika for the Somerville Police Department. She has been an invaluable asset . . . While in my employ, she was someone I could always rely on to go above and beyond . . . She was friendly but firm with difficult customers and was a great manager who inspired her staff to provide excellent service often under hectic circumstances.”

⁶ Ms. DuVal did not remember the closed cell phone account. She switched to a different provider and her last contact with that creditor was years ago. (*Testimony of Appellant*)

N.S. [name redacted], Owner, Cambridge Restaurant & Night Club

“It is with a great sense of confidence that I write this letter of recommendation for Marika DuVal . . . Over the few years that she was employed at my establishment (first as an entry level hostess then working her way up to door manager) she exhibited a strong work ethic, a sense of responsibility and dedication . . . that is hard to find . . . [S]he trained and led by example a team that still serves me well today. She also developed a solid relationship with the Cambridge Police detail officers to the point that they often [deferred] to her judgment when evaluating whether a patron’s id was counterfeit or not! Marika set a high standard of integrity, professionalism and composure under pressure”

E.O.[name redacted], Service Director/Partner, [name redacted] (former co-worker at Cambridge Lounge)

“I have known Marika for over seven years since we worked together as bouncers at the [name redacted] in Cambridge. At that time she was always the one we looked to lead us with her strong leadership ability and sense of fairness. . . . I trust Marika without reservation. As a business owner with over a dozen employees, I understand the value of moral character and strong work ethic and know this to be two of her many strengths. . . . I find her to be honest, almost to a fault, and a very stand up person. . . .”

Officer [name redacted], Somerville Police Department

“I am writing . . . to recommend . . . Marika DuVal for the position of police officer for the City of Somerville. In the time I have known Marika, she has demonstrated to me a real passion for police work. She has a keen sense for all the different aspects of police work, and she is very good in dealing with the members of the public. . . Marika is very dependable, and highly organized. She gives everything she does her best effort. She is a very fast learner. . . . I believe that Marika has all the qualifications to become . . . a real asset to the Somerville Police Department.”

*(Exh. 1)*⁷

18. SPD Lt. Timothy Mitsakis was assigned to perform Ms. DuVal’s background investigation, in accordance with standard SPD procedures. The SPD relies “heavily” on the background investigation in deciding who to recommend for hire. (*Exhs.2 & 53; Testimony of Mitsakis, Roche & Cotter*)

19. Prior to preparing his investigation report, Lt. Mitsakis reviewed Ms. DuVal’s “Recruit Candidate Information Form”, the on-line CJIS (Criminal Justice Information System) records, and an on-line report from National Comprehensive Report Plus Associates, which included searches for possible aliases, political donors, relatives and business associates, among other things. (*Exh. 2*)

⁷The application form asked if Ms. DuVal knew any SPD officers, and, In addition to the officer who wrote her a recommendation, Ms. DuVal listed another SPD officer and two SPD detectives who also knew her personally. (*Exh. 1*)

20. Lt. Mitsakis contacted Cambridge florist and learned there were “no issues” with Ms. DuVal. He drove past the Bar & Grille in Somerville, just to “see it”, but never spoke to anyone there. He noticed that an SPD Officer had written a letter of reference, and learned that he came to know Ms. DuVal from working police details at the Bar & Grille in Somerville, but he did not ask the officer any substantive questions about her. (He thought it inappropriate.) He also did not pay any attention to the letter of reference she had obtained from the General Manager of the Bar & Grille because “anyone” can get a letter of referral. (*Testimony of Appellant & Mitsakis*)

21. Lt. Mitsakis spoke to a manager (Ms. DuVal’s former boyfriend) and one of the owners at the Restaurant & Night Club in Cambridge. He learned that they “did not have any issues” with Ms. DuVal. He noted that both of the owners had written positive letters of reference which he thought odd, and disregarded them, because according to Ms. DuVal’s application, and what his investigation confirmed, she had been fired from that job after a conflict with a band manager. When he called the Lizard Lounge, the person he spoke to did not have any information to provide the “answers [he] was looking for.” He did not follow-up with the reference who had known Ms. DuVal as a co-worker at the Lounge in Cambridge for the same reason that he ignored the Joshua Tree references – anyone can get a letter. (*Testimony of Mitsakis*)

22. Lt. Mitsakis also contacted the family services agency and the electrical company, two prior employers for whom Ms. DuVal recently had worked briefly. The person he spoke to at the family services agency, gave Lt. Mitsakis the “vibe” that DuVal “was not a good employee”. When he asked about why she left, he did not get a definitive answer. At the electrical company, Lt. Mitsakis spoke to someone who described Ms. DuVal as “standoffish.” (*Testimony of Mitsakis*)

23. As part of his investigation, Lt. Mitsakis, along with his superior officer, Capt. Bernard Carter, met with Ms. DuVal and reviewed the “red flags” in her background, specifically, her work

history, her history of “anxiety attacks” and taking Xanax from a friend, and “jumping around” in college without ever getting a degree. Capt. Carter also asked if she was confident she could pass the PAT (Physical Abilities Test). At the end of this meeting, Capt. Cotter and Lt. Mitsakis told Ms. DuVal that they did not see her getting through the process with this many “red flags” and offered her the option to withdraw her application. Ms. DuVal informed them that she chose to continue through with the hiring process. (*Testimony of Appellant, Mitsakis & Cotter*)

24. In his investigation report, dated April 9, 2015, Lt. Mitsakis noted Ms. DuVal’s 2003 domestic assault and battery arrest, her 2002 motor vehicle accident and a 2006 speeding ticket, as well as the following:

Employer Interviews:

Present employer: [Name Redacted] Florist, Cambridge, Employed since August 2011”
[Somerville Bar & Grille], Employed since 2012 part time 9 hours a week.

Past Employer: [Electrical Company], Cambridge, 5/2012-10/2012. Spoke to Manager [N.H.] stated Marika was very “standoffish” and left on her own accord after only a short time . . .

[Family Services Agency], Somerville, 8/2011-5/2012. Spoke to Manager [R.M.] who said Marika was not a good employee and would not hire her again Marika quit Dare.

Credit Check:

Credit is poor thru TransUnion with a D grade, 3 negative accounts and 1 in collection.

Positive Employment Aspects: None

Negative Employment Aspects:

- 1) Marika has a poor work history, seems to have problems working with peers.
- 2) During interview Marika stated she illegally consumed Xanax a controlled substance which did not have a prescription for. Marika said about a year and a half ago she took her friends prescribed Xanax several times because she was having anxiety. This violates the conspiracy law under MA general laws 94C.

Applicant Interview: During Makira’s [sic] interview which was short in nature I focused on her work history which showed a person that can’t seem to keep a job for extended period of time. She was fired from 2 jobs and left several others for no specific reason. She stated she was let go from the [Cambridge Restaurant & Night Club] for threatening a tour manager. Makira [sic] also was unable to specify why she went to 4 colleges and never earning [sic] a degree. When asked about drug use she stated she took a friends [sic] prescription of Xanax because she was having anxiety attacks.

