

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

JOAO PAULO LEITE PEREIRA DE ARAUJO,
Appellant

v.

G1-16-065

ABINGTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Pro se, aided by Alicia Araujo, wife of the
Appellant

Appearance for Respondent:

Timothy D. Zessin, Esq.
Kopelman and Paige, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

Commissioner:

Cynthia A. Ittleman

AMENDED DECISION WITH SCRIVENER'S ERROR CORRECTED ON PAGE 63

Joao Paulo Leite Pereira de Araujo (Mr. Araujo or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on April 4, 2016, under G.L. c. 31, § 2(b) challenging the decision of the Abington Police Department (APD or Respondent), as a delegated authority, to bypass him for appointment to the position of fulltime Police Officer and to ask the state's Human Resources Division (HRD) to remove his name from the eligible list of candidates pursuant to Personnel Administrative Rules (PAR) .09, and challenging HRD's approval of the request to remove his name from the eligible list. A prehearing conference was

held in this regard on April 19, 2016 at the offices of the Commission. A hearing¹ was held on this appeal on May 20, 2016 at the Commission. The hearing was digitally recorded and the parties received a CD of the proceeding.² The parties submitted post-hearing briefs. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Forty-eight (48) exhibits³ were entered into evidence at the hearing. Post-hearing, the Respondent submitted one (1) set of documents (Respondent's Post-Hearing Documents).⁴

Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Christopher Cutter – Deputy Chief of Police, APD
- David Majenski – Chief of Police, APD

Called by Appellant:

- Joao Paulo Leite Pereira de Araujo – Appellant; and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following.

FINDINGS OF FACT

1. The Appellant is in his early thirties and he has been living in Abington for approximately two (2) years. He was married in 2004 and he and his wife have two (2) small children. He has been working at the Norfolk County Sheriff's Department in

¹ The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. 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. If such an appeal is filed, this CD should be used to transcribe the hearing.

³ Twenty-seven (27) exhibits were entered into the record for the Respondent; twenty-one (21) exhibits were entered into the record for the Appellant.

⁴ The Respondent's Post-Hearing Documents relate to the Appellant's discrimination claims filed at the U.S. Department of Justice and at the Massachusetts Commission Against Discrimination.

corrections for five (5) years, where he has received several letters of commendation and multiple evaluations rating his performance from good to excellent. He graduated first in his class at the Norfolk Sheriff's Department corrections academy. He has become a defensive tactics instructor, having been certified by the Municipal Police Training Committee (MPTC), and he trains new recruits. (Testimony of Appellant; Respondent Exhibit (hereinafter R.Ex.) 3; Appellant's Exhibits (hereinafter A.Ex.) 17 and 18) The Appellant practices Jiu Jitsu and has received a number of awards in that regard. In addition to English, he speaks Portuguese fluently and speaks Spanish well. (Testimony of Appellant; R. Exs. 3 and 9)

2. The Appellant was born and raised in Brazil. He came to the U.S. in 2001 after high school on a six (6)-month "B2 visa". He remained in the U.S., becoming a temporary resident in 2005, a permanent resident (green card) in 2007 and he became a United States citizen in 2009 when he was naturalized. (Testimony of Appellant; R. Exs. 3, 11 – 13; A.Exs. 3, 5 and 7)
3. On December 6, 2013, the Appellant submitted an application for the position of Special Police Officer (SPO) at the APD. SPO candidates fill out an application for employment form that is the same as the one used for fulltime police officer candidates at the APB. SPOs are volunteers but they may be assigned to certain paid details. SPOs attend a police academy for intermittent police officers. (R.Exs. 3 and 9; Testimony of Cutter) There is no indication whether SPO candidates take and pass a police officer exam, if they are given written conditional offers of employment⁵ prior to being required to take

⁵ Since the Respondent considers SPOs to be volunteers who may perform certain paid details, referring to the SPOs' "employment" is questionable. Therefore, it is unclear if the Respondent is required, and/or permitted, to have SPO candidates undergo psychological testing after having been given conditional offers of "employment" and

the psychological exam, if they are administered other medical/physical exams after receiving written offers of employment, the extent to which the Respondent conducts investigations of the SPO candidates, including a check of prior employment, criminal records, driver records, credit history and personal references, and whether SPO candidates are interviewed.⁶ (Administrative Notice)

4. Page 6 of the Appellant's completed 2013 SPO application is missing.⁷ (R.Ex. 9) The questions on page 6, according to the Appellant's subsequent application for fulltime police officer, ask the candidate for information relating to whether he or she has ever worked for this municipality, his or her marital status, and his or her last three girlfriends/boyfriends and states, in subpart "u.", "[o]ccasionally the application format makes it difficult for individuals to adequately summarize their complete backgrounds. Use the space provided below to summarize any additional information necessary to describe your full qualifications or add additional sheet(s) if necessary." (R.Ex. 3)
5. The Appellant was required to submit to a psychological evaluation as a candidate for the SPO position. The resulting psychological report, dated August 10, 2015, states, in pertinent part,

“ ... DRUGS AND ALCOHOL HISTORY
He has never used illicit drugs. He drinks beer on occasion. ...

LEGAL HISTORY
Negative. ...

if the Respondent can rely on the psychological exam report for an SPO if he or she subsequently applies for employment as a full-time police officer at the APD.

⁶ Deputy Chief Cutter testified that another member of the APD, his nephew, conducted the Appellant's SPO background investigation. However, it is unclear what was involved in the APD's background investigation of SPO candidates. Deputy Chief Cutter also testified that no one related to a member of the APD was hired during the hiring cycle for fulltime police officers at issue here.

⁷ After the Commission hearing, I found that page 6 of the Appellant's SPO application (R.Ex. 9) was missing. I asked the parties to provide the missing page but neither of them was able to do so.

TESTING

The claimant answered the [MMPI-2, Minnesota Multiphasic Personality Inventory] in a generally frank and open manner. Therefore, his scores on the clinical, supplemental, and content scales are likely to reflect an adequate appraisal of his present personality functioning. ...

He tends to externalize blame. ...

This was discussed with the claimant, and although he states he does at times have problems with anger, it has never come out inappropriately at work. Most psychologists would argue that the best prediction of future behavior is past behavior, so that a careful review of his work history of (sic) references is in order. ...

INTERPERSONAL RELATIONSHIPS

He does not fully trust anyone. ...

The PAI [Personality Assessment Inventory test] generates a psychological rating risk factor statement. ... The psychological rating risk factor produced on the PAI by this applicant is 31%, placing him at moderate risk of receiving a poorly suited rating.

The 2nd key piece of information developed by the PAI is what they call the critical items. Job applicants for public safety positions rarely endorse PAI items at critical levels. The average number of critical items endorsed is 10. This claimant endorsed 17 items ...

The probability of job-related problems risk level for this applicant is moderate. The likelihood of integrity problems is moderate. The likelihood of anger management problems is moderate. The likelihood of alcohol use concerns is low. The likelihood of illegal drug use concerns is low.

SUMMARY & CONCLUSIONS

... On the face of it, he is a pleasant and cooperative gentleman with a good work history, and ... psychologists generally prefer to rely on past history to predict future behavior, rather than on psychological testing, which is less reliable than a claimant's historical behavior. ...

... this examiner would rather rely on a solid 5-year work history, especially since it is in correctional work, rather than relying on the testing alone. ...

(R.Ex. 18)(emphasis added)

The length of the psychologist's interview of the Appellant and the number of times he met with the Appellant are unknown. (Administrative Notice – Id.)

6. Subsequently, but prior to the Appellant's application for the APD fulltime police officer position in or about January 2, 2016, the Respondent appointed the Appellant to the position of SPO where he received positive reviews, in addition to maintaining his

fulltime position at the Norfolk County Sheriff's Department in corrections.

(Administrative Notice; A.Exs. 3 and 13)

7. The Appellant took and passed the April 25, 2015 civil service police officer examination. (Administrative Notice - HRD documents provided to parties)
8. In or about November 2015, the Respondent submitted a requisition to the HRD for a certification of candidates who passed the exam to hire three (3) police officers. On November 18, 2015, HRD issued certification 03855 to the Respondent. On December 14, 2015 and February 2, 2016, in response to the Respondent's requests, HRD added names to this certification. There were a total of fourteen (14) candidates on this certification, of whom twelve (12) signed the certification indicating that they would accept employment if it was offered. Among those who signed the certification, the Appellant was ranked 8th, tied with one (1) other candidate. (R.Exs. 1, 21; Administrative Notice – HRD documents provided to the parties)
9. The Appellant is the first naturalized citizen to be considered for employment as a fulltime police officer at the APD. (Testimony of Cutter)
10. On February 1, 2016, the Appellant submitted a completed application for the full-time police officer position at the APD. In response to certain questions, the Appellant attached additional pages to the application to provide further information. (R.Ex. 3)
11. The APD application contains a section VI. Entitled "Criminal Record", which asks:
 1. Have you ever been arrested by a law enforcement agency or any agency of competent jurisdiction for a violation of any criminal statutes? ... If yes, please explain
The Appellant answered "no".
 2. Have you ever been placed in any type of Protective Custody by any law enforcement agency ... If yes, please list the agency, date, and circumstances.
The Appellant answered "no".

3. Have you ever been arrested or summoned to appear in criminal court on a complaint or hearing, but never been tried for a criminal offense; ... If yes, please explain ...
The Appellant answered “yes”.
4. Have you ever been tried for a criminal offense, but were not convicted? ... If yes, please explain ...
The Appellant answered “no”.
5. Have you ever been convicted of a felony offense by a law enforcement agency, or District Attorney’s Office (sic)? ... If yes, please explain ...
 - a. Were you convicted of a misdemeanor more than 5 years ago which resulted in a jail sentence from which you were released within the last 5 years?
 - b. If your answer to any of the six preceding questions ... is yes, please describe the offense involved, the date of the offense, the court or department in which you appeared, and any mitigating circumstances ...
Please include the Docket Number ...
 - c. Have you ever been convicted of a sexual offense? ... If you have answered yes, please state (Date; Place/Department; Charge/Court/Disposition/Docket No. ...
 - d. Have you ever been charged or convicted of a drug-related violation of MGL Chapter 94C (The Controlled Substances Act), or similar type action from another local, county, state or federal law enforcement agency ...? If you have answered yes, please state the following: Date; Place/Department; charge/Court/disposition/Docket No.
 - e. Have you ever been sentenced to imprisonment after conviction of a crime? ... If you have answered yes, please state the following: Dates; Place; Charge/Court/Disposition/Docket #.
 - f. Are you now under charge for any criminal offense in any jurisdiction which you are awaiting trial or final disposition? ... If you have answered yes, please state the following: Date; Place/Department; Charge/Court; docket #.
 - g. Have you ever been or are you currently the subject of any petition for a restraining order requested or issued pursuant to Chapter. 209A (Abuse Prevention), ... or any similar abuse prevention order from any other state? ... If you have answered yes, please explain when and where.
 - h. Have you ever been ... a defendant in any civil court action ...
 - i. Have you ever been contacted, approached, questioned, stopped, detained, or arrested by ANY law enforcement officer for ANY reason? ... If yes, give the date of the action, the nature of the action and the name of the law enforcement agency ...
 - j. Have you ever been directed to appear in any court for any criminal or civil action for any reason? ... If yes, give the date of the action, nature of the action and the name of the agency or persons who directed you to appear
(R.Ex. 3, pp. 16-18)(emphasis added)(*emphasis* in original)

The Appellant answered “no” in response to all questions except question #3 (have you been arrested), #5i (have you been stopped by police) and 5j (have you been directed to appear in court). The Appellant explained his responses to both questions 3 and 5j in an attachment, stating,

Back in 2002, while working for [Contracting Company], myself and [the owner’s son] ... were acused (sic) of entering an apartment on a three family home we were working on. We were painting the outside of the house, we had no access to the inside of the apartments. The tenent (sic) ... made a complaint with the Boston PD, stating that she was missing some CD’s and ball caps. One of the neighbors mentioned that she saw myself and [the Contracting Company owner’s son] out side (sic) of the building that day. We were called to appear in court, the tenent (sic) never showed. The case was dismissed. Later we found out that someone from her family had gone in the apartment.

(R.Ex. 3)(emphasis added)

In response to question 5i, the Appellant listed a 2002 speeding ticket, a 2005 stop by a police officer but no action was taken and a license plate display violation in 2007. (Id.)

12. In the APD application section IX, entitled “Miscellaneous”, a subsection entitled “Other Personal Declarations” asks:

1. Have you ever had sex with another person without their consent?
2. Have you ever had sex with a person under the age of 16?
3. Have you ever used drugs or alcohol to seduce a sex partner?
4. Have you ever paid for sexual favors?
5. Is there anything in your life that could subject you to extortion?
6. Have you ever sued someone or have you ever been sued?
7. Have you ever been convicted of a violent crime or a crime of domestic violence?
8. Have you ever been committed to any hospital or institution for mental illness, or alcohol or substance abuse?
9. Have you ever been diagnosed as having Post Traumatic Stress Disorder (PTSD) ...

If you answered ‘yes’ to any of the above questions numbered 1-6 ... please attach additional sheets to explain”

(R.Ex. 3, p. 21)(emphasis added)

The Appellant answered “no” to all of these questions. (Id.)