(Exh. 2)⁸

⁸ Save for the report itself, Lt. Mitsakis’ investigatory notes, if any, were not produced.

25. On April 13, 2015, Lt. Mitsakis e-mailed his investigation report to Somerville's HR Coordinator, Deborah Connelly, who immediately forwarded it to her supervisor, William Roche, Somerville's Director of Personnel, with the message: "Do you want me to call her in and try to get her to withdraw?" (*Exh. 4; Testimony of Roche*)

26. On April 19, 2015, Ms. DuVal appeared at SPD headquarters and met with the Public Safety Interview Panel, consisting of SPD Chief David Fallon, Capt. Carter, Personnel Director Roche and Somerville Chief Labor Counsel, the latter doing most of the talking. Originally meant to be a candidate interview, the panel, instead, informed Ms. DuVal that the panel did not see her making it through the process with so many "red flags" and it was in her "best interest" to withdraw. Chief Fallon expressed a lack of confidence in her ability to handle life-threatening situations. Captain Cotter again mentioned Ms. DuVal's physical condition and repeated his doubt that she could pass the PAT. She was, again, offered the option to withdraw and told to think about it. (*Testimony of Appellant, Roche & Cotter*)

27. The next week, Ms. DuVal met with Deborah Connolly who told Ms. DuVal that she did not seem ready to become a police officer and recommended that she take time to better prepare herself for the position of a police officer. Ms. Connolly told Ms. DuVal that "as a mother, she would tell her own children the same thing." Ms. DuVal's employment at the family services agency came up and Ms. DuVal provided further, explicit detail – stating that she had reported a supervisor for stealing and the employer did not support her when the supervisor turned hostile on her. Ms. DuVal, again, reaffirmed her decision to continue on with the process. Accordingly, she was rescheduled for a candidate interview with the panel on May 11, 2015. (*Exh. 3; Testimony of Appellant*)

28. The panel for Ms. DuVal's May 11, 2015 candidate interview included Chief Fallon, Captain Cotter and Personnel Director Roche. In accordance with standard practice, Ms. DuVal was asked

the same set of questions posed to all applicants. The panel members took notes, but the interviews were not recorded by audio or video means, and the candidates were not scored or rated. (*Stipulated Facts; Exh. 3; Testimony of Fallon, Cotter & Roche*)

29. During the interview, Ms. DuVal's work history came up. She emphasized her ten years in security work at local clubs and, said, according to the panelists' notes: "I train people in how to recognize a fake ID and I am proud when who I train finds a fake ID" and that "detail officers told me to be cop." She explained why she quit the family services agency (a "hostile work environment") and the electrical company (the clerical work was "mind-numbing" and she knew she could never be "passionate" about it). When asked how she has handled being asked to do something unreasonable, she recalled the incident at her current employer, the Somerville Bar & Grille, when someone called her a "bitch". Her boss ordered the woman admitted after what Ms. DuVal called a "fake" apology, so she protested with a rhetorical question: "Well do I just have to let in everyone who is rude and disrespectful?" (The same supervisor eventually promoted her and wrote her a strong letter of reference). (*Stipulated Facts; Exhs. 1 & 3; Testimony of Appellant*)

30. Several interview questions tested Ms. DuVal's moral compass and work ethic. The panel notes indicate she repeatedly emphasized the importance of honesty, said being lied to was one of her "hot buttons", said she would report a fellow officer who was intoxicated on duty and would obey an order that could put her life in jeopardy "as safely as possible" because "when your boss tells you to do something you do it." Nothing in the panel notes indicates Ms. DuVal was asked about credit history, her family, or Xanax. (*Stipulated Facts; Exhs. 1 & 3; Testimony of Appellant*)⁹

⁹⁹I heard oral testimony from each interview panelist, but give diminished weight to that testimony, much of which was not corroborated in the notes or otherwise proved accurate or credible. For example, Chief Fallon said he remembered "not a whole lot" about the interviews. Capt. Cotter mixed up some of Ms. DuVal's employment history and mistakenly recalled that, after her reprimand at the Somerville Bar & Grille, she "just let everyone in" (i.e. stopped checking IDs or sobriety). He also made a dubious claim that she had trouble keeping a job (blaming everyone except herself), had "issues" with her father, and used a "narcotic", i.e. Xanax, obtained "at work" from coworkers, implying he saw that as being almost as close as getting it "on the street". (*Exhs.1, 3, 22 & 27; Testimony of Appellant, Fallon, Cotter & Roche*)

31. By letter dated May 12, 2015, Personnel Director Roche notified Ms. DuVal that Somerville Mayor Joseph A. Curtatone decided to “extend to you the opportunity to continue in the process of becoming employed as [an SPD police officer] . . . conditional upon your successful completion of the City’s hiring process . . . The next step . . . is for you to report [for a physical exam on May 18, 2015 and a psychological screening on May 21, 2015] . . .” (*Stipulated Facts; Exhs.5 & 6*)

32. Mr. Roche understood that a “conditional offer” of employment was a prerequisite under civil service law to proceed with the medical and psychological components of the process, but he also thought it would not represent a decision that Ms. DuVal has passed the “non-medical” part of the process. In fact, as Somerville would later learn, the process requires precisely the opposite; once a “conditional offer” of employment has been made, an appointing authority who receives medical information about a candidate can only use that information as the basis for a bypass and cannot resurrect “non-medical reasons” to bypass the candidate, as that would violate federal and Massachusetts anti-discrimination laws.¹⁰ Somerville has now changed its procedures to comply with these requirements. (*Exh. 18 through 21; Testimony of Roche & Stein*)

33. On May 18, 2015, Ms. DuVal reported to a Cambridge medical facility for a medical exam by a board certified physician in Internal Medicine & Occupational Medicine. She completed the standard HRD health questionnaire. All relevant findings in her physical examination were normal, including ‘Mental Status’. The physician failed Ms. DuVal, however, for a “Category B” medical condition, citing HRD Medical Standard (q)2(c).¹¹ (*Stipulated Facts; Exh. 7; Administrative Notice*

¹⁰ See G.L.c.151B,§4(16) (Massachusetts law); 42 U.S.C. §§12112(d)(2)-(3) (Americans With Disabilities Act)

¹¹ Under HRD’s Medical Standards, a Category B medical condition is one that “based on its severity or degree, may or may not preclude an individual from performing the essential job functions of a municipal police officer, or present a significant risk to the safety and health of that individual or others.” A “(q)2.c.” Category B condition means the regular use of various chemicals and drugs, including -- but not limited to . . . c. sedative-hypnotics.” (*Administrative Notice [Commonwealth of Massachusetts Initial Hire Medical Standards 2014, www.mass.gov/massachusetts-medical-standards-2014-physicians-guide-1.docx]*) Neither the CHA exam, nor any other evidence supports the conclusion that Ms. DuVal made “regular use” of a “sedative-hypnotic” drug.