13. Page 5 of the application asks if the candidate has applied for other positions “ ... authorizing criminal or civil process” (Id.) In the Appellant’s 2016 application for the position of fulltime police officer, the Appellant answered “yes” and attached a separate sheet indicating that, in addition to applying to the APD for the position of SPO, he had also applied to one (1) named university campus police department in 2015, four (4) named Sheriffs’ Departments (including the Plymouth Sheriff’s Department and the Norfolk Sheriff’s Department) in 2010, the state’s Department of Correction (DOC) in 2010 and one (1) named municipal police department in another state. The Norfolk Sheriff’s Department hired the Appellant in or about 2010. (Id.) In his 2013 application for the position of SPO at the APD, the Appellant answered this question stating that he had applied to the four named Sheriffs’ Departments and to the DOC in 2010, not mentioning that he had applied to an out of state municipal police department in 2010. He did not apply to the campus police department until 2015. (R.Ex. 9; Administrative Notice)

14. As noted above, question “u.” on page 6 of the APD application asks the candidate “ ... to summarize any additional information necessary to describe your full qualifications” (R.Ex. 3) The Appellant attached to his 2016 application for the position of fulltime police officer a separate sheet stating, in full,

I came to the US as a 19 year old kid from Brazil, looking to improve my English before returning home and starting college. I started working and making money, had a girlfriend, and really had a new independent life that I enjoyed. I decided to postpone college in Brazil and stay in the U.S. a little longer. I was working in construction a lot, and would see and talk with police officers regularly. I always really respected and admired them. In Brazil, they are viewed and seen very differently than they are here. Here they help and protect their citizens and it has always been something I dreamed of doing. Few years passed. I met and married the love of my life, but still was not happy with my job situation. I had exhausted my construction career. These New England winters were too much

for me to take working outside. When offered a regular full time, indoor job at [redacted] Safe Company I was pretty happy. During this time I was finalizing everything in the process of becoming a United States Citizen. It was one of the proudest days of my life. Shortly after, I was laid off from [redacted] Safe [Company]. I knew this was a sign for me to finally try and pursue something in law enforcement and I was more than happy to graduate from the academy and become a Corrections Officer. I've worked for NCSO [Norfolk County Sheriff's Officer] for 5 years now. I am very proud of the work I do there, but continued to take police exams because I am not one to give up on my goals. I have two beautiful daughters who will grow up in the town of Abington. I want to make my girls proud, and serve and protect the community we live in.

(R.Ex. 3)

As noted above, p. 6 was missing from the Appellant's 2013 application for the position of SPO. (Administrative Notice)

15. On the Appellant's 2016 application for employment as a fulltime police officer at the APD, the Appellant provided his employment history, indicating that he was employed at various places and times, including in the period 2001 – 2005. (R.Ex. 3) On the Appellant's 2013 application for employment as an SPO at the APD, the Appellant indicated that he was employed at various places and times, including in the period 2002 – 2005. (R.Ex. 9)⁸

16. Dep. Chief Cutter conducted most of the investigation of the Appellant for the position of fulltime police officer, asking another member of the APD to assist him on computer checks. Dep. Chief Cutter attended training for background checks approximately twenty (20) years ago and has conducted many background checks for candidates. The APD conducts background investigations, collects pertinent documents and then conducts the candidate interview. (Testimony of Cutter)

Driver Record Allegations and Untruthfulness

⁸ The precise details of some of the Appellant's employment record in his applications to the APD vary in some regard but both of his applications indicate that he was employed, at least, between 2002 and 2005.

17. Page 5 of the application for employment at the APD asks, in two (2) separate questions, if the applicant has ever received a “citation” and a “written warning” in Massachusetts or elsewhere. On his 2016 application for employment as a fulltime police officer at the APD, the Appellant indicated he received no written warnings but had received two (2) citations – one (1) for “plate violation” in 2007 and one (1) for a speeding ticket in 2002. In his 2013 application for employment as an SPO, the Appellant indicated that he had received written warnings for the 2007 plate violation and the 2002 speeding ticket but no citations. (R.Exs. 3 and 9)

18. The Appellant’s driver record, obtained from the RMV by the APD in connection with his 2016 application for employment, indicates the following driving incidents:

2002 – 2 charges (issued at the same time): illegal operation and speeding incidents – for both of which the Appellant was found Not Responsible;

2002 – 1 charge: approximately 1 week after the earlier incidents, safety regulations incident for which the Appellant was found Responsible;

2002 – 1 notation: approximately 2 weeks after the safety regulations incident, Appellant sent notice of “suspension payment default indefinite”[];

2002 - approximately ten (10) days after the “suspension payment default indefinite” notation on the Appellant’s driver record: “expiration payment default RLS”⁹. I take administrative notice that “RLS on this type of RMV document means “release”, indicating that the “suspension payment default indefinite” had been resolved;

2002 – 1 charge: approximately two months after the “release” notation, state highway violation incident for which the Appellant was found Responsible; and

⁹ The “Expiration Payment Default RLS” notation indicates that the payment default notation had been released approximately ten (10) days after the “Suspension Payment Default Indefinite”.

The Commission receives numerous appeals involving, at least in part, an appellant’s driver record. For that reason, the Commission members attended an RMV training session years ago. That training leads me to conclude that the “suspension payment default indefinite” does not necessarily mean that a driver’s license was actually suspended and that it could also mean that a license or registration may be at risk of suspension if the driver did not, for example, pay an outstanding fine by a certain date. See Wine v. City of Holyoke, G1-17-022 (2018).

2007 – 2 charges (issued at the same time): traffic/safety violation and display number plate incidents for which the Appellant was found Not Responsible. (R.Ex. 4)(emphasis added)

There are no other incidents noted in the Appellant's record. (Administrative Notice)

Background Investigation

19. On February 3, 2016, Dep. Chief Cutter sent an email message to the Appellant stating,

I'm still in the process of conducting your background investigation and at this point I would like to take you off the Special Police schedule for the month of February until I can complete a thorough review. I will be asking you for some more supporting documents in the near future and will expect your full cooperation to get through this process. I will notify Lt. Mini that I have asked that you come off the schedule for the time being.

A.Ex. 1)

20. Between February 3 and 9, 2016, Dep. Chief Cutter emailed the Appellant, asking him to

respond to a number of questions and to provide various documents, to which the

Appellant provided certain responses. (A.Exs. 1 – 9 and 21; R.Exs. 11-13) requests.

Dep. Chief Cutter developed the form for requesting additional information from

candidates, although its precise form varies depending on the need. (Testimony of

Cutter)

21. On February 3, 2016, Dep. Chief Cutter emailed the Appellant, attaching a supplemental

background questionnaire for the Appellant to complete as soon as possible. The

following are the Respondent's questions (A.Ex. 2)(emphasis in original) and the

Appellant's responses (A.Ex. 3):

Q. "... provide ... any and ALL court documents related to ALL criminal charges in which you appeared in court ... "

A. "In my best efforts to be completely honest, I wrote on my original application that I went to court for a breaking and entering charge in 2002. On February 4, 2016 I spoke with the owner of the company that I was working for at the time, and he told me the company, and myself were never involved in a criminal charge. It only went as far as a visit to the Boston Police Station where Detective Green (deceased), who was assigned to the case informed us that they had already made a case against the occupants (sic)

boyfriend at the time. The company owner's name is [name redacted] and his number is [phone number redacted], if you would like to verify this information with him. **Before I became Naturalized I had a CORI check done in 2009, because I couldn't remember if I had been to court for this. I have that attached here ... This was in 2009 and there were no records of me having appeared.**"

(A.Ex. 3)(emphasis added)

There is no indication that Dep. Chief Cutter called the person identified by the Appellant at the phone number the Appellant provided. (Administrative Notice; *see also* A.Exs. 3 and 16)

23. Dep. Chief Cutter's Feb. 3, 2016 email questions continued and the Appellant responded, in pertinent part,

Q. "...provide me with the name and address of the court in which you appeared for ALL criminal charges"

A. "N/A"

Q. "... provide ... the name(s) you used during all criminal cases you (sic) associated with. This would be the name associated with the criminal charge (docket) that may or may not be your full legal name."

A. "N/A"

Q. "... provide ... a copy of a High School (or equivalent) diploma."

A. "Attachment 2 – translated copy of my High School Diploma"

Q. "... provide any supported documents to include complete investigative files pertaining to your incident at the PCHC [Plymouth County House of Corrections].

Please understand the (sic) some internal investigation files may be determined to be public record subject to disclosure pursuant to a public records request."

A. "Attachment 3"

Attachment 3 is a Norfolk County Sheriff's Department memorandum regarding the 2015 incident at the PCHC. (Administrative Notice).

Q. "... provide ... a list of all your assignments while working for NCSD and the dates in which you were assigned. If there was ANY break in any assignment please list the date and reason.

A. "April 2011 – July 2015 – Line Officer

Line Officer assignments included: all units, central control, SAP (Special assignment officer) assigned wherever an officer is needed at the time. All line officer assignments are rotated every 3-6 months.

July 2015- Sept 2015: Transportation Officer

Sept 2015-Present: Line Officer
Current assignment is SAO”

The Appellant was returned to the Transportation Unit in March 2016 by bid.
(Testimony of Appellant)

Q. “... explain in detail the rear end collision you had while working. Please supply supporting documents to include investigative reports, accident reports and investigative conclusions. ...

A. “This incident happened in September or October of 2012. The car was a blue Crown Victoria, registered to Norfolk County, but it was not a police registered vehicle. I was given permission to use this vehicle to transport myself and another individual to Plymouth Country (sic) for the Police Intermittent Academy.

I was traveling on Ivory Street in Braintree, MA making a right turn onto Union Street. I was at a yield sign, and there was a van in front of me. The van moved forward a little, and when I looked left to see if it was clear to turn right, it was all clear. I proceeded to turn right thinking that the Van was already gone, but it had stopped and I hit it.

Both parties pulled into the Motel 6 parking lot to assess the damage. There was no damage to either vehicle. We exchanged information and both continued to our destinations.

In researching this incident I discovered that Norfolk County no longer owns this vehicle. I am currently speaking with the Fleet Personnel, trying to obtain the documentation on this accident, and I will send it to you as soon as I received (sic) it.”

Q. **“If there has been any illegal drug use in your history, please explain in detail the circumstances surrounding the use, including types and approximate dates.”**

A. **“Experimented with marijuana at the age of 19 or 20. No drug use since that time.”**

(A.Ex. 3)(**emphasis added**; all other emphasis in original)

24. The APD SPO and fulltime police officer employment application given to the Appellant does not ask if the applicant has used drugs¹⁰, although it asks, on page 17, “Have you ever been charged or convicted or a drug-related violation of MGL Chapter 94C, (The Controlled Substances Act), or similar type action from another local, county, state, or federal law enforcement agency, of competent jurisdiction? (Yes () No ()). If you have answered yes, please state the following: Place/Department, Charge/Court Disposition/Docket No.” (R.Exs. 3

¹⁰ Oddly, the APD application for fulltime police officer filled out by Candidate A, who bypassed the Appellant, does inquire about the candidate’s drug use (“Do you now, or have you used any type of drug. If prescription drugs were used, have you ever used them contrary to the issued prescription?”) in the Miscellaneous section of the application. (R.Ex. 25)

and 9; Administrative Notice) The Appellant answered “no” in both of his APD applications.

(Id.)

25. In his application for employment at the Plymouth County Sheriff’s office in 2010, the

Appellant indicated that he had used marijuana twice when he was a teenager. (R.Ex. 10)

26. Dep. Chief Cutter’s Feb. 3, 2016 email questions continued and the Appellant responded, in pertinent part,

Q. “Please explain in detail the reasons for why your probation period at NCSD was extended. Please provide any supporting documents to include complete investigative files”

A. “Attachment 4 During a verbal discussion with a Deputy I was told that I was a very by the book officer, and came across as abrasive, and my IPC [interpersonal communication] skills were not up to par.”

Attachment 4 is a 2012 letter from the Norfolk County Sheriff’s Human Resources Director to the Appellant stating,

The [NCSO] has decided to extend your probationary period another six (6) months. Should you agree to this six (6) month extension of your probationary period please sign the acknowledgement below. If you decline to accept the six (6) month extended probationary period your employment will be terminated

(A.Ex. 3)(emphasis in original)

Q. “Please provide me with a date in which you became a resident of Massachusetts. If this date is different from the date in which you moved from Brazil please indicate your moving date and location.”

A. “Date Entered the United States: [date redacted in part] 2001 – living with Family in Quincy, MA

Date of Temporary Residency: [date redacted in part] 2005

Date of Permanent Residency: [date redacted in part] 2007

Date of Citizenship: [date redacted in part] 2009”

Q. “**Not fully understanding the legal aspects of residency**, please provide me with any and all documents pertaining to any visa or other document that allowed you to remain in this country prior to citizenship.”

A. “Attachment 5 – Visa

Attachment 6 – Permanent Resident Card (also known as Green Card)”

Q. “Please explain in detail and provide supporting documents for the following driving incidents in which a police officer documented his findings:
2002 Illegal Operation Quincy

2002 RMV/FED Safety Regs Quincy
2002 Suspension Payment Default¹¹
2002 St. Hway Violation Dorchester
2007 Traffic safety Viol Quincy”

A. “2002 Illegal Operation Quincy – Speeding ticket – to the best of my knowledge (memory)
2002 RMV/FED Safety Regs Quincy – I am not denying this happened in any way but I can’t remember what it is was (sic) for. My driving record from the RMV only gave me information for the last 10 years.
2002 Suspension Payment Default – I sincerely do not remember, but it could have been a late payment on my insurance
2002 St. Hway Violation Dorchester – **Driver’s license name did not exactly match registration name. My full name did not fit on registration.**
2007 Traffic safety Viol Quincy – License plate on Yamaha R6 was angled in a way the State Trooper said was not fully visible.
Attachment 7 – RMV record from last 10 years”

(A.Ex. 3)(**emphasis added**)

Attachment 7 is the Appellant’s RMV “Unattested Driving Record”, dated February 5, 2016. It states, in part, “ACCORDING TO THE RECORD OF THE REGISTRY OF MOTOR VEHICLES THERE IS NO RECORD OF ANY ACTIVE OFFENSE OR ACTION FOR THE PREVIOUS TEN YEARS.” (Id.)(**EMPHASIS** in original)

27. Dep. Chief Cutter then emailed the Appellant asking him to provide his “Certificado de Conclusao do Ensino Medio (certificate of secondary school completion/diploma) issued by the Colegio or Ministerio da Educacao and Historico Escolar (academic transcripts)”, his ‘passport number and county (sic) of origin of the passport that way (sic) used upon entry to the USA”, and “[y]ou have indicated that you came to this country on a Regular Visa in 2001. You have also indicated that you obtained your Permanent Resident Card

¹¹ The APD had a copy of the Appellant’s RMV driver record. (R.Ex. 4) Dep. Chief Cutter’s request for information from the Appellant in this regard fails to include certain information in the Appellant’s RMV driver record. For instance, although Dep. Chief Cutter asked the Appellant about the “Suspension Payment Default” notation in his record, Dep. Chief Cutter did not indicate that there was a notation immediately after it indicating “Expiration Payment Default RLS Quincy” shortly after the “suspension” notation. In addition, Dep. Chief Cutter’s request for information did not indicate that the Appellant was found responsible for only two (2) of the six (6) driving incidents.

in 2005. Please supply all documents authorizing you to remain in the country from 2001-2005.” (A.Ex. 4) The Appellant responded on or about the same day, providing the “original certificate of diploma, issued by the institution”, the number of his Brazilian passport, and he added that he does not have “any other documents in regards” to the period 2001 – 2005. (A.Ex. 5)

28. Dep. Chief Cutter then emailed the Appellant asking additional questions, to which the Appellant responded, in pertinent part,

Q. “Please provide your high school diploma and academic transcripts.”

A. “I have this, and tried scanning it, but the document is too light to show up in a scan. I can drop this off for you. If you need a sealed copy I can request it from the school, but turnaround will most likely be slow.”

Q. “Under what legal authority did you remain in this country from 2001 – 2005? Did you possess some other type of Visa, other than the one you presented to me? If you have no other authority, can I assume you were an illegal alien, or is there something I’m missing? ...”

A. “I have no further documentation. I came in 2001, and obtained residency in 2005. When I came to the U.S. I only planned on staying a few months to better my English, and then return to Brazil and start college. Things changed and I decided to stay a little longer, and then I met my wife. After we got married and I knew I would be living here permanently, we started the process of residency immediately.”

Q. “Please provide me with your filed Federal and Massachusetts Tax Returns for the period of 2002 – 2005[.] ...”

A. “**2001 – 2003 – Did not file, not working**

2004 – Attached

2005 – Could not locate. **Requested a copy from the IRS. Takes 5 – 10 business days. Will forward to you upon receipt.**”

Q. “Upon initial entry to this country, how long were you authorized to visit?”

A. “6 months”[.]

(A.Ex. 7)(**emphasis added**)

The Appellant's 2004 IRS tax return, attached to the Appellant's response to these questions, is a joint tax return filed with his wife in which she reported income but the Appellant did not. Both the Appellant and his wife signed the joint tax return. (Id.) During cross-examination at the Commission hearing, the Appellant was asked about his tax returns for the pertinent time period. After I informed him of his 5th Amendment right against self-incrimination under the U.S. Constitution, the Appellant invoked his 5th Amendment right in that regard. (Testimony of Appellant; Administrative Notice)

29. By email message dated February 9, 2016, Dep. Chief Cutter wrote to the Appellant, in pertinent part,

This is unfortunate. .. (sic) Based on the circumstances, the Chief would like to give you the opportunity to resign from your Special Police position. **Knowing the information that was uncovered during your background investigation puts our department in a difficult position to continue this process. The Chief requests that you come in tomorrow with a letter of resignation and all issued equipment.** We would like to meet with you anytime (sic) prior to 4pm to discuss this unfortunate situation in person. **We are sorry things didn't work out for the better and please know that if you ever need anything** from the Chief or I just call. ... (A.Ex. 8)(**emphasis added**)

30. The Appellant responded on February 9, 2016, in pertinent part,
I would be happy to speak to you and/or the chief about this situation.
As far as I am concerned, the background check has not uncovered any thing (sic) that would be grounds for disqualification.
I would be happy to provide you with the resources to clarify this issue. I could provide you with a number of a labor lawyer or a number for USCIS.
The law is clear: as a United States Citizen I am fully qualified to apply for this position. I have not committed any crime or felony that would jeopardize my application. Thus, I would kindly ask you to revise the policies and your current position. ... (A.Ex. 8)

Dep. Chief Cutter asked what time the Appellant would be in the office to meet. The Appellant responded, "Does 10am works (sic) for you sir?" (A.Ex. 8) Deputy Chief

Cutter responded saying that 10 a.m. was fine and he wrote “[p]lease bring all your issued equipment to this meeting.” (*Id.*)¹²

February 10, 2016 Meeting

31. On the morning of February 10, 2016, the Appellant met with Dep. Chief Cutter and Chief Majenski, as scheduled. The Appellant went to the Department on the morning of February 10 as arranged. At the beginning of the recording, which was approximately six (6) minutes long, Chief Majenski called the Appellant “J” or “Jake” and stated that their meeting was being “sight and sound” recorded. At the conference table, the Appellant sat directly across from Chief Majenski and diagonally across from Dep. Chief Cutter (whose back faced the camera). Throughout the meeting, the Appellant faced the camera and sat with his elbows and hands on the conference table, with his hands sometimes clasped. The following is a transcript I prepared of pertinent parts of the recorded meeting.

Chief Majenski – “...we’re here to discuss some of the issues that were found in the background investigation ... So ... take me through when you came to this country.”

Appellant - “I looked into this. I meet the qualifications to become a police officer ... I am a U.S. citizen. The fact that you are asking me how I got to this country, how I became a citizen, it’s not legal.”

Chief Majenski - “ok.”

Appellant – “The fact that the United States granted me citizenship should be enough. I am a citizen of the United States of America regardless how I got to this country. ... It shouldn’t matter. ... Nothing in my background, nothing in my work history, would disqualify me from being a good police officer.”

Chief Majenski - “Do you feel that you ever violated the law?”

Appellant – “No ... because that shouldn’t matter.”

Chief Majenski - “Well let me just qualify - not whether it should matter or did you think you did it?”

App – “No.”

Chief Majenski – “So when you came into this country how did you come in?”

¹² In his email messages to the Appellant, Dep. Chief Cutter repeatedly addresses the Appellant as “JP”.

Appellant – (Appellant’s voice was raised at this point somewhat.) “I told you, I don’t have to answer you this question, sir. And the fact that you are asking me this – I thought you would go looking into this ... it is not ok. If the United States granted me citizenship, I don’t mean to be disrespectful, who are you to deny me this right? ... So the question right now is that’s what we are coming down to?”

Chief Majenski – “So ... are you refusing to answer me those questions?”

Appellant – “The fact that I don’t have to answer I don’t think it’s a refusal sir?”

Chief Majenski – “So are you going to answer my questions or are you refusing ...?”

Appellant – “Oh ... I’m answering your questions as long as I have to answer them”

Chief Majenski – (putting his arm on the table, leaning forward toward the Appellant) “So it’s your determination that you don’t have to answer them.”

Appellant – “If it infringes on my rights ...”

Chief Majenski – (speaking while the Appellant is speaking) “At this point you have determined that you’re not going to answer any questions regarding your immigration status coming into this country.”

Appellant – “Correct.”

Chief Majenski – “Ok so let me try something else.”

Appellant – “Ok.”

Chief Majenski – “... you were in this country in what year?”

Appellant – “2001.”

Chief Majenski – “You were employed during that period.”

Appellant – “Yes sir.”

Chief Majenski – “... as part of that employment you were paid a salary or you were paid wages, is that correct?”

Appellant – “Correct.”

Chief Majenski – “... I believe you indicated that you didn’t file federal and state tax returns?”

Appellant – “No.”

Chief Majenski – “For three years?”

Appellant – “Yeah.”

Chief Majenski - “So do you believe that’s illegal to not claim money that you made over a three year period?”

Appellant - (Appellant raised his voice here somewhat.) “So that’s the technicality that you’re going to try to get me on I guess you are correct sir.”

Chief Majenski – “... that’s a technicality?”

Appellant – “... it doesn’t reflect on my character in any way, shape or form. It doesn’t make me a bad candidate. I understand you have reservations on – for some reason - on hiring me but ... you’re right.”

Chief Majenski – “Alright how much would you say you earned that you didn’t pay taxes on?”

Appellant – “... I didn’t make that much money at all. Entry level carpenter.”

Chief Majenski - “I believe on your application it was somewhere around \$31,000.”

Appellant – “I don’t recall. It’s on the application you have”

Chief Majenski – “So over three years that’s close to \$90,000 that you failed to pay taxes on?”

Appellant – “That’s correct.”

Chief Majenski – “Think the IRS would be interested in that?”

Appellant – “It’s a battle that I’m going to have to fight with them.”

Chief Majenski – “Because it’s illegal, correct?”

Appellant – “Correct.”

Chief Majenski – “Ok so you think that as a police officer, as a candidate ... that it’s appropriate that you break the law prior to becoming a police officer that’s ok?”

Appellant – “No.”

Chief Majenski – “So then how – if you’re admitting to breaking the law prior to becoming a police officer how do you say that because now you don’t break the law, and I’m not questioning your character now, ... but what I’m saying ... prior to this point you have broken the law.”

Appellant – “So prior to this point you mean prior to becoming an American citizen because this is the point that you are failing to mention now - (raising his voice somewhat) I’m going to flat out say it now I feel like I’m being discriminated against and I know I can’t continue especially with the way you’re are putting it now – ... you know, it is what it is - we’re going to have to ... see where it’s going to take me.”

Chief Majenski – “Ok.”

Dep. Chief Cutter – “**Chief, he doesn’t want to answer the questions and he feels like he’s being discriminated against there’s no sense going forward.** We’ll go from there.” (Chief Majenski is also talking at this point so it is unclear what few other words were spoken.)

Chief Majenski – “So did you I, I had suggested that you down a letter of resignation from the special police department - did you do that?”

Appellant - “No, I’m not – I don’t feel like I have to resign. If you want to fire me that’s fine. I’m not signing anything that says I resign. I didn’t do anything wrong.”

Chief Majenski (to Dep. Chief Cutter) – “As of right now he’s still on suspension until further notice?”

Dep. Chief Cutter – “Correct. ...” (They talk over each other briefly so it’s unclear what few other words spoken.)

(R.Ex. 19)(**emphasis** added)¹³

At this point in the recording, Chief Majenski extended his arm to the Appellant over the conference table as they rose from their chairs and they shook hands. They then spoke briefly at the same time and it appears that one or both of them said “thank you”. The Appellant politely asked if he could have back the bag from home in which he brought his SPO gear to return to the Department as requested. At the close of the recording it appeared that Dep. Chief Cutter was casually reaching behind them to obtain the

¹³ The parties did not offer, and I did not request, recordings of the meetings/interviews that the APD conducted with other candidates.

Appellant's now empty bag to return it to him. At no point in the recorded meeting did the Appellant act aggressively. (R.Ex. 19; Administrative Notice)

32. Later that morning, shortly after the February 10, 2016 meeting, Dep. Chief Cutter forwarded to the Appellant by email a letter from Chief Majenski terminating the Appellant from his position as an SPO. This Chief's letter stated, in pertinent part,

As you understand, **you were hired** by this department as a Special Police Officer and as a Special Police Officer **you are an employee at will** ... When hired it is understood that the **Special Police Organization is a volunteer organization under the appointing authority of the Chief of Police.**

Effective immediately, you are hereby notified that **I have terminated your employment** ... based on a complete and thorough back ground (sic) investigation. ...

(A.Ex. 9)(**emphasis** added)

Removal of Appellant's Name from the Eligible List

33. The day after the February 10, 2016 meeting, Chief Majenski submitted a written request to HRD to remove the Appellant's name under PAR.09 from the eligible list from which it had issued certification 03385. (R.Ex. 20) The APD requested the removal of other fulltime police officer candidates but not all of the candidates that it did not hire.