[massachusetts-medical-standards-2014-physicians-guide-1.docx]; Administrative Notice [https://www.challiance.org/cha/find-a-doctor/rielly_albert_md_709])

34. On May 21, 2015, Ms. DuVal reported for her psychological examination. She was seen by a licensed clinical psychologist (Ph.D.), who administered two standard psychological tests (the MMPI-2 and 16 PF) and conducted a clinical evaluation. The psychologist opined that Ms. DuVal's personality profile showed no serious risk of employment problems. "She would probably have little trouble adapting to a wide range of work." He concluded:

"There was no evidence of psychological and/or emotional difficulties presented on the written portion of the evaluation, and . . . both the MMPI and 16 PF were valid and an accurate appraisal of Ms. DuVal's current functioning. On the basis of the psychological testing and evaluation, Ms. DuVal is recommended for appointment as a Full Time/Reserve Officer in the Somerville Police Department."

(Exh. 8)

35. On May 26, 2015, the psychologist supplemented his report to address five "red flags" that Somerville expressly asked him to consider, namely: "Poor work history – blaming others for her being fired" "Seems to have a problem with peers", "Admitted to taking Xanax that she got from a friend for anxiety", "poor credit history" and "Attended 4 different colleges – no degree." The psychologist reported that the "clinical interview was one of the more lengthy ones that I have conducted" and "pressed her pretty hard" on the "red flags". He stood by his professional opinion:

"Her written results indicated that she was open and honest, and the validity measures were within normal limits. She did not demonstrate any significant levels of psychopathology or emotional distress. . . . Overall, based on her answers and the clean results of the written portion, there is no reason . . . to prevent Ms. DuVal from moving ahead in the process."

*(Stipulated Facts: Exhs. 8 & 16)*¹²

¹² The psychologist explained his view of each "red flag". For example, as to peers: "[S]he has a close group of friends and strong social support network. [Her] anxiety . . . only relate[d] to . . . difficulty with boyfriends. She denied having any significant difficulties getting along with peers." As to taking a friend's Xanax: "Ms. DuVal admitted to engaging in this behavior but . . . only had done so because she was prescribed Xanax in the past. She stated that she would never take a medication she was not prescribed previously . . . She currently has a prescription for Lorazepam, which she has not used for 3 or 4 months,. She reported that she would never engage in this behavior in the future . . ." *(Exh. 16)*

36. On June 3, 2015, Deborah Connelly wrote to the psychologist, stating that the medical facility “has some concerns with Marika and have requested to see your report.” The psychologist complied and Ms. DuVal was required to return to the medical facility on July 6, 2015 for a “2nd opinion”, which she did. (*Stipulated Facts; Exhs. 9 through 11*)

37. By report dated July 6, 2015, contrary to the conclusions of the medical facility and the initial medical facility’s examining physician, a different physician at the medical facility (Board Certified in Internal Medicine) reported that Ms. DuVal had an “abnormal” Mental Status, “c/w [consistent with] mild personality disorder” which the doctor categorized as a Category B medical condition under Medical Standard (o)2.a. [“a history of any psychiatric condition, behavior disorder or substance abuse problem not covered in Category A. Such history shall be evaluated based on that individual’s history, current status, prognosis and ability to respond to the stressors of the job”]. The report provided no other details. (*Stipulated Facts; Exhs. 7, 11 & 12*)

38. By letter dated September 1, 2015, Mr. Roche informed Ms. DuVal that she was disqualified from appointment to the SPD based on the determination of the medical facility’s physicians that she suffered from two Category B medical conditions [(q)2.c. and (o)2.a.] that “indicated you cannot adequately perform the essential functions of [an SPD police officer].” She was informed that her name would be removed from the eligible list. (*Stipulated Facts; Exh. 12*)

39. Ms. DuVal duly appealed the September 1, 2015 decision to the Commission. At the pre-hearing conference held October 27, 2015, Somerville was apprised that HRD rules generally required that a bypass for psychological reasons be supported by a second opinion from a qualified mental health specialist (psychiatrist), and Somerville agreed to work with HRD to arrange for such a compliant second opinion examination. (*Stipulated Facts; Exh.15; Administrative Notice [DuVal v. City of Somerville, CSC Docket No. G1-15-191 (DuVal I)]*)

40. On December 2, 2015, Ms. DuVal reported to a licensed psychiatrist and President of the Academy of Organizational & Occupational Psychiatry. The psychiatrist reviewed all prior medical and psychological evaluation reports from the two medical facility physicians and the psychologist, along with the results of the psychological tests administered by the psychologist, and conducted his own clinical interview. He subsequently issued a 10-page single spaced report which concluded:

“This writer was asked to evaluate [Ms. DuVal] specifically with regard to whether the history of receiving prescriptions for anxiolytic medications constituted an indication . . . that she manifested a “category B” condition that rendered her incapable of safely and effectively training for and performing the duties of a Law Enforcement Officer in the Commonwealth of Massachusetts. The following facts are, *in toto*, inconsistent with an indication that she manifests potentially job-relevant dysfunction – or a high risk of manifesting potentially job-related dysfunction – attributable to a “category B” disorder or problem.

- there is no evidence that suggests that the candidate manifested problematic *patterns* of abuse or dependence relative to benzodiazepine medication.
- there is no evidence that suggest that the candidate was ever *prescribed* benzodiazepine medications – or any psychotropic medication – on a regular or consistent basis;
- there is no evidence that the candidate ever *used* benzodiazepine medication on a regular or frequent basis;
- There is no evidence that the candidate presently uses benzodiazepine medication or . . . a likelihood [of such prescription] on a regular or consistent basis in the future;
- there is no evidence that the candidate manifests a psychiatric condition – or vulnerability or predisposition towards manifesting a psychiatric condition – that would confer an unacceptably high risk that the candidate would . . . use benzodiazepine medication in a manner that would compromise her capacity to safely and effectively perform the duties of a law enforcement officer . . .

There is no evidence of mental disorder, current mental impairment, or difficulty with behavioral control or judgment that would prevent the candidate from successfully performing the duties of a Law Enforcement Officer in the Commonwealth of Massachusetts.”

(Stipulated Facts; Exh. 13)

41. On January 4, 2016, Somerville withdrew its medical disqualification of Ms. DuVal and informed the Commission that it was reassessing her candidacy. Accordingly, the Commission dismissed DuVal I for lack of jurisdiction (no bypass had occurred). *(Stipulated Facts; Exh. 15)*

42. On February 11, 2016, Somerville Mayor Curtatone issued a “Notice of Employment” of six (6) candidates as SPD Reserve Police Officers from certification #02473, with an appointment effective date of January 28, 2016. Five of the candidates [sometimes referred to herein as

Candidates #1, #2, #3, #4 & #6] were ranked above or tied with Ms. DuVal. One of the candidates hired [Candidate #7] was ranked below Ms. DuVal. (*Stipulated Facts; Exh. 54*)¹³

43. By letter dated March 2, 2016, signed by Mayor Curtatone, Somerville, again, bypassed her for appointment as a Reserve Police Officer. The reasons stated for her non-selection included:

“The Interview Panel felt that you were not qualified . . . based on your responses to the questions in the . . . Recruit Candidate Information Form, the Somerville police background investigation and your responses to the Interview Panel’s own questions.”