(Testimony of Cutter)

34. On February 25, 2016, the Appellant wrote to Chief Majenski, copying the Town Manager, stating, "[i]t is my understanding the town of Abington is no longer considering me as a candidate for the Abington Police Department. This is a request for a formal bypass letter from the department. ..." (A.Ex. 20)

35. By email message dated March 3, 2016, Dep. Chief Cutter sent the Appellant a copy of a two (2)-page, single-spaced letter, dated February 11, 2016, sent to HRD by Chief Majenski listing the reasons the APD sought to have HRD remove the Appellant's name from the eligible list. (A.Ex. 11) Later that day, Dep. Chief Cutter sent the Appellant an

email message informing him of his right to appeal Chief Majenski's decision to the Commission. (R.Ex. 20)

36. On March 24, 2016, the APD hired three (3) candidates, one of whom, Candidate A, was ranked below the Appellant, thereby bypassing the Appellant. (R.Ex. 21)

37. On April 4, 2016, the Appellant filed the instant appeal at the Commission.
(Administrative Notice)

38. On April 19, 2016, the Commission conducted a prehearing conference in this case on April 19, 2016. (Administrative Notice)

39. By letter dated May 13, 2016 from Chief Majenski to HRD, the Respondent expanded its March 3, 2016 letter to a five (5)-page, single-spaced letter seeking the Appellant's removal from the eligible list. (R.Ex. 23) In summary, the May 13, 2016 letter alleged that the Appellant was untruthful about his name, his illegal drug use, his firearms license application, his name, his criminal record, his driver record and his disciplinary record at work; that he failed to produce his tax records 2001 – 2005 and high school transcript from Brazil; that he remained in the U.S. illegally from 2001 through 2005; that he failed the psychological test when he applied for the SPO position; and he earned income between 2001 and 2005 but did not report it to the tax authorities. (R.Ex. 23)¹⁴

40. By letter dated May 17, 2016, after the Appellant filed his appeal at the Commission, the state's Human Resources Division (HRD) informed him that it had removed his name from the eligible list as requested in the APD's May 13, 2016 letter and attached the APD's letter requesting his removal from the list. (R.Ex. 24)

Allegations Regarding Appellant's Name and Untruthfulness

¹⁴ Neither the APD's February 11, 2016 letter nor its May 13, 2016 letter stated that the APD was bypassing the Appellant.

41. On page 2 of the Respondent's application form requesting the candidate's first, middle and last name, the Appellant wrote that Joao is first name, Paulo is his middle name and Araujo is his last name on both his SPO application and his fulltime police officer application. (R.Exs. 3 and 9)
42. Question j. on page 4 of the application form used by the Respondent for both SPO and fulltime police officer candidates asks, "Have you ever used another name? (Yes (No If yes, please explain:.". The Appellant answered "yes" and added, "My full name Joao Paulo Leite Pereira De Araujo" on both the SPO and fulltime police officer application forms. (R.Exs.3 and 9)
43. There are "... important differences ... between the structures of English (simple or compound name and patronymic surname) and Spanish names (simple or compound name, patronymic and matronymic surnames)." (Administrative Notice - <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC128958> November 29, 2017)¹⁵
44. In documents the Appellant has signed and submitted in this appeal, he has shortened his name, typically, to Joao P. Pereira de Araujo. (Administrative Notice)
45. The Appellant's driver history states that the Appellant's name is "Joao P. Pereira-deAraujo". (R.Ex. 4)
46. The Appellant applied for (and was granted) a Firearms Identification Card by the Quincy Police Department (QPD) in 2009. The firearms application form that the Appellant completed by hand requested his first name and the Appellant wrote that his first name is "Joao P."; where the form requested his middle name the Appellant wrote "Leite"; and where the form requested his last name, he wrote "Pereira De Araujo".

¹⁵ I take further administrative notice that one (1) online source states that more than one (1) million people in Brazil have the surname Araujo (<http://forebears.io/surnames/araujo>).

Asked on the firearms application form if he has “ever used or been known by another name, he wrote “My friends call me ‘John’ because they can’t pronounce my first name”.

(R.Ex. 8)

47. The Appellant applied for (and was granted) a renewal of his Firearms Identification Card by the QPD in 2014. The Appellant filled out the application form by hand. Where the form requested the Appellant’s first name, the Appellant wrote “Joao Paulo”, where the form requested his middle name he wrote “Leite”, and where the form requested his last name, he wrote “Pereira De Araujo”. Where the form asked if he has used or been known by another name, the Appellant answered “yes” and wrote “Joao P. Araujo (shorter)”. (R.Ex. 7) A QPD police officer typed the Appellant’s information into the QPD system, entering the Appellant’s name the same way that the Appellant had written it on the application. In response to the question asking if the applicant has used or been known by another name, the QPD officer entered “Y” and “Name: JOHN LEITE PEREIRA DE ARAUJO Comment: FRIENDS THAT CAN’T PRONOUNCE FIRST NAME.” (R.Ex. 6)(EMPHASIS in original).

48. In 2010, the Appellant applied for the position of Correction Officer for the Plymouth County Sheriff’s Department. The application form asked for the candidate’s first name, middle name and last name. The Appellant wrote that his first name was “Joao”, his middle initial was “P.” and his last name was “Araujo”. That application also asked if the applicant had used or been known by another name, nickname or alias and the Appellant wrote that he was known by the first name of “John”. (R. Ex. 10)¹⁶

¹⁶ Although the Plymouth Sheriff’s office did not hire the Appellant, the Plymouth Sheriff’s Investigator Summary states, in part, “ ... [t]he applicant’s personal references have produced positive information. ... The investigation shows that the applicant presents to be a responsible, mature, and reliable candidate. Interviewers for PCSD noted that the applicant presented himself well. He received ‘A’s’ from all interviewers. The applicant’s self-assuredness

49. On a W-4 tax form in connection with his current employment at the Norfolk Sheriff's Department, the Appellant wrote that his name was "Joao Paulo L. Pereira de Araujo".
(Id.)
50. On the twelve (12)-year old tax return that the Appellant provided at APD's request, the Appellant wrote that his name was Joao Paulo L. Pereira de Araujo. (A.Exs. 11-13)
51. The Appellant's high school certificate indicates that the Appellant's name is Joao Paulo Leite Pereira de Araujo. (R.Exs. 11-13)
52. The Appellant's 2001 visa to the U.S. indicates that his "given name" is Joao Paulo Leite Pereira and his "surname" is Araujo. (Id.)
53. The Appellant's 2005 Permanent Resident Card indicates that his name is Joao Paulo L. Pereira de Araujo. (Id.)

Allegations Regarding Criminal Record and Untruthfulness

54. In 2009, prior to his naturalization that year, the Appellant asked the state Criminal History Systems Board (CHSB) to check his criminal record. An April 2009 sworn statement from CHSB reported, "A computerized search has been made of the database of the Criminal History Systems Board, which is the repository for criminal records in the Commonwealth of Massachusetts, for DE ARAUJO, JOAO PAULO, date of birth [redacted] and have determined that he or she has no adult criminal court appearances." (A.Ex. 3)(EMPHASIS in original; emphasis added)
55. Even though the CHSB indicated in April 2009 that he had no adult criminal court appearances, the Appellant handwrote "yes" on his June 2009 Firearms License

and work ethic have been noted as attributes that will ensure his success. In terms of behavior, the applicant has not acquired a criminal background ... Throughout his career, the applicant has shown to be a dependable and stable employee. ..." (R.Ex. 10)

application at the QPD when asked if he had “appeared in court” regarding a criminal offense. (R.Ex. 8)(emphasis added)

56. The Appellant handwrote “no” on his 2010 Plymouth Sheriff’s Department application when asked if he had had “ANY dealings with a law enforcement agency, as a victim, witness, or other: Y/N If yes, give agency, date(s) and circumstances:” (R.Ex. 10)(EMPHASIS in original)(emphasis added)

57. An Investigator’s report by the Plymouth Sheriff’s Department regarding the Appellant’s application for employment in 2010 indicates, in part, “The applicant’s criminal information review shows nothing of derogatory nature.” (R.Ex. 10)(emphasis added)

58. The Norfolk Sheriff’s Department documents pertaining to the Appellant’s employment application there in 2011 include prints of all ten (10) of his fingers and an accompanying form from the Criminal Justice Information System (CJIS) Division referring to “Joao Paulo Araujo”, and indicating the Appellant’s correct social security number, date of birth, height, weight and the color of his hair and eyes. The FBI CJIS report concludes, “[a] search of the fingerprints on the above individual has revealed no prior arrest data.” (A.Ex. 16)(emphasis added)

59. In his handwritten July 2014 Firearms License renewal application at the QPD, the Appellant answered “no” when asked if he had “appeared in court” regarding a criminal offense. (R.Ex. 7)(emphasis added)

60. When a QPD police officer entered the Appellant’s July 2014 Firearms License renewal application information into the QPD system, he indicated “yes” in response to the

question asking if the Appellant had “appeared in court” regarding a criminal offense. (R.Ex. 6)(emphasis added)¹⁷

61. A January 14, 2016 search by the APD of the name “Joao Araujo” in the Interstate Identification Index (III) for criminal records returned a list of names, a few of which included the name “Araujo” but no other parts of the Appellant’s full name. The III document does not include criminal records for the Appellant or the other persons listed. The III document provides a date of birth for one of the persons listed but it is not the Appellant’s date of birth; it also states that the one of the persons listed has tattoos described as “misc numbers”. (R.Ex. 14) The Appellant’s 2010 Plymouth Sheriff Department application indicates that the Appellant has “tribal tattoos”¹⁸ and a tattoo of an animal on specific locations on his body and does not mention tattooed numbers. Conversely, the person listed in the III document does not mention the tribal and animal tattoos and their location on that person. (R.Ex. 10; Administrative Notice)

62. The Respondent’s own May 13, 2016 letter to HRD requesting the bypass and removal of the Appellant from the eligible list states, “No record can be found” regarding a criminal offense for the Appellant. (R.Ex. 23)(emphasis added)¹⁹

63. In his 2013 SPO application to the APD, the Appellant answered “no” to question #3, “Have you ever been arrested or summoned to appear in criminal court on a complaint or

¹⁷ The record here does not include a similar electronic entry by a QPD police officer when the Appellant initially applied for a Firearms License in 2009.

¹⁸ <https://www.urbandictionary.com/define.php?term=tribal> (December 29, 2017; “... a form of tattooing that uses symmetrical patterns. ...”)

¹⁹ The May 13, 2016 letter from the Respondent to HRD asserts that the reason there is no criminal record for the Appellant is that he “uses several variations of his naturalized name”. (R.Ex. 23) As noted herein, I find that Portuguese names have more components than English names, that the Appellant had to abbreviate his name to fit English language forms, that he referred to himself as John twice on such forms to people only with regard to those who could not pronounce Joao, on formal documents the Appellant included his entire Portuguese name and there is nothing more than unsupported speculation that the Appellant used variations of his name to disguise himself.

hearing but never been tried for a criminal offense; (sic) ... If yes, please explain circumstances.” (R.Ex. 9)

64. In his January 2016 application to the APD for the position of fulltime police officer, the Appellant answered “yes” in response to question #3. (R.Ex. 3) The Appellant added that there was a breaking and entry offense against him in Boston in 2002 and that the case was “dismissed”. (Id.)

65. In his 2013 APD application for the position of SPO, the Appellant answered “yes” in response to question #5i, “[h]ave you ever been contacted, approached, questioned, stopped, detained, or arrested by ANY law enforcement officer for ANY reason?”. The Appellant wrote that he was contacted by police in 2013 as a character witness. (R.Ex. 9)

66. In his 2016 APD application for the position of fulltime police officer, the Appellant answered “yes” in response to question #5i. (R.Ex. 3) The Appellant answered listed a speeding ticket in 2002, that he was pulled over in 2005 but no action was taken, and a plate violation in 2007. (Id.)

67. In his 2013 APD application for the position of SPO, the Appellant answered “no” in response to question #5j, “[h]ave you ever been directed to appear in *any court* for any criminal or civil action for any reason? ...” (R.Ex. 9)(emphasis added)(*emphasis in original*)

68. In his 2016 APD application for the position of fulltime police officer, the Appellant answered “yes” in response to question #5j. (R.Ex. 3) The Appellant referenced a breaking and entering charge and added an attachment stating that while working at a contracting company, he and another worker were alleged to have entered a tenant’s apartment and stolen some CDs and baseball caps, that the Appellant and another worker

were “called to appear in court”, the tenant never appeared and the case was dismissed. Thereafter, someone from the tenant’s family had gone into the apartment. ((R.Ex. 3; *see* Fact 11 for quoted text). When Dep. Chief Cutter asked about this during his background check, the Appellant explained in detail that he was mistaken and gave him the name and phone number of his employer at the time who could clarify that he was not even charged and with committing a crime. (A.Exs. 3 and 16) There is no indication that Dep. Chief Cutter contacted the Appellant’s former employer in this regard. (Administrative Notice; *see* Fact #21)

Allegations Regarding Employment Discipline and Untruthfulness

69. In his 2013 application for the SPO position at the APD, the Appellant answered “no” to the questions “Have you ever: (sic) (Answer YES or NO only, in the following provided spaces to these ... questions) ... 8. Fought verbally or physically with other workers or your supervisor? 9. Been disciplined by an employer for any reason whatsoever. ...” (E.Rx. 9 (p. 13))

70. In his 2016 application for the fulltime police officer position at the APD, the Appellant answered “yes” and “report attached” to question 8 (*supra*). The Appellant’s verbal altercation with a correction officer in another county occurred in 2015. (Id.) The document that the Appellant had attached to his 2016 application regarding question 8 was not included in R.Ex. 3. (R.Ex. 3;Administrative Notice)

71. The Appellant’s response to question 9 (*supra*) in his 2016 application, regarding any discipline he may have received was “yes (see attachment)”. This attachment states,

After one year of employment at [the Norfolk Sheriff’s Department], I was notified that my probationary period was being extended by 6 months. This was

surprising since I had received a very good performance review shortly after (attached).²⁰
(A.Ex. 18)

This occurred in 2012. (Id.) The Appellant credibly testified at the Commission that this was common at the Norfolk Sheriff's Department. In fact, on May 18, 2016, after the Appellant was bypassed and HRD approved the request to remove his name from the eligible list of candidates, the Norfolk Sheriff's Department Director of Human Resources wrote a letter stating,

I would like to detail Officer John Arajuo (sic) status within the Norfolk Sheriff's during his probationary period. Officer Arajuo as with all newly hired officers was placed on a probationary period for 12 months. At the conclusion of this 12 month period, his probation was extended for a period of 6 months. This is a very common occurrence within our agency. This allows our staff to further evaluate newer officers. The language to which this agreement is signed (sic) has been standard for many years and consistent for all. It is an agreement between the Norfolk Sheriff's office and the officers (sic) union that has been in place since the early 2000's. Officer Araujo has been an exemplary Officer within the Sheriff's Office over his career. He currently serves on our 'Sheriff's Response Team' which mandates not only high physical standards but also recommendations from supervisors and the passing of additional psychological testing. He also has been appointed to our transportation division which is also a rigorous selection process. If I can provide anything further on this matter please let me know. (A.Ex. 15; Testimony of Appellant)²¹(emphasis added)

72. After the Appellant submitted his 2016 application to the APD, Dep. Chief Cutter asked him for documentation regarding an incident at the Plymouth Sheriff's Department of Corrections involving the Appellant, as a Norfolk Sheriff's Corrections Officer, when he was transferring inmates to the Plymouth correctional facility. (R.Exs. 11-13) In response to this request, the Appellant provided a Norfolk Sheriff's Department memorandum to file from Supt. Horgan about the incident. This memorandum states,

²⁰ This attachment was also not included in R.Ex. 3 though it appears as A.Ex. 18.

²¹ Attached to May 18, 2016 letter is the pertinent Memorandum of Agreement between the Norfolk Sheriff's Department and the County Correctional Officers Association, Local 295.

September 2, 2015: Today, Assistant Superintendent Reilly and I spoke to Officer Araujo about an issue that occurred on August 31 at the Plymouth County facility. Officer Araujo was involved in a verbal altercation with a Plymouth County Officer in the intake area. Officer Araujo was on transportation and the entry of the [Norfolk Sheriff's] van was delayed at Plymouth's booking area. Araujo reported that he was upset at having to wait since he [and another Norfolk Officer] arrived at 9:40 PM and did not get into the facility until 10:10 PM. Araujo signed the paperwork and a Plymouth County Officer asked him if he was mad. When he replied that he was upset, Araujo reported that the Plymouth County Officer asked him if he thought he was tough because of his tattoos and stated that Norfolk County was a 'PC county'. A Plymouth County Lieutenant that (sic) informed him that he had made the call for the delayed entry due to a Carver Police vehicle being there.

Assistant Supt. Reilly and I counseled Officer Araujo and told him that we were taking him off of Transportation and SRT for a period of time. I advised him that we would observe how he reacted over the course of the next few weeks. Araujo stated that he was disappointed to be off Transportation and SRT but that he understood.

October 2, 2015: Today Assistant Supt. Reilly and I decided to reinstate Officer Araujo to SRT. We called him and told him that we were impressed with the way that he handled himself over the past month and how he carried out his duties in the facility. He indicated that he wanted to demonstrate how important being on SRT was to him and he pointed to the professional growth that he (sic) shown from his probationary period to present. We agreed that he had progressed in his career and that he earned his way onto SRT.

(A.Ex. 3)(emphasis added)

The Appellant was returned to the Norfolk Sheriff's office transportation department in March, 2016. (Testimony of Appellant).

Allegations Regarding Driving Record and Untruthfulness

73. Page 5 of the APD application asks, "Was your driver's license ... ever suspended, revoked, or denied? ... If yes, give ALL details" (R.Exs. 3 and 9) In both his 2016 and 2013 applications for employment at the APD, the Appellant answered "no". (Id.) The Appellant was not aware that his license may have been suspended. (A.Ex. 3) Page 5 of the APD application asks, "... have you ever received a [driver] citation If yes, explain fully with ALL details. Attach extra sheet, if necessary." (R.Ex. 3) In his 2016 application for the position of fulltime police officer, the Appellant responded "yes" and

wrote that he had a citation in June 2007 a “plate violation (on motorcycle)” and in August 2002 “speeding ticket.” (R.Ex. 3)

74. As noted above (Fact 17), the Appellant was cited five (5) times for six (6) citations, the most recent of which was 2007. He was found responsible for only two (2) of the incidents. He received a “suspension payment notice” notice and a release therefrom in 2002) (R.Ex. 4)

75. Page 5 of the APD application asks, “ ... have you ever received a [driver] citation” (R.Exs. 3 and 9) In his 2016 application for the fulltime police officer position, the Appellant responded “yes” and wrote that he had a citation in June 2007 a “plate violation (on motorcycle)” and in August 2002 a “speeding ticket.” (R.Ex. 3) In his 2013 application, the Appellant answered “no”. However, another question on the same page also asks if he had received a written warning, to which he replied “no” in 2016 and “yes” in 2013, referring to his 2007 plate violation and his 2002 speeding ticket.²² (R.Exs. 3 and 9)

76. Page 5 of the application asks, “Have you ever driven a motor vehicle while under the influence of alcohol or drugs?” (Id.) The Appellant answered “no”. (Id.)

77. Page 5 of the application further asks, “Was your driver’s license in this state, or elsewhere, ever suspended, revoked, or denied?” In both his 2016 and his 2013 applications, the Appellant wrote “no”. (R.Exs. 3 and 9)

78. During the background check, the Appellant was asked for details regarding certain parts of his driving record. The Appellant responded to each such question in detail and

²² The Appellant seemed to confuse these two (2) questions but provided the same information, albeit in different places.

submitted to Dep. Chief Cutter a copy of his unattested driver record, which states that there are no entries in the Appellant's record over the past ten (10) years. (A.Ex. 3)

Candidate A Bypassed the Appellant

79. Candidate A was ranked below the Appellant on the APD certification but he was appointed by the APD to the position of fulltime police officer. (R.Ex. 21)

80. The information about Candidate A herein is based on his application for employment at the APD and his previous application at an out-of-state municipal police department.

Candidate A is a U.S. citizen and he is married. He attended school in a town near Abington. He has a B.A. degree in criminal justice with high grades. He has been a security employee at a Boston hotel for a number of years where he received counselling and written warnings for being tardy. For a year or two (2) prior to applying to the APD for the position of fulltime police officer, Candidate A had also been an auxiliary police officer in a Massachusetts municipal police department, for which he attended a reserve intermittent police officer academy. (R.Exs. 25 and 26)

81. Previously, Candidate A had unsuccessfully applied for employment at some campus police departments. (R.Exs. 25 and 26²³)

82. Candidate A disclosed on his APD application that he:

has been paid for hours that he did not work on occasion,
drove a motor vehicle while under the influence of alcohol in college,
had been involved in a fight once while drinking,
had been minimally disciplined in high school,
smoked marijuana "12 – 24 times" between 2002 and 2006, and

²³ Page 11 of R.Ex. 26, which is partly Candidate A's application to the out-of-state municipal police department and that department's background report, is missing. The bottom of page 10 of R.Ex. 26 is entitled, "Legal/Criminal/Motor Vehicle". *Id.* The last line of page 10 states, "After verifying the criminal record check, I also contacted the :". *Id.* Page 12 begins with a list of four (4) speeding tickets Candidate A received and that he was found responsible for only one (1) of them. Thus, it is unknown what information appeared on page 11 of the background report prepared by the out-of-state municipal police department where Candidate had applied.

was cited for speeding in 2005, 2006, 2007, 2008, 2009 and 2012 but was found responsible for only the speeding incidents in 2006, 2008 and 2009. In 2012, Candidate A was found responsible for one (1) (“ST HWAY TRAFFIC VIOL”) of three (3) citations with which he was charged on one (1) day. (Id.)

83. Candidate A has no criminal record. (Id.)

84. Before the APD selected Candidate A, he had unsuccessfully applied for employment at an out-of-state municipal police department. Prior to being selected by the APD, Candidate A was hired by the out-of-state municipal police department and was about to begin employment there. When the APD hired Candidate A he resigned from the out-of-state municipal police department. (Id.; Administrative Notice)

85. Although Candidate A was forthcoming with regard to unfavorable past conduct at the APD hiring process, he did not disclose certain driver records when he applied for employment at the out-of-state municipal police department, telling the background investigator there that he “misunderstood the wording ... and was not trying to omit any information. He verified all the incidents listed and explained he has since changed his driving behavior.” (R.Ex. 26)

86. The Appellant is the first naturalized citizen to be considered for employment as a fulltime police officer at the APD. (Testimony of Cutter)

Relevant Authorities

G.L. c. 31, s. 1 defines “basic merit principles”, in pertinent part, as follows,

(a) 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; ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.

(Id.)

Pursuant to G.L. c. 31, § 27, a bypass occurs,

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

(Id.)

Upon an appeal of a bypass by a candidate for employment, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Comm'rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971)(quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. *See* City of Beverly v. Civil Serv. Comm'n, 78 Mass.App.Ct. 182, 189 (2010). In its review, the commission is to “find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). However, the commission’s work “is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). Further, the commission does not ignore the previous decision of the appointing authority, but rather “decides whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the

appointing authority made its decision.” Id. at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

Therefore, in deciding an appeal, the commission “owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” for the bypass. Beverly, 78 Mass.App.Ct. at 188. The Commission should not substitute its own judgment for that of an appointing authority. Id. (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965)); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Boston v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)). Rather, the Commission is charged with ensuring that the system operates on “basic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001).

The deference that the Commission owes to the appointing authority is “especially appropriate” in respect to the hiring of police officers. Beverly, 78 Mass.App.Ct. at 188. The Commission is mindful of the standard of conduct expected of officers of the law. *See* Dumeus v. Boston Police Dep’t, 24 MCSR 124 (2014) (finding that a police officer must be a model of good citizenship). An officer of the law “carries the burden of being expected to comport himself or herself in an exemplary fashion.” Mclsaac v. Civil Serv. Comm’n, 38 Mass. App. Ct. 473, 474 (1995). Police 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). Therefore, the appointing authority can give some weight to an applicant’s criminal record when making its hiring decisions. Thames v. Boston Police Dep’t, 7 MCSR 125, 127 (2004).

Beyond bypassing a candidate, an appointing authority may seek removal of a candidate's name from an eligible list of candidates pursuant to Personnel Administrator Rules (PAR).09(2). This provision states,

If an appointing authority concludes the appointment of a person whose name has been certified to it would be detrimental to the public interest, it may submit to the administrator a written statement giving in detail the specific reasons substantiating such a conclusion. The administrator shall review each such statement, and if he agrees, he shall remove the name of such person from the certification and shall not again certify the name of such person to such appointing authority for appointment to such position. For the purposes of this section, 'appointments' shall include promotions.
(PAR.09)(emphasis added)

Specifically, to ask the Personnel Administrator at HRD to remove the name of a candidate requires more than that required for a bypass. The HRD Certification Handbook – Entry Level Public Safety Appointments Subject to Civil Service provides, in pertinent part,

In extreme instances, an Appointing Authority may conclude that the appointment of an applicant whose name appears on an eligible list would be detrimental to public safety and to the community. Request for removal under PAR 09(2) (sic) or PAR .03 must be made in writing and accompanied by specific reasons documenting the circumstances under which the request is made.
Id. (emphasis added)

As noted in Radochia v. Somerville, 25 MCSR 559 (2012), the PAR.09 process “appears to be meant to apply only in exceptional circumstances ... and is not intended to serve as a routine substitute for the established statutory process for bypassing a candidate” Id. (emphasis added). *See, e.g.* Davis v. Boston Police Department, 21 MCSR 212 (2008)(candidate removed from eligible list for having “an array of criminal charges against him, including Operating Under the Influence of Liquor, Malicious Destruction of Property, Assault and Battery on a Police Officer, Possession of Class D Controlled Substance, Compulsory Insurance Violation, Attempted Breaking & Entering, Breaking and Entering Night Time with Intent to Commit a Felony, and Malicious Destruction of Property Over \$250”, committed when he was younger

and he had since learned from his errors but he had been on probation for three (3) years); Losano v Swampscott, 20 MCSR 97 (2007)(candidate removed from list for having his firearms license revoked by the Respondent's Police Chief, violating a restraining order, admitting to having many fights when he was young (including one in which he acknowledged he may have bit off someone's ear), having been charged with assault and battery with a dangerous weapon (which charge was later dismissed)); Campbell v. Boston Fire Department, 22 MCSR 482 (2009)(candidate removed from list for having been arraigned six times in nine years (for matters such as disorderly conduct carrying a dangerous weapon, trespassing and operating with a suspended license, although the charges were later dismissed), he had been placed on probation, he had numerous driving citations for speeding, failing to stop and attaching an improper license plate, and he was arrested three times for driving with a suspended license).