“[T]he interview . . . can sometimes explain errors, omissions or short comings revealed in [a candidate’s] application or background investigation in a way that mitigates their impact. Your interview with the panel did not overcome these negatives.”

“[Y]ou checked ‘yes’ to the question . . . ‘Has your credit ever been considered unsatisfactory’ but did not provide complete details as is required at the bottom of the page. . . . [Y]ou denied being over 180 days delinquent on any loan or financial obligation. . . . [but] your Experian credit report shows that you were ‘seriously past due . . . assigned to attorney, collection agency or credit grantor’s internal collection department’ and that for a 24 month period you are listed as ‘Key Derogatory’¹⁴. . . . [Y]our credit reports indicate other negative accounts that you failed or chose not to report . . . The panel draws two possible negative inferences . . . inattention to detail concerning important information . . . and/or . . . you chose not to provide this information that would cast a negative light on your chances . . .”

“[T]he panel determined that you had a poor work history and seemed to have issues working with others. . . . [A]sked about a specific instance where your supervisor told you to let someone into the establishment who you felt had been rude to you, you responded that if that’s the way it is going to be, you’d let everyone in. The panel felt that this response was not only immature but also placed your employer at risk as well as the general public.”

“The police background investigation also revealed that you had illegally taken a controlled substance which you did not have a prescription for. You did not provide the panel with sufficient explanation as to why you . . . did not seek an appropriate, legal means to address what you described as ‘anxiety.’ This demonstrates, to the panel . . . extremely poor judgment and a willingness to take shortcuts and unnecessary and inappropriate risk.”

“[A]sked . . . to give an example of the last law enforcement article or book you had read and the issue being addressed you could not name one. Your response indicated a lack of preparation.” (*Exh. 14*)

¹³ At approximately the same time as he made the reserve police officer appointments under certification #02473, acting under certification #02466, Mayor Curtatone also appointed Candidate #5 to the position of Permanent Full-Time Police Officer, retroactive to 5/18/15. Candidate #5 had gone through the process at the same time as the permanent and reserve candidates considered under certifications #02466 and #02473 but he was deployed on military duty in May 2015 when the other permanent appointments were made. (*Stipulated Facts; Exhs. 55 & 56*)

¹⁴ The term “key derogatory” is not defined in the SPD bypass letter. According to Experian’s website, Experian marks an account with a “KD” (“key derogatory”) “simply to describe an account that is having a significant negative effect” on a person’s credit score. A designation of KD is used to distinguish months when accounts are over 180 days late (“derogatory”) from months of 30, 60, 90 or 120 days late, called “delinquent”). The “KD” on Ms. DuVal’s credit report related to amounts due on the closed cell phone account that had not been used since 2011. (*Exhs. 1 & 58*)

44. The March 2, 2016 bypass letter was dictated by Somerville Labor Counsel to Debbie Stein (successor to Deborah Connelly who retired), and presented by Personnel Director Roche to Mayor Curtatone for his approval. In accordance with his practice, Mr. Roche made an oral presentation to the Mayor as to why Ms. DuVal should be bypassed, without providing any documentation to the Mayor for his review, save for the draft bypass letter.¹⁵ (*Testimony of Roche & Stein*)

45. When Mr. Roche was asked at the Commission hearing to recall “as specifically as possible” what he told Mayor Curtatone in the meeting recommending Ms. DuVal’s bypass, Mr. Roche said he told Mayor Curtatone that Ms. DuVal had “flunked the physical, but for psychological reasons” and, when “we were told we couldn’t do that, that is why she went to Dr. Brown” who cleared her “medically and psychologically . . . however, we didn’t think she was a good candidate.” No notes of this conversation were produced. (*Testimony of Roche*)

46. Ms. DuVal’s March 2, 2016 bypass letter also provided the following justification for hiring Candidate #7, who ranked below Ms. DuVal:

“This candidate’s police background investigation revealed a dedicated and prepared candidate who had no negative employment aspects indicated. Candidate [name redacted] completed his paperwork without significant error or omission, cooperated fully. . . had a clean driving record and demonstrated responsibility through both his employment record and credit history. The panel found that he gave straight-forward and honest replies to all questions and appropriate responses to various scenarios presented to him.”

(*Exh. 14*)

47. The application of Candidate #7 contains, in part, the following information:

- He worked as a 911 Dispatcher for the SPD since 2011[five years] and held a part-time job as a police officer for the Somerville Housing Authority.
- In answer to the Question: “Do you personally know any police officer working in the department. If YES, name and rank (if known): he stated: “*I have worked for the department for three [sic] years, so I am familiar with everyone who works there.*”
- In answer to the Question: “Have you ever used Marijuana? If YES, how many times and when was the last time you used, explain the circumstances”, he checked “YES” but provided no information as to when, how often or circumstances of his use as required.

¹⁵ Mr. Roche follows the same procedure when recommending candidates for appointment, making an oral presentation that summarizes from memory the reasons for the recommendation in a one-on-one meeting with the Mayor who would not usually be shown any part of the application packet, *per se*, prior to approving the appointment. (*Testimony of Roche*)

- In answer to the Question calling for information on all educational institutions attended, he listed none. The Background Investigation, however, reported that he briefly attended Merrimack College (9/09-12/09) and Middlesex Community College (01/10-5/10)
- The Background Investigation contained a section entitled “**LETTERS OF RECOMMENDATION/Professional References**” which summarized four letters of reference for the candidate, including three Somerville employees.
- The credit reports the candidate submitted were versions obtainable for “free” and did not include credit scores, which required payment of a fee.
- When the interview panel asked about the following scenario: “The Police Department’s schedule will require you to work during many family and holiday events. If you were scheduled to report to work at 6:00 p.m. for the night shift and were attending a family function, such as a wedding in the afternoon, what would be an acceptable number of alcoholic drinks to consume at that function?”, the candidate said: “one or two” and, then, after “discussion”, said “maybe none.”¹⁶

(Exhs. 48 through 51)

48. The father of Candidate #7 had retired from the SPD in 2016, where he had worked as a Special Motor Equipment Repairman since 1985.¹⁷ At least two other candidates listed on certification #02473 in the same tie group (24th place) as that candidate also had ties to Somerville, one whose father was a SPD police officer and another whose mother was a City Alderman. Neither of them were hired. (Exh. 17; Testimony of Fallon & Roche)

49. Another hired candidate’s application packet contains, in part, the following:

- He answered the Question: “Do you personally know any police officer working in the department. If YES, name and rank (if known), stating: “*I currently work at SPD as a civilian. I know every officer who works here personally, except for some who work the Last Half shift.*”
- He answered “YES” to the Question: “Has your credit ever been considered unsatisfactory?” which was when he was “having trouble paying my student loans.”
- He answered “NO” to the Question: “Are you now over 180 days delinquent on any loan or financial obligation?”
- The candidate submitted two credit reports, obtained for “free” without credit scores, which required payment of a fee. The third credit report was not provided because the credit bureau would not supply a free copy on-line, only by mail.
- The candidate’s credit report shows a “Charge Off” in 2011 for a \$950 balance due to Bank of America that was “written off” after being more than 180 days past due.

(Exhs. 23 through 26; PHExh. 60)

¹⁶ Ms. DuVal responded to this question, as did every other reserve candidate, with an immediate and unequivocal “ZERO”. (Exhs. 3, 25, 29, 32, 36, 41 & 47)

¹⁷ Chief Fallon said Candidate #7’s family connection (which he denied considering) would not have been helpful to his application. (Testimony of Fallon)

50. Another hired candidate's application packet contains, in part, the following:
- He answered "YES" to the Question: "Have you ever been convicted of a felony?"¹⁸
 - The candidate submitted two credit reports obtained for "free" without credit scores, which required payment of a fee. He did not provide the third credit report because the information he provided to the credit bureau "did not match data" in its system.
 - The Background Investigation contained a section entitled Employment History which summarized interview with his current employer and a section entitled References, which summarized three letters of reference he submitted.

(Exhs. 27 through 29; PHExh. 61)

51. Another hired candidate's application packet contains, in part, the following:
- The Background Investigation revealed that the candidate was named in a 6/23/07 police report as one of a group at a WalMart who were "loud and kicking items off of shelves. . . [and] told . . . that if they returned they would be prosecuted for trespassing. Most of the group began arguing, laughing and continued to be disrespectful."
 - When the background investigator apprised the candidate of the incident, he seemed "caught off guard" and claimed to have recalled the incident but "it couldn't have been when the officer's report said because he had moved back to Massachusetts by then."
 - The Background Investigation listed two "Negative Aspects"—failure to disclose the WalMart incident and "two large car payments totaling almost \$1,500 a month, which "his friend and roommate [name redacted] was actually driving one of the cars and . . . making the payments", prompting the investigator to discuss "the liability involved."
 - The Background Investigation contained a section entitled EMPLOYER INTERVIEWS with summaries of interviews with two supervisors at his current employer.

(Exhs. 30 through 32; PHExh. 62)

52. Another hired candidate's application packet contains, in part, the following:
- In the section of the application entitled "Financial Record", the candidate listed one credit card account (Capital One). He answered "NO" to: "Are you now over 180 days delinquent on any loan or financial obligation" and answered "YES" to: "Has your credit ever been considered unsatisfactory?", but provided no details.
 - No open credit card account (and no Capital One account) appears on the one credit report the candidate submitted. It shows four (4) "potentially negative" accounts, one 120 days or more past due, one that was in collection and closed, one that was a "key derogatory" (KD) "charged off as bad debt", and one that was 60 days past due until 2013. (This does not include a jewelry store account that the candidate claimed was not his.) His credit was rated "fair" by all three credit bureaus.
 - The Background Investigation section on "Credit Check", states: "payments on time."
 - The candidate attended college (2004-2007) but dropped out and never got a degree.
 - The Background Investigation includes summaries of interviews with the candidate's current and one former employer.
 - The Background Investigation lists "Negative Employment Aspects" for the candidate including: "Can be unprofessional, failure to follow directions."

(Exhs. 34 through 37)

¹⁸ Unless this answer was a mistake, it would be an automatic disqualifier for the job of a police officer. G.L.c.41,§96A.

53. Another hired candidate's application packet contains, in part, the following:
- He listed nine (9) jobs from 2009 to 2015, including 10 months at a car dealership he left "for personal reasons" and approximately two years with TSA from which he was "let go." When he applied to the SPD, he had been in his current job for one month or less.
 - He finished high school in 2005 and did not continue his education since then.
 - In the "Financial Record" section of application the candidate answered "NO" to the question: "Has your credit ever been considered unsatisfactory?"
 - The candidate submitted three credit reports, obtained for "free" without credit scores, which required payment of a fee. One report listed five (5) "Potential Negative Items", two of which were "scheduled to go to a positive status" in 2020 and 2022. The other reports listed four (4) "Adverse" or "Negative Accounts". His "Debt to Credit Ratio" was 104% (i.e., outstanding debt exceeded total available approved credit).
 - The Background Investigation listed a current employer and former employers, and, as to credit, noted only "2 accounts in collection", which he had "cleared up".¹⁹

(Exhs. 38 through 43)

54. Another hired candidate's application packet contains, in part, the following:
- The candidate answered "YES" to the question "Has your credit ever been considered unsatisfactory", but provided no details.
 - The Background Investigation includes summaries of the investigator's interviews with four current supervisors, and a prior employer, along with neighborhood and personal references.
 - The Background Investigator notes as a "Negative Employment Aspect" that the candidate's letters of reference had "[n]amed the wrong police chief."

(Exhs. 45 through 47; PHExh. 63)

55. The Recruit Candidate Information Form asks "Have you ever used Marijuana? If YES, how many times and when was the last time you used, and explain the circumstances." Every candidate, save one, answered this question "YES". (Exhs. 1,23,27,30,34,39,48) None of the Background Investigation Reports noted this use as a negative attribute and the SPD did not consider it disqualifying of any candidate. (Exhs. 2,24,28,31,35,40,49; Testimony of Cotter)

56. Marijuana is categorized by the U.S. Drug Enforcement Agency (DEA) and the Massachusetts Department of Public Health (DPH) as a "Schedule I" controlled substance, which, at the time, was not legally available by prescription in Massachusetts. This designation means that

¹⁹ The background investigator who prepared the report on this candidate (the same officer who prepared the report on Ms. DuVal), explained at the Commission hearing that he knew that the candidate previously had "horrible credit" and knew his statement that he had never had unsatisfactory credit was "untrue", but did not mention this in his report because he assumed the candidate had simply answered the question "in error." He also described the candidate's prior work history as a "mess" but did not mention that in his report either because, based on information from his current employer and military supervisor, the candidate had since "improved himself". (Exh 40; Testimony of Mitsakis)

marijuana was determined to be a drug with: (a) high potential for abuse; (b) no currently accepted medical use in treatment in the United States; and (c) lack of accepted safety for use even under medical supervision. (*Administrative Notice [Controlled Substances Act, 21 U.S.C. §801 et seq.; 21 C.F.R. §1308; Mass. Controlled Substances Act, G.L.c.94C,§2; 105 C.M.R. §700.002; see generally https://www.dea.gov/pr/multimedia-library/publications/drug_of_abuse.pdf]*)

57. Xanax (alprazolam) and Ativan (lorazepam) are categorized by the DEA and the DPH as Schedule IV controlled substances, and are available by prescription. This designation means, relative to drugs in Schedules I, II or III, these drugs: (a) have a low potential for abuse; (b) have a currently accepted medical use in treatment in the United States; and (c) may lead to limited dependence. (*Administrative Notice [Controlled Substances Act, 21 U.S.C. §801 et seq.; 21 C.F.R. §1308; Mass. Controlled Substances Act, G.L.c.94C,§2; 105 C.M.R. §700.002; see generally https://www.dea.gov/pr/multimedia-library/publications/drug_of_abuse.pdf]*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” described in Chapter 31 for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment” and ensuring that “all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L.c.31,§1. The primary mechanism that ensures adherence to these principles in hiring and promotion is provision for regular competitive qualifying examinations administered by the Massachusetts Human Resources Division (HRD), open to all qualified applicants, from which “eligible lists” of successful applicants are established, ranking candidates in order of their exam scores, along with certain statutory credits and preferences. The eligible list is then used to create a “Certification” (containing the names of at least three

candidate for each open position – known as the “2n+1” formula), also listing names in the same rank order as they appear on the eligible list, from which an appointing authority must select the candidate(s) for the civil service appointment. G.L.c.31, §§6 through 11, 16 through 27; Personnel Administration Rules (PAR), PAR.09.