Minority Analysis and Conclusion (Commissioner Ittleman)

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant based on his failure to pay taxes between 2002 and 2004 and untruthfulness related thereto. When asked at the Commission hearing if he had filed an income tax return for that time period, the Appellant declined to respond, invoking his 5th Amendment right against self-incrimination under the U.S. Constitution. When the Appellant was asked if he has since filed amended tax returns, the Appellant asserted that the IRS does not pursue such matters after a seven (7) year period.²⁴ This was more than a decade before he applied to be a fulltime police officer at the APD. The Commission's finding in this regard does not say that the Respondent has proved that the Appellant failed to report his income for tax purposes or that the Respondent is required to prove that he failed to report his income. Rather, the Respondent is required to prove that its reasonable justification is based on a reasonably thorough review of the pertinent, reliable information, which I find that it did by obtaining the Appellant's 2004 income tax filing and reviewing the employment history that the Appellant himself provided in responding to the Respondent's employment 2016 application.

The Appellant's 2016 application for employment as a permanent full-time Abington police officer indicates that the Appellant worked in construction between 2001 and 2004.²⁵ During the Respondent's background investigation in February 3 through 9, 2016, the Respondent asked the Appellant to produce his tax records for 2002 through 2005. The Appellant promptly responded, stating that he would request his tax return for 2005. The Appellant produced his 2004 tax return and asserted that he was unemployed 2001 to 2003. However, by February 11 (if not at the meeting on February 10), the Respondent had clearly

²⁴ As the Appellant is *pro se*, he did not indicate what information he relied on in making this assertion. I make no finding whether this assertion is accurate as a matter of law.

²⁵ In his 2013 application, the Appellant indicated that he was employed 2002-2004. (R.Ex. 9)

decided against hiring the Appellant and a few days was insufficient time for the Appellant to obtain his 2005 tax return. Clearly the few days between the Respondent's request for this information and the Respondent's February 11 decision provided inadequate time for the Appellant to obtain this transcript. Therefore, the Respondent's allegations that it waited for these documents are inaccurate. In addition, at the Appellant's February 10, 2016 meeting with Dep. Chief Cutter and Chief Majenski (which was either an interview or a meeting to discuss the Appellant's termination as an SPO) the Appellant was asked again if he paid taxes in 2002 through 2005 and the Appellant acknowledged that he had not and that he had not subsequently reported his earnings for that period. Although these events occurred a decade or so before the Appellant applied for the position of permanent, full-time police officer in Abington, the Respondent found that the Appellant's failure to report his income for that time period indicated that he was untruthful. Police are held to a higher standard, especially with regard to truthfulness, as they are required to testify truthfully in court and regularly prepare truthful reports of their actions to their Police Departments. The Respondent conducted a reasonably thorough review of the Appellant's background in these regards and found that the Appellant's non-payment of taxes during the stated period when he was employed was untruthful and, therefore, unacceptable. For these reasons, the Respondent had reasonable justification to bypass the Appellant on this basis.

Although I find there was reasonable justification to bypass the Appellant (but not to remove his name from the eligible list) based on the foregoing, I do not find there was sufficient evidence to bypass him and remove his name from the eligible list pursuant to PAR.09 for the other reasons offered by the Respondent.²⁶ First, although documentation in evidence establishes

²⁶ The Respondent makes numerous other assertions about the Appellant which are not specifically mentioned herein. They too have been considered and have been rejected as lacking merit.

for civil service purposes that the Appellant failed to pay taxes 2002 – 2004, during which time he had been employed, more than a decade earlier, there is no indication that he has failed to pay taxes since then or been involved in any criminal conduct. Secondly, the PAR.09 request is predicated on a number of unproven allegations and/or allegations that are stale. Further, the Respondent’s May 13, 2016 letter asking HRD to remove the Appellant’s name from the eligible list, which request HRD granted, alleges that the Appellant has a criminal record.²⁷ FBI documents indicate that he does not have a “prior arrest” and a CHSB report states that the Appellant “has no adult criminal court appearances”. The May 13 letter further alleges that the Appellant has “no interpersonal skills”. (R.Ex. 23) This is inaccurate as there is evidence of only one (1) incident of a verbal altercation during the Appellant’s five (5)-year career at the Norfolk Sheriff’s office for which the Appellant was “counseled” (as the Respondent notes in R.Ex. 23, p. 4) by the Sheriff’s office, he was removed from SRT for one (1) month and restored to the assignment when his superiors “told him that we were impressed with the way that he handled himself over the past month”. (A.Ex. 3) Indeed, it is unlikely that such counseling, with a related temporary change of duty, would qualify as discipline that a civil service employee could appeal to the Commission.

The Respondent has not established by a preponderance of the evidence that the Appellant was untruthful regarding his use of illegal drugs. Although the Respondent’s application form does not ask about an applicant’s drug use (other than asking if the applicant

²⁷ The Respondent’s May 13, 2016 letter also alleges that the Appellant failed to disclose that he had a criminal record on his Norfolk Sheriff’s Department employment application. However, the Appellant did not have a criminal record to disclose and the Appellant’s full personnel file at the Norfolk Sheriff’s Department is not in evidence. (The Appellant, not the Respondent, produced the part of his Norfolk Sheriff’s Department personnel file that includes the FBI report, based on the Appellant’s fingerprints, that the Appellant has “no prior arrest”.) If instead the Respondent was referring to the Appellant’s application to the Plymouth Sheriff’s Department in 2010, which is in evidence, the Appellant did not fail to disclose a criminal record because he did not have one, the only related question in the application asks “have you ever been party to ANY civil or criminal proceedings?”, the Appellant answered “no” and there is no evidence that the Appellant has been a party in a criminal or civil proceeding.

has been charged with violating drug laws), the psychologist who interviewed the Appellant wrote that the Appellant said that he did not take any illegal drugs. However, there is no indication what question the psychologist posed to the Appellant in this regard. Did the psychologist ask the Appellant at their meeting? Was it one of the many questions the Appellant had to answer when he took the MMPI and/or PAI psychological examinations? If the question/s about illegal drug use were in the psychological examinations, was the psychologist paraphrasing the questions and/or the Appellant's answers? The psychologist was not called to testify at the Commission hearing to respond to these and other questions based on his personal knowledge. Further, on a more basic level, the psychological exams on which the Respondent relied here were administered when the Appellant applied for the SPO position. It is unclear if the Respondent was authorized to require an SPO candidate to take such tests and, even if the Respondent was so authorized, there is no indication that the Respondent issued a conditional offer to the Appellant prior to the testing. Moreover, it is unclear what authority the Respondent had to bypass the Appellant for the fulltime police officer position based on a psychological exam he had taken when being considered for the SPO position, especially since the Respondent did not extend a conditional offer of employment to the Appellant prior to the tests as required. Finally, I note that when the Appellant responded in writing to Dep. Chief Cutter's email question regarding illegal drug use, the Appellant's response matched his response to a similar question in his employment application at the Plymouth Sheriff's office, i.e. that he had used marijuana twice when he was in high school in Brazil. Therefore, the Respondent has failed to provide reasonable justification to bypass the Appellant and seek the removal of his name from the eligible list for based on his alleged untruthfulness about his use of illegal drugs.

Further, the Respondent inaccurately asserts that the Appellant's bypass is justified because the psychological report states that "if candidate (sic) shows anger and job problems he would fail psychological (sic) as a police officer" and the Appellant has had such problems at work. (R.Ex. 23) However, the psychological report states that tests applied assess each candidate's risk of receiving a poorer rating and the report rated the Appellant as a "moderate risk of receiving a poorly suited rating ..." (R.Ex. 18, p. 4) The psychological report also states that because the Appellant admitted to certain flaws and yet denied having been disciplined that, "... psychologists generally prefer to rely on past history to predict future behavior, rather than on psychological testing, which is less reliable than a claimant's historical behavior. ... this examiner would rather rely on a solid 5-year work history, especially since it is in correctional work, rather than relying on the testing alone. ..." (R.Ex. 18, p. 4) The Appellant has had one (1) negative interpersonal incident in his five (5)-year tenure at the Norfolk Sheriff's Department resulting in his being counseled and temporarily removed from an assignment, which does not establish that the Appellant had the type of anger and job problems that would result in his failure of the psychological exam. In fact, the evidence establishes that the Appellant so favorably "impressed" his superiors that they returned him to his special assignment and submitted a letter in support of the Appellant's application to the APD with high praise. For this reason, the Respondent has failed to establish reasonable justification for bypassing the Appellant and seeking the removal of his name from the eligible list in these regards.

The Respondent further alleges that the Appellant's purported problems with interpersonal skills was evident at the February 10, 2016 meeting that Dep. Chief Cutter and Chief Majenski had with the Appellant, saying that the Appellant was aggressive. Chief Majenski even testified at the Commission that he thought that the Appellant was going to come

at them over the table when they met. I repeatedly reviewed the recording of this meeting.

(R.Ex. 19) The Appellant evinced no such aggression. Further, the Chief Majenski and Dep. Chief Cutter alleged in their testimony at the Commission that the Appellant ended the February 10, 2016 meeting when it was Dep. Chief Cutter who ended the meeting telling Chief Majenski, “Chief, he doesn’t want to answer the questions and he feels like he’s being discriminated against there’s no sense going forward.” R.Ex.19. However, by that point, the Appellant had answered a number of their questions. In addition, Chief Majenski and Dep. Chief Cutter unfairly used their meeting with the Appellant on February 10, 2016, for two purposes without clearly stating so at the meeting: 1) to terminate the Appellant from his SPO position and 2) to ask him about in connection with his application for the fulltime police officer position. In fact, Dep. Chief Cutter’s email message to the Appellant the day before the meeting similarly blurred the lines between the same two (2) purposes, stating on one hand that the Department could not go forward in the process with the Appellant and asking him to return his gear to the Department and submit his resignation. In his email responses, the Appellant was asking the Department to reconsider its apparent determination not to hire him as a fulltime police officer. At the meeting, it was apparent that the Appellant dutifully returned his gear to the Department at their meeting but he declined to resign since he believed he had done nothing wrong. At the meeting, the Appellant declined to respond to repeated questions about his immigration status prior to receiving a green card, asserting that such questions constitute discrimination. The Appellant was firm in such statements and he was clearly disappointed that, despite responding to Dep. Chief Cutter’s many email inquiries, he was being asked repeatedly about his immigration. Considering the apparent dual-purpose of the meeting and repeated questions which the Appellant felt were discriminatory, the Appellant’s conduct was appropriate and, therefore, it

does not provide reasonable justification for bypassing the Appellant or removal of his name from the eligible list.

The Respondent further asserts inaccurately that the Appellant “was going to be terminated from his prison guard job in 2012 if he didn’t agree to a probation extension”, that the Appellant “failed to disclose the threat of termination on his application and the candidate knowingly signed receipt of the threat of discipline.” (R.Ex. 23) As the Appellant credibly testified and as indicated by a letter from the Norfolk Sheriff’s Department Director of Human Resources, all newly hired officers had their twelve (12)-month probationary periods extended six (6) months in this manner pursuant to a Memorandum of Agreement with the pertinent union that has been in effect for years. Therefore, there was no threat of termination that the Appellant failed to disclose and this assertion does not provide reasonable justification for bypassing the Appellant and seeking the removal of his name from the eligible list.

Next, the Respondent relied on an assertion by someone at ICE that the Appellant was in the U.S. illegally for a period of time as a reason to seek removal of the Appellant’s name from the eligible list. However, we do not know the authority of the ICE personnel who responded to Dep. Chief Cutter’s brief email inquiries to make such determinations. However, federal immigration officials approved the Appellant’s green card and naturalization. We are not in the position to second guess the decisions of federal immigration officials in these regards. Therefore, I find that the assertions in the ICE email to Dep. Chief Cutter, alleging that the Appellant was in the U.S. illegally before receiving his green card, has not been established by a preponderance of the evidence and, therefore, the Respondent failed to provide reasonable justification for bypassing the Appellant and seeking to remove his name from the eligible list on this basis.

Further, notwithstanding the multiple documents indicating that the Appellant has no criminal record, the Respondent's letters to HRD requesting the removal of the Appellant's name from the eligible list make many assertions that the Appellant has a criminal record related to a matter in 2002. One of the definitive documents indicating that the Appellant has no criminal record is an FBI report based on fingerprints of all ten (10) of the Appellant's fingers, which states that he has no criminal record. The Appellant mistakenly stated in his 2016 APD application that he had gone to court about an alleged breaking and entering fourteen (14) years earlier but that the matter was dismissed. When Deputy Chief Cutter asked the Appellant to provide documentation in this regard, the Appellant reported that there were no documents in this regard and that he had contacted his 2002 employer to verify what happened. In so doing, the Appellant learned that he had not been charged and he had not gone to court in 2002, that he (and others from the company) had gone to a Boston Police station to discuss the matter but that the police were pursuing someone else. The Appellant's error, as he indicated in his email response to Deputy Chief Cutter, was that he wanted to be as forthcoming as possible. As a result, with respect to his 2016 application to the APD, he described what he could recall of the incidents fourteen (14) years earlier. Here, the Appellant was never even charged with a crime. While the Appellant sometimes provided inconsistent information in response to the many criminal record questions, I do not find that he was untruthful in these regards. First, I find that a number of the questions asked overlap, leading to confusing answers. Secondly, the Appellant was mistaken, against his own interest, in stating that he was involved in a breaking and entering case in 2002, which was more than a decade prior to his 2016 application at the APD. He had contacted his 2002 employer, who clarified what happened. The Appellant gave Dep. Chief Cutter the employer's name and phone number to call to verify this information. Since Dep.