In order to deviate from the rank order of preferred hiring, and appoint a person below the “person whose name appears highest” on the Certification, an appointing authority must provide a specific, written statement of all of the reasons – positive or negative, or both – consistent with basic merit principles, for bypassing the higher-ranked candidate. G.L.c.31,§1,§27; PAR.08(4). “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.” Id.

A person who is bypassed may appeal under G.L.c.31,§2(b) for de novo review by the Commission. On appeal from a bypass, the Commission's role is not to determine if the candidate should have been bypassed. Rather, the Commission determines whether, by a preponderance of evidence, the bypass decision was made after an “impartial and reasonably thorough review” of the background and qualifications of the candidates’ fitness to perform the duties of the position and that there was “reasonable justification” for the decision. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012) citing Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban , 434 Mass. 256, 259 (2001); Brackett v. Civil Service Comm’n, 447 Mass. 233, 241 (2006) and cases cited; Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003). See also Mayor of Revere v. Civil Service Comm’n, 31

Mass.App.Ct. 315, 321 (1991) (appointing authority must prove, 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.’ ” Brckett 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). It is not necessary, however, for the Commission 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). 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.” 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). 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) The Commission has been clear that a bypass is not justified where “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).

ANALYSIS

Somerville failed to establish reasonable justification for its March 2, 2016 decision to bypass Ms. DuVal. Having made a conditional offer of employment and processed her through full medical and psychological screening, Somerville could not lawfully substitute previously known “non-medical” reasons for the failed medical reasons used to bypass her. Moreover, the “non-medical” reasons provided for bypassing Ms. DuVal do not stand up on the merits, as they were not supported by a reasonably thorough review, they do not comport with the facts, they reflect improper disparate treatment, and they are a pretextual, post-hoc rationale for the original, failed reasons used to bypass her based on her “medical condition”.

Impermissible Use of “Non-Medical Reasons” for Bypass

On May 12, 2015, Somerville made a “conditional offer of employment” to Ms. DuVal and processed her through a medical exam and psychological screening. (*Exh. 6*) On September 1, 2015, after receiving and reviewing the medical and psychological evaluations, Somerville informed Ms. DuVal that she would be bypassed because she suffered from a “Category B” medical condition that precluded her from performing the “essential functions” of an SPD police officer for which “reasonable accommodations were not possible.” (*Exhs. 7 through 13*) Only after the medical and

psychological reasons were found deficient and withdrawn did Somerville “reassess” Ms. DuVal’s qualifications and issue a second bypass decision that purported to rely on “non-medical” reasons. Ms. DuVal argues that, after having obtained extensive medical and psychological information on her, and, initially, claiming she was medically disqualified, Somerville cannot now “unlearn” that information and claim to rely merely on “non-medical” reasons to bypass her. I agree.

It is a crucial tenet within basic merit principles under civil service law to assure, among other things, “fair treatment of all applicants and employees in all aspects of personnel administration without regard to . . . handicap . . . and with proper regard for privacy” G.L.c.31,§1. Both the federal Americans With Disabilities Act, 42 U.S.C. §§12112(d)(2)-(3), and the Massachusetts Employment Discrimination Law, G.L.c.151B,§4(16), strictly regulate how employers may acquire and use private, medical information about a candidate for employment, essentially, precluding inquiry into a candidate’s medical history without first having made a bona fides, i.e., “real”, offer of employment based on an evaluation of “all relevant non-medical information.” See, e.g., Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 682,n.5 (2012); O’Neal v. City of New Albany, 293 F.3d 998, 1007-1009 (7th Cir. 2002); Downs v. Massachusetts Bay Transp. Auth., 13 F.Supp.2d 130, 137-39 (D. Mass. 1998), *citing*, “ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations”, (EEOC Notice 915.002 October 10, 1995); Massachusetts Commission Against Discrimination, “Guidelines; Employment Discrimination on the Basis of Handicap-Chapter 151B”, §IV & §V, <http://www.mass.gov/mcad/resources/employers-businesses/emp-guidelines-handicap-gen.html>

The duty to compartmentalize medical and non-medical employment decision-making stems from the statutory mandate to minimize the risk of cross-contamination between these two separate issues, which can be a very illusive matter to prove after-the-fact. See, e.g., O’Neal v. City of New

Albany, 293 F.3d at 1008, *citing* McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 360 (1995) (“proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.”); Garlitz v. Alpena Reg. Med. Ctr., 834 F.Supp.2d 668, 677 (E.D. Mich. 2011) (“The obvious purpose of [42 U.S.C.§12112(d)(2)] is to limit the gathering and use of medical information as one of the ways to reduce the possibility of discrimination.”); Downs v. Massachusetts Bay Transp. Auth., 13 F.Supp.2d at 141 (“The distinction between what may be asked in the pre-and post-offer stages is designed to facilitate discovery of discrimination.”)

This appeal presents compelling reason to hold Somerville to its original (failed) election to bypass Ms. DuVal as medically disqualified. I appreciate that Somerville may have been operating under a misunderstanding of the applicable legal requirements for conducting pre-employment medical examinations and acknowledge that Somerville has now changed its practice to conform to the law. Nevertheless, those positive steps do not cure the error made in Ms. DuVal’s case. Here, there is more than mere “possibility” that Somerville’s second bypass took account of and integrated the medical information from the initial evaluation process; the preponderance of the evidence established that, in fact, Somerville did just that. Personnel Director Roche told Mayor Curtatone, in recommending the second bypass, that Ms. DuVal had initially failed her psychological exam. He thought it relevant to the first bypass to be sure the psychological evaluators knew about the so-called “red flags” in Ms. DuVal’s background, expecting that the evaluators would put their imprimatur on them, so as so justify a bypass on stronger medical or psychological grounds than might otherwise be the case. Then, when that tactic failed, Somerville recast the failed medical issues as a non-medical concern, i.e., claiming that she exposed her proclivity for risky behavior by using a friend’s Xanax instead of taking “legal means to address what you described as anxiety”.

In other words, Somerville's issue with Xanax evolved from a per se (albeit non-existent) medically disqualifying drug dependency and mental disorder, into what was, in effect, a layman's proxy for that mental health concern, i.e., taking Xanax from friend was illustrative of a fragile emotional state, as it showed Ms. DuVal was prone to use desperate, extra-legal means to cope with her future "anxiety attacks." It is particularly disturbing that Somerville continued to insinuate that Ms. DuVal had any degree of psychological or substance abuse issues after that question was thoroughly vetted by two mental health providers, both of whom expressly and completely discredited the notion. I find it hard to imagine a more compelling reason to provide Ms. DuVal a fresh review untainted by this unjustified innuendo about her mental stability. See generally, Rivit v. City of Lawrence, 29 MCSR 234 (2016) (recession of conditional offer for "contrived" non-medical reasons after accessing applicant's medical information appeared "unjust"); Funaro v. Chelmsford Fire Dep't, 8 MCSR 29 (1995), *cited in* Dunn v. Boston Police Dep't, 27 MSCR 497 (2014) (town precluded from rescinding conditional offer on information obtained prior to making invalid medical bypass)

Lack of Candor in Application Process

The duty imposed upon a police officer to be truthful is one of the most serious obligations he or she assumes. "Police work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer." Falmouth v. Civil Service Comm'n., 61 Mass.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) See, also, 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). Untruthfulness also may compromise an officer's credibility as witness. See

United States v. Agurs, 427 U.S. 97, 108 (1976), citing Brady v. Maryland, 373 U.S. 83 (1963). See also Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667 (1985).²⁰

Likewise, an Appointing Authority is well within its rights to bypass a candidate for police officer who “purposefully” fudges the truth during the application process. See, e.g., Barbosa v. New Bedford Police Dep’t, 29 MCSR 495 (2016) (pattern of inattention to detail and lack of candor regarding prior employment and criminal history); 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, however, 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 471 (2016) (honest mistakes answering ambiguous questions on NBPD Personal History Questionnaire); Morley v. Boston Police Dep’t, 29 MCSR 456 (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)

²⁰The Commonwealth has somewhat different standards for prosecutorial disclosure of exculpatory evidence; facts not generated by “the prosecution team”, but unrelated internal affairs investigations, generally, do not come within the “Brady” paradigm. See, e.g., MASS.R.CRIM.P. 14(a)(1)(A) and 2014 Reporters Notes; 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); Commonwealth v. Thomas, 451 Mass. 451 (2008)

Here, Ms. DuVal's alleged omissions in her application packet do not support a conclusion that she demonstrated the disqualifying trait of untruthfulness or inattention. Indeed, in many respects, she went above and beyond to disclose less than flattering information about herself.

First, the alleged omissions of "details" from her credit history were all legitimately explained. She answered "NO" to a question that asked if she was "now" over 180 days delinquent in any obligations, in the honest belief that was a correct answer. She had not remembered the \$280 telephone bill from 2011, which account was closed and she had no contact from the creditor for several years. Indeed, whether a closed account could be considered "now" delinquent is, at least, ambiguous. Two of the hired candidates took the very same approach, answering "NO" to this question, although one had a closed "charge off" over 180 overdue, and the other a history of "KDs" on his credit report. Similarly, Ms. DuVal's omission of the "details" of her "unsatisfactory credit" is also reasonably explained by the ambiguity in the SPD's application form, which, by the way it is formatted, appears to ask for such details only as to a different question. Two other hired candidates also answered "YES" to this question but, as they apparently interpreted the form in the same way as Ms. DuVal, they, too, provided no details other than attaching their credit reports, as did she.

Second, whatever critique might be lodged against Ms. DuVal for her omissions on her application, they pale in contrast to the omissions of other candidates, whose responses are far more troubling and yet went entirely excused. For example, the candidate who bypassed Ms. DuVal admitted to using marijuana, but provided no further explanation, as required, as to how often and how recently. This same candidate left off the application the two colleges he briefly attended before dropping out, but he was not called out for it, as was Ms. DuVal. Another candidate answered "NO" to whether he had ever had bad credit, which was not true, as even the background investigator acknowledged he knew all about, but he was given a pass for honest error. Ms. DuVal was only one

of two candidates who paid to obtain all three credit bureau reports including credit scores. Of the three scores, one was in the “fair” range and one was in the “average” range, which is closely comparable to the only other candidate whose credit report does contain his scores, and who was rated “fair” by all three bureaus. Given these examples of disparate treatment, among others, Ms. DuVal’s “omissions” and “bad credit” cannot be reason to single her out and disqualify only her for those reasons.

Third, the degree to which Ms. DuVal took care to disclose information that was not entirely favorable to her belies the notion that she “chose not to provide [negative] information that would cast a negative light” on her chances. She meticulously reported her employment and educational history, fully disclosing the jobs from which she had been fired and all discipline she had ever received, no matter how minor. She disclosed her isolated use of a friend’s Xanax, although, had she not voluntarily disclosed it, the chances it would be discovered in the background investigation were probably nil. She disclosed the details of her 2003 brush with the criminal justice system, although she was entitled to state “NO RECORD” and was entitled to provide no further information about it. This is not the pattern of a person who had any intent to keep information from the SPD.

Work History

Somerville’s assertions that Ms. DuVal’s had a “poor work history” and “seemed to have issues working with others” is not based on a fair and “reasonably thorough review” of her employment record and it is flatly contradicted by the credible evidence in the record.

First, the background investigation into Ms. DuVal’s work history was woefully incomplete. The investigator based his conclusion that Ms. DuVal had a poor work history on his memory of oral interviews with sources at two selected prior employers for whom she had only worked briefly and an ex-boyfriend, who still worked at the Cambridge Restaurant & Night Club. The investigator never

interviewed anyone at Ms. DuVal's current employer at the Somerville Bar & Grill), where she worked for two and a half years, beginning as a Door Manager and rising to her current supervisory position of Director of Security. He made no effort to follow-up with the owners of the Cambridge Restaurant & Night Club, the General Manager of the Somerville Bar & Grille, a former co-worker at the Cambridge Lounge, all of whom had percipient knowledge of her work and who had provided glowing recommendations. He makes no mention in his report of any of these positive references. Nor did he follow up with any of the SPD officers and detectives whom she listed, as required by the application, as person who knew her personally.

Second, what information the background investigator did obtain, and had available to him in Ms. DuVal's application, in fact, fairly portrays a mostly positive picture of her credentials and work experience. Her current employer at the Cambridge Florist had "no issues" with her in the two years she worked there. The only arguably negative information he obtained was from a supervisor at the family services agency (where Ms. DuVal had worked for nine months and quit after she had turned in her supervisor for stealing and the supervisor had turned hostile), and electrical company, where a supervisor said she was "standoffish" (and where Ms. DuVal worked for five months and left because clerical work was not her cup of tea). The application, interview record and references (containing reliable percipient opinions from supervisors, peers and others) consistently confirmed these positive facts and refuted the unreliable negative hearsay on which the investigator's conclusions rested. There was simply no credible evidence to support the background investigator's opinion that Ms. DuVal had left her jobs "for no specific reason", that she "can't seem to keep a job for extended period of time" or that she "seems to have problems working with peers."

Third, the mischaracterization of Ms. DuVal's disciplinary record by the Background Investigation and the second bypass letter are particularly troubling, especially coming from a law

enforcement agency, such as the SPD, that I would expect to commend someone, such as Ms. DuVal, who consistently demonstrated that she puts enforcement of the law above personal favors or profit, although not always in her own personal interest to do so. Thus, the Background Investigation mischaracterizes Ms. DuVal's departure from the Cambridge Restaurant & Night Club for "threatening a tour manager". The truth was, she confronted the manager for abusing staff, "informed" him she would have him removed unless he changed his behavior, and was overruled by management, who chose to side with the band manager (who brought in customers). There is no credible evidence that she ever physically or verbally "threatened" harm to the person involved.

Similarly, Ms. DuVal never "placed [her] employer at risk as well as the general public" by "letting everyone in" in alleged retaliation for the Somerville Bar & Grille manager allowing a woman to enter who had insulted her. In fact, Ms. DuVal did no such thing. Throughout her career in the security field, she consistently demonstrated that she sees safety and compliance with the law as her core mission. Her termination by the Cambridge Lounge, for example, was due to her decision to enforce the legal capacity limits, which the owner decided to ignore because he wanted her to admit a personal friend. The General Manager of the Somerville Bar & Grille calls her "the most important member of my security team" who is "loyal, dependable and above all else a leader . . . at the top of my list" and "every decision she makes is always in the best interest of our bar."

Fourth, the disparate treatment Ms. DuVal received concerning her employment history is well-documented. For example, other candidates received the benefit of a thorough investigation, which included interviews with current and past employers and background reports that accurately summarized these interviews in full, as well as provided summaries of the opinions from the candidate's personal and professional written references. Ms. DuVal, however, received short shrift in virtually every respect. I cannot imagine a more poignant example of disparate treatment or failure

to conduct a “reasonably thorough review”, as required by civil service law, than appears here with respect to Ms. DuVal’s employment record.

Other Issues

The remaining issues raised by the parties will be addressed briefly.

First, Somerville’s contention that Ms. DuVal presented poorly at her interview does not stand up to scrutiny. No audio or video record was made of any of the interviews and there was no specific method to score or rate candidates’ interview performance. The interview notes do little to inform the conclusion that the interview went badly. In fact, if there were any person whose interview responses could be viewed as a “deal breaker”, it would be the person who bypassed Ms. DuVal, the only candidate who thought it was acceptable to have a couple of drinks a few hours before reporting for a shift. But what puts reliance on a “poor interview” beyond consideration is the credible evidence that Ms. DuVal’s bypass was a foregone conclusion well before her interview took place.

Second, to the extent that Somerville presses Ms. DuVal’s prior use of Xanax as a “non-medical” issue (although I have concluded it cannot be separated from the flawed medical and substance abuse issues from which it sprung), it still falls short of providing any reasonable justification to bypass her. The circumstances underlying her self-disclosure of this “offense” (accepting a Xanax – a Schedule IV prescription drug for which her friend had a legal prescription, as had Ms. DuVal in the past) pales in comparison to the acknowledgment by virtually every candidate to their use of marijuana (an illegal “Schedule I” drug), typically, on multiple occasions. To suggest, as the background investigator did, that the former shows a possible “conspiracy” to violate the drug laws and disqualifying judgment for not taking “legal” means to address a legitimate perceived need for the medication, while excusing the latter (i.e., the repeated use of a wholly illegal, highly risky and intoxicating recreational drug), is illogical, at best, if not the height of hypocrisy. Indeed, Ms.

DuVal's isolated personal ingestion of a prescription drug provided by a friend for the precise legitimate purpose for which it is prescribed (and not to "share" in getting "high") certainly would appear to qualify for treatment as a civil infraction under federal law; indeed, whether such personal use would ever be prosecuted as a felony or conspiracy, or even could violate such criminal laws, is certainly open to very serious and legitimate doubt. See generally 42 U.S.C. §§ 841 & 844; G.L.c.94C, §§32 et seq. & 40; United States v. Bobadilla-Pagán, 747 F.3d 26 (1st Cir. 2014); United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977)

Third, Ms. DuVal argues that Somerville's decision to bypass her in favor of the lower ranked candidate was motivated by nepotism because of his father's past employment with the SPD. The evidence, however, did not establish that such bias played a role, directly or indirectly, in the selection process. As Somerville points out, other candidates on the same certification, who had close family ties with Somerville city officials, were not hired and, further, Somerville had authority to hire more reserve officers than it eventually appointed, so it was not necessary to bypass Ms. DuVal to "get to" the lower ranked candidate. The absence of nepotism, however, does not alter the established facts, as described above, that Ms. DuVal received disparate and prejudicial treatment as compared with the lower-ranked candidate, as well as most others who were hired, in the manner her application was investigated, reviewed and evaluated. Unjustified unequal and disparate treatment among candidates, whether or not driven by an ulterior motive, is still a violation of civil service law. See, G.L.c.31,§1; Borelli v. MBTA, 1 MCSR 6 (1988).

CONCLUSION

In sum, for the reasons stated herein, the appeal of the Appellant, Marika Duval, is hereby *allowed*.

RELIEF TO BE GRANTED

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission orders: (1) the name of the Appellant, Marika Duval, shall be placed at the top of all current and future certifications for appointment to the position of permanent Reserve Police Officer with the Somerville Police Department until his is selected for appointment or bypassed after a selection process that conforms to civil service law and rules; (2) If Ms. DuVal is appointed as a Somerville Reserve Police Officer, she shall receive a retroactive civil service seniority date of January 223, 2016, the same as those reserve officers appointed from Certification #02473; (3) the retroactive seniority date is not intended to provide Ms. Duval with any additional pay or benefits, including, but not limited to, any claim to credible service toward retirement.

Civil Service Commission
/s/Paul M. Stein
Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on December 7, 2017.

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:
Dennis M. Coyne, Esq. (for Appellant)
Shannon T. Phillips, Esq. (for Respondent)
John Marra, Esq. (HRD)

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

MARIKA DuVAL,

Appellant

CASE NO. G1-16-082

v.

CITY OF SOMERVILLE,

Respondent

CONCURRING OPINION OF
CHRISTOPHER BOWMAN, CYNTHIA ITTLEMAN & PAUL CAMUSO

We concur with the conclusion that this appeal should be allowed, but for somewhat different reasons. We agree with Commissioner Stein’s well-supported conclusion that the City’s flawed, and, arguably illegal, review process here harmed Ms. DuVal’s candidacy, thus warranting reconsideration.

To ensure clarity, however, we believe that the City, as part of a new review process, should be able to consider that Ms. DuVal, on multiple occasions, took a prescription drug meant to control anxiety *without a prescription*. This serious issue, along with the circumstances surrounding two (2) separate terminations from prior employers, and issues regarding Ms. DuVal’s credit history, cannot be discarded or ignored,. While, given the missteps by the City here, it may be warranted to establish certain guidelines for any new review of Ms. DuVal’s candidacy, no appointing authority should be prohibited from considering these issues as part of a fair, impartial review process, particularly when it involves the highly consequential position of police officer.

/s/ Christopher C. Bowman

/s/ Cynthia A. Ittleman

/s/ Paul Camuso