Chief Cutter did not call the Appellant's prior employer, the mistaken self-reporting of the incident in 2002 snowballed and the Respondent ignored the multiple documents indicating that the Appellant had no criminal record.²⁸ For these reasons, the Respondent has not established that it had reasonable justification to bypass the Appellant and to seek removal of his name from the eligible list based on a criminal record.

The Respondent further alleged that it could not verify the Appellant's criminal record because he used different names to avoid detection. The evidence establishes that the Appellant did not alter his name except to abbreviate it so that it would fit into the various English language application forms he completed which afforded spaces only for a first name, middle name and last name. The one exception is that the Appellant has indicated that some people who cannot pronounce "Joao" correctly, they refer to him as "John", which the Appellant readily disclosed. The Appellant's full name is Joao Paulo Leite Pereira De Araujo. I have taken administrative notice that Portuguese names do not, typically, have only one first name, a middle name and one "last" name. Even when the Appellant signed his joint 2004 tax filing and reported no earnings that year, the Appellant signed his full name. For these reasons, the Respondent's asserted reasons for bypassing the Appellant and seeking the removal of his from the eligible list based on a criminal record and use of an alias to avoid detection are unfounded.

The Respondent also sought removal of the Appellant's name from the eligible list based on its assertions about his driver record. Specifically, the Respondent alleged that the Appellant failed to disclose that his driver's license had been suspended and that he had failed to report other moving violations. However, there is insufficient evidence to find that the Appellant's license was suspended. In addition, the Respondent failed to note that the Appellant had been

²⁸ There is no indication of what the Quincy Police Department relied on to assert on the Appellant's firearms license application that he had a criminal record.

found not responsible for four (4) of the six (6) moving violations and that the most recent violation on the Appellant's driver record occurred more than a decade ago. Further, the RMV record obtained by the Appellant simply stated that he had no driving incidents in the past ten (10) years. In his response to one of Dep. Chief Cutter's many email questions, the Appellant openly indicated that, this many years later, he did not recall an incident but said that he would not deny it. Therefore, the Respondent failed to establish reasonable justification for bypassing the Appellant or removing his name from the eligible list on this basis.

The Respondent also alleged that the Appellant failed to produce his high school transcript from Brazil (in addition to the high school diploma he had obtained and translated for the Respondent) even though it waited to receive the document. Dep. Chief Cutter requested this document on or about February 9, 2016. By February 11, 2016, the Respondent had already sent a lengthy letter to HRD asking it to remove the Appellant's name from the eligible list. Clearly the few days between the Respondent's request for this information and the Respondent's February 11 decision provided inadequate time for the Appellant to obtain this transcript and the Respondent did not wait for the Appellant to produce it. Therefore, the Respondent has not established that it had reasonable justification to bypass the Appellant and to seek removal his name from the eligible list on this basis.

PAR.09 provides that an appointing authority make seek to remove the name of a candidate on an eligible list if it finds that appointment of such person "would be detrimental to the public interest". Id. Our case law indicates that removal of a candidate's name from the eligible list is intended to address cases allegedly involving extreme misconduct, not an alternative for bypass. Given the absence of such misconduct in this case and the findings herein that the Respondent established by a preponderance of the evidence only one (1) reason to

provide reasonable justification to bypass the Appellant, and the nature of the one (1) reason, compared to the many speculative, questionable, and/or inaccurate reasons it offered to HRD in support of its request to remove the Appellant's name from the eligible list, I find, at a minimum, that the Respondent did not have adequate reason to request that HRD remove the Appellant's name from the list and that HRD should not have approved the request.

Discrimination Allegation

The Appellant alleges that the APD violated his rights by discriminating against him based on his national origin when it sought to remove his name from the police officer eligible list. G.L. c. 151B is "the state's primary civil rights law regarding discrimination in employment". <http://www.mass.gov/mcad/pubs/regs/statutes-regs/> Pursuant to section 3 of Chapter 151B, MCAD has functions, powers and duties including,

... 6. [t]o receive, investigate and pass upon complaints of unlawful practices ... alleging discrimination because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, children, marital status, veteran status or membership in the armed services, the receiving of public assistance, or handicap of any person alleging to be a qualified handicapped person. ... (Id.) (see also MCAD regulations regarding employment discrimination at 804 CMR 03.00)

The Appellant avers that the removal of his name from the list constitutes discrimination. In particular, he argues that the Respondent asked him to produce information concerning his taxes for 2001 through 2004 and information about his immigration status at that time when he applied for employment at the Abington Police Department in 2016 and that the Respondent did not request such information from other police officer candidates during the selection process at issue here. Federal law, he asserts, in 8 U.S.C. s. 1324b, prohibits discrimination against someone applying for employment based on his or her national origin or immigration status. It states, in part,

... Employers may not request more or different documents than are required to verify employment eligibility, reject reasonably genuine-looking documents, or specify certain documents over others with the purpose or intent of discriminating on the basis of citizenship status or national origin. U.S. citizens and all work authorized individuals are protected from document abuse. ...

A.Ex. 14 (<https://www.justice.gov/crt/types-discrimination>) (March 10, 2016)²⁹

The U.S. Department of Justice enforces this part of the statute.³⁰

(<https://www.justice.gov/crt/immigrant-and-employee-rights-section>) (November 28, 2017)³¹

The Appellant filed a discrimination charge against the APD at the U.S. Department of Justice Civil Rights Division. The Appellant also filed a discrimination claim at the Mass. Commission Against Discrimination.

The Respondent argues that it did not discriminate against the Appellant. To the contrary, it avers, the APD hired the Appellant as an SPO. In addition, the Respondent argues that it “does not dispute that the Appellant lawfully applied and was granted citizenship in 2009. However, any unlawful acts or omissions committed by him prior to this date are the fair subject of investigation, independent of his citizenship or immigration status.” Respondent’s Post-Hearing Brief. In this regard, the Respondent refers to the U.S. Department of Justice U.S. Citizenship and Immigration Services (USCIS) Policy Manual (Manual), Vol. 12, Part F,

²⁹ I note that 8 U.S.C. s. 1324b(a)(4) also states, in part, “... [n]otwithstanding any other provision of this section, it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified. ...” (*Id.*)(*emphasis added*)

³⁰ At the USDOJ, Office of the Chief Administrative Hearing Officer (OCAHO) conducts hearings under the Immigration Reform and Control Act of 1986 (IRCA) and the Immigration Act of 1990. These acts, among others, amended the Immigration and Nationality Act of 1952 (INA). These hearings address: “... (1) knowingly hiring, recruiting, or referring for a fee unauthorized aliens, or the continued employment of unauthorized aliens, failure to comply with employment eligibility verification requirements, and requiring indemnity bonds from employees in violation of section 274A of the INA (employer sanctions); (2) immigration-related unfair employment practices in violation of section 274B of the INA; and (3) immigration-related document fraud in violation of 274C of the INA. Complaints are brought by the Department of Homeland Security, the Immigrant and Employee Rights Section in the Civil Rights Division of the Department of Justice (formerly the Office of Special Counsel for Immigration-Related Unfair Employment Practices), or private individuals or entities as prescribed by statute. ...” <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer> (February 7, 2018)(*emphasis added*)

³¹ As the extended references to at least part of 8 U.S.C. indicate, federal immigration and naturalization law has been amended numerous times.

Chapter 5, section M.2., regarding whether citizenship candidates who fail to file tax returns or pay taxes can establish the requisite Good Moral Character for citizenship.³² Finally, in this regard, the Respondent argues,

In sum, it was reasonable and lawful for the Department to inquire into the Appellant's status when he provided information that led to a reasonable inference that he was working earning wages in the country without authorization. Because he was applying for a position as a law enforcement officer, where integrity and respect for the law are paramount, the Department could not, in good faith, turn a blind eye to these blatant violations.

Respondent's Post-Hearing Brief

The Appellant's arguments concerning discrimination are unavailing here. First, this Commission has no jurisdiction over discrimination. That said, the basic merit principles of civil service law require that all applicants receive fair treatment, *inter alia*, without regard to national origin and with proper regard for their constitutional rights. The Appellant provided information about himself relating to his immigration and employment in his 2016 application for appointment to the position of permanent full-time police officer in Abington. In the conduct of a background investigation, the Respondent asked the Appellant for additional information based, to some extent, on what the Appellant had disclosed in his application, which the Appellant provided, and obtained additional information on its own. At the February 10, 2016 meeting the Appellant attended with Dep. Chief Cutter and Chief Majenski the Appellant admitted that he did not pay taxes on his earnings 2001 through 2004 but he declined to answer

³² The Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) office is currently charged with processing applications for citizenship and naturalization. (<https://www.uscis.gov>) (November 28, 2017) The USCIS Policy Manual (Manual)³², Volume 12, Part F (as of August 23, 2017) describes part of the administrative process for naturalization, according to cited statutes, regulations, policies and caselaw. One of the requirements for naturalization is for the applicant to have Good Moral Character (GMC) over a pertinent period of time. "An applicant who has committed, was convicted, or imprisoned for an unlawful act or acts during the GMC period may be found to lack GMC. ... This provision does not require the applicant to have been charged or convicted of the offense." Further, this Manual provides, "[i]n prescribing specific periods during which GMC must be established, Congress generally intended to make provision for the reformation and eventual naturalization of persons who were guilty of certain past misconduct." <https://www.uscis.gov/policymanual/Print/PolicyManual-Volume12-PartF.html> (November 16, 2017; citations and footnotes omitted)

other questions about his immigration, although he had answered the same questions in response to Dep. Chief Cutter’s email questions in that regard. As a result, the Respondent concluded that the Appellant was untruthful. There is no indication whether every candidate was asked for the same documentation that the Respondent requested of the Appellant or obtained regarding the Appellant but there is also no indication that any other candidate in the same hiring cycle as the Appellant indicated in his or her application that he or she was employed during a period for which he or she did not pay income tax and/or disclosed in his or her application that he or she overstayed his or her visa to the U.S. Candidate A, the one (1) candidate who bypassed the Appellant, was asked additional questions after submitting his application, like the Appellant, but on different topics. Candidate A’s driving record appeared to be worse than the Appellant’s in that he had repeated speeding citations in more recent years but he was found responsible for few of them. Candidate A also disclosed in his application that he had driven a car after drinking once and that he had used marijuana a couple of dozen times in college but has not done so since then. The Respondent hired Candidate A because it found that he was more open about past misconduct. He had also attended an intermittent reserve police officer academy for parttime work at a police department nearby and has a Bachelor’s degree in criminal justice. In the end, the Respondent established by a preponderance of the evidence that it had other, neutral reasons (documented failure to pay income taxes at a time that the Appellant had indicated in his application that he had been employed and untruthfulness regarding his use of illegal drugs) for not selecting the Appellant. Further, the USDOJ Civil Rights Division found that there was “insufficient evidence of reasonable cause to believe that [the Appellant] was discriminated against as prohibited by 8 U.S.C. s. 1324b.” Respondent’s Post-Hearing Documents.³³ Lastly,

³³ The Civil Rights Division notice regarding the Appellant’s complaint states that the Appellant could file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety (90) days. On

the MCAD has yet to issue a decision regarding the Appellant's claim there.³⁴ *Id.* As a result, there is insufficient evidence of disparate treatment in violation of civil service basic merit principles.

APD Employment Application Questions Regarding Criminal Conduct and Medical Issues

As recently noted in Kerr v. Boston Police Department, G1-16-203 and G1-17-230 (2018), 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), regulate how employers may obtain and use medical information about a candidate for employment, precluding inquiry into a candidate's medical history without first having extended an 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>. Kerr v. Boston Police Department, G1-1203 and G1-17-230 (2018), p. 17.

As noted in Man v. Quincy, G1-17-023 (2018),G.L. c. 151B, s. 4(9) and 4(9^{1/2}) prohibit employers from asking about criminal behavior orally or in an application or discriminating against applicants who fail to provide such information. On the other hand, G.L. c. 31, ss. 20

November 28, 2017 I phoned the OCAHO and was informed that the Appellant had not filed a complaint there. (Administrative Notice)

³⁴ I phoned MCAD on November 9, 2017 about the status of the Appellant's claim and was informed that it is pending investigation. (Administrative Notice)

and 50 permit questions regarding criminal convictions. Further, G.L. c. 41, s. 96A actually prohibits a police department from appointing anyone who has been convicted of a felony. *See* related statutes, such as G.L. c. 6, s. 167, et seq, regarding the use of criminal records from various sources. The Commission has recently specified its concerns about law enforcement employers requesting such information on their applications and/or by oral questions in that regard is appropriate under the law. *See* Man; Kerr, *supra*; and Wine v. City of Holyoke, G1-17-022 (2018). However, the Commission has yet to issue a decision in this regard as the cases were decided based on other issues. These recent Commission decisions have also acknowledged that judicial decisions have similarly not yet decided whether civil service employers may obtain criminal record information from applicants or if, and the extent to which, law enforcement agencies are exempt from G.L. c. 151B, s. 4 and related laws barring discrimination in employment. *See* Man v. Quincy, G1-17-023 (2018) at 19-20 and cases cited.

That said, there are many troubling criminal record inquiries in the instant appeal. The Respondent's application alone has a section entitled "Criminal Record", asking numerous questions, such as have you ever been arrested, have you ever been placed in any type of Protective custody by law enforcement, have you ever been arrested or summoned to appear in criminal court, have you ever been tried for a criminal offense, but were not convicted, have you ever been convicted of a felony, were you convicted of a misdemeanor more than 5 years ago which resulted in a jail sentence from which you were released within the last 5 years, have you ever been convicted of a sexual offense, have you ever been charged or convicted of a drug-related violation, have you ever been "contacted, approached, questioned, stopped, detained or arrest by ANY law enforcement officer for ANY reason?", and, in a section entitled "Other Personal Declarations", asking have you ever had sex with another person without consent, have

you ever had sex with a person under 16, have you ever used drugs or alcohol to seduce a sex partner, have you ever paid for sexual favors, all of which are followed by a requirement to describe the offense, the date of the offense, the court where you appeared, were convicted or sentenced, if any. Further, the period of time in which someone can request that his criminal record be sealed was reduced when state criminal offender registry information laws were amended in 2010. *See, e.g.* G.L. c. 6, s. 172. The endless inquiries whether the candidate has “ever” committed the described offenses or actions seem ripe for address in the appropriate case. This is not that case. Ironically, the Respondent here found a “criminal record” where there was none, despite abundant evidence to the contrary.

Similarly, the Appellant’s 2016 APD application for the position of fulltime police officer asked, under the heading “Other Personal Declarations”, “[h]ave you ever been committed to any hospital or institution for mental illness, or alcohol or substance abuse?” and “[h]ave you ever been diagnosed as having Post Traumatic Stress Disorder (PTSD)”. (R.Ex. 3³⁵) As indicated above, the federal Americans With Disabilities Act and the Massachusetts Employment Discrimination statute bar inquiries about a candidate’s medical history without first having extended an offer of employment. Although the Appellant answered “no” to these questions, the APD’s decision to seek removal of his name from the eligible list was not based on his responses to the questions or medical information he supplied, he was not given a conditional offer of employment before being asked these questions. The law in this regard is clear and unambiguous and the Respondent shall remove such medical questions from its applications forthwith.

³⁵ I note that these two (2) questions were not contained in the application that the Appellant completed in 2013 for the SPO position.

For all of the above reasons, I have concluded that the Appellant's appeal under Docket No. G1-16-065 should be denied.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

Majority Analysis and Conclusion (Commissioners Bowman, Stein, Camuso and Tivnan)

“I have two beautiful daughters who will grow up in the Town of Abington. I want to make my girls proud, and serve and protect the community we live in.” That statement was included in the Appellant’s application for full-time police officer for the Town of Abington. Had the review process been conducted in a fair, impartial manner, free of personal or political bias, the Appellant would have every reason to believe that he had a fair chance of being appointed. At the time of his application, the Appellant:

- Was a United States citizen;
- Had taken the civil service examination for police officer and received a score of 94;
- Was residing in Abington in a home that he and his wife own;
- Was currently serving as a Special Officer in the Abington Police Department;
- Had been employed as a correction officer since 2011 for the Norfolk County Sheriff’s Office, where the Human Resources Director describes him as “an exemplary Officer within the Sheriff’s Office over his career;”
- Had no criminal record;
- Had been issued a license to carry a firearm; and
- Had a driving record similar to a candidate ranked below him who was appointed.

At some point, however, the review of the Appellant’s background took a turn for the worse, ultimately resulting in the Police Chief producing a list of *over two (2) dozen* allegations in an attempt to justify the Appellant’s bypass, most of which are either unsupported by the record, taken out of context or simply untrue.

A careful review of the record shows that the turning point here occurred at the time the Deputy Police Chief penned the following question to the Appellant:

- “Under what legal authority did you remain in this country from 2001-2005? Did you possess some other type of Visa, other than the one you presented to me? If you have no other authority, can I assume you were an illegal alien, or is there something I’m missing.”

Shortly thereafter, the Appellant appeared at the Abington Police Department for a meeting with the Police Chief and Deputy Police Chief, where he was interrogated (not interviewed) about his immigration status between 2001-2005; terminated from his employment as a Special Police Officer and effectively bypassed for appointment as a full-time police officer. The Police Department then took the additional step of requesting that the Appellant’s name be removed from the eligible list altogether under a provision of the Personnel Administration Rules (PAR.09 (2)) that allows for such removal if the person’s appointment “would be detrimental to the public interest.” As poignantly stated by the Appellant in his post-hearing submission: “It wasn’t just enough for this department to bypass me. They have painted a picture of a criminal and a liar, neither of which I am.” Numerous examples, including, those cited below, support the Appellant’s contention:

REASONS GIVEN AND OTHER STATEMENTS MADE BY ABINGTON POLICE DEPARTMENT	FACTS
<ul style="list-style-type: none"> ▪ “Candidate failed to disclose on his application that his license was suspended.” 	<ul style="list-style-type: none"> ▪ The RMV records do <u>not</u> show that the Appellant’s license was ever suspended. The Police Department mis-read the RMV records.
<ul style="list-style-type: none"> ▪ “Candidate failed to disclose on his application several other moving violations from 2002-2007.” 	<ul style="list-style-type: none"> ▪ The Appellant was found responsible for <u>two</u> violations between 2002 and 2007, both of which were listed on his application.
<ul style="list-style-type: none"> ▪ “Candidate violated the law by driving a motor vehicle in 2002 unlicensed ...” 	<ul style="list-style-type: none"> ▪ The RMV records do <u>not</u> show that the Appellant’s license was ever suspended or that he ever operated a vehicle without a license.

REASONS GIVEN AND OTHER STATEMENTS MADE BY ABINGTON POLICE DEPARTMENT	FACTS
<ul style="list-style-type: none"> ▪ Candidate was untruthful on his LTC application (when) he indicated that he was never criminally charged. 	<ul style="list-style-type: none"> ▪ There is <u>no</u> evidence that the Appellant was ever charged with a crime. He does <u>NOT</u> have a criminal record. He provided a detailed explanation regarding an incident in which he appears to have been falsely accused of a crime by a citizen who later recanted the accusation.
<ul style="list-style-type: none"> ▪ “Candidate failed to provide an official high school transcript as requested in order to compare educational equivalences to the United States ... it was learned that that many times high school diplomas from other countries don’t equal an equivalent United States high school diploma ...” 	<ul style="list-style-type: none"> ▪ The Appellant was terminated from his position as a Special Police Officer one (1) day after the request to produce the transcript. The Police Chief’s statement that the Appellant was still under consideration for appointment as a police officer after his termination is not credible. (see below)
<ul style="list-style-type: none"> ▪ “Candidate was going to be terminated from his prison guard job in 2012 if he didn’t agree to a probation extension.” 	<ul style="list-style-type: none"> ▪ The Norfolk County Sheriff’s Office describes the Appellant as an exemplary employee “over his career” and that extensions of probationary periods are common, pursuant to a union agreement.
<ul style="list-style-type: none"> ▪ “Having a candidate that has no interpersonal skills would be a detriment to the police profession.” 	<ul style="list-style-type: none"> ▪ The evidence does not support the conclusion that the Appellant (husband for 12 years, father of two daughters and veteran correction officer) has “<u>no</u> interpersonal skills”.
<ul style="list-style-type: none"> ▪ “ ... [T]he candidate was terminated as Special Police Officer based on his overly aggressive attitude when questioned and the uncovering of untruthfulness on the application he submitted as a Special Police Officer in 2013 ...” ▪ “Even though the candidate was terminated as a Special Police Officer, at no time did we inform the candidate that his candidacy for a full-time police officer was ending.” 	<ul style="list-style-type: none"> ▪ The decision to end the Appellant’s employment – and stop the processing of his application – was made before any purported “interview”. ▪ On February 9, 2016, prior to the “interview” of the Appellant, the Deputy Police Chief penned the following email to the Appellant: “ ... Based on the circumstances, the Chief would like to give you the opportunity to resign from your Special Police position. Knowing the information that was uncovered during your background investigation puts our department in a difficult position <u>to continue this process.</u>” (emphasis added)

There are (many) other troubling aspects to the review process here. The Police Department, without ever issuing a conditional offer of employment, relies (and, arguably misconstrues) the results of a prior psychological interview to justify the Appellant’s non-selection. They cite that

same psychological assessment to conclude that the Appellant untruthfully denied ever using “illicit drugs”, without ever producing the actual question (among several hundred) that was allegedly asked of the Appellant and what his response was. The reality, when viewed fairly and impartially, is that the Appellant has been forthright and honest about experimenting with marijuana many years ago, similar to a candidate who was appointed. The Police Department’s misuse of those psychological interview results is highly problematic as are many other questions and statements made by the Police Department. We share all of the concerns cited by Commissioner Ittleman in her detailed findings and analysis.

We disagree, however, with Commissioner Ittleman’s conclusion that, among the two (2) dozen bypass reasons put forth by the Police Department, those related to the Appellant’s alleged non-payment of taxes provide a valid reason for bypass for the following reasons.

First, a review of another candidate’s application, who was appointed as a full-time police officer in this hiring process, appears to show how the Appellant was treated differently than other candidates.

As part of that candidate’s application, the candidate reported receiving counseling and written warnings for being tardy multiple times in a 12-month period while employed as a security officer at a hotel. He further reported that he called in sick to this employment to work a detail for a police department where he was employed as a special police officer. The Police Department cites this employment as a positive stating: “candidate has held positions with employers for upwards of 7 years showing an ability to maintain a job” and “Candidate comes with extensive private security experience that closely correlates to some of a police officer’s duties.” We infer that the Respondent was either not concerned about the issues cited above or,

in the alternative, based its assessment on a thorough review of that candidate's entire career as a security officer at the hotel. In regard to the Appellant, the Police Department either didn't complete a similar, thorough review, or simply mischaracterized the Appellant's exemplary career as a correction officer, either of which show disparate treatment.

Second, there is nothing in the record to show that the Police Department required all other candidates to undergo the same level of scrutiny regarding whether they reported all of their earnings from fifteen (15) years ago, including the review of jointly filed tax returns from approximately twelve (12) years ago. For example, were all candidates asked whether, when they were a teenager (as the Appellant was in 2001) they ever received income that was not reported on their tax returns (i.e. – through odd jobs, shoveling snow, mowing lawns, etc.)? The point here is that the Police Department appears to have asked the Appellant to produce this information based on their conclusion that he was an “illegal alien” at some point prior to becoming a [lawfully naturalized U.S.] citizen. To us, that is the type of disparate treatment that the civil service law was meant to prevent.

Third, and finally, the basic merit principles of civil service law require, among other things, consideration of qualified applicants for civil service positions based on assessment of their “ability, knowledge and skills”. G.L.c.31,§1. Disqualification, in our opinion, is “reasonably justified” only after “impartial and reasonably thorough independent review” by the Appointing Authority of all facets of a candidate's credentials bearing on his or her present fitness to serve as a police officer. While we acknowledge that the Commission must rightly give “deference” to a judgment that a particular candidate is an unacceptable risk to serve as a police officer, we believe that, in cases such as this one, that deference is appropriate only when the judgment is

the product of a thorough review, weighing of ALL of a candidate's credentials including a fair, impartial assessment of the applicant's character and fitness for duty, which did not occur here.

For all of the above reasons, the Appellant's appeal under Docket No. G1-16-065 is hereby *allowed*.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Civil Service Commission hereby orders the following:

1. The decision by the state's Human Resources Division (HRD) to remove the Appellant from the eligible list is hereby rescinded.
2. HRD shall place the name of the Appellant **at the top of** on any current or future Certifications for Abington Police Officer until such time as the Appellant is appointed or bypassed.
3. The Abington Police Department shall not use any of the reasons used to bypass and/or remove the Appellant from the eligible list in this hiring cycle in any future consideration.
4. If and when the Appellant is appointed as an Abington Police Officer, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 03385. This retroactive civil service seniority date is not meant to provide the Appellant with any additional compensation or benefits, including creditable time toward retirement.³⁶

Civil Service Commission

/s/ Christopher C. Bowman, Chairman

/s/ Paul A. Camuso, Commissioner

/s/ Paul M. Stein, Commissioner

/s/ Kevin M. Tivnan, Commissioner

³⁶ Nothing in this decision is meant to prevent the Appellant from pursuing his current MCAD complaint and/or to prevent MCAD, should it find that the Respondent violated the state's anti-discrimination laws, from awarding appropriate monetary damages and/or any other relief it deems appropriate.

By a vote of the Civil Service Commission:

Bowman, Chairman – Yes;
Camuso, Commissioner – Yes;
Stein, Commissioner – Yes;
Tivnan, Commissioner – Yes;
Ittleman, Commissioner – No;

on March 1, 2018.

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:

Joao Paulo Leite Pereira de Araujo (Appellant)
Timothy D. Zessin, Esq. (for Respondent)
John Marra, Esq. (for HRD